MAHKAMAH KONSTITUSI
REPUBLIK INDONESIA

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

PROCEEDING

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

Jakarta- Indonesia, 10 - 14 July 2011

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THE INTERNATIONAL SYMPOSIUM ON CONSTITUTIONAL DEMOCRATIC STATE THE 8TH ANNIVERSARY OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

PROCEEDING

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PROCEEDING

THE INTERNATIONAL SYMPOSIUM ON CONSTITUTIONAL DEMOCRATIC STATE

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Jakarta, 2011

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

PREFACE

We are very pleased to present this proceeding book to all the delegates and participants of the International Symposium on "Constitutional Democratic State" at the Closing Ceremony of this distinctive Symposium. Contradicting with the customary proceeding books, this book does not only contain papers presented by the delegates, but also speeches and remarks delivered by the President of the Republic of Indonesia, H.E. Susilo Bambang Yudhoyono, the Chief Justice of the Constitutional Court of the Republic of Indonesia, H.E. Moh. Mahfud MD, and the representative of the delegates at the opening and closing ceremony of the Symposium. In addition, this proceeding book also contains verbatim and summary reports of the Symposium generated by each panel simultaneously.

We sincerely hope that by having this comprehensive proceeding, the product of the discussion of this Symposium will be useful and beneficial for the delegates and participants who were involved in the Symposium and others readers, in order to understand the substance of Constitutional Democratic State comprehensively.

By publishing this proceeding book, we expect the delegates and the participants of the International Symposium from 23 countries all over the world, as well as the general public who have concern to constitution, laws, and democracy will benefit from the International Symposium programs.

Thank you.

The Constitutional Court of
the Republic of Indonesia
Secretary General

Janedjri M. Gaffar

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

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REPUBLIK INDONESIA

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

REPORT OF THE SECRETARY GENERAL OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA AT THE OPENING OF THE INTERNATIONAL SYMPOSIUM ON CONSTITUTIONAL DEMOCRATIC STATE

MONDAY, JULY 11, 2011

Bismillahirrohmaanirrohim,

Assalamu'alaikum warahmatullahi wabarakaatuh,

Good morning, and peace and prosperity to us all.

- The Honorable President of the Republic of Indonesia, **Dr. H. Susilo Bambang Yudhoyono**,
- The Honorable Chief Justice of the Constitutional Court of the Republic of Indonesia, **Prof. Dr. Mohammad Mahfud MD**,
- Your Excellencies, Chief Justices and Justices of Constitutional Courts and Equivalent Institutions from the nations participating in this Symposium,
- Your Excellencies, Speakers and Members of Parliament of the nations participating in this Symposium,
- Honorable Leaders of State Institutions, Ministers of United Indonesia Cabinet II, and other State Officials,
- Your Excellencies, the Ambassadors and Chief Representatives of the nations participating in this Symposium, and
- Distinguished invitees and attendees.

Praise be to *Allah Subhanahu Wa Ta'ala*, God The Almighty, through Whose mercy and grace we are able this morning to attend the **Opening of the International Symposium on îConstitutional Democratic Stateî** in good health.

From today, Monday, 11 July 2011, until Wednesday, 13 July 2011, the Chief Justices and Justices of Constitutional Courts and Equivalent Institutions, and Speakers and Members of Parliament from various nations, will discuss fundamental issues concerning constitutional democratic state.

Honorable President,

I would like to report that the convening of this International Symposium is one of a series of activities to celebrate the 8th Anniversary of the Constitutional Court of the Republic of Indonesia. This International Symposium has been organized based on the fact that democracy is an absolute necessity. Democracy is trusted as a state system capable of transforming people's aspirations and interests to realize state goals. In this context, a democracy must be run based on a constitution as the supreme law, which is a mutual agreement of all of the people, born of the democratic process, and also plays a role in materializing and directing a democracy.

In applying these principles of constitutional democracy, clearly one nation will have different experiences and practices from other nations. Therefore, sharing information on the experiences and practices of constitutional democracies is both necessary and beneficial for every nation.

Based on this conceptual background, the Constitutional Court of the Republic of Indonesia has organized this International Symposium with the theme "Constitutional Democratic State." To achieve optimal results, the theme of "Constitutional Democratic State" has been divided into three sub-themes, namely:

Sub-theme 1 : The Role of Constitutional Court and Equivalent Institution in Strengthening the Principles of Democracy

Sub-theme 2 : Democratization of Lawmaking Process

Sub-theme 3 : The Mechanism of Checks and Balances among State Institutions

Honorable President,

I would also like to report that this International Symposium is being attended by delegates from 23 (twenty-three) states. Each state is being represented by its Constitutional Court or Equivalent Institution and its Parliament.

Allow me, please, to mention the states participating in this International Symposium one by one, in alphabetical order:

1. Austria,
2. Azerbaijan,
3. Chile,
4. Colombia,
5. Indonesia,
6. Germany,
7. Kazakhstan,
8. Lithuania,
9. Malaysia,
10. Morocco,
11. Mexico,
12. Mongolia,
13. Russia,
14. Spain,
15. Tajikistan,
16. Thailand,
17. The Philippines,
18. The Republic of Korea,
19. Timor Leste,
20. Turkey,
21. Ukraine,
22. Uzbekistan, and
23. Venezuela,

This International Symposium is also being attended by local participants, including the Justices of the Constitutional Court, the Leadership of the People's Consultative Assembly, Leaders and Members of the House of Representatives, several Ministries, Members of the Constitutional Forum, Deans and Lecturers of Law Faculties and Social Science and Political Science Faculties, and Civic Education Teachers, and is being widely covered by the local and international mass media.

Honorable President,

This International Symposium will be broadcast directly using video conferencing facilities belonging to the Constitutional Court of the Republic of Indonesia and located in 33 (thirty-three) provinces, and will also be broadcast at 39 (thirty-nine) universities throughout Indonesia. The Symposium will also be broadcast online using video streaming technology via the website of the Constitutional Court of the Republic of Indonesia. This is being done so that this international Symposium can be witnessed and its benefits felt by all layers of society.

During this International Symposium, in addition to using the Indonesian language, other languages will also be used, in line with the configuration of the nations participating in the Symposium, namely English, Arabic, German, Spanish, and Russian.

God willing, on the last day of the Symposium, delegates will be introduced to various Indonesian cultural heritages through a cultural program.

Honorable President,

That concludes my report on the convening of this International Symposium on "Constitutional Democratic State." Please accept my sincere apologies for any deficiencies in the organization of this Symposium. I would like to thank all parties that have supported the convening of this International Symposium.

I would now like to present the Chief Justice of the Constitutional Court of the Republic of Indonesia to welcome you. Following that, we respectively invite the President of the Republic of Indonesia to welcome you, deliver the Keynote Speech, and officially open this International Symposium on "Constitutional Democratic State."

Thank you.

Billahi taufiq wal hidayah,

Wassalamu'alaikum warahmatullahi wabarakaatuh.

SECRETARY GENERAL,

JANEDJRI M. GAFFAR

MAHKAMAH KONSTITUSI
REPUBLIK INDONESIA

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

SPEECH OF
THE CHIEF JUSTICE OF
THE CONSTITUTIONAL COURT OF
THE REPUBLIC OF INDONESIA
AT THE OPENING CEREMONY OF
THE INTERNATIONAL SYMPOSIUM ON
CONSTITUTIONAL DEMOCRATIC STATE

MONDAY, JULY 11, 2011

Bismillahirrahmanirrahim,

Assalamu'alaikum warahmatullahi wabarakaatuh.

Good morning and peace and prosperity to us all.

- Your Excellency, the President of the Republic of Indonesia,
- Your Excellencies, Chief Justices and Justices of the Constitutional Court or Equivalent Institutions of the countries participating in the Symposium,
- Your Excellencies, Speakers and Members of Parliament of the countries participating in the Symposium,
- The Honorable, Leaders of State Institutions, Ministers of the United Indonesia Cabinet II and Other State Officials,
- Your Excellencies, the Ambassadors of the states participating in the Symposium, and
- Distinguished Ladies and Gentlemen.

Let us praise and thank God The Almighty, *Allah SWT*, for His grace and blessing allowing us the opportunity to attend this **International Symposium on ìConstitutional Democratic Stateî** in good health.

On this happy occasion, I would first of all like to extend a very warm

welcome to the delegates and participants of the Symposium, as well as to all attendees. I would also like to convey our sincerest gratitude to all delegates who have come here upon the invitation of the Constitutional Court of the Republic of Indonesia to participate in this International Symposium. We would like to convey our greatest gratitude to Mr. President, who has made the time and place available for this Symposium.

Your Excellency, Mr. President, distinguished Ladies and Gentlemen,

The Indonesian nation has been undergoing rapid growth and development in structuring democracy and constitutional life since the beginning of the reform about 13 (thirteen) years ago. The dynamics of the era and the spirit of change reflecting a desire for democratization and a more consistent implementation of constitutional state principles have produced the spirit to actualize the new order and institution.

So far, the success achieved by the Indonesian nation in developing constitutional democratic state has been a valuable experience gained from hard work and collective cooperation of all elements of the nation and state over time, under the national leadership prioritizing the interest of the nation and state, as well as the greater level of maturity of its citizens in the life of the nation and state. Such experience and success have been highly valuable as the development capital of the Indonesian nation in the future.

Mr. President, Ladies and Gentlemen,

Undeniably, one of the contributions towards the realization of more democratic conditions of the state today comes from the Constitutional Court, which is entering the 8th (eight) year of its existence this year. It means that for almost 8 (eight) years now, the Constitutional Court has existed and has worked together with other state institutions and elements, in striving towards establishing and developing a more democratic order of the state of Indonesia.

The role of the Constitutional Court of the Republic of Indonesia has been considered as rather phenomenal. At a relatively young age, the Constitutional Court of the Republic of Indonesia has won public trust, as its decisions have made a positive breakthrough in law. On the same basis, the Constitutional Court has received acknowledgment from the international world as a state institution which has been successfully developing and implementing democracy. Therefore, the Constitutional Court of the Republic Indonesia has been acknowledged as having a strategic role in asserting the identity as a constitutional democratic state.

Honorable Ladies and Gentlemen,

The Constitutional Court is one of the executors of judicial power holding adjudication in order to enforce law and justice. In order to uphold law and

justice, the Constitutional Court has been constantly upholding the most intrinsic principle of a judicial institution, namely independence.

The independence of judicial institution is the pillar of a state based on law, and it serves as a universal principle for any judicial institutions, in all countries. Judicial independence requires that the judicial institution be free from intervention, pressure, and coercion, either directly or indirectly, either coming from other branches of state power, or any other parties. The absence of judicial independence is the greatest threat to a constitutional state, as it will open up the opportunity for non-neutrality of the judiciary in examining cases.

For the Constitutional Court of the Republic of Indonesia itself, independence is construed and understood as immunity to external influence coming not only from the executive body, but also from the pressure of public opinion, non-government organizations, as well as political parties. I feel very proud that in performing its constitutional duties and authorities so far, the Constitutional Court of the Republic of Indonesia has been able to work independently, and that by doing so it has earned public trust.

Such independence has been possible not merely due to the Constitutional Justices' strong determination to remain free from external influences, but also because state institutions outside the Constitutional Court of the Republic of Indonesia have not been trying to intervene. The President of the Republic of Indonesia has never attempted to influence or interfere with the Constitutional Court of the Republic of Indonesia, even though there were many cases brought to the Constitutional Court of the Republic of Indonesia that were related to the interest of the President, either in the form of cases of judicial review, or cases of electoral disputes actually involving the political party fostered by the President. It is for that reason that we would like to express the highest appreciation to Mister President of the Republic of Indonesia, who has been extremely compliant with the Constitution, and understands the important role of the Constitutional Court of the Republic of Indonesia in building and implementing democracy.

Ladies and Gentlemen,

In the Constitutional Court, this principle of independence has been actualized in many forms, one of which being that the Justices have the freedom to explore ideas, express opinion, and use their belief and conscience to deciding cases. Such independence is manifested in the legal consideration of the Justices as they are deciding a case, which can be read in the Constitutional Court's decisions. Justices who do not agree with the majority opinion can give a different reason or dissenting opinion, which forms an inseparable part of the decision.

With regard to the Constitutional Court's independence, one of the things deserving appreciation is that although the Justices of the Constitutional Court are nominated by three different institutions, after being elected and inaugurated

as Justices of the Constitutional Court, both personal as well as organizational bonds with the nominating institutions are to be released with immediate effect.

The Constitutional Court has 9 (nine) Justices, consisting of three Justices nominated by the Government, three Justices nominated by the House of Representatives, and three Justices nominated by the Supreme Court. The fortitude with which the principle of independence is upheld is expressly proven by the fact that the Justices of the Constitutional Court do not represent the interest of the nominating state institutions, rather than that, they serve the nation and state in their capacity as statesmen, devoting themselves to the nation and state, and taking sides with law and justice at all times. They cannot be lobbied, either for the matters of a case or any other issues related to the administration of the Constitutional Court as an institution.

Distinguished participants of the Symposium, Ladies and Gentlemen,

The principle of the Constitutional Court's independence must continue to be maintained, no matter what. Therefore, there is a lot that can and needs to be done, including among other things, safeguarding the selection of Justices of the Constitutional Court through three doors, namely the Government, the House of Representatives, and the Supreme Court. These three nominating state institutions need to have strict and accountable procedures and mechanism in place. The selection made within the respective nominating state institutions must be completely fair in order to be able to guarantee the selection of the best people having a high quality of knowledge, achievements, and good track record as well as a high level of integrity.

In addition to the mechanism for selecting Justices, in the context of maintaining such independence, there is also a need for a more effective control mechanism for Justices of the Constitutional Court. This needs to be stated not only because there is a strong demand by people at large to assert the need for a control mechanism for Justices of the Constitutional Court, but also because control is a natural and substantive need of the Justices of the Constitutional Court in order to permanently and systematically avoid behavior which compromises not only their honor and noble dignity as Justices, but even more importantly, their impartiality in the face of law and justice.

Distinguished Ladies and Gentlemen,

In order to continuously strengthen and maintain consistency in the role of the Constitutional Court of the Republic of Indonesia in upholding the law and guarding democracy in Indonesia, there is a need for the process of inter-state transformation of experiences and practices. In reality, constitutional democracy practices are not always identical among states, although the basic idea of democracy is essentially the same, namely placing the people in the most important position of state decision making.

In my point of view, in order to understand constitutional democracy practices of other states, they can be viewed at least from the following aspects. First, the extent to which such states guarantee and make endeavors to ensure that judiciary has the power to safeguard and maintain the Constitution, playing a more optimal role in strengthening the principles of constitutional democracy. Second, the manner in which the law making process in the state concerned is being kept or maintained to ensure that it stays within the corridor of democracy, both related to the procedural aspect as well as the substantive aspect. Third, the manner in which such state develops the system and relationship among state institutions in the checks and balances mechanism in practice.

It has been based on the above considerations, and in the context of commemorating the 8th Anniversary of the Constitutional Court of the Republic of Indonesia, that we have convened the International Symposium on "Constitutional Democratic State".

Mr. President, participants of the Symposium, Ladies and Gentlemen,

The presence of 23 (twenty-three) states in this symposium, other than to exchange information, experiences, and constitutional democratic practices, is also expected to foster further friendly relationships among nations.

Before concluding my speech, I would especially like to thank the **President of the Republic of Indonesia**, who has honored the Constitutional Court of the Republic of Indonesia and the delegates to the Symposium by sharing his precious time in delivering his keynote speech and also opening this International Symposium.

Finally, to all delegates and participants of the Symposium, I would like to wish you success in this International Symposium.

Thank you.

Wassalamu'alaikum warahmatullahi wabarakaatuh.

THE CONSTITUTIONAL COURT OF
THE REPUBLIC OF INDONESIA
CHIEF JUSTICE

Prof. Dr. MOH. MAHFUD MD.

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

KEYNOTE SPEECH OF THE PRESIDENT OF THE REPUBLIC OF INDONESIA AT THE OPENING CEREMONY OF THE INTERNATIONAL SYMPOSIUM ON CONSTITUTIONAL DEMOCRATIC STATE

JAKARTA, JULY 11, 2011

Bismillahirrahmanirrahim,

Assalamu'alaikum Warahmatullahi Wabarakatuh,

Good morning,

Peace and prosperity to us all,

- Your Excellency, the Chief Justice of the Constitutional Court of the Republic of Indonesia,
- Your Excellencies, Chief Justices and Justices of Constitutional Courts and other Similar Institutions of friendly countries,
- Your Excellencies, Speakers and Members of Parliament from countries participating in the symposium,
- Your Excellencies, Leaders of State Institutions, Constitutional Justices, Ministers and other State Officials,
- Your Excellencies, the Ambassadors of countries participating in the symposium, and
- Distinguished ladies and gentlemen,

Let us praise and convey our gratitude to God The Almighty, on this wonderful and, God Willing, blissful occasion, for we have been blessed with the opportunity, strength, and health today to meet in order to attend the **International Symposium on ìConstitutional Democratic Stateî** in the context

of commemorating the 8th Anniversary of the Constitutional Court of the Republic of Indonesia. It is a great honor and privilege indeed for Indonesia to be hosting this International Symposium.

On this wonderful occasion, on behalf of the people, the government, and the state of the Republic of Indonesia, allow me to extend a very warm welcome to Your Excellencies, Chief Justices of Constitutional Courts or Equivalent Institutions and Your Excellencies, Speakers of Parliament, as well as delegations from friendly countries, and it is with pride and joy that I say welcome to Jakarta, welcome to Indonesia.

Your Excellencies' presence indicates the strong and warm relations among us. I hope that Your Excellencies' and delegations' presence today, throughout this Symposium, will become a valuable and historic momentum for a closer international cooperation at the present and in the future.

Distinguished Ladies and Gentlemen,

Distinguished Participants of the international symposium,

First of all, in the beginning of my speech, I would like to convey my appreciation to the Constitutional Court of the Republic of Indonesia, which is hosting once again an international event, namely this International Symposium, after having hosted the 7th Conference of Asian Constitutional Court Justices in 2010. I hope that this event will serve as a good and beneficial momentum serving the benefit of our beloved people, nation and state. In addition to that, at the international level, this event is expected to contribute new ideas in developing a constitutional democratic state.

In my view, Constitutional Democratic State, as the major theme of this International Symposium, is an accurate, relevant and contextual theme for all states. In the context of this theme, we are urged to align our perceptions as well as to seek breakthroughs and innovative solutions, for the improvement of the quality of democracy in our respective countries. This theme is a very interesting central issue amidst the developments of democracy, which have raised various forms and variations in its implementation, not only in Indonesia, but in almost all countries.

As the current global conditions indicate, democracy has become an epicentrum which greatly influences human civilization. All of the foregoing is inseparable from the development of democracy which has been believed for a long time to be the best system among the existing choices of systems, which is deemed to be able to provide guidance in the materialization of effective and highly legitimate state administration, as democracy places people in the position of determining state policies.

In order to apply democracy consistently as the foundation of state administration, every country needs to, and must, ensure that the democracy being applied is truly directed and oriented towards the agreed national goals. In a modern state, national goals and agreements are set out in the

constitution. Therefore, democracy serves as the fundamental idea underlying the constitution, and similarly, the constitution serves as the legitimation of democracy. A state is considered as a constitutional democratic state if constitutional supremacy is applied. Accordingly, constitution is the basis and the reason for every state administration activity, and the life of a society.

Based on such argument, it becomes obvious that constitution is the framework for democracy, so that regardless of the extent to which the principle of freedom is used as a pretext and jargon of democracy, it cannot be allowed to violate constitutional boundaries. This is an elegant way of collaboration between constitutionalism and democracy, believed to be the formula for materializing democracy state administration system that is effective, yet it is still within constitutional boundaries referred to as constitutional democracy. It is based on the same argument that we are facing one of the many challenges, namely ensuring that a constitutional government is also able to materialize a democratic government.

In order to create a constitutional – democratic government, a state must at least have the following agenda, *first*, providing assurance that judicial power is truly independent in performing its functions. *Secondly*, establishing laws and policies at various levels through democratic means and avenues, both with regard to the aspect of procedure as well as substance. *Thirdly,* building structure and relations among state institutions within the mechanism of checks and balances.

Considering the challenges and the agenda that need to be implemented in order to materialize a constitutional democratic government, strategies, planning, safe-guarding and continuous evaluation are required. It is in this context that this Symposium gains its momentum, significance, and appeal for participants. In the context of this symposium, participants will obtain a clear understanding, will find concrete comparisons, and assess the degree of growth and development of constitutional democratic state practices in various countries. I do hope that this Symposium will serve as an interesting forum for sharing information, insights, lessons learned and practices related to democracy. However, we should not stop at that level, because most importantly, the results of this Symposium should be applicable and should be able to provide a real contribution to the enforcement of the values of democracy throughout the world, particularly in the countries participating in this Symposium, and more particularly in Indonesia.

Distinguished Ladies and Gentlemen,

Democracy embarks from the idea that people hold an important position, which determines the direction of state administration. However, in actual practice, democracy takes routes which are not always identical in every country. In Indonesia, the route of democracy is different from the one taken in the United States of America, Turkey, or Germany, and also the Republic of Korea, Mongolia, Thailand, as well as other Asian countries. This is due to the

fact that every regime and every country have their own unique perspectives in the manifestation of democracy.

As for Indonesia, democracy is the system elected ever since the first days of its foundation. Under the Indonesian Constitution, the idea of democracy has remained irreplaceable, despite the several changes and amendments to the Constitution. Similarly, although the governing regimes have changed periodically, there has never been an effort to replace democracy as the elected system. Accordingly, democracy, with all of its noble values and universal values, has always been a part of this nation's history.

However, the manifestation of democracy has changed due to its being influenced and even determined by many factors, among other things the tug of war between the role of the state and of the people. The universal nature of democracy allows it to be manifested in unique forms. Consequently, in each period of a state administration regime, democracy is manifested in various forms and according to their respective tastes. A system that is normatively claimed and campaigned for is founded on the values of democracy, however, it may be ultimately "challenged" if it substantively contradicts democratic values.

On Indonesia's history, the people's dissatisfaction with the performance of democracy of the governing regimes prior to the reform movement in 1998 had been triggered by the fact that they had failed or had not been able to materialize democracy. Political and governmental systems at that time were considered as being far from the criteria of democratic systems, even though they were constantly being framed and labeled with democracy. In the course of development, such condition led to the emergence of the people's collective awareness of having the courage to make changes in developing more democratic political and state administration systems. Ultimately, following the political crisis marked by massive protests by the people demonstrating their dissatisfaction, the old regime was successfully toppled down. That momentum marked the beginning of a new chapter of democracy in Indonesia.

Upon entering the new era, democracy in Indonesia appeared to be facing and taking the path towards a brighter future. However, conditions of political anomaly were created because, although the old system had been abandoned, the new system was not yet ready to anticipate it. Legal instruments and policies were not available, there was a state of unreadiness in facing new social-economic-political conditions, and there was euphoria amidst the rapid flow of freedom, all of which resulted in unique complex problems. Those were difficult times in the history of Indonesia's democracy.

As a nation, we are grateful that Indonesia has been able to pass through the crucial phase in the beginning of the transitional period of democracy in a relatively safe, peaceful way while, most importantly, the process remained within constitutional boundaries. This is encouraging and we should be thankful for that, considering that in several other states, the collapse of an authoritarian regime is frequently accompanied by counter-productive

conflicts and controversies *vis a vis* the state and the citizens of the state concerned.

The transitional government moved quickly in responding to critical situations triggering demands for necessary reforms in the political and other areas. One of its targets and points of interest was the Indonesian Constitution, the 1945 Constitution. As the fundamental law, the 1945 Constitution was deemed to contain too many loopholes and weaknesses, so that it could be easily used as a legitimation for abusing power. Subsequently, as some of the substance of the 1945 Constitution was deemed as no longer suitable to be used as a foundation for developing a new, more democratic Indonesia, constitutional reform became the main and mandatory agenda in a series of reform processes.

Constitutional reform was materialized in the process of the amendments to the 1945 Constitution, conducted in 4 (four) stages during the period of 1999-2002. The amendments did not totally change the Constitution entirely, but rather reasserted several fundamental issues to remain unchanged, namely the Preamble of the 1945 Constitution, which still maintains the presidential system, and the unitary form of the state. The amendments to the 1945 Constitution imply various fundamental changes in political and state administration in Indonesia, including the structures of and relations among state institutions, as well as the establishment of new state institutions.

The relations among state institutions based on the Amendments to the 1945 Constitution create a new pattern which is functional-horizontal in nature, with a mechanism of *checks and balances*, which is no longer vertical-hierarchical in nature as it had been provided for previously. This means that state institutions implementing the executive, legislative and judicial functions are positioned at the same, equal levels, hence the terms high or highest state institutions are no longer used. In fact, the People's Consultative Assembly (MPR), which according to the 1945 Constitution prior to the amendments used to be the highest state institution because it was determined to be the manifestation of the people, now has an equal position with the President, the Parliament, the Regional Representatives' Council (DPD), the Supreme Audit Board (BPK), the Supreme Court, and the Constitutional Court.

With such an equal position, each of the respective state institutions are implementing their authorities as stipulated in the 1945 Constitution, and apply the *checks and balances* mechanism among the branches of state power with the aim of creating harmony and preventing superiority of a particular state institution. The *checks and balances* mechanism allows state institutions to monitor each other and oversee other state institutions of equal position, as well as to limit the authorities of those state institutions continuously. For a democratic state, the mechanism of *checks and balances* is a necessity in order to eliminate abuse of power or authority held by state institutions, serving as a benchmark for the establishment of the concept of constitutional state in the context of materializing democracy.

Regardless of the above, I realize that in practice, the implementation of the *checks and balances* mechanism in Indonesia is still often encountering obstacles, challenges, and problems, because the *checks and balances* mechanism is an ideal concept which requires a process and relatively long period of time. Based on such realization, the *checks and balances* mechanism requires continuous and sustainable evaluation. The most important thing to be considered in this context is that every possible abuse of power must be prevented and avoided by ensuring that every state institution provides correction for each other.

Distinguished participants of the symposium,

In the perspective of democracy theories, the process or the course of democracy in a country is likely to pass through at least two important phases, namely the democratic transition phase, and the democratic consolidation phase. According to a political scientist, Samuel P. Huntington, at least three important events are to occur in the process of democratization, namely: *first*, the end of an authoritarian regime, *second*, the establishment of a democratic regime, and *third*, the consolidation of such democratic regime.

Based on such theory, a democratic regime is usually established upon the remnants of an old, authoritarian regime, which was ended by more democratic new legal and political rules. This phase is referred to as the democratic transition phase. Whereas, the subsequent phase is the democratic consolidation, namely a condition where democracy becomes the only rule applied and complied with in the life of a society and a state.

Democratic transition is a critical phase which greatly determines the future of democracy. In addition to not providing any guarantee of success that after passing this particular phase democracy would be consolidated automatically, the democratic transition phase is most likely to cause various problems, which can potentially thwart and compromise the growth of democracy even before it has a chance to blossom.

Democracy in Indonesia has been going through continuous improvements over time, however, we have to admit that up to this very day we are still unable to say that we have reached the phase of a firmly established democracy. During the democratic transition period, Indonesian democracy has indicated some very encouraging developments, at least during the period of the decade following the political reform. In line with the amendments to the constitution resulting in a more democratic constitution, there have been major leaps in democratic practices.

If we refer to the conventional measures for judging whether or not a state administration is democratic, such as the existence of government accountability, rotation of power, transparent pattern of political recruitment, general elections, and the fact that people can freely enjoy their fundamental rights, Indonesia has applied democratic government practices, even though we must admit that flaws and weaknesses can still be found.

Increasingly open political competition, either through the organization of general elections or regional head elections, has been the most visible example of democratic developments. There has been an increasing participation of the people in politics. Freedom of the press has obtained constitutional guarantee and protection. Similarly, human rights have been acknowledged, guaranteed and protected.

In principle, I wish to say that Indonesia's democracy does not only exist at a merely legal-formal normative level, but endeavors and efforts have also been made to ensure that it is implemented consistently in more substantive practices. However, I also have to say that in practice, the democratization process is constantly creating problems. In my view, the greatest issue during the transitional period in Indonesia was that, despite all endeavors, the democracy that we can present is more of a procedural nature. This means that democracy is currently functioning only at the procedural level with its symbolic patterns, while it has not been able to bring concrete effects on the improvement of the people's social, economic and political conditions. Whereas in fact, democracy as an instrument should be able to promote the materialization of the people's welfare.

Therefore, the future agenda of democratization in Indonesia needs to be directed towards ways of building a quality democracy, which does not merely prioritize the procedural-symbolic aspects, but also the substantial aspects, with the aim of ensuring that the goals of democracy can be duly achieved. During the transitional period, democracy has not been able to offer fundamental solutions to various social and economic issues in this country. This is an essential point in completing the democratic transition period in Indonesia.

Distinguished participants of the Symposium,

The developments of democracy achieved after the Amendments to the 1945 Constitution, have been the fruit of hard work of all elements of the nation, including the Constitutional Court of the Republic of Indonesia. The establishment of the Constitutional Court of the Republic of Indonesia has been one of the important achievements of the Amendments to the 1945 Constitution. The Constitutional Court of the Republic of Indonesia was established as one of the executors of judicial power, in addition to the Supreme Court.

The primary function of the Constitutional Court is to safeguard and protect the Constitution. However, in a broader sense, in performing such function, the Constitutional Court of the Republic of Indonesia also plays an important role in safe-guarding democracy and protecting the citizens' constitutional rights. In my view, the establishment of the Constitutional Court of the Republic of Indonesia is a manifestation of a high level of enthusiasm in adopting the spirit of constitutionalism and constitutional supremacy. That is the reason why I have been constantly participating in maintaining and encouraging the Constitutional Court of the Republic of Indonesia to become

a genuinely independent judicial body and to be impartial in performing its function to enforce the Constitution.

Observing its development as an institution that serves as the guardian of the Constitution, I have seen and felt that the Constitutional Court of the Republic of Indonesia has brought an important meaning to every constitutional enforcement effort through the implementation of its constitutional duties and authorities. One of the authorities of the Constitutional Court of the Republic of Indonesia is conducting judicial review of laws against the Constitution. Through this authority, the Constitutional Court of the Republic of Indonesia plays an important role in the enforcement of democratic values based on the Constitution. With such authority, the Constitutional Court of the Republic of Indonesia maintains harmony in the legal system, thus ensuring that it stays within the appropriate boundaries as mandated by the Constitution at all times.

I have also witnessed that, in implementing the aforementioned authorities, the Constitutional Court of the Republic of Indonesia has been playing a great role in the efforts to guarantee the protection of the people's fundamental rights as guaranteed by the Constitution. In addition to that, the presence of the Constitutional Court of the Republic of Indonesia has created a new phase in the equal and balanced relationship among state institutions. The Constitutional Court of the Republic of Indonesia has become one of the key factors affecting the establishment of a harmonious relationship among state institutions in the framework of a democratic state.

For the above stated reasons, I have repeatedly expressed my appreciation for all the endeavors that have been, are being and will be made by the Constitutional Court of the Republic of Indonesia in materializing a mechanism of *checks and balances* among the branches of state power. As the President, I have never questioned, and in fact I have the obligation to comply with every decision of the Constitutional Court of the Republic of Indonesia at all times, not only because it is a constitutional mandate, but because I am also strongly convinced that the Constitutional Court of the Republic of Indonesia has independence, impartiality, and good intentions for the benefits of the state and the nation.

Thus far, I feel that the Constitutional Court of the Republic of Indonesia has always been demonstrating its efforts to instill views on the way laws and democracy should be functioning in the framework of constitutional norms and values. This is another reason why I have never questioned, I have always accepted, and in fact have implemented the decisions of the Constitutional Court of the Republic of Indonesia. As a nation which is becoming increasingly mature and experienced in enforcing law and practicing democracy, this is a part of the endeavors for materializing a constitutional state, in accordance with the mandate under the Constitution.

Ladies and Gentlemen, Distinguished participants of the Symposium,

Before concluding this speech, I would like to invite the participants of the Symposium to use this important event for enhancing cooperation, expanding the exchange of information, and sharing experience. Let us use this Symposium as a forum which will also give positive contribution to the efforts in determining the direction and the development of constitutional democracy and constitutional civilization throughout the world.

I realize that the situation and conditions of each country may not always be the same, however, the state's obligations to develop and strengthen constitutional democracy is the same. Based on that, I do hope that this international Symposium can genuinely produce the best thoughts in the context of the creation of a more democratic, prosperous and a more just world order.

This is to conclude my speech and finally by asking for the blessings of God The Almighty, and by saying *Bismillahirrahmanirrahim*, I declare the **International Symposium on ìConstitutional Democratic State"** officially opened.

Thank you,

Wassalamu'alaikum warrahmatullahi wabarakatuh.

The President of the Republic of Indonesia,

Susilo Bambang Yudhoyono

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

VERBATIM OF SYMPOSIUM

The International Symposium "Constitutional Democratic State"

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ON CONSTITUTIONAL DEMOCRATIC STATE

VERBATIM OF SYMPOSIUM

The International Symposium "Constitutional Democratic State"

Venue: Shangri-La Hotel, Jakarta
Monday, Day One : 11 July, 2011

PLENARY SESSION

Master of Ceremony :

Your Excellency, the Speaker of the People's Consultative of the Republic of Indonesia, Mr. Taufik Kiemas, Your Excellency, the Speaker of *Dewan Perwakilan Rakyat* (the House of Representative) of the Republic of Indonesia, Mr. Marzuki Alie SE, MM, Your Excellency the Speaker of *Dewan Perwakilan Daerah* (the House of Regional Representative) of the Republic of Indonesia, Mr. Irman Gusman SE, MBA, Your Excellency Chief Justice of the Constitutional Court of the Republic of Indonesia Prof. Dr. Moh. Mahfud MD, Heads of State Institutions, Chief Justices and Justices of the Constitutional Court and equivalent institutions, speakers and members of Parliament of friendly countries, participants of the international symposium, ladies and gentlemen,

Welcome back to the Shangrila hotel to follow the Second Plenary Session of the International Symposium of the Constitutional Democratic State in celebration of the 8th anniversary of the constitutional court of the RI. Our first plenary session is the opening session of the international symposium

officiated this morning at the State Palace by His Excellency the President of Republic of Indonesia. This afternoon we are honored to;... with His Excellency Chief Justice of the Constitutional Court of the Republic of Indonesia

Ladies and gentlemen, our first keynote speech will be the Speaker of People Consultative Assembly of the Republic of Indonesia, His Excellency Mr. M Taufik Kiemas. Mr. Taufik Kiemas is the Chairman of the Advisory Board of *Partai Demokrasi Indonesia Perjuangan* (PDIP), one of the political parties in Indonesia. He is also the spouse or the husband of the former President of the Republic of Indonesia, Madame Megawati Soekarnoputri who is the first daughter of the late Soekarno.

Ladies and gentlemen, I would also like to announce that if in the diplomatic corps there is what we call the Dean of the diplomatic corps, Mr. Taufik Kiemas is regarded as *Ketua Kelas* or the Head of the Class of the Head of the State Institution, meaning he is highly regarded in his position as the Speaker of the People's Consultative Assembly of the Republic of Indonesia.

Today, His Excellency Mr. Taufik Kiemas will not be able to deliver his keynote speech due to a sore throat but his speech will be represented by the Vice Chairman of the People's Consultative Assembly of the Republic of Indonesia.

Ladies and gentlemen I would like to kindly welcome Mr. Lukman Hakim.

SPEAKER 1

Hon. Taufik Kiemas

Speaker of *Majelis Permusyawaratan Rakyat*

(the People's Consultative Assembly) of the Republik of Indonesia :

Deliberation of speech replaced by Lukman Hakim Saifuddin

FOUR PILLARS OF NATIONAL AND STATE LIFE AS THE FOUNDATION FOR THE MANIFESTATION OF A CONSTITUTIONAL DEMOCRATIC STATE

Lukman Hakim Saifuddin : (delivered his speech in *Bahasa*)

Translator :

May God the Almighty be with you and may God give you His mercies and His blessings, good afternoon to all of us. Please allow me to represent His Excellency Taufik Kiemas to deliver the paper titled FOUR PILLARS OF NATIONAL AND STATE LIFE AS THE FOUNDATION FOR THE MANIFESTATION OF A CONSTITUTIONAL DEMOCRATIC STATE.

His Excellency, the chief justice of the Constitutional Court of the Republic of Indonesia, the speaker of the House of Regional Representative and the Indonesia House of Representative, judges of the Constitutional Court and other equivalent institutions, members of the parliaments from the participating countries in this symposium and also judges of the Constitutional Court

of Indonesia and other state officials, the ambassadors of the participating countries, ladies and gentlemen,

The constitutional amendment as one of the reformation agenda is part of the national initiative in putting into order the state concept towards the implementation of a more democratic and constitutional nation.

The basic implication of the constitutional amendment is the strengthening of people's sovereignty concept, which no longer conducted in a centralized way by one institution, the People's Consultative Assembly. Nonetheless, it is distributed to various institutions in accordance with their tasks and authorities as regulated in the Constitution of 1945 of the Republic of Indonesia (*Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*).

Article 1 paragraph (2) of the Constitution of 1945 prior to amendment stated that : "Sovereignty is held by the people and should assumed and implemented fully by the People's Consultative Assembly". The article was amended as: "Sovereignty is held by the people and implemented in accordance with the Constitution.

As commonly understood, democracy is a never-ending and continuous work that will never completely finished. Therefore, all democratic systems, of whatever form, as well as perfection require continuing reformation efforts.

Within the context of the democratic process, constitutional democracy becomes a big leap in the Indonesian history. It gave birth to a constitution with its basic concept resting on the sovereignty of the people (*read*: democracy), and places the constitution at the highest state's law (*read*: constitutionalism).

With the constitutional conception of a democratic characteristics and constitutional nature, the implementation of the democratic values in national and state life changes by adjusting to the democratic process itself.

In relation to the implementation of the constitutional democratic values, the People's Consultative Assembly has experienced up and downs in its function and role together with the development and understanding of democracy from various governments administration. However, the People's Consultative Assembly remains its existence strengthening the democratic process up to the present day. Since its establishment, the People's Consultative assembly holds a strong ideological concept based on the four principles of *Pancasila*, which are stated in the fourth paragraph of the Preamble of the Constitution of 1945.

Therefore, the establishment of the People's Consultative Assembly in the Indonesian political system as a consultative forum for the sake of the people's interest not only on the base of a sociological background only. Nevertheless, it is based on a more philosophical idea, as the manifestation of the national ideology, *Pancasila,* which stipulated that people consultative forum should be led by *musyawarah mufakat* (wisdom and consensus).

In his speech of June 1, 1945, one of the founder of *Pancasila*, Soekarno, believed that an absolute condition for the strive of Indonesia is actually the consultation based on the presentation. The People's Consultative Assembly

is a special institution in Indonesia's legal and political system that is not adopted by any other countries. As a state institution the People's Consultative Assembly has its role and constitutional authority which related to important and basic things in the Indonesian political system. It is regulated in the Indonesian constitutions, both, before and after the amendment. In the history of Indonesia, since the very beginning it is a democratic country where the sovereignty lies in the hand of the people. The constitution 1945, before the amendment, constructed the people sovereignty and manifested it in the People's Consultative Assembly. Hence, its members are representation of the people and manifestation of all Indonesian sovereignty. It has the power above other state institutions. According to Constitution 1945, before the amendment, state institutions were positioned in a hierarchal way with People's Consultative Assembly at the top of the structure as the highest institution. The People's Consultative Assembly, then, devolve its power to other state institutions namely the President, *Dewan Perwakilan Rakyat* (the House of Representative), *Dewan Pertimbangan Agung* (the Supreme Advisory Board), *Badan Pemeriksa Keuangan* (State Auditory Agency) and *Mahkamah Agung* (the Supreme Court). Based on the constitution, before the amendment, the State People's Consultative Assembly has the authority to draft and approve the constitution and also *Garis-garis Besar Haluan Negara* (State's guidelines), to elect and appoint the President. In this case, the President is the mandatory of the People's Consultative Assembly that is subordinate and accountable to the People's Consultative Assembly. The President should implement all the People's Consultative decisions. Therefore, it has the authority to impeach the President and the Vice President before their terms in office ended if the President and Vice President considered as not implemented the guidelines. In this context, the history has written that the People's Consultative Assembly has refused the accountability reports of President Soekarno and President Habibie and has impeached President Abdurahman Wahid during his term in office.

The authorities of the People's Consultative Assembly after the constitutional amendment are limited and shifted. After the amendment, the sovereignty is not held by one institution rather the authorities and state institutions have a more even and balance in structure. So, there is no more one absolute power in one hand of an institution, but they have equivalent position. The structure of the People's Consultative Assembly after the constitutional amendment are no longer become the highest institution. This is the implication of the strengthening the idea of democracy, that sovereignty should not be concentrated in one institution since it potentially create an authoritarian regime. The new position of People's Consultative Assembly as a state institution is a big progress for democracy in Indonesia because it changes the implementation of the people power in the highest position in the state as basic concept which is framed by the Indonesian founding fathers. The authorities and functions of the People's Consultative Assembly, after the amendment is stipulated in Article 3 and Article 8 of the 1945 Constitution which are to amend the constitution; to inaugurate the President and/or Vice President; to impeach President and/or Vice President according to the Constitution; to appoint Vice President if

the position of the President were vacant; and to appoint President and Vice President if the President or Vice President were vacant simultaneously.

Although the authorities of the People's Consultative Assembly are limited, but they are fundamental and plays important roles, since because they all related to the constitution and the election or impeachment of the President and/or Vice President. Aside from its constitutional authorities, the Law number 27 Year 2009 in Article 15 paragraph (1) mandated the Speakers of the People's Consultative Assembly must coordinate members of the People's Consultative Assembly to disseminate the 1945 Constitution and it's amendment. In regards to that mandate, the People's Consultative Assembly has implemented a number of programs in all over the country regions with various communities as the targeted audiences.

There are four pillars to applied the constitutional democracy namely *Pancasila* as the national ideology, the Constitution of 1945, the form of the State, Unitary State, and the national slogan, *Bhinneka Tunggal Ika* (Unity in Diversity).

These four basic pillars are fundamental values that can be found in the Preamble of the 1945 Constitution. These four pillars are the things that unite Indonesia as a state in facing various challenges and dynamics in establishing Indonesian statehood and democratic governance. The four pillars are the re-conceptualization of state development that consists of national character building and ideological understanding, the change in statehood paradigm and the implementation aspect in the statehood and governance.

The conceptive value in disseminating these four pillars is the spirit that embedded as the Indonesian spirit that live in the Indonesian communities. Therefore, we need to realize this state commitment and we should see it as a way to explore and develop this understanding so that the four pillars can always be the fundamental pillars in our statehood in order to reach welfare.

The efforts to raise the awareness to implement the four pillars are not the responsibility of one institution, but it is the joint responsibility. The task to disseminate the information on the four pillars is not an easy task, but it needs support and examples as a role model, especially from the state officials. They should be the role model and in terms of their spirit and also the compliance. No matter how good the *Pancasila* is, and no matter how good the constitution as the derivatives of *Pancasila* is, it is only wisdom on papers if we do not take it seriously in implementing *Pancasila*.

Therefore, the constitutional democratic state can only be realize if the state official or, in this case, the constitution can consistently serve as a guidelines model in implementing the four pillars in our daily political and governmental system. Being role model in disseminating the four pillars is actually one of the things that will strengthen and confirm the strength of Republic of Indonesia, and these four pillars will guide Indonesia. Because in this four pillars Indonesia goal in reaching independence can be implemented. Through the four pillars, Indonesia as a diverse country can be united in one

point of view in one perception. Indonesia that we are dreaming about, as a prosperous country that can be reached, if we have a strong ideological constitutional basis as a commitment to unite the people and to value diversity as a foundation for unity.

With understanding, and also the implementation of these four components we can rest assure that the statehood commitment can be realized so that we can face all challenges and we can use all opportunity nationally and globally.

The importance of understanding about the four pillars cannot be, then, use only on physical development, but also for the meta-physical development. The natural resources and cultural resources and also diversity of Indonesia are our modals that can move Indonesia to a better life, but it would not be beneficial to us if it is not being managed in good manner.

With good understanding and good implementation of the four pillars, it is expected that all state component in their daily life can refer to *Pancasila* as the basic value, the basic law which is the Constitution of 1945 and we can also maintain the Unitary State of the Republic of Indonesia, and also Unity in Diversity, so every policy in the national or sub-national level will have the same goal which is to bring the welfare to all the people of Indonesia.

This is the end of the paper, thank you. Peace be with you and may God gave you His mercy and blessing.

Master of ceremony :

Ladies and gentlemen, let us give a big warm applause to Mr. Lukman Hakim Saifuddin. Also, we would like to convey our appreciation to Mr. Taufik Kiemas which still have the spirit to attend the meeting with his unhealthy conditions. please give a warm applause

As I said earlier, that Mr. Taufik Kiemas Is the head of the class, and now one of his students, ladies and gentlemen, the Speaker of the House of Representatives, his excellency, Mr. Marzuki Ali

SPEAKER 2

Hon. Marzuki Alie

Speaker of *Dewan Perwakilan Rakyat*

(the House of Representative) of the Republic of Indonesia

THE HOUSE OF REPRESENTATIVES OF THE REPUBLIC OF INDONESIA AND THE STRENGTHENING OF DEMOCRATIC VALUES

Marzuki Ali (delivered his speech In Bahasa)

Translator :

Excellencies, Speakers of Parliaments,

Excellencies Chairpersons of Constitutional Courts,

Distinguished participants,

"Sovereignty belongs to the people and is implemented according to the Constitution".

These words are clearly stated in The Constitution of The Republic of Indonesia, article 1 paragraph (2). It means that the highest power in this Republic is in the hands of the people. A democratic country is a state where people's sovereignty is above all. In a democratic system, the popular sovereignty is represented by the government. The government has the power to control the sovereignty. But, the power needs to be regulated and limited in order not to create an absolute power or a dictatorship and laws that only belongs to the rulers. An absolute power will certainly be abused, as stated by Lord Acton: "power tends to corrupt, and absolute power corrupts absolutely".

The idea to limit the government's power is known as a constitutional democracy. The constitutional democracy has the characteristic where the government has a limited power and does not perform an arbitrary action against its citizens. As the government's power is limited by a constitution, it is often called a constitutional government.

In a constitutional democratic country, the power is, then, distributed to state institutions in accordance to their functions. The distribution of power is performed in order to avoid the abuse of power. To avoid a one-man power where the center of a power lies on one person or one institution, the power of the government is limited by constitution. This concept has generated various concepts of the distribution of power, for example *trias politica*.

According to *trias politica* concept, the power of the government should be divided into three separate branches of power, namely the legislative, the executive and the judiciary branches. The legislative branch has the power to make laws, the executive branch implements the laws and the judiciary prosecutes on behalf of the laws.

In Indonesia, the amendment of our 1945 Constitutions has resulted a governmental system which are different from the structure in the past. Alongside *Dewan Perwakilan Rakyat* (DPR -the House of Representatives-), now, we also have *Dewan Perwakilan Daerah* (DPD -the House of Regional Representatives Council-), as the legislative branch that are directly elected by the people. We also have a new state institution, namely Constitutional Court. The changing of the institutional structure makes the function of all state institutions is redefined.

The executive power is held by the President, the legislative is under the authority of House of Representatives and House of Regional Representatives,

and the judiciary power is held by the Supreme Court and other courts below it and also by the Constitutional Court.

Excellencies Speakers of Parliaments,

Excellencies Chairpersons of Constitutional Courts,

Distinguished participants,

Indonesia is the third largest democratic country in the world. It is characterized by a democratic process that has been running since the reform era in 1998. Direct elections to voted for the members of representative institutions, the President and Vice President and also the Head of Regions have been implemented.

However, we realize that the democracy that has been running is not without shortcomings. Democracy should be executed within framework and legal corridors. The law is not interpreted as a command of the authority, but should be seen as a manifestation of the will of the people.

Distinguished Participants,

The DPR has three main functions, namely legislative, budgetary and oversight functions. The legislative function is implemented as a manifestation that the DPR has the power to make laws. The power of the DPR to make laws is conducted in conjoint with the President, as stipulated in article 20 paragraph (2) of the 1945 Constitution. The provision on mutual approval in the deliberation of a bill means that the power of the DPR to make laws is not infinite.

Having the power to make laws, the DPR has to put into consideration the 1945 Constitution and other legislations. Law number 10 of 2004 stipulates that the Law should regulated further provisions of the 1945 Constitution. The constitutional provisions covers human rights, the rights and obligations of citizens, the implementation and enforcement of the state's sovereignty and the distribution of state institution's authorities, state's borders, regional authorities, nationality and citizenship, the state budget; or contains constitutional provisions mandated to be regulated by laws.

The process of legislative tasks that is implemented by the DPR and the President should be within the corridor of democracy and based on constitution, both, in terms of formal and material of the laws. However, it should be understood, that in accordance with the Indonesian legal systems, laws are object to judicial review by the Constitutional Court, so they are in accordance to the Constitution of the Republic of Indonesia.

Distinguished Symposium Participants,

The DPR has the authority to deliberate and determine the State Budget and carry out oversight function. In applying duties and authorities, the DPR carries out its budgetary function by deliberating bill on state budget proposed by the President.

At the end of the deliberation, the parliament has the power to approve or reject the bill, by taking into consideration the input from the DPD.

In addition, in carrying out its oversight functions, the DPR oversees the implementation of laws and state budget. The implementation of the DPR's oversight function over the executive institution is carried out within the framework of the checks and balances mechanism based on the prevailing laws.

Excellencies,
Distinguished participants,

The strengthening of democratic values in the implementation of the three functions of the DPR is performed by giving space for public participation. Public involvement is very crucial in law-making process, budget discussion, and the implementation of oversight function.

Public involvement in assisting the implementation of the DPR's functions should be perceived as a process of interaction, relation, and mutual assistance which involves, both, national and local governments, supra-structural institutions, infrastructural institutions, social institutions, academics, professional organizations, community organizations, and other members of society as its stakeholders.

The DPR believes and realizes that public involvement is very important to give input to the House, to improve the readiness of the public to accept decisions, to provide legal protection, and to democratize decision-making process. Public involvement will involuntarily improve the effectiveness of the enforceability of the law in the society and provide legitimacy as well as political support to the establishment of a law.

Distinguished participants,
Excellencies,

In order to meet the third amendment of the 1945 Constitution, the DPR introduce a law on Constitutional Court. This institution is new in the structure of the state, as stipulated by Law number 24 of 2003.

The goal in establishing the Constitutional Court is to give protection for the constitutional rights and to support the spirit of enforcing the constitution as the basic norm, which means every regulation having less power than the Constitution must not in conflict with the Constitution. In short, Constitutional Court has to perform its roles and functions related to the constitution in order to enforce the principle of constitutionality of law. The Law on Constitutional Court has been amended by the DPR in order to help the institution to perform its roles and functions better.

Excellencies,
Distinguished participants,

To conclude, first, the DPR as a democratic institution has performed ceaseless efforts to strengthen Indonesian democratic values. Those efforts are

performed by maintaining the democratic values in every implementation of the DPR's function. The public criticism towards the DPR's performance should be perceived as a collective effort to strengthen the democratic values.

Second, the DPR perceives the Constitutional Court as a newly established State Institution, as stipulated in the amendment of the 1945 Constitution. This institution will be the House's counterpart in its efforts to strengthen democratic values. Therefore, the DPR and the Constitutional Court, should be in "check and balances" position in the area of legislation. By maintaining good relationship between institutions, public will hopefully enjoy the benefit from the strengthening of democratic values as it will no longer be a mere jargon. The values should benefit the public through the realization of the state's goals as mandated in 1945 Constitution.

Thank you.

Peace be with you

Master of ceremony :

Thank you very much to his excellency, Mr Marzuki Ali, the speaker of the House of Representatives of the Republic of Indonesia.

Your excellencies, distinguished gusets, ladies and gentlemen,
we continue with the next keynote speaker, the Speaker of the House of Regional Representatives of the Republic of Indonesia, his excellency, Mr Irman Gusman.

SPEAKER 3

Hon. Irman Gusman
Speaker of the House of Regional Representative of
the Republic of Indonesia

"STRENGTHENING THE CONSTITUTIONAL DEMOCRACY IN INDONESIA"

Irman Gusman : (delivered his speech in Bahasa)

Translator :
Assalamualaikum Wr. Wb.
Salam sejahtera bagi kita semua,

Let's raise our thanks to *Allah Subhanahu Wa Ta'ala*, because of his blessing we can gather today in the International Symposium of Constitutional Democratic Country at Jakarta.

Good afternoon all of the participants, all of the spokepersons of the Parliament, including the Representatives and your excellency of the chief justice of Constitutional Courts from different states and also the justices of Constitutional Courts and other equivalent institutions and also the parliamentarians who are here, who have been specializing other issues related to the Constitutional Courts and also to the speaker of the *Majelis Permusyawaratan Rakyat*, Mr. Taufik Kiemas and the speaker of the *Dewan Perwakilan Rakyat*.

First of all, I would like to say welcome to all of the delegates from the International symposium that talks about Institutional Democratic State that just opened by the President of Indonesia and who also conveyed his keynote speech.

And this symposium is held to celebrate the eighth anniversary of the Constitutional Court and, therefore on behalf of the DPD (Regional Representative Council) I would like to say Happy Anniversary and we hope that the court as the guardian of the Constitution will always contribute to the development of the democracy and to strengthen the pillars of law in Indonesia

And this international symposium indeed is very relevant to the political life in Indonesia since the Reform in 1998 and era that we called as the power transition from authoritarian regime to the democratic regime.

The development of political life in Indonesia has been directed to a change of system for a constitutional structure that is democratic, although the democracy development has been going through ups and downs that can be observed from the cases and the social political reign from Soeharto. Even though, the process of democracy has been up and down from one regime to another, since Soekarno, Soeharto, Habibie, Abdurrahman Wahid, Megawati, until Susilo Bambang Yudhoyono but as an archipelago states consists of thousands of island, various of ethnicities, tribes, tribal languages, and religions, we have managed to go through all of the upheavals safely. And this is something that was appreciated by Barack Obama when he conveyed a public lecture at the University of Indonesia when he visited Indonesia several months ago.

As a diverse nation, we have a strong quality as a tolerant democratic and harmonious nation. Because we have four pillars which are *Pancasila* as our ideological principle; 1945 Constitutions, as a political consensus and the highest law; Indonesia as a unitary state, as the concept defined all of diverse groups; and the national slogan “Bhinneka Tunggal Ika” (Unity in diversity) as our identity in political society.

And indeed democracy, in Indonesia, started with centralistic regime and therefore a lot of abused of power that does not go in line with the constitutional spirit and there were huge gap in development amongst regions. And this resulted in unfairness and unequality. This basically what propelled the ways of reformed in 1998 with all of this demands such as the member of constitution, the division of dual function of the military, the centralization of autonomy region, and the eradication of corruption and enforcement of law, and the freedom of press and freedom of expression.

And in this transitional era, Indonesia could avoid Balkanization that has been happening in Eastern Europe, the breaking up of the former Yugoslavia into new states. Also, recently, we have seen Southern Sudan as a new state, whose majority is Christian that split from the Republic of Sudan with the majority of Moslem. A new state is born to shows that it is not easy to balance the diversity in a country. But in Indonesia we have democratic values, even though the majority is Moslem, namely ninety percent of our population are Moslems, and maybe some people, especially the western people, they might have an assumption that democracy is hard to be excepted by the Moslems, but in Indonesian democratic history, the values of Islam is in line with the democracy values such as harmony, justice, freedom, and equality.

Ladies, and gentlemen,

For all of the transitional countries, including Indonesia, because we just hit the thirteen year mark as a transitional state, the hardest work is to find the best ideal democratic format. This was already pointed out by the previous two speakers. Since the amendment of our constitution in four phases (1999, 2000, 2001, and 2002), we are trying to perfect our structure of the state and the amendment also signify the major changes in our democratic system.

First of all, the supremacy of parliaments changed into the constitutional supremacy where the sovereignty is in the hand of the people as implemented by the law. Secondly, the affirmation of relation among state institution in equal position and balance. There is no institution higher than another. President, *Majelis Permusyawaratan Rakyat, Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah, Mahkamah Konstitusi, Mahkamah Agung, Komisi Yudisial* and *Badan Pemeriksa Keuangan,* are the state institutions that have different authorities but are in the equal position. Third, the adoption of checks and balances among the state institutions; So, the legislative would have the control over the check and balances maybe in the context of the cooperation between legislative and executive but also within the relation amongst the legislative institutions namely the DPR and the DPD. Also, in Indonesia we have the DPD that is meant in the US, *the senate* or *House of Lords* in UK, *San* in Japan, *Erajasaba* in India, or *Dewan Negara* in Malaysia.

The establishment of DPD formed by the third amendment of UUD 1945 in November 2001, had transformed the political representation system. In terms of legislative, the DPR is selected based on the political party and the DPD whose election also by popular vote based on the regional. And the MPR will be the guarantee of the pillars of the state as already mentioned by Mr. Lukman Hakim as the representative of the People's Consultative Assembly. Therefore, Indonesia as a constitutional democracy state, as already mentioned by our president in the keynote speech that opened this symposium, has major characteristics such as equality before the law, free and democratic election, acknowledgement of civil rights (right to convene, right to religious believe and freedom of the press), and there is checks and balances mechanism among state institution.

In this perspective, these institutions will strengthen the unitary state of Indonesia. And regions will strengthen and represent the interests of the regions which will accelerate social and economic development of the regions. These are the functions of the DPD.

DPD are the regional representative that has legislative functions, such as drafting state budget, but only in limited scope. The DPD represent the interests of local people, therefore problems that were face by the regions can be expressed at the national level. And it also able to gave different perspectives for decisions making process in the parliament especially In relation to the interests of the regions.

Democracy is the correct options for Indonesia which already experience an authoritarian regime in the New Order era. Nowadays in the constitutional regime, the power is in the hands of the people. The power are limited by the constitution and there is check and balances between the branches of government. The legislative will control the executive power so that it would not be derailed from the rail of constitution.

Therefore, there is this idea that the constitutional government are people with limited power and the real power is in the hands of the people.

Ladies and gentlemen,

As a process that has been commencing since 1998, whereby our democracy has been 13 years, and the process of democracy have already given a positive impact in Indonesia. It is transform the political power from the authoritarian regime to democratic regime based on transparency, accountability and this open the room for the participation of the people and the economic development democracy has propelled the growth of the nation.

In the past two years, our economic growth has increased. In 2009, from 5,5% has increased in 2010 and it is projected that in 2011 we are going to reach 6,6%. And even when there was economic crisis in Indonesia we still could gain a positive economic growth together with India and China. It is expected that Indonesia, one day, will be one of the ten best economic powers in the world reaching 10.000 per capita where, as now, we still at 3.000 per capita. Indonesia's economic capacity will be equivalent to Brazil, India, China, and Russia with the potential of mastering the global economical development growth. Democracy can propel the competitiveness of the nation. Based on World Economic Forum (WEF), Global Competitiveness Index, Indonesia has increased from rank 133, now, we are in the position 44. Last year we were in the position of 55 now we have increased in the position of 44. If compare to the BRIC Countries, Indonesian competitiveness is above India, Brazil, and Russia where as China is in the rank of 27th. Also the G-20 countries, our competitiveness is on the 10th compare to the other G-20 countries.

Indeed this is a significant advancement for Indonesia who just got into democratization in 13 years. This Global Competitiveness Index performance is a logical consequence from our transitioning from authoritarian regime to democratic regime and also from our centralized government to decentralisation.

Ladies and gentlemen,

Indeed as a new democratic state, Indonesia always tries to develop the democracy. We have had a new architecture of national development; we called as democratic regime, at this time we are in the consolidation track.

In the global democracy index, the quality of democracy Indonesia has reached a positive level, especially when we see this from the five indicators, namely general election and pluralism, the function of the government, the political culture, and the civil rights and political participation which are the indexes of the global democracy.

According to this index issued by the Economist Intelligence Unit in 2010, our index is at the 60th amongst 167 states. Compare to South Korea, South Korea is the 20th, Spain 18th, Chile 34th, and Austrian the 13th, and Germany on the 14th, and Hungary 43. Indeed Indonesian democracy is still lower.

But if compared to Mongolia on the 66th, Kazakhstan 132, Venezuela 96th, Azerbaijan, Ukraine 67th Uzbekistan 164th and Russia 174th, we see that Indonesia growth is actually towards a positive level.

So democracy has give bigger opportunity for the people, the business persons, the NGOs, the mass media, to always participate in the development. And there is a strong correlation between democracy and development. Without democracy, it is hard to find progress as I already mentioned to you before including about the legal development.

In the index Rule of Law in 2011 issued by World Justice Project, we were 22 out of 66 states in terms of limitation of power. And also the fulfillment of people's fundamental rights, we are in the 30th out of 66 countries evaluated.

Therefore, democracy has helped in the development of supremacy of law in Indonesia. Supremacy of law is then in order to guarantee the rights of the people as stipulated in our constitution.

As a constitutional democracy, we still have to perfect our administrative system. And in order to strengthen our constitutional system we need to perfect our administrative system that has been a part of our public agenda.

And therefore we need to perfect the presidential system, strengthening the parliamentarian system, strengthening the autonomy and decentralization system, and to strengthen the between the executive, legislative, and judicative.

Because a mature and quality of democracy is the main capital in having good development. The best capital for our future is to enforce democratic values. As Indonesia is the third most populated country, Indonesia has the potential to become a better state and more developed nation because we can live together within the constitutional values, acknowledging the differences and believing tolerance. Therefore ladies and gentlemen, this symposium has large contribution for our democratic, made before Indonesia and also other states that are here. We hope that from this symposium we can have new ideas gathered from the participants for the advancement of our countries and humanity as a whole. So again have a good symposium.

Wassalamu'alaikum Wr. Wb.

Master of Ceremony :

Thank you very much his excellency, Mr Irman Gusman, the speaker of the House of Regional representatives.

And last but not least, the Chief Justice of the Constitutional Court of Indonesia, Ladies and Gentlemen, Mr. Prof. Dr. Muhammad Mahfud MD

SPEAKER 4

Hon. Moh. Mahfud MD.

Chief Justice of the Constitutional Court of the Republic of Indonesia

THE ROLE OF CONSTITUTIONAL COURT IN REALIZING THE CONSTITUTIONAL DEMOCRATIC STATE IN INDONESIA

Mahfud MD : (delivered his speech In Bahasa)

Translator :

God's speed, peace be upon you.

Ladies and Gentlemen,

I'm going to give you my presentation. The title is the Role of Constitutional Court in Realizing the Constitutional Democratic State in Indonesia.

A. Background

The 1998 political reform in Indonesia made constitutional reform necessary. Why? Because, constitution is the basic foundation of a country in determining the country's design and its management, including political affairs. Therefore, the reform process requires the improvement of substance of the Constitution. One of the strong reasons was that the 1945 Constitution (UUD 1945), which was still valid at that time, was considered to have too many loops and weaknesess, therefore it was cosidered incapable of being used as the basis of developing a more democratic Indonesia. Based on this premise, the constitutional reform was selected as the main agenda to start the reform process in Indonesia.

From 1999 to 2002, the 1945 Consitution went through four stages of change in one series of amandement. The constitutional changes affected various basic changes in governance system, be it in paradigm, format, structure as well as relationship among state's institutions. In addition, the amendment to the 1945 Constitution formed new state institutions, one of which is the Constitutional Court (MK).

MK was set as one of the state institutions implementing authorities in addition to the Supreme Court (MA), which was designed to safeguard the Constitution. The establishment of MK complemented the practice of

the new paradigm of constitutional supremacy where the 1945 Constituion, in accordance to its nature and position, became the basic and the highest law in governing the Indonesian country. This paper presents the idea and background of establishment, function and authorities as well as the role of Indonesian MK in materializing a democratic constitutional state.

I will directly jump to my point C on page 5 of my paper,

C. **The background of MK establishment in Indonesia**

Based on the governance dynamic practices and political experiences experienced by Indonesia, the establishment of MK was more motivated and inspired at least by three issues. **First,** MK was established as a consequence of the desire to materialize a democratic and constitutional country, as stated in the 1945 Constitution. In the context of democratic country, it is possible that a law or regulation is formed based on democratic procedures and mechanisms but the substance may not be in line with or may be contrary to the democracy, which means, contrary to the Constitution. Thus, it is necessary to have a state institution with the authority to review the constitutionality of legislation.

Second, the Amendment of UUD 1945 required shifts and changes in the relationship of state authorities from *distribution of power system* to the separation of powers system in the framework of checks and balances mechanism. The shift in the inter-state-institution relationships will possibly create conflicts or disputes among the state institutions. However, it was not only because of the change of relationship, it also because of the many state institutions that were established based on the UUD 1945, which provided bigger potential of disputes between the state institutions. Considering the equal status of these state institutions, and the fact that there is no supreme institution, it is deemed necessary to have an institution that has function and authority to resolve authority disputes among these state institutions.

Third, the impeachment of President Abdurrahman Wahid by MPR during its Special Session in 2001, was a constitutional phenomena which was considered inconsistent with the adopted presidential system. In the presidential system a president cannot be impeached during its tenure because of its fixed nature, particularly if it is due to the political reasons. President can be impeached only if the president was proven guilty against certain laws as regulated in the Constitution.

This phenomena inspired the drafters of the Constitutional amendment to find a mechanism that can be exercised to terminate the term of service of the President and/or the Vice President, so that the impeachment can be exercised not solely due to political reasons. In this regard, it was agreed to have a mechanism as well as a legal body which has the responsibility to first review the violation of the law committed by the President and/or Vice President which will result in the termination of the President and/or Vice President during their tenure.

D. The position of MK in the Indonesian Governance

The system of separation of authorities resulted in the basic changes of state institutional format after the amendment of the 1945 Constitution. Prior to this, the state institutions were formed as in a vertical-hierarchical manner, with the MPR being at the top structure as the highest state institution. Article 1 Paragraph (2) UUD 1945 prior to the amendment stated that the highest authority was in the hand of people and MPR as its exercises. As the implementor of the people's sovereignty, MPR was always regarded as the people's incarnation and MPR distributed its power to various state institutions, such as the President, DPR, DPA, BPK an MA. These five bodies have equal position as higher state institutions.

In the power separation system, the state bodies were not classified as highest and high state bodies. It was because those bodies have its authorities based on the UUD and at the same time was also limited by the UUD. After the UUD 1945 amendment, the people's power was not wholly casted upon only one state body. It was now placed based upon UUD. In other words, the power was distributed among state bodies in accordance with the UUD 195.

In such a context, the state institutions are differentiated based on their roles and functions as stipulated in the 1945 Constitution. As one of the bodies implementing judicial authority, MK has equal position with other bodies in different power branches, i.e. executive and legislative. These equal positions imply no other reasons to consider that a state body as super-body or superior compared to other state bodies. Based on that, there was no reason to say that MK has higher position compared to their state bodies, especially if only seen based on MK's authority to cancel laws that were issued by legislative and executive bodies. MK can cancel those laws not because of its higher position but it was mandated by the constitution.

E. MK Functions and Authorities

The role and function of MK are to safeguard the constitution as the highest basis of constitution and laws implementation in the course of state governance. Within this function and role, MK's main authority is to review the law. In this regard, MK is formed to guarantee that there is no more, or at least minimum, legal products that are not in accordance with, contradict, or out of the constitutional corridor as those legal products can not be regarded to realize and safeguard the citizen's constitutional rights.

In order to review whether a law is contradictory to the constitution, it was agreed to use the judicial review mechanism. If a law or article, paragraph and/or part of that law was proven not in accordance with or contradictory to the constitution, MK will declare that the legal product will not be legally binding. In that case, all legal products should make reference and should not contradict to the constitution, in any case. By the judicial review authority, MK will safeguard the constitution.

In addition to judicial review, MK Indonesia will have other functions, i.e. (1) to take decision on inter-state institution disputes, (2) to dissolve a political party, and (3) to resolve electoral disputes. Those functions provide

the mechanism to resolve various disputes (inter-state institutions) which can be resolved by ordinary court process, such as electoral disputes, and claim for political party liquidation. This kind of dispute is closely regarded as citizen's right in the democratic political dynamic which is ensure by the UUD. In relation to that, the task to resolve the electoral disputes and political party abolishment was regarded as MK's authorities.

Based on Articles 7B and 24C of UUD 1945, MK has four authorities and one constitutional obligation. Its constitutional authority is to do the judicial review against the UUD 1945, to take decision on authorities disputes among state bodies, as casted by the UUD 1945, to decide on political party liquidation and decide on the result of an election. MK is constitutionally obliged to decide the DPR's opinion if the President and or Vice President has violated the law or misbehaved or was not fullfilled the requirement to be a President and or Vice President as stated in the UUD 1945.

F. The Role of Constitutional Court in Realizing Constitutional Democracy

In accordance with the efforts to realize a constitutional democratic country, implementations of four authorities and one obligation, MK has a strategic role and contribution. The role of Constitutional Court in realizing constitutional democracy through authorities and constitutional obligation is explained as follows:

1. Judicial review

The legal test mechanism is an effort to ensure and guarantee that the laws are consistent and are not contrary to UUD 1945. Laws as political products are crystallization of political interests of the law makers within the political institution authorities. As a political product, the legal substance is just an accommodation or compromise for certain political interest, even political domination which is not consistent with or against the stipulation and aim of the constitution.

According to the regulation hierarchy theory, the substance of lower legislation must not be contrary to or must refer to the higher legislation. In this regard, Constitutional Court has the authority mandated by the constitution to test and review a law whether it is contrary to constitution or not, through the legal test. If the law or part of it considered inconsistent with the constitution then the legal product will be anulled by Constitutional Court. Through judicial review, Constitutional Court becomes a safeguard institution so there will not be a statute that is inconsistent with the constitution.

Several Constitutional Court's decisions in implementing judicial review task are made by the spirit to support the efforts of strengthening the constitutional democratic principle. Constitutional Court has and will make rule to strengthen democracy. Constitutional Court ruling on rehabilitate the right of former *Partai Komunis Indonesia* (PKI -Indonesia Communist Party) members to vote, to allow independent candidates to take part in the Regional Head Election, to annuled Legal Education Agency Act (*Badan Hukum Pendidikan*), and also the

use of identity card and passport as a requirement to vote, are few of many of the Constitutional Court's concrete roles in supporting democracy.

2. Resolving Constitutional Dispute among State Institutions

Constitutional Court authority to resolve constitutional disputes among state institutions basically provides protection to ensure state institutions run within the constitutional tracks. This authority is an effort to prevent a state institution from taking over, overlapping, or dominating other state institutions in governing the country. Whenever there is a dispute, the resolving mechanism is provided in the Constitutional Court.

The dispute of authority among state institutions is the difference in opinion accompanied with a conflict or other claim about authority of each state institution. It may occur due to the relationship system involving one institution to another that exercises check and balance mechanism and principle, meaning the state institutions are equal position, but they can monitor and balance each other. In consequence to that kind of relationship, there is a possibility of dispute in interpreting the distribution of authorities as stipulated in UUD 1945. In this regard, MK will be the referee to solve this within the legal and constitutional mechanism.

3. Decision to dissolve a Political Party

The authority to dissolve a political party is authorized by the UUD 1945 to MK, in order to safeguard democracy, especially to maintain the existence of the political parties as the pillar of democracy. Political parties reflect the freedom to organize openly and they have a place in the democratic country.

As a democractic pillar, the existence of a political party should not jeopardize the democracy, and it should not endanger the existence of the nation. If there is a violation, a political party can be dissolved. The political party liquidation cannot be done by the government, as in principle, the government is also formed by the political parties. Based on this, the liquidation of a political party should be done the judicial body, in this case MK, on the basis of strict laws and constitutions.

The claim to dissolve a political party can not be submitted by private entities or individuals which might be disappointed or have different views with the political party's executive. Therefore, the political party abolishment can only be submitted by the Government on the reasons as stated in the constitution and laws. In addition, a political party can be dissolved if that party's activities are proofed to be contradicted against the UUD 1945, in its ideology, principles, activities, goals and programmes. The evidences will be conducted in the courts. Therefore, the liquidation of political party can not be based only on the political motives and authority's approach.

In this regards, MK will safeguard political party from power abuse which is authoritative and un-democratic, as well as to maintain the constitutional democracy against the political party that does not have synchronized ideology, principles, activities, goals and programs not in line with the constitution.

4. Decision on the results of election disputes

The general election is the main instrument to form and manage the government, from, by and for people. Therefore, election should be done in an open and transparent manner. There should not be a vote that is not counted, or manipulated as this means abusing the people power.

In Indonesia, the general election can be grouped as elections for legislative members, President and Vice President, and Regional Head and Vice head. These elections are very volatile to disputes. Therefore, any disputes should be resolved through a fair court, in this case MK.

The election disputes are between the KPU and the election participants regarding the decision on the national election result. The dispute can occur if the KPU's decision affects 1) the election of DPD members, 2) the decision of presidential and vice presidential candidates who are entitled to the second round as well as the elections of pesident and vice president, and 3) The result of political party seats in one of electoral regions. By its decision, MK will not have any doubts to order recalculation of votes or re-voting, if there is violation against the democratic principles.

In this case, MK will not only decide the votes counting, but also safeguard the election process and quality to ensure that election is conducted in a direct, open, free and discrete as well as honest manner. The result of election is definitely influenced by the process. The issue is whether it significantly changes the result of the election or not. The significance can be measured by the difference of the result and/or the occurence of any violations that are structured, systematic and massive in nature.

In relation to safeguarding the election, since the enactment of Law No 12, 2008 regarding the Second Amendment of Law No 32, 2004, MK authorities are increased by reviewing, judging and deciding the dispute in elections of regional heads, which authorities previously belong to MA. The expansion of these authorities is the result of Law no 22, 2006 regarding the Election implemention which puts the election of the regional head under the general election affairs.

5. Decision on DPR's opinion regarding the possible violation committed by President and/or Vice President

In the presidential system, the president cannot be impeached during its tenure prior to the completion of its term, as the president

is directly elected by the people. However, based on the principle of supremacy of law and equality before law, president's term of service can be terminated if proven violating certain laws as stipulated in the Constitution. The termination can only be done based on certain reasons as stipulated in the UUD 1945, that is violation of laws, treason against the state, corruption, bribery and other heavy crimes or misconducts and if he/she does not meet the requirements as President and/or Vice President.

However, the termination process should not be against the legal principles. Therefore, prior to the court decision that finds a president guilty, the president cannot be impeached. The specified Court is MK which handles the case put forward by the parliament. However, prior to that, in taking stance on that kind of opinion, the process of decision making in parliament should be supported by 2/3 (two-thirds) of all parliament members present during the plenary meeting which should be attended by at least 2/3 (two-thirds) of parliament members.

G. MK's decision is final and binding

The MK's decision in exercising its authorities and constitutional obligation as mentioned above, is final and binding in nature. This means, there are other legal efforts available, such as Review or other efforts as in the general court. The MK's decision has the legal binding since it was announced in the MK's plenary court which is open to public. The court's decision has already had permanent legal binding, which means it has a legally binding power to be executed. Therefore, all parties including the concerned state apparatus have to conform to MK's decision.

In the judicial review, for example, the norms of Law to be reviewed is abstract and publicly bound in nature, although the request is based on the individual's right that has been violated, in fact, it presents the community's interests to implement the constitution. The law making bodies, DPR and President, do not serve as defendants who should be responsible for the committed violation. The Law maker is the relevant party who provides background information and interpretation of the submitted Law, in order that the interpretation is not done only by the requestor and MK, but also by the Law maker to have a legal certainty that is not contrary to the constitution. Therefore, the binding parties to MK's decision are not only the Law makers, but also all parties concerned to MK's decision.

This is the end of my paper, thank you

Peace be upon you.

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

SESSION ONE

The Role of Constitutional Court and Equivalent Institutions in Strengthening the Principles of Democracy

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

SESSION I
DISCUSSION TOPIC :

The Role of Constitutional Court and Equivalent Institutions in Strengthening the Principles of Democracy;

Testing the Laws against the Constitution is the main authority of the Constitutional Court in almost all countries.

PANEL I

MODERATOR
Susi Dwi Haryanti

SPEAKER 1
Hon. Rogov Ignor Ivanovich,

The Chairperson of the Constitutional Council of Kazakhstan

The role of the Constitutional Council in the realization of principles of the democratic state in the Republic of Kazakhstan

Good day, dear Ladies and Gentlemen

Let me on the behalf of the Constitutional Council of the Republic of Kazakhstan greet the participants of the conference and express our gratitude for the invitation.

Today's forum is devoted to actual themes. In the legal state, which is Kazakhstan poses itself to be, the decisions of the organs of constitutional control are the clue factor of development of country in accordance with democracy ideas and principles, laid in the Constitution. The decisions of the

given state organs, standing on the guard of the Constitution and ensuring its supremacy over the territory of country act is the logical continuation of the Main Law.

This year Kazakhstan celebrates 20-th anniversary of its Independence. Owing to reasonable, constant and purposeful actions on consolidating the constitutionalism, Republic of Kazakhstan became the country of ascending democracy. And the democracy is not conceivable without highest lawfulness. For the years of its independence Kazakhstan seriously advanced to the achievement of this ideal.

Touching upon the questions of realization of democracy principles in Kazakhstan, I would like to start my speech with highest constitutional values of the state – human rights and freedoms. Practically every normative resolution of the Constitutional Council is directed to the safeguard of specific human rights and freedoms. The Constitutional Council orients the development of legal system, lawmaking and law enforcement practice in direction of their complying with modern understanding of human rights and freedoms, consolidated in fundamental international acts.

Thus, on appeal of the President of the Republic of Kazakhstan as an preliminary constitutional control the subject considered by the Constitutional Council was the law of the Republic of Kazakhstan "Of mass media", adopted by the Parliament and presented to President to be signed by him. In its resolution of 21 April 2004 No. 4 the Constitutional Council clarified, that the right for freedom of word supposes the freedom of opinions, points of view, ideas expression in different kinds and forms, in mass media as well. The Constitutional Council found this law not complying with Constitution, as it limited the sphere of realizing the word freedom, entitled to disprove the unrealistic information only to the citizens of Kazakhstan, allowed the possibility to limit the freedom of word by normative legal acts, and cease the activity of mass media in extrajudicial order.

One of the most important ways to ensure the supremacy of democratic principles is the official interpretation of Constitution norms. For the years of work of the Constitutional Council the constitutional norms, concerning the questions of general elections, republican referendum, forms of delegating by people their authority to state organs, legal status of political parties and other social associations, private property regime and others. The normative resolutions of 1 December 2003 No. 12 and of 31 January 2011 No. 2 the Constitutional Council ascertained, that point 1 article 3 of the Constitution "the only source of state power is its people" means that the base of Kazakhstan, its sovereignty, independence and constitutional system is its people. Being one of the fundamental constitutional values, the act of expression of popular will acquires the compulsory juridical power by means of voting at the republican referendum or at the Presidential elections and Parliament deputies, periodically held in the country. In the other normative resolution of August 19 2005 No. 5 the Constitutional Council, having considered the appeal of the group of the deputies of Parliament concerning the date of the next Presidential elections, ascertained that the starting point of

the cycle of will expression of people as the source of state power is the Presidential election day. In that very day the people of Kazakhstan realizes its will and displays its sovereignty, defining its democratic character of power, giving it the highest legitimacy.

So, the shown stable principles of democracy, composing the basis of the constitutional system of the overwhelming majority of the world states, amongst them Kazakhstan, were interpreted by the Constitutional Council. Its legal positions on the given questions penetrates the contents of the whole Kazakhstan legislation.

One of the basic principles of the democratic state is the private property, the regime of realization of which was the subject of study in the Constitutional Council. In result, the legal positions, which allowed to approach the questions of limitation of title in another way were worked out. In the opinion of the Constitutional Council, the positions of the Basic Law of property make the political legal basis of establishment of Kazakhstan as the democratic, temporal, legal and social state, the highest values of which are men, his life, rights and freedoms. The principles and norms of the Constitution declare and consolidate the guarantee of rights of ownership at all the stages of its origin, change and break off and spread over the all the procedures of passing the resolutions by state organs and officials, ensuring steady and progressive development of society and state, firmness of human rights and freedoms. In exceptional cases, foreseen by law the expropriation for state needs can be done on the decision of court under conditions of its equal compensation (normative resolution of 23 April 2008 No. 4 and of 28 May 2007 No. 5).

Certainly, this is not the full list of what Constitutional Council has done for the realization of the democratic values in Kazakhstan. But they clearly indicate that the Constitutional Council in its activity develops defined by Constitution vectors of democracy.

I think, that today's conference will help all of us to comprehend these questions deeper, exchange positive experience and aim the ways of further work to ensure the supremacy of Basic Law of our countries and the ideas and principles of sovereignty of the people.

SPEAKER 2
Hon. Durgejav Munkhgerel,

Justice of the Constitutional Court of Mongolia

The judiciary plays an important role in strengthening democracy through separation of powers among all level of governance, which is the main condition of a constitutional state. Section I of Article 64 of the Constitution of Mongolia says : "The Constitutional Court shall be an organ exercising supreme

supervision over the implementation of the Constitution, making judgment on the violation of its provisions and resolving constitutional disputes. It shall be the guarantee for the strict observance of the Constitution."

The responsibility of the Constitutional Court to resolve constitutional disputes, procedures to settle disputes, competence of the decisions issued by the court and the criteria for examining disputes exclusively at the request of certain legal subjects highlight the fact that the Constitutional Court in Mongolia is an independent court.

A vital principle of the state structure in a democratic society is creation of a legal environment and implementation mechanism of interdependent, mutually monitored and balanced actions of legislative, executive and judiciary bodies.

As indicated in the Constitution of Mongolia, the Constitutional Court of Mongolia shall examine the decisions of specific organizations and public officials as well as actions of some public officials.

The Constitution Court shall consider and resolve disputes concerning whether laws, decrees of the President, other decisions of the Parliament and President, decisions of the government, international treaties concluded by Mongolia, national referendum, decisions by the central electoral body on the Parliament, its members, and on presidential elections are in conformity with the Constitution. If the Constitutional Court decides that the decisions of the above legal subjects are in compliance with the Constitution, decisions in question, as indicated in Section 4 of Article 66 of the Constitution, shal be considered invalid.

The Constitutional Court also has the full power to consider whether the President, the Chairman, and members of the Parliament, the Prime Minister, and members of the Government, the Chief Justice of the Supreme Court and the Prosecutor General have committed a breach of the Constitution, whether the legal grounds exist for the removal from office of the President, the Chairman of the Parliament, or the Prime Minister, and for recalling members of the Parliament.

Once the Constitutional Court decides that the given legal subject violated the Constitution and that legal grounds exist for their removal or recall, the parliament should approach the matter according to the decision of the Constitutional Court.

The disputes to be considered and resolved by the Constitutional Court or the range of dispute consideration by the Constitutional Court, as specified above are restricted to certain high state and government bodies and some high ranking public officials. Although it is obvious that high raking state and government officials likely to breach the Constitution, the judicial power as a major pillar of democracy should be required to more broadly supervise decisions of public official who violated the Constitution for the consideration by the Constitutional Court. If the range disputes to be examined and resolved by the Constitutional Court were to be expanded, for example to apply to decisions both the governors and government agencies, the Constitutional Court

would play a greater role in the process of implementation of the principles of democracy and in safeguarding the values of democracy.

The Constitutional Court examines and resolves constitutional disputes at its own initiative on the basis of petitions or applications submitted by citizens, or at the request of the Parliament, the President, the Prime Minister, the Supreme Court and the Prosecutor General. In other words, a judge has an independent power to start examining disputes on the basis of petitions or applications submitted by a citizen and if the above mention public officials submit a request to dispute should be considered and settled compulsorily. This differentiated regulation is said to be due to the level of legal knowledge and education of the citizens.

Under the constitution of Mongolia, every citizen if Mongolia as well as foreign citizens and stateless persons residing lawfully in Mongolia have the right to submit a petition or a complaint to the constitutional Court of Mongolia. Also, it is one of the specific features of the Constitution of Mongolia that every citizen enjoys a constitutional right to submit a petition or a complaint concerning any body indicated 2 of the present report irrespective of the relevance of the dispute to an individual personally. It is considered to be important for protection of personal and civil rights and freedoms in our country at this current stage of strengthening the foundation of democratic and legal state.

The principle of equality which declares that every person has an equal right before the law and the courts, and the principle of democracy of decision-making by the majority with the consideration of minority's votes surely holds an important place among fundamental principles of strengthening a democratic lawful state. Let me introduce how the Constitutional Court of Mongolia resolved a case of distortion of equality, and the majority-minority principle. This dispute concerns Mongolian law protection organs not being able to investigate the case of a member of the Parliament involved in a crime.

Content of the dispute is as follows : Section 24.7 of Article 24 of the Law on the State Great Hural states that "the sub-committee on the Immunity of members of Parliament shall comprise four members who have been elected to the Parliament the most number of times, and these members shall review the proposals submitted by relevant organs and authorities to suspend or terminate the mandate of a Member of Parliament. They should reach a unanimous conclusion on the issue and present their conclusion to relevant Standing Committees and the plenary session of the State Great Hural." The petition argues that the section concerning the "unanimous conclusion" violates Section 1 of Article 14 of the Constitution which says 'All persons lawfully residing within Mongolia are equal before the law and the courts."

Thus, Section 3 of Article 29 of the Constitution which states that if a question arises that a member of the State Great Hural is involved in a crime, it shall be considered by the session of the State Great Hural to decide on the suspension of his or her mandate could no longer be executed because of the above provision which indicates that the given issue should be considered by relevant Standing Committees and the plenary session of the parliament

only after the four members of the parliamentary sub-committee reach a unanimous conclusion.

The Constitutional Court of Mongolia began the dispute review upon the receipt of the petition and found out that the violation mentioned in the petition was obvious in the operations of the State Great Hural. On two occasions the sub-committee on the Immunity Members of Parliament has declined to submit to the Standing Committee and the plenary session of the proposal submitted by the State General to suspend the mandate of a member of parliament involved in a crime on the basis that one member of the sub-committee failed to agree with the General Prosecutor's proposal.

This means that instead of 76 members of Parliament only one member was more powerful enough to issue a decision in violation of one major principle of democracy to decide any matter at equal rights of all or by the decision of majority. This action restricted the possibility to investigate and resolve according to the law of the case of a Member of Parliament who is under suspicion. In other words, a condition has been created that the Member of Parliament under investigation could lobby one of our four members of the sub-committee on the Immunity Members of Parliament by any reason thus making legal organs incapable to complete the investigation. Furthermore, the legal condition was created to avoid legal responsibility. Consequently, it would be possible for parliamentary members to avoid the principle that every person is equal before the law and the courts.

The constitutional Court of Mongolia examined the dispute and came to the conclusion that the above mentioned 2 provisions of the Constitution were violated and therefore declared invalid the past of the law which states that the sub-committee on the Immunity of Members of Parliament should reach a unanimous conclusion.

Thus the Constitutional Court of Mongolia carries an important duty in the practical implementation of Principles of Democracy.

Let me wish success for the present symposium. Thank you for the attention.

SPEAKER 3
Hon. Juan Carlos Henao Perez,

President of the Constitutional Court of Colombia

One of the aspects that is very important in planning the constitution of the Colombian nation is to weigh in the actions of those who are in power in the Constitution declaration, decisions of the court and change the law and all made in the constitutional reform.

In the case of representing the norm, 16.000 public officials who are in the administrative offices, and the court stated unconstitutionally that the law that shall be reformed constitutionally assisted by the theory that becomes a parliamentarial law constitutionally. And this is reformed.

The public process representing people becomes an opinion of the people. So this is an automatic control of people's norm in the constitution without needing the consent of the people in this law. In the law we have these statutes and the structure of the law for our fundamental law in the function for justice.

International treaties will be controlled automatically in the way of probationary law. So the President of the republican only rectify the articles in a convention that is equitable to the articles in the constitution so they can be rectified if this is the case, by the President of the Republic. But in 2009, in the authorization of the President, the US military is allowed to be in the territory of Colombia and the court thinks that this authorization as unconstitutional and the Parliament cancelled this act. Until now, the Parliament does not allow this kind of convention and the president also has the authority to declare the emergency in economic, political or ideological sphere through the presidential act in a critical period the power that the parliament has can be overtaken. Colombia has a law that regulates the presidential power with the exception of law no. 1991 that limits the power of the president. For the past three years, there are already two constitution and then lastly, the referendum of "Asas Popular" to replace the constitution. In the history in the law of the, there is a prohibition for the election of the President for three consecutive terms. This was requested by 15 million population and ratified by the parliament. And then in February 2010, there is a decree that stated that substitutes and 80percent of the people do not support this. So are trying to ask when the parliament allow the law for the president to be unconstitutional , considering that this cannot be signed and then the time has passed to the next phase and secondly as the protection for the fundamental constitutional rights. These are the two that we call in Colombia as the "accion deputella". So this is a process so that the first institution can only last for ten days and various people can come as the judge in a place to overcome a crime or to resolve threats to their fundamental rights and this can increase the protection. And this action is already there in the 1991 constitution. Since 1992, there are 3,500,000 actions that is increased to 40,000 per month. In terms of the biggest protection for the right to protection for the persons and for the pensioners.

The constitutional rights are of high value and the state needs to protect the rights by providing protection for these thousands of people. There is a case in 2005, where protection of 40 million people who could be victimized by crime and the protection from the constitutional court and there is this development that can protect people from crime. This is the dialogue between the Ministry of Interior Affairs, Ministry of Finance and the politicians who promise democracy. This also happens to the health provisions that should

protect the people who are suffering from diseases. We are very thankful for the system in Colombia.

Thank you.

SPEAKER 4
Hon. Rudolf Mellinghoff,

Justice of the Federal Constitutional Court of Germany

Ladies and Gentlemen, I would like to say thank you for the opportunity that is given to me, and I would like to give some presentation for the discussion as well. The Federal Republic of Germany as a democratic and social state, the principle of democracy is one of the essential constitutional principles. In Germany, it may not be abolished even by means of an amendment of the constitution.

All the implementations of the institutions powers have to be based on the people's decisions.

In a sense, the legitimacy of the state's powers that have been executed through the people is Democracy of such model is a democracy that is not real if it is one by one ratio. If we talk about democratic representation, we are talking about a form of democracy as the power of the state.

Democracy in form of representation indeed can be strengthened by either democratic elements but it can be proven that the representative democracy whereby the people's representatives in the parliament is the most important corner stone in democracy.

The Constitutional Court of Germany is trying to strengthen this four sites.

In order to have this court that can ensure that this is run perfectly, we will see whether the parliament can run perfectly and that is why the decision of the Constitutional Court can empower the parliament. I will also talk about the challenges on legitimizing democracy and this is very important because this shall provide the competence to the state of German in terms of a state or within the domain of European Union. In the context of the freedom of association and opinion.

Democracy needs exchange of thoughts and thus giving the opportunity to express opinion freely . Without the political freedom for all humans then there is no guarantee for freedom of expression. Whomever could not express his political beliefs or fear, it can be said that the direction or his decision cannot impact the direction of the state. Whether one agrees or not, it has to be decided upon in a democracy namely the majority votes shall win. The majority vote does not mean that it is certain because this is dynamic. Sometimes one person can be part of majority but another time this person can be part of minority. So freedom of expression basically will be

affirmed by the majority decision. And this is basicly one of the basis of the democracy so the freedom of association in Germany means very important in expressing or in deciding public opinion. And this freedom are protected by our constitution. And the expression of opinion as a collective entity may be from the majority or the minority sides will give the opportunity for the public and this can be even furthered even more by the media. This is my second point, I am going to jump out so that the interpretation so I am going to talk about starting from the principles of democratic parliament. In representing democracy the people exercise their power from state institutions and they have a fundamental importance. The transfer of the power from the people to the institution is done through elections. The parliamentary elections is the important act in which the people bindingly expresses its will through the representative body. The election is the only action in which people can decide in legally binding manner. This is where there are division of powers and the state can form the parliament legitimized by the people and without that the state cannot be act in legally binding manner. Thus election is the most basic foundation in a democracy.

Each person can vote for his or her representative in a political organ. If there is disagreement in this context, than they can submit for election irregularity in several phases. And we are the highest appeal for this matter the Constitutional Court, so we are the corner stone in democracy. We have to maintain the fundamental nature of general election. We also see that the decisions that limit general elections will also provide for the minority rights and other issues related to the elections.

The live part of a nation and the state. The Constitutional Court strengthen this principle by giving the parliament certain rights. Furthermore the further constitution watches over the parliament's ability to function so that they always abide to the rules and regulations. Germany is a representative democracy in which parliament is the only state body that is directly elected by the people, only that is directly elected by the people. In this direct personal democratic legitimacy, indeed does not result in all requirements of parliamentary approval or in exclusive reservation of decisions to parliament because there are also the political strength of decisions of other institutions and in a parliamentary democracy they have the right to make the law in other words parliament is the people's representative organ and they shall discuss about decisions of the people without involving the executives. And that is why the Constitutional Court of Germany decides that decisions important for the fundamental rights of the people will be in the hands of the parliament. So the basis is all important decisions have to be decided upon by the parliament and this is not only about the construction of the law but also how far the law can have implementative power. Based on this principle, the law makers have the freedom to make law for the public interest. For example the provision of sex education in schools or how you regulate nuclear or how you regulate the usage of hijab (head scarf) in Germany. For all of these issues the parliament has to have the final say. All of the members of German parliamentary shall have the right in publication that are equal one another. This is because the people give them equal rights and they cannot be counted as certain groups

in the parliament or the majority of the parliament. Even if there is a majority party in the parliament so each of the parliamentarian will attain the same right, indeed in democracy the majority may prevail over the minority but the principle of democracy is strengthen if the minority in the parliament can be protected and paid attention to. Therefore the Constitutional Court provides protection to the minorities.

As the representative of the whole people of Germany, so they are not bound by party rules. And they are only bound by their own consciousness. And the consciousness of those who voted for them so they have the duty to represent the interest of those who voted. So each member of the parliament has the right to associate, to give argument, to engage in debating and to engage in discussions and to discuss elements in the context of parliamentarian democracy. And the seeking of solution in this context we try to balance out all of the interests in the parliament and the debate in this discussion in the parliament have the function to provide adequate information to every one who listens and the parliamentarian members will have the opportunity to hear all of the arguments to think and express their decisions. So they have the right to question, and the government has the obligation to answer the enquiry of the parliament. And therefore the right to speak in the parliament is protected. And also protected for all of those who have already voted as the parliamentarians in German parliament. They have a plenary meeting to hear the opinion and to have the constructive discussion to make laws and also the parliamentarians have the right to amend the laws. They can propose for amendment of laws. Now I am going to go to the fourth point, namely the institutional relation and the interrelation to European Union. You can read it in my manuscript because I cannot decide, I cannot talk about everything here because I run out of time.

Thank you.

SPEAKER 5
Hon. Maria Farida Indrati,

Justice of the Federal Constitutional Court of Germany

Justice of the Constitutional Court of the Republic of Indonesia

In this session I am going to explain the constitutional court in strengthening the democratic principles in Indonesia, and I am going to split them into three sub-sections.

The first is the formation of constitutional court

The establishment of the Constitutional Court in Indonesia happened because of the changes 1945 Constitutions made by the People's Consultative Assembly (MPR) in 1999-2002. It is a process of constitutional changes intended

to improve the basic rules of civic life that can reduce the potential for abuse of power like what happened in the past.

Through the changes of Article 24C of the 1945 basic constitutions, the Constitutional Court came Indonesia, and the formation of this official state is to strengthen the checks and balances principles among the institutions In Indonesia with the main power is the judicial review of the law against the basic constitution which in the past could not be conducted.

In the changes of the 1945 Constitution, the idea of judicial court given to the constitutional court for the judicial review of law against the 1945 and also on the Supreme court for the judicial review for laws under the low level is given to the Supreme court. There were three alternatives on the institutions that were going to be given.

She is to hear at the first and last our final decision in which the decision is final for review on the law against the constitution. Second, settle dispute of state institutions whose authorities are granted by the constitution. Third, to decide the solution of political parties and then to decide dispute of the election results. And also, the court is obligated to give decision on the opinion of DPR or the lower parliament on the allegation violation by the President and or by the vice president under the 1945 constitution.

Since the establishment in 2003 up until now, Constitutional Court has received up to 840 case requests, and from all the cases that has been examined by constitutional court 781 requests has been settled up to July 2011.

The first one is Judicial Review against 1945 Constitution

The cases of Judicial Review against the Constitution is the most widely requested to the Constitutional Court. The decision of the review can tell whether any provisions of law being petitioned as against or not, is contradictory or not to the 1945 Constitution. Constitutional Court's decision which grants a petition for judicial review automatically will change the provisions of a Law which is declared contradictory to the 1945 Constitution and therefore it will not have any more legal binding force.

The Constitutional Court decisions on the judicial review in principle is to protect the rights of the constituents and also the basic principles of human rights for the implementation of democracy, and also there are also decision of the constitutional court related to the mechanism of democracy, namely , election, both on national and local level.

There are some examples of court decisions which are closely associate with the development of democracy in Indonesia, are :

a. Voting Rights for Former Members of the Forbidden Organization
b. Terms of Contempt against President and Vice President
c. Offense Hostilities may Cause Offense Abuse of Power
d. Individual candidates in the Regional Head Election
e. Changing Desirability Election System based on the Most Voted Ballots

In this case, the Constitutional Court determined that affirmed that Article 55 paragraph (2) of Law 10/2008, which define each of the three candidates have at least one female candidate is a policy in order to meet affirmative action for women in politics as a follow-up of Women of the World Convention of 1995 in Beijing and various international conventions which have been ratified. According to the Court, affirmative action will provide opportunities to women for the formation of gender equality having the same role between women and men.

The Court confirmed its interpretation that the provision of a quota of 30% (thirty percent) and having a female candidate out of every three candidates is a positive discrimination in order to balance the representation of women and men to become legislators in the DPR, DPD and DPRD. However, the Court also emphasized that to improve the position of women in politics, it is not solely dependent on legal factors, but also the cultural factors, capabilities, proximity to the people, religion, and the degree of community trust in female legislative candidates, as well as the increasing awareness on the role of women in politics.

f. Eliminating Releases Sanctions and Prohibition of the Quick Count and Survey

g. Terms Endorse Presidential Election Voters ID Cards or Passports

This is one of the landmark decision of the Constitutional Court in the context of escorting democracy is the decision number 102/PUU-VII/2009 dated July 6, 2009 which broke the deadlock Presidential Election Law relating to legal issues about unregistered voters in the voters list (DPT). With reference to Decision Number 011-017/PUU-I/2003 dated February 24, 2004, the Court affirmed that the constitutional rights of citizens to elect and be elected (rights to vote and right to be candidates) is a right guaranteed by the Constitution, laws, and international conventions, so the restriction, distortion, elimination, and removal of rights is a violation of the rights of citizens.

Therefore, the Court gave legal considerations by stating that the rights of citizens to vote should not be hampered or hindered by using various administrative procedures or regulations that hinder citizen to use their voting right. And therefore, the provision requiring a citizen to be registered as voters in the voters list (DPT) is more of an administrative procedure and should not negate the things that are substantially the citizen's right to vote in the general election.

The second section is Dispute about Election Results

The next authority which is quite important in strengthening democratic principles is to decide disputes about election results. Case of election disputes is the case brought under the argument that there has been a mistake resulted from vote count conducted by the Election Commission (KPU) and /or there is a structured, systematic and massive violation. Election disputes cover the

whole series of elections, both for the presidential and legislative elections. The authority of the Constitutional Court in judging disputed elections contributed to the strengthening of the principles and pillars of democracy in Indonesia, because this is the downstream of the process of election of the President and Vice-President and the representatives of the people who will sit in the Parliament.

The third is Dispute of Constitutional Authority among State Institutions

The case on constitutional disputes between state institutions is a matter in which the petitioner is a state agency whose authority is granted by the 1945 Constitution. The state agency has a direct interest in the disputed authority. In the state system in Indonesia, the relationship between a state agency with another is bound by the check and balance principle. Under this principle, state institutions are considered equal and mutually compensate each other.

In this regulation that has been regulated in 1945 constitution, dispute mechanism is conducted through given to the constitutional court of Indonesia.

And then the fourth is Dissolution of Political Parties and Impeachment

This mandate has not been used at all. It is to determine that the solution by the political party that was given by the government. Up until now there has not been requests from the government to dissolve a political party.

Therefore it can be concluded that no political party at the moment is indicated as violating the constitution and law, which can be used as based to dissolve it. Until the establishment until now the president and all vice president has never been impeached by the Parliament, violate the specific law, or no longer qualifies a president and or vice president according to the 1945 basic constitution. Now as a closing, up until this moment, the presence of Constitutional Court in the Indonesian State system is considered by many people has given contribution to the growth of democratic principle and law enforcement in Indonesia. Since the establishment of the Constitutional Court, the law maker cannot only be based on the majority consensus on the current interest but to also need to consider whether the regulation is contradictory to the constitution or not. If it is later proven that the law making process is contradictory to the constitution, then the Constitution Court can annulled this. Although there has been some hindrances in the implementation of the decision of the Constitutional Court, but in general the decision of Constitutional Court can be implemented by all parties including the president and the Parliament and therefore in general we can say that the presence of CC in Indonesia has supported and guard the implementation of constitutional democracy so that the constitution and democracy can work synergistically with the supremacy law, with the existence and role of constitutional core and the strengthening of democratic principle in Indonesia is expected to be materialized. Thank you very much for your attention.

QUESTIONS AND ANSWERS:

Moderator :

Ladies and Gentlemen, that is the presentation from the five speakers. Before we begin with the next session, we'd like to give a great applause to the presenters. We have about 30 minutes for the question and answer session. And to fill this session, I would like to request three people to give question or give confirmation or other inputs to the presenters. Mr. Radian Salman, second Dr. Akil Muchtar, and than Mr. Harun Kamil from Constitutional Forum. So we have three questions. The first one to Mr.Radian Salman please tell us address to whom and please use the shorter time possible.

Moderator:
Question 1:

Radian Salman to President of the Constitutional Court of Colombia: Juan Carlos Henao

Interpreter :

Thank you very much. My name is Radian Salman from Airlangga Law Faculty. I would like to ask to the presenter from Columbia. On your last.. In the last page of the paper submitted by Columbia, it is very interesting because we have an issue that the Columbian Constitutional Court has the possibility to become a creator of law so like a law maker. Can you understand the question, the presenter from Columbia?

Juan Carlos Henao :

Go in English and I put my attention to understand.

Radian Salman :

Ok. Yes. In your paper in page five, you say that there has been question whether the Columbia Constitutional judge with its interpretive function has become the creator of law itself. I think this a debate about how you bring the court into whether judicial activism or judicial restrain.

Juan Carlo Henao :

I am sorry but I can't hear anything from the Spanish interpreter. I am really sorry. (paused to listen the interpretation and then answered in Spanish, but it wasn't interpreted directly byt the interpreter) I try in English. The constitutional (no sound) .. Okay. Excuse me my English. Okay. Don't do the law. Never. But we can broke the law and I told you that we have a public action against all the laws. So normally 60% of the laws are attacked in front of the Constitutional Court. So some kind of decision we take that what we call, in German is also similar, we call interpretation decision. So we say the law is constitutional but if you understand that the law say that. You look.. So, the people say "Aa you are doing the law because you are saying what the law tell." We say no, we are not doing the law. We tried between two sense of

the law. One no constitutional and one constitutional. And that was we say the law is constitutional if you understand that when.. for example The Sybil code say man and woman married you understand not only man and woman married but also a marital union free union and also homosexual union. You see.. the law say, the law say the law say the it situation is for man and woman married. We say that is constitutional. But you have to understand that this not only for the man and the woman married but also for the person no married included homosexual person. That you say, you say, addition to the law and that what do the Constitutional Court. Do you understand what I saying. Okay, Thank you. If you understand, thank you.

Moderator :

Go ahead to Dr. Akil Muchtar

Question 2:

Akil Mochtar to Justice of the Federal Constitutional Court of Germany: Rudolf Mellinghoff

Akil Mochtar :

Thank you. My question is to the honorable Mr.Mellinghoff from Germany. How Germany Constitutional Court in facing the European Union which of course will create impact to what's implementation of law in Germany on citizens who are also European other European countries citizen. So if there is a conflict, is it possible for citizens who are not Germany but part of European Union, can they request for a law to be reviewed by the Constitutional Court with the unification of Europe?

Rudolf Mellinghoff :

We need to have.. to split two questions. The first one is how a country anticipate a unification of states such as what happen in European Union and one of the sovereignty and the competence has to be released and we have to use what is implemented by European Union. One of the important question is that a state has to release part of his competencies to this unification and he can only influence half of the condition. The decision of the Constitutional Court has to overcome this. How this happen. European Union is a unification of countries in which the member state is still a sovereign state and the competence, the main competence, is still within each state. The competence taken over by European Union in this case is that the European Union take over this and the German Constitutional Court must also see this to find out whether there are limitation that cannot be violated but has been violated. So a union like European Union this phenomenon can also be found in Latin America or… I think it also happens in Asian. How in a unification the member states can still be independent.

As to the question how foreign citizen we have a universal human rights and those are applicable for all human and it's not only applicable to Germany

citizen but also to all human being. So this means, that everybody who are in Germany can go to the Constitutional Court to demand their rights. Everybody can demand their property right but there are some regulations in which it is only applicable to the citizens of each country. For example the right to vote and to be voted. In Germany has to be for Germany only. So a French citizen cannot be elected as a Germany Parliamentary Member. A basic constitutional right that is only implemented for the Germany citizens but it is part of the basic fundamental human right for all people leaving in Germany.

Moderator:

Question 3: Harun Kamil to Justice of the Federal Constitutional Court of Germany: Rudolf Mellinghoff

Harun Kamil :

Thank you very much to Madame Moderator.

This is to Herr Rudolf Mellinghof, if we talk about democratic state we cannot separate it from election and also parliament. What I would like to have further explanation, from Germany, what is the role of the constitutional court in the strengthening of democratic implementation in Germany. Like for example, in Indonesia, MK or constitutional court has the authority to settle on election disputes or dissolve political parties. Probably in 1965 we have constitutional court the one that decide that the solution of the Indonesian Communist party should be the constitutional court. So, please explain about the role of the constitutional court in strengthening democracy in Germany. Thank you.

Rudolf Mellinghoff :

In this case we in Germany has basic constitution that enables us or enables political party that are not democratic to be prohibited. However, this is an absolute exception and it can only be implemented for certain cases. The Germany Constitutional Court in the 1950s after the second world war has prohibited extreme left and right parties. After that we some attempts to have radical parties to be dissolved but Germany Constitutional Court always refused that. In the democracy we need to have, we have to determine and if we are talking about prohibition and thus we prohibit the opinion this can only be done for certain context. In which when party is very aggressive, rampantly try to destroy the fundamental of a country. This is how the democracy will fight for itself. If the party only gives opinion and this opinion maybe extreme but without any intention to destroy the basis of the country without showing aggressiveness towards the state then this party will not be dissolved in Germany. And since the 1950s we have never prohibit or dissolve any parties and ever since that time I have never received any case in the Constitutional Court in Germany for this context.

Moderator - Review and Closing of Panel I Session One

Ladies and gentlemen time has shown 11.50 and therefore this session has to be ended. For ladies and gentlemen who would like to have more questions, we have the next session still in the same Panel in this room, Panel I. And therefore allow me to read out some of the general conclusion that I have taken from the papers presented so far.

From the various states system democracy is seen to be as the best but not the perfect system. Allow me to quote one of the founding fathers of Indonesia which is a former Vice President Mr. Mohammad Hatta, stating that democracy without responsibility and tolerance will change into anarchy. Because it is seen as the best, democracy is used as a principle which is generally, explicitly stated in the constitution or basic constitution of each country. From all the presentations given, at least democracy will have the following:

First of all the arrangement of responsible state organizer, because there is no position in the democracy that cannot be accounted for.

Secondly, public participation in the state's function in many forms. First opportunity for the people to sit as the organizer of the state and the state organizer as a form by the people, the state organizer overseen by the people and lastly, the people has the right to replace the state organizers that do not do the aspiration of the people. And therefore it is very important to understand that democracy is not only seen as political democracy or democracy as power phenomenal. But democracy must also be understood to achieve people welfare. The implementation of democracy needs the presence of pre-conditions as stipulated by Honorable Prof . Dr. Rudolf Mellinghof that the implementation of democracy needs the freedom of expression and opinion and also fair and honest election. In practice, several state organs have brought important road to uphold the democratic principles. Constitutional Court or similar organs through various roles and authority try to uphold the democratic principle, constitutional democratic principle and among other is through work of material judicial review or people see as judicial review. Although this is seen as contradictory because sometime it goes against the majority but it is more into the protection of constitutional or citizen rights. His honorable has also given the example of given the rights for foreigners and stateless people who are living legally in Germany to submit petition or complaint. In Colombia, public action of constitutional has secured the full exercise of deliberating democracy. In addition to conducting the judicial review, the most important thing possessed by the Constitutional Court and also similar organ, is through interpretation of constitution.

His honor, Mr. Ivanovich as the President of Constitutional Council of Kazakhstan even stated that official interpretation of the constitutional norm is the most important way to ensure the supremacy of democratic principles. In addition to that, to maintain and implement the constitutional democratic principles it is conducted through the authority possessed by the constitutional

court or similar organ, such as through the election disputes which in Indonesia as informed by Prof. Maria Indrati, Constitutional Court not only deal on the election result but also deal with the substantive issue. In the end democracy will always develop in line with the development of the people that will never stop. Or in other words, democracy will never be completed and without specific end. Or in using the words of Prof Mellinghoff it is stated as a living democracy. In this context, it is very important for constitutional court and/ or other similar institutions to always adjust with the aspiration values uphold and demand among the community including future challenges that will be faced by these institutions, such as challenges faced in Germany and when Germany is part of the European Union. The whole implementation of duties and authorities as stated above are implemented to uphold the principle of constitutional democratic state. And to close this allow me to quote the opinion of the Honorable Munkhgerel, Judges of the Mongolian Constitutional Court. The fundamental principle that is the creation of legal environment and implementation mechanism or interdependent mutually monitored and balanced action of legislative, executive and judiciary bodies.

Moderator :

Ladies and gentlemen that is the conclusion or review that I can submit as the Moderator of this First Panel. Thank you very much for your attention, and I would like to apologize for all the mistakes, including the inconvenient that happened during the implementation of this event.

I would like to request you to take your coffee break outside. Thank you very much

PANEL II

MODERATOR
Jawahir Tanthawi

SPEAKER 1
Hon. Min Hyeong-Ki,

Justice of the Constitutional Court of Korea

I'm very happy to be the first speaker of this commission. I'll deliver you the speech titled of "The Past and the Present of the Constitutional Court of Korea". That would be a national report concerning the role of the CC in strengthening the principles of democracy. I will read what is prepared.

The foundation of Constitutional Court in Korea.

Since it's launched on September 1st 1988, the CC of Korea continued to demonstrate the ideals and values of the Constitution of Korea. The court also made persistent effort to bridge the gap between the constitution norm and its reality by reinforcing the state's duty to safeguard the fundamental rights of individuals. As such efforts gradually gained the confidence of the people who pursued the rule of law and guarantee of fundamental rights, the Court was able to secure the status and influence as an independence institution adjudicating constitutional cases.

The Constitution of Korea is no longer simple ornament in the code of laws. Instead, it has been become a living norm in our day to day lives and the standard for all state actions. The court has become a trustworthy guardian of the constitution.

As a result, the CC has continuously been voted as the most trusted and influential state agency in the recent opinion polls. The court is also being noted and recognized not only in Asia but throughout the world for having successfully established the constitutional adjudication system within such a short period of time.

I Constitutional Status and Competence of the Constitutional Court of Korea.

Article 111, section 1 of the Constitution provides for five areas of jurisdiction: the first, constitutionality of a law upon the request of the ordinary courts; secondly, impeachment; third, dissolution of a political party; fourth, competence dispute between state agencies and local governments and between local government; fifth, and constitutional complaints as prescribe by Act.

First, in adjudication on constitutionality of the statutes, only the concrete norm control is adopted, as the constitutional review of statutes is exercised upon the request of an ordinary court when the constitutionality of laws is at issue in a pending case. In the case of adjudication on competence disputes, the Korean Constitutional Court differs from those of other countries where constitutional competence disputes between state agencies are the principle subject matter of review. The Korean CC is vested with more comprehensive powers to adjudicate on constitutional or legal competence disputes between all government institutions established on the basis of the Constitution, as well as disputes between the state agencies.

Last but not least, there are two types of constitutional complaints: one filed by individuals who have had their constitutional fundamental rights violated by exercise or non exercise of governmental power (Article 68, section 1, Constitutional Court Act) and the other directly filed by an individual who had his or her motion request for constitutional review denied at an ordinary court (Article 68, section 2, Constitutional Court Act). The second type of constitutional complaints exist to prevent the Constitutional Court's norm control power from becoming insignificant and merely symbolic when the ordinary courts are reluctant to request the constitutional review of laws. This kind of a constitutional complaint system is unique to Korea,

and it is widely accepted as a prudent method to make the Constitutional Court's norm control more effective. Over the past three years, such types of constitutional complaints filed by individuals have amounted to some 30% of the total constitutional complaint cases, and their acceptance rate is even as high as that of cases filed by the ordinary courts requesting constitutional review. This, in fact, demonstrates that the current system turned out to be effective.

Political Independence

Since its inception, the Constitutional Court has been exercising its power of constitutional adjudication as an institution independent from all political powers, acting as a guardian of the Constitutional order and guarantor of individual's fundamental rights. Among the most high-profile cases that demonstrate its independence are the impeachment case of the former President Roh in 2004 (2004 Hun-Na 1, decided on May 14, 2004) and the constitutional complaint case opposing the relocation of Korea's capital city Seoul (2004 Hun-Ma 554, etc, decided on October 21, 2004).

The impeachment case was about a charge against the former president brought by the National assembly, which argued that he violated an election law. The constitutional court rejected the case after a number of oral pleadings.

In the constitutional complaint case, the Court declared unconstitutional the Special Act for relocation of the nation's capital and nullified the Act. The relocation of the nation's capital was one of the most important projects which had been promoted by the President.

The political circle was sharply divided over the decisions of the Constitutional Court: then President and the ruling party that had welcomed the Court's decision in the impeachment strongly condemned the Court in the capital relocation case, while the opposition party took a completely contrasting position. These cases clearly show that the Constitutional Court has maintained its independence and executed its adjudicative power solely based on the Constitution.

Implementation of the Rule of Law

The Constitutional Court of Korea, to date, has reiterated that all state powers, namely the legislative, executive and judiciary, should be exercised in conformity with the Constitution.

Even in the case of highly-politicized state actions that were exempt from judicial review under the pretext of governance, the Constitutional Court ruled that such state actions should rightfully be bound by the Constitution and therefore should be subjected to the Court's constitutional review (KCCR 93Hun-Ma186, Feb. 29, 1996). In particular, the Court also held that the power of the President, even when exercising national emergency power, could not exceed the limits defined by the Constitution (KCCR 92Hun-Ka18, June 30, 1994).

Although the National Assembly has autonomy in its legislative process, the Court can exercise constitutional review over the legislative process if it is in violation of the procedures as specified in the Constitution and laws.

In this regard, in a case where the Speaker of the National Assembly notified the time of the meeting only the majority party members, preventing minority party members from attending the process of legislation review and voting, and passed a bill, the court ruled that the Speaker's act violated the right to review and vote of the minority party members.

The Court ruled that the prosecutor's refusal to grant the defense attorney the right to inspect and copy criminal investigation records infringed upon the defendant's right to assistance of counsel and to a speedy and fair trial, and the prosecutor's refusal was unconstitutional. The Court, on the basis due process of law, also struck down the "Act against Anti-State Activities." which provided that if the accused did not attend a trial for no good cause, the trial should be held in his absence and a final judgment should be held on the very first trial date.

As such, the Constitutional Court helped all state powers conform to the Constitution by declaring those violating the Constitution unconstitutional. By doing so, the court has worked hard to strengthen the rule of law based on the constitution.

Lastly,
Conclusion.

As the Korean Constitutional Court has come of age with 22 years of history, we will continue to focus on further strengthening the Court's political independence and impartiality. We will continue to do our best in achieving full-blown democracy and implementing the rule of law, so that the people of Korea can have their dignity and value more respected and pursue happiness in a more just and affluent society.

Thank you very much.

SPEAKER 2
Hon. Toma Birmontien,

Justice of the Constitutional Court of the Republic of Lithuania

The original paper is a much longer paper and is provided in this conference, and I shall try to touch only some aspects that looks for me very important, bearing in mind the subject of this conference. And first of all, I would like to stress very much the importance of constitutional control institutions especially in those countries, who are undergoing big and serious changes in their political life, who are undergoing some problems that in the

historical period, those countries have to find their new ways how they have to build the society on democratically grounds.

And looking to the history of central and eastern Europe in the end of last and beginning of this century, we see that countries when they want to reform, to change the system of the state and to introduce democratic institute, they approach to a rather new institute, the constitutional court or alleged institutions.

Theoretically, it looks very easy for you just to find the place, somehow select 9, 15 or more or less nice lawyers, and it looks like that probably for the parliament, sometimes for the government, sometimes for president it looks like everything is alright. And that there were lawyers that thought they will promote everything, they will do everything and all problems will be solved.

But even the history of the Europe shows that sometimes the introducing of such institutions play some kind of a role of "let us have a medicine (solution)" even in neighbouring countries to Lithuania, we have un-democratic visions together with the controlling institutions, so it is not enough to put in the Constitution, to write a nice law, it is very important that all these principles have to be carried out. And it is very important that those institutions, who are introduced and who are formed that they have real possibilities to act as the guardians of the constitutions. Looking to the history of Lithuanian constitutional court, our constitutional court was established in 1993 so soon we will celebrate our 21th anniversary, and this way was not easy and it was not a very simple way, for the constitutional controlling institution, to prove as the guardian of the constitution and as the guardian of the democratic principles.

First of all, when the constitutional court first was formed, of course the very big and very important question is, who are those lawyers who will carry out such very important tasks, who are those people who will be able, not only theoretically but practically, to vote and say sometimes to the parliament that parliament is wrong, to tell to the president that probably like in South Korea, the same was in Lithuania, we have an impeachment process for the president to say that the president is wrong, and sometimes even constitutional course have a very difficult tasks though society likes them, and they think that these course can protect all their social & economical rights, but bearing in mind that economical crisis that all the countries were in and specially heated in some European countries

Our constitutional court in 2010 had to tell that the parliament adopted reductions of state employees salary, and even their pensions from social insurances, and that it was under the constitution and that it did not contradict the constitution, because even for the constitutional court judges looking at the constitutions and principles and imperatives that are coming from the constitutions, we also see the whole society. We have to carry in mind what happened all over the world. What economical things are happening. It is much easier to say well, that parliamentary is wrong, and we the judges 9 or 12 or 15 we can protect or we can give the economical and some other dire

use, but for the judges, for the people who are working as the constitutional for judges, it is a very big and serious tasks, to look at the whole system and to protect the constitution not only by wording, but just feeling its spirit. Constitutional controlling institutions they are very new. Parliaments, presidents, governments are very well- known institutions, also state power sometimes introducing and accepting some new institutions , still think that they somewhere are not as important as they are. That's why all constitutional courts probably face some conflicts.

And it is much easier to say that, well, the parliamentarians are wrong, and we are judges, nine or 12 or 15, we can protect and we can give you economical and some other values. But for the judges, for the people who are working as constitutional co-judges, it is a very big and serious task to look at the whole system and to protect the constitution not only by wording but just feeling its spirit. Constitutional control institutions, parliaments, presidents, governments are very well-known institutions. So state powers sometimes introduce and accept new institutions. Still think that they are, somewhere, not as important as they are. That is why all constitutional face problems they face some conflicts and they have to prove their powers, first of all, standing for the decisions that they have to be implemented. And the Constitutional Court of Lithuania even in its ruling had to tell that its decisions have not, as it is, not, it's of course it's written at the constitution that they have a power of law. But the constitutional court had to say that it's a very important source of law. And when the constitutional court interprets the constitution, so this jurisprudence of our constitutional court has the same level. So it has to be obeyed as the constitutional court has provided.

Constitutional courts sometimes are a little bit helping politicians and sometimes they are making problems for them. And one of the examples could be the ruling of the 1998 of the Lithuanian Constitutional Court. It was only five years when the constitutional court was acting. When we had to decide whether the death penalty is constitutional, whether the criminal law that provided capital punishment for some crimes is really in line with the constitution. In this case, a group of parliamentarians addressed the constitutional court, though theoretically it is much easier for the parliament just to vote for the amendment. But in some cases the politicians think that probably maybe this hot case and difficult case could take the constitutional court. So the constitutional court of course announced that capital punishment is against the constitutional principles. And that's why they sometimes were having some complicated reaction, but nevertheless this question was completely decided. Sometimes constitutional courts are appearing to decide the conflict between the branches of government. And we also had one case in 1998 when constitutional court had to draw the lines how the government and the president have to be, what kind of powers and competences they have.

And they have to prove their powers, first of all in terms of standing for their decisions that have to be implemented by them. And the constitutional court of Lithuania even in its ruling has to tell that each decision have not written in its constitution that they have the power of law. But the constitutional

court had to say that it's a very important source of law. And when the constitutional court interprets the constitution, there is jurisprudence so that our constitutional court has the same level. So it has to be obeyed as the constitutional court has provided.

Constitutional court sometimes somewhat helping their politicians and sometimes they are making problems for them. And one of the examples could be their ruling government in 1998 of the Lithuanian constitutional court. It was only five years while the constitutional court was acting when we have to decide whether the death penalty is constitutional, whether the criminal law that provided the capital punishment for some crimes is really in line with the constitution.

In this case the group of parliamentarians address to the constitutional court thought theoretically it is much easier for the parliament just to vote for their amendment. But in some cases, politicians think that probably maybe this is a hot case and difficult case could take the constitutional court. So constitutional court of course announces that the capital punishment is against the constitutional principals. And that's why they have sometimes some complicated reactions, but nevertheless this question was completely decided.

Sometimes constitutional courts are appearing to be in deciding the conflict between the branches of the government. And we also had one case in 1990, when the constitutional court had to draw the lines, how the government and the president have to be what kind of power and competencies they have. Is the president free to choose any prime minister? Is the president free to choose any minister? Or in doing this, the president has to look at the parliament and what is the majority of the parliament, how it accepts.

So, in this case constitutional court is trying to answer the question, what are the powers of the president and of the government. Have to tell what kind of governess Lithuania has. And the constitutional court, not scholars, not the constitution itself, directly provided that Lithuania is a parliamentarian republic with some semi presidential features. Politicians and lawyers criticize this very much because they said all the rights of the president. Yes, they are not right, but now many presidents have changed and this procedure the appointment of the prime minister and of the government goes on the rules that the constitutional court is provided.

And another case I would like, and probably the last case I would like to address is a very special case probably for the Lithuania constitutional court is the case of 2006 when a group of parliamentarians not being satisfied with the activities of the constitutional court address that whether the constitutional court is a court. It look like there are this question, but very good mind that this happen in a peace process so that president and some other complicated cases, some groups of parliamentarian somehow tried maybe to see or maybe to discuss their power of the constitutional court . And the constitutional court had to tell and have to provide and give real and true answer. Yes, a constitutional court is a court though it is not in the system of other courts. But still a constitutional court carries the powers of their state and its decisions

have to be obeyed and so there are no any doubt that constitutional court could be treated not as a constitutional court.

The Constitutional court of course has a considerable jurisprudence. It is presented in my paper. So I think if there is or would be any question from the paper I have presented, later on I will answer.

SPEAKER 3
Hon. Christian Suarez Crothers,

Substitute Justice of the Constitutional Tribunal of Chile

Institutional Justice, Democracy and Human Rights

Professor Jawahir Tanthawi, the Excellencies participants in this symposium, ladies and gentlemen.

I would like to start my presentation by thanking the Constitutional Court of Indonesia for his kind invitation to participate in his celebration of his 8th anniversary.

I want to convey to you the cordial greetings of the Constitutional Court of Chile and his members. The subject I've chosen is constitutional justice, democracy and human rights. In the time available, I would like to explain how the combination of constitutional justice and democracy has recruit in Chilean Constitutional System, especially after the 2005 constitutional amendment.

The first Chilean Constitutional Court was created in 1970 under the constitution of 1925. The nature purpose was to create a code of law with full power to resolve conflict between the highest state's organs. Chilean democracy, however, collapsed in 1973 and the military government ruled in Chile for 17 years. The constitution of 1980 now we force was inactive under the military government and established a constitutional court initially composed of members related of the military government. It's the first constitutional Court was created under the fear of the rival to power of President Salvador Allende the new code was created as new institutional guardians of political party and the parliament.

It was a way of the preserving the heritage of the un-forces government in global context of the cold war. However, that situation said the transition to democracy following the democratic, President Patricio Aylwin Azocar in 1989, who governed with the coalition parties for democracy.

After the referendum at the government of General Pinochet, a very important amendment to the constitution was submitted to the referendum agreement compromised between the military government and his opponent. In 2005 there was a new amendment to the constitution. This time led by President Ricardo Lagos which end the existence of the non elected senators and restricted the power of the national Security Council which was an organ

composed of a large number of military officials, two appointed senators, and two members of the Constitutional Court. This amendment was also important in other aspects, but we will regard to record there was a change in its composition and its powers.

The court is composed of ten members, three appoint by the president, three by the Supreme Court, and four by the senate, two with approval of the House of Representative. The modification of the organic law of the court also provide for the existence of two alternate members, I am one of them, nominated by the President of the Republic from Naturalist by the Constitutional court and by two third of the senate approve.

Thus, the 2005 Constitutional amendment gives Congress a bigger say in the composition of the Constitutional court. As the power of Constitutional court the member are to be sure to introducing two legal instruments which are playing an important role from the point of view of the protection of rights. First, election for the declaration of inapplicability of the e statute this legislation exist in Chile since 1925 and allows the parties to all dispute, also any judge toward the supreme court then the Constitutional court now to declare that a statute is not to be applied to the particular dispute. Although it has resemblance to the recent phrase institutions of the question priority the constitutionality. This action differs from the Chilean action because the issue can be more easily raised without prior involvement of other Court. In the French Case, it is essential that grant is prior authorization The Court, The cassation and the conseldetta. There also has been an intense activity of the Chilean court on the waiting of right and now perform a specific control of the constitutionality in which is way up And the rest are rarely affected. This has given rise to a very extensive case law ranging from the right to life to process and personalize it to proper the right of education and health care. The constitutional court has been active integrating admissible the issue presented is time receiving more complaints of in applicability.

The second instrument is the power to strike down a statute by reason of each unconstitutional effect. I will talk about disfunction of the code later.

I want to talk then in order of the time a specifically about two legal institutions bearing in mind that impact on the quality of our democracy and the protection of fundamentals rights.

The lead of inapplicability.

The lead for the inapplicability for a statute in a particular dispute pending allows the party of the judge to ask to the constitutional court to declare that a statute is unenforceable and forcible in that particular case. Unlike what usually happens in comparative law in Germany and Colombia the declaration of inapplicability is not a tied action for the protection of fundamental rights before the Constitutional court. But as a declaration, the purpose of which obtained that particularly legislation is not applicable law to the case. We noted earlier that this action if inapplicability accelerated an increasing case law of rights. The court is

forced to examine whether or not a statute conformed to the constitution. The court needs to wake a specific case the rights that maybe affected and he has been forced to do the job in resolving conflicts of rights.

Petition to declare inapplicability of a statue were less frequent before when this function was performed by the supreme court and the constitutional court stood it all role of exercising ex anti control of the constitutionally of parliamentary bills.

Now it is time to move to the second instrument that they have mentioned before, the Erga Omnes declaration of unconstitutionality.

The declaration of unconstitutionality

The most radical decision that a Constitutional Court might take is to strike down with erga omnes effects, a law declared to be incompatible with the constitution.

I will describe the five occasions in distinguish court, as declare unconstitutionally of the law under the new powers convert by the 2005 amendment to the constitution. In the first case, judgment, opposition on March 26, 2007, the court reoffend the principles of duo process and declared unconstitutional the rules stated in that the regional director of the IES could also authorize official of that service to help and decide claims and complaints, acting on behalf of the director.

The second decision of April 18, 2008 declares the unconstitutionally of the use of morning after pills because it declared that the pill affects the right to life of the fetus. The severally as of May 25, 2009 declared an unconstitutionally, (de solve et repede doctrine).

According to this doctrine and administrative decision that imposed of fine can now be challenged after define what a part of what it's been paid. In that case the court stated that this practice was against duo process and the right of access to justice. The fourth ruling issue on July 29, 2009, is stated that the requirement of lawyers should provide a free legal aid, most importantly to the constitution and particularly against the right to an equal distribution of the public borders.

Finally the fifth case opened up in Chile to social rights. This decision dealt with the rights to health. According to the court, the rules concerning private health insurance in Chile are contrary to the constitution, as they quoted, they debate the guarantee of and equal access to healthcare and the right to choose healthcare assistance they wish to use whether public or private. In addition, the excessive increase in the price of healthcare plans forced people, especially in the higher age and strata to immigrate to a system that they do not want to belong to which directly goes against the constitution.

In this ruling on the court based its decisions on the legal equality between men and women. The nature of the rights to health and important social rights in the constitution concerning the rights to social security is substance and the implementation of the convention 102 of the International Labor organization among all other aspects of interest such as the principle of proportionality to resolve conflicts of right set out in the

field of abstract control of constitutionality. This decision no doubt adds an impact in The Chilean legal system which recently introduces this power of repealing democratically in acting legislation. After examining these two institutions and in order of time, I must say that the pending question is whether or not the Court contributes to improve the democratic nation of the Chilean institution, as it has recently happened in Spain and Greece. Chilean citizens are also restless. They demand better education, social protection and participation in the political process. All these aspects influence and demand the Constitutional court to update the Constitution but the democratization of Chilean society and its transformation will be more the result of politics than the restate of judicially. Without prejudice of the contribution that the constitutional court will can provide. Thanks.

SPEAKER 4
Hon. Francisco Perez de Los Cobos,

Justice of the Constitutional Court of Spain
(recording all in Spanish language)

SPEAKER 5
Hon. Anwar Usman,

Justice of the Constitutional Court of the Republic of Indonesia

THE ROLE OF CONSTITUTIONAL COURT IN STRENGTHENING THE PRINCIPLES OF DEMOCRACY IN INDONESIA

A. The establishment of the Constitutional Court in Indonesia

The birth of the Constitutional Court (MK) in Indonesia was initiated by the amendment of the 1945 Constitutions by the People's Consultative Assembly (MPR) in 1999-2002. A process of changes in governance intended to perfect the basic rules of civic life that can reduce the potential for abuse of power.

Through the addition of Article 24C of the 1945 Constitutions, the Constitutional Court is present in the state system of Indonesia. The establishment of this state institution is intended, among others, to strengthen the principle of checks and balances between state institutions by providing primary authority that is testing the law against the 1945 Constitution which previously couldn't be done.

Thus, the formation of the Constitutional Court cannot be separated from the development of thoughts and ideas of the importance of judicial review in a democratic legal state.

In the 1945 Constitution Amendment, the idea of judicial review is given to the Constitutional Court for judicial review of Laws against the 1945 Constitution and for judicial review under the laws and regulations is given to the Supreme Court. At first there were three alternative institutions which were proposed to be given the authority of judicial review against the 1945 Constitution, namely the People's Consultative Assembly, the Supreme Court or Constitutional Court.

The idea of giving the authority to the People's Constitutional Assembly (MPR) was finally set aside because in addition to no longer being the highest state institution, the MPR is not a group of legal and constitutional experts, but mainly representatives of political organizations and interest groups. The idea of reviewing the laws by the Supreme Court was also ultimately not accepted because the Supreme Court itself has already been overloaded with their own tasks. Therefore, the authority of judicial review against the Constitution was finally granted to a special institution, namely the Constitutional Court.

B. Constitutional Court and Democracy

Article 24C of the 1945 Constitution asserts that the Constitutional Court is one of the judicial power perpetrators that hold four authorities and one obligation. Constitutional Court has the authority to judge at the first and last final decision for: (1) review on the laws against the 1945 Constitution, (2) settle dispute of state institutions whose authorities are granted by the Constitution, (3) decide upon the dissolution of political parties, and (4) decide dispute of the general election results. In addition to its authority, the obligation of the Constitutional Court is to give decision on the opinion of the Parliament regarding the alleged violations by the President and / or Vice President under the 1945 Constitution.

Since its establishment in 2003, the Indonesian Constitutional Court has received some 840 case requests consisting of 372 petitions for judicial review against the 1945 Constitution, 15 requests authority dispute between state institutions, 116 petition disputes against the results of national elections, and 337 petition disputes against the results of elections of regional heads. Of all the cases examined by the Constitutional Court, 781 requests had been settled by early July 2011.

1. Judicial Review against 1945 Constitution

Cases of judicial review against the Constitution are the most requested to the Constitutional Court. Constitutional Court's decision which grants a petition for judicial review automatically will change the provisions of a Law which is declared contradictory to the 1945 Constitution and therefore has no binding legal force.

Constitutional Court decisions in the case of reviewing the law, in principle, aims to protect citizens' constitutional rights and human rights which are fundamental to the establishment of democracy. In addition, there are also

decisions of the Constitutional Court related to the mechanisms of democracy, namely general elections, both at national and local level.

Here are some examples of Court decisions which are closely associated with the development of democracy in Indonesia.

a. Voting Rights for Former Members of the Forbidden Organization

Article 60 Sub-Article g of Law Number 12 Year 2003 concerning General Elections for the DPR, DPD and DPRD specify the requirement to be candidates for the DPR, DPD, Provincial /Regency / City DPRD, which is not a former member of the banned Indonesian Communist Party (PKI), including its organization mass, nor the people involved directly or indirectly in G30S/PKI, or other illegal organizations. Constitutional Court declared that the 1945 Constitution prohibits discrimination as stated in Article 27 paragraph (1), Article 28D paragraph (1), Article 28I paragraph (2), of the 1945 Constitutions. However, Article 60 Sub-Article g of Law Number 12 of 2003 mentioned above prohibits a group of Indonesian Citizen (WNI) to be nominated and use their rights to be elected based on their previous political beliefs. So, the article is declared unconstitutional by the Constitutional Court.

b. Terms of Contempt against President and Vice President

Constitutional Court declares that Article 134, Article 136 bis up to Article 137 of the Criminal Code on defamation offenses against the President and Vice President against the 1945 Constitution and has no binding legal force. Constitutional Court found the articles governing criminal defamation against the President and Vice President could create legal uncertainty (rechtsonzekerheid) as very susceptible to interpretation whether or not a protest, a statement of opinion or thought is a critique or insult against the President and / or Vice President.

c. Offense Hostilities may Cause Offense Abuse of Power

In Decision Number 6/PUU-V/2007 Constitutional Court states that the substance of Articles 154 and 155 of the Criminal Code does not guarantee legal certainty so contradictory to Article 28D Paragraph (1) of the 1945 Constitution.

Both formulations of the Articles according to the Constitutional Court could lead to a tendency of abuse of power because they can easily be interpreted according to the ruling taste. Consequently, these articles assessed by the Constitutional Court may obstruct the freedom to express thoughts and attitudes as well as freedom of expression that is contradictory to Article 28 and 28E Paragraph (2) and Paragraph (3) of the 1945 Constitution. Therefore, Constitutional Court decided that the provisions of Article 154 and Article 155 of the Criminal Code against the 1945 Constitution and have no legal force.

d. Individual candidates in the Regional Head Election

Constitutional Court Decision under No. 5/PUU-V/2007 grant judicial review of Article 56 paragraph (2), Article 59 paragraph (1), (2), and (3) of Law Number 32 Year 2004 regarding Regional Government. These articles provide that candidates for regional head and deputy head of the region can only be submitted by political parties and coalitions of political parties. However, after the Constitutional Court Review decision, now candidates can also follow the general elections of regional heads of political parties without going through the political party proposal as long as they meet all minimum requirements which have been stipulated in the legislation.

e. Changing Desirability Election System based on the Most Voted Ballots

In this case, the Court affirmed that Article 55 paragraph (2) of Law 10/2008, which define each of the three candidates have at least one female candidate is a policy in order to meet affirmative action for women in politics as a follow-up of Women of the World Convention of 1995 in Beijing and various international conventions which have been ratified. According to the Court, affirmative action will provide opportunities to women for the formation of gender equality having the same role between women and men.

The Court confirmed its interpretation that the provision of a quota of 30% (thirty percent) and having a female candidate out of every three candidates is a positive discrimination in order to balance the representation of women and men to become legislators in the DPR, DPD and DPRD. However, the Court also emphasized that to improve the position of women in politics is not solely dependent on legal factors, but also cultural factors, capabilities, proximity to the people, religion, and the degree of community trust in female legislative candidates, as well as the increasing awareness on the role of women in politics.

Meanwhile, Constitutional Court judged that Article 214 letters a, b, c, d, and e of Law 10/2008 are unconstitutional. Those articles determine that the selected candidate is a candidate who gets above 30% (thirty percent) of the voter divisor number (BPP), or occupy a smaller sequence number if no one is getting 30% (thirty percent) of the voter divisor number, or who occupies a smaller sequence number if a gain of 30% (thirty percent) of the voter divisor number is more than proportionate number of seats obtained by a political parties participating in the election.

The above provision according to the Constitutional Court is contrary to the substantive meaning of popular sovereignty and qualified to be on the contrary to the principles of justice as set forth in Article 28D Paragraph (1) of the 1945 Constitution. It is also stressed that it is a violation of the sovereignty of the people if the will of the people which is reflected in their choice is being ignored in the determination of legislators, then it would actually violate the sovereignty of the people and justice. According to the Court, if there are two candidates who get extremely different votes between

them then the candidate who received the most votes was defeated by the one who has less vote, because the one with less votes gets smaller rank number. Based on this decision the desirability of legislative candidates is determined directly based on the rank of votes they get.

f. Eliminating Releases Sanctions and Prohibition of the Quick Count and Survey

The provisions concerning the imposition of sanctions for the press declared unconstitutional by the Constitutional Court through Decision Number 32/ PUU-VII/2009 dated February 24, 2009. The reason is because such provision causes legal uncertainty, injustice, and contrary to the principle of freedom of expression guaranteed by the 1945 Constitution.

Three main considerations underlying the decision of the Constitutional Court, namely: First, these articles can lead to interpretations that the institution which can give sanction could be an alternative institution, namely the Indonesian Broadcasting Commission (KPI) or the Press Council which allows the type of sanction imposed is also different; Second , the formulation of these provisions also mix the position and authority of the Indonesian Broadcasting Commission and the Press Council against the authority of the general election Committee to impose sanctions on the Commission who implement election campaign, and Third, the imposition of sanctions for broadcasters should not be done by the IBC (KPI), but rather by the Government (Minister of Communication) after fulfilling the due process of law, while toward the print media it is not possible to do revocation sanctions because the Law 40/1999 no longer use the licensing agency issuing the print media, so it is a norm that no longer needed because the loss of legal force and raison d'être of this.

Meanwhile, the ban on poll (survey) and counting fast (quick count) of the Act of legislative and the President / Vice President elections also expressed against the 1945 Constitutions by the Constitutional Court Decision Number 9/PUU-VII/2009 dated March 30 2009 and successively Decision Number 98/ PUU-VII/2009 dated July 3, 2009. According to the Court, although they are not conducted by academicians or scholars, the survey or quick count about the election result is a scientifically-based activities which must also be protected by the spirit and principles of academic freedom and freedom of the pulpit-scientific-academic because it is guaranteed not only by Article 31 Paragraph (1), Paragraph (3), and Paragraph (5) of the 1945 Constitution but also by the provisions of Article 28F of the 1945 Constitution which includes freedom to explore, process and release information, including scientific information.

Further consider that the opinion polls, surveys, or the quick count results of voting by using the scientific method is a form of education, supervision, and a counterweight in the process of organizing the state, including the general election. Another consideration is public, from the beginning, has known (notoir feiten) that the quick count is not the official results and therefore cannot be treated as official results, but public has the right to know it. The quick count was not going to affect voters' freedom to impose their choice. This

was because, according to the Court, the voting is over and a quick count is not possible to be done before the completion of voting.

g. Terms Endorse Presidential Election Voters ID Cards or Passports

One of the landmark decision of the Constitutional Court in the context of escorting democracy is the decision number 102/PUU-VII/2009 dated July 6, 2009 which broke the deadlock Presidential Election Law relating to legal issues about unregistered voters in the voters list (DPT). With reference to Decision Number 011-017/PUU-I/2003 dated February 24, 2004, the Court affirmed that the constitutional rights of citizens to elect and be elected (rights to vote and right to be candidates) is a right guaranteed by the Constitution, laws, and international conventions, so the restriction, distortion, elimination, and removal of rights is a violation of the rights of citizens.

It is explicitly guaranteed in the Constitutional Court according to Article 27 Paragraph (1), Article 28C Paragraph (2), Article 28D Paragraph (1), Article 28D Paragraph (3), and Article 28I Paragraph (2) of the 1945 Constitution. In addition, also in line with Article 21 of the Universal Declaration of Human Rights, Article 25 of International Covenant on Civil and Political Rights, and Article 43 of Law Number 39 Year 1999 on Human Rights.

Therefore, the Court gave legal considerations by stating that the rights of citizens to vote should not be hampered or hindered citizens to use their voting rights by various regulations and any administrative procedures. Thus, the provision requiring a citizen registered as voters in the voters list (DPT) is more of an administrative procedure and should not negate the things that are substantially the citizen's right to choose (right to vote) in the general election.

The Court considers that the best solution to overcome the problems of voters who are not listed in the voters list is to allow the use of ID cards or valid passports in the Presidential Election. However, in order not to cause the loss of citizens' constitutional rights and not violate the provisions of the legislation in force, the Court also ordered the Election Commission (KPU) to further regulate the technical implementation of the use of voting rights for Indonesian Citizen not registered in the voters list.

Based on those considerations, the Court decided that Article 28 and Article 111 Election Law are constitutional insofar they are interpreted as to include citizens who are not enrolled in the DPT and fulfilled the election terms and procedures, (conditionally constitutional).

2. Dispute about Election Results

The next authority which is quite important in strengthening democratic principles is to decide disputes about election results. Case of election disputes is the case brought under the argument that there has been a mistake resulted from vote count conducted by the Election Commission (KPU) and /or there is a structured, systematic and massive violation.

3. Dispute of Constitutional Authority among State Institutions

The case on constitutional disputes between state institutions is a matter in which the petitioner is a state agency whose authority is granted by the 1945 Constitution.

4. Dissolution of Political Parties and Impeachment

The authority that has never been used is to examine and decide upon the dissolution of political parties requested by the Government. The obligation of the Constitutional Court upon deciding on the opinion of the House of Representative that the President and / or Vice President has violated a specific law or no longer qualifies as President and / or Vice President under the has never been addressed by the Constutional Court since up until now the House has never filed such a case.

C. Closing

Up to this moment, the presence of Constitutional Court in the Indonesian state system is considered by many has given contributions to the growth of democratic principles and law enforcement in Indonesia. Since the establishment of the Constitutional Court, making the laws can not be based only on majority consensus of the current interests, but also needed to be considered whether the regulation is contradicted with the constitution or not. If later it is proven that the law making process and its content is contradictive with the Constitution, the Constitutional Court could annul.

Although sometimes there are some obstacles during the implementation of the Constitutional Court's decision, but in general the rulings of the Constitutional Court can be implemented by all parties, including the President and the House of Representative.

QUESTIONS AND ANSWERS :

Moderator:

We are continue to open our floor to give some contribution in this discussion.

Question:

Pataniari Siahaan (Forum Konstitusi) to CC of Korea and Lithuania:

How could your constitutional court make an effective control to the judges?

Question:

Samuel Maraf from Asociation for Electoral Procedural Law of Constitutional Court and also from Gajah Mada University.

The first question related to the very first question, is it any obligation to supervise a constitutional Court. How the mechanism to supervise Constitutional Court? Are there any mechanism provided in some country?

The second, is it possible in the Constitutional Court grounded the position exit for the party purpose? Is it possible to deliver a ultra pettish decision?

Answer:

The most important one that matters in all constitutional review, every judge must bind by the law and constitution. If the judgment in certain cases, or if the states, status, or lawyers against constitution, or certain party or certain case request for a constitutional review to the ordinary court, the judge decide whether the request is accepted or not. If the request for constitutional review is denied in the ordinary court then the person who request the constitutional review directly request to the constitutional court for the constitutional review. The Constitutional Court decides that also the law or certain law against the constitution or not. If the Constitutional Court decides that the certain statutes against the constitutional the judges cannot apply the statutes in any case. So the Constitutional Court can control the judges through that kind of process.

Moderator:

Are there any parties or experience about impeachment in Korea?

Answer:

Yes, just one case. As I said before, the impeachment is concerning the like presidential role. There is one case that we have experience.

Answer: by (Lithuania):

The best control of the judges is the procedure of this appointment. During the appointment all judges procedure is very clear, very transparent and takes rather long time, because all candidate to us given half of the year before and the legal committee, the parliament, and the other institution, there are a lot of discussion and a lot of investigation. In our case I think that the best process for choosing the judges is vestibule choosing those who can do this right. If there are any possibilities to control judges when they are serving, judges are appointed by the parliament they'll kind a to us give the President, the head of the Supreme Court and also the head of the Parliament, the speakers of the parliaments. And those judges are appointed for 9 years. If during those 9 years something happened to the judges, so it would practically it could be that we have announce this practice. Constitutional Court Judges could be impeached. So impeachment process covers the Constitutional Court Judges.

The second question is about mistakes solve our problems whether Constitutional Court is always right. We are not God, everything happens. And if we look to the very beginning of Constitutional Court in Lithuania in 1995, so after the 2 years the court was organized and started to work. We

had a very interesting and important case, it was the case whether the some provisions of the European Conventional Human Rights are in compliance with the constitution. The answer was yes, so no problem came out from this. But the argument are still discussed by the university professors and by other sometimes even by the politicians.

So you can discuss the argument, you can criticize the constitutional Court, but you have to accept that such institution if you want to have it. And if you want to have it strong there are decisions had to be obeyed and have to be binding. Can the Constitutional Court go ultra pettish? Yes, our court can and does it rather often. We are a very active court, especially in the cases when the parliament addresses groups of parliamentarian. Not everybody likes it, but we do it.

Coming back to the impeachment, I could give even just electoral how Constitutional Court reacts in this field. We have a very big practice. We have impeached two of our president; we have two processes of the impeachment of the parliamentarian. And one of them was because of the drive of 1999. The situation is very strange and the parliamentarian was even in a jail, but he was still having his mandate, so the parliament didn't vote to take him out away. So we have something very special, a very crazy situation.

Another problem we have impeachment process in 2010 and to hear the power of Constitutional Court the President was leading this case, and this case is very interesting. Two parliamentarians were impeachment process started in the parliament then the Constitutional Court only give conclusion and then the parliament votes. It is an interesting case because one of our parliamentarians decided instead of sitting in the parliament and walking to go far away to Thailand, Cambodia, and to other nice places. And his friend at the parliamentarian voted for him, so this case because the first parliamentarian said that he was not abroad, he was looking for his father, probably his father so old, so those things came out of the class and the impeachment process started. This case is very important because the Constitutional Court later developed the doctrine of free mandate. Mandate is free but the parliamentary is not free. They still have to be under the constitution.

It is interesting that the parliament voted differently that parliamentarian who was travelling far away just to these places is out of the parliament. And another one who was voting for him still works. So situation sometimes is different.

And now I want to touch very shortly because it is a very difficult question, about some contradictions of jurisprudences, as we are binding by the European Conventions of Human Rights, we have a very interesting case and very difficult case. While the Constitutional Court was delivering case on the impeachment of the president, in another ruling that is not directly on the impeachment but on the other ruling when the Constitutional Court has to decide whether the requirement for the impeached president or any other impeached person not to take any position that under the Constitution you have to give an off, so this is forever. And in this case, impeached president addressed to the European Court of Human Rights and recently, this year, the

European Court of Human Rights gave a little bit different decision. Under the sub-protocols, one of the protocols of the European Conventions of Human Rights, while looking at the electoral rights, and the election rights to the parliament, the European Court of Human Rights said that restrictions could be but they can't be forever. So now we have some kind of constitutional crisis and we have to mend even the Constitution. So different problems are coming out, like all democratic institutions courts are wrecking and during, in some cases, our evaluation of the standards that are coming from the Constitution, sometimes even are more, maybe, strict than it appears later in European institutions. Thank you.

Moderator : Review and closing of Panel II Session One.

PANEL III

MODERATOR
Paulus Hadi Suprapto

SPEAKER 1
Hon. Uzak Bazarov,
Justice of the Constitutional Court of Uzbekistan

Conception of Further Deepening Democratic Reforms and Development of Civil Society of the Republic of Uzbekistan and Democratization of the State Power and Governance

First of all, let me express my gratitude to the Constitutional Court of the Republic of Indonesia for the opportunity to participate in this international symposium in such a high level, and I also congratulate Indonesia on its eighth anniversary and wish success in the efforts to strengthen democracy and protect human rights.

Since gaining independence, Uzbekistan has set the goal of creating a humane and democratic and constitutional state, which was proclaimed in the Constitution of the Republic of Uzbekistan.

The Constitution stipulates that Uzbekistan is a sovereign democratic republic, and that democracy in the Republic of Uzbekistan is based on human principles in which the highest value is the man, his life, freedom, honor, dignity and other birth rights. The Constitution also stipulates that the system of state power in Uzbekistan is based on the principle of separation of powers into legislative, executive and judicial branches. Based on this principle, the parliament of the country - the Oliy Majlis - was elected; an effective system and structure of executive power was created; and a complete system of

judicial power - the Constitutional Court, courts of general jurisdiction and commercial courts - was established.

Alongside with that, during the past period of independence, a wide-range of reforms in the sphere of state power and administration were carried out in order to progressively realize the constitutional principle of separation of powers, to create between them an effective system of checks and balances, to strengthen the role of authority and control functions of the legislative and representative powers in central and local levels, and to implement the measures of liberalization, autonomy and independence of the judicial system.

Based on the decision of the referendum held on January 27, 2002 a bicameral national parliament, Oliy Majlis, was established. The main objectives pursued in this case were to form a system of checks and balances in exercising the powers by the Parliament, to substantially improve the quality of legislative work, to achieve a balance of national and regional interests, while bearing in mind that the upper house - the Senate, representing mainly the local councils, represents the regions and the lower Legislative Chamber operates on a permanent professional basis.

In the development of the national parliament, the particular importance is placed on the adoption (in 2003) of the Constitutional Law on "Legislative Chamber of Oliy Majlis of Uzbekistan", "The Senate of Oliy Majlis of the Republic of Uzbekistan", which clearly defined the status, powers and mechanisms of each chamber and the new parliament as a whole.

One of the political-legal acts of the enormous importance of this period was an exclusion from the Constitution of the Republic of Uzbekistan in 2007, the law stipulating that the president is the chief executive power. Now, Article 89 of the Constitution specifies that "the President of the Republic of Uzbekistan is the head of the state, and ensures a coordinated functioning and interaction of bodies of state power."

An important step towards liberalization was the abolition of the post of Chairman of the Cabinet of Ministers, which was previously held by the President of the Republic of Uzbekistan. In accordance with the adopted laws, now, the Prime Minister, not only organizes, but also manages the activities of the Cabinet of Ministers, is personally responsible for effectiveness of its activity, presides at meetings of the Cabinet of Ministers, signs its documents, and makes decisions on state and economic management.

However, the growing level of political culture and social consciousness of the population and the dynamic processes of democratization and liberalization of society, and the strengthening of the multi-party system, create the necessary prerequisites to ensure a more balanced distribution of powers among the three bodies of state: President - Head of State, the legislative and executive powers. In this regard, the President of the Republic of Uzbekistan, Islam Karimov, on November 12, 2010 at the joint session of the chambers of the Oliy Majlis of Uzbekistan, presented "The Concept of further deepening of democratic reforms and the formation of civil society in the country", which provided the legislative initiative for democratization of state power and

control. Based on these initiatives, the law on "Amendments to Certain Articles of the Constitution of the Republic of Uzbekistan (articles 78, 80, 93, 96 and 98)" was adopted.

Thus, the law established a new mechanism for the appointment of the Prime Minister. Now, candidate of the Prime Minister is proposed by a political party with the most numbers in the parliamentary seats in elections for the Legislative Chamber of Oliy Majlis, or more political parties that have obtained the equal numbers of seats in the parliament.

The President of the Republic of Uzbekistan, after considering the nominated candidate for the post of Prime Minister, within ten days proposes this candidate for consideration and approval by the chambers of the Oliy Majlis of the Republic of Uzbekistan.

An important novelty is the introduction of the institution of non-confidence vote in the system of government which is based on the principle of separation of powers. It represents itself as a mechanism to handle a case where there arises stable contradiction between the Prime Minister and the Legislative House of the Oliy Majlis on the suggestion, officially made concerning the name of the President of the country by deputies of the Legislative House when the votes counted for is not less than one-third of the total number, the question on expressing the veto to the Prime Minister will be introduced for discussion in the joint session of the Houses of the Oliy Majlis. The Veto to the Prime Minister will be considered accepted if not less than two thirds of the total number of deputies of the Legislative House and members of Senate of the Oliy Majlis vote for him. In this case the President of the country makes a decision on dismissing the Prime Minister from the position. And all members of the government will vote out the Prime Minister.

This institute was introduced for the purpose of expanding the authority of the parliament in realization of the control over execution of laws by the executive power and is challenged to increase the role of the Legislative power in the political system of the country as well as the responsibility of the parliament for provision of consistent and qualitative execution of adopted laws.

Another principle provision of the above mentioned law is granting the houses of the Oliy Majlis the right to hear and discuss the reports of the Prime Minister on urgent questions of social-economic development of the country. This norm completing the mechanisms for interaction of the parliament with the government emphasizes the accountability of the government before the parliament, raises the Prime Minister's responsibility, and finally, promotes the establishment of a constructive dialogue between the legislative and executive branches of the government.

Thus, in the Republic of Uzbekistan, the principle of creating an effective system of checks and balances is designed to ensure balance and to operate not only between branches of state bodies, but also between the subjects of power - the head of state, and branches of government. Thus, the President has the right to submit a legislative initiative, and legislation passed by

Parliament shall come into force upon signature by the President. The President has the right to veto that is to return the law to parliament for revision; the Constitutional court determines the constitutionality of laws, decrees of the chambers of the Oliy Majlis, the decrees of the President, government regulations. The President attends the Senate sesion for election nominations of judges of the Constitutional, Supreme and Economic courts. All this and the others are part of a comprehensive mechanism to ensure the principle of checks and balances.

In the system of ensuring the principle of checks and balances, an important place occupies the Constitutional court of the Republic of Uzbekistan. The Constitutional court is the judicial body operating on a permanent basis. It is elected for five years by the Senate of the Oliy Majlis of the Republic of Uzbekistan upon representation of the President of the Republic of Uzbekistan. The Constitutional Court consists of a Chairman, Deputy Chairman and five members of the Constitutional Court, including a judge from the Republic of Karakalpakstan. The Constitutional Court and its judges in theirwork, are independent and they only obey the Constitution of the Republic of Uzbekistan. Decisions of the Constitutional Court are binding for all bodies of state authority and administration, as well as enterprises, institutions, organizations and public associations, officials and citizens.

Basic principles of the operation of the court are dedication to the Constitution, independence, collegiality, transparency and equality of rights of the judges.

The Constitutional Court tries cases on the constitutionality of the acts of legislative and executive power, that is, determines the compliance of the laws of the Republic of Uzbekistan Republic of Uzbekistan, decisions of Oliy Majlis, presidential decrees, regulations of the government and local authorities, international treaties and other obligations of the Republic of Uzbekistan. Consequently, it protects individuals from violations of their rights and freedoms and from unconstitutional legal acts, including the laws. Jurisdiction of the Constitutional Court applies to the regulations which have formally been adopted and entered into the legal force. The Constitutional Court has no control over the constitutionality of draft legal acts, i.e, carry out the subsequent control and not the preliminary. Decisions adopted by the Constitutional Court on normative-legal acts are not conforming to the relevant norms of the Constitution, and come into effect upon publication in the press. Decisions of the Constitutional court are final and could not be appealed.

Protecting the rights and freedoms is of great importance and the Constitutional Court has an authoritative interpretation of the Constitution and laws. Interpretation is a form of an activity of the Constitutional Court, which ensures the implementation of constitutional norms, principles and guidance, promotes the authority of the Constitution, prevents the violation of the Constitution and laws, and, ultimately, protects human rights and freedoms. The aim of interpretation is to eliminate uncertainties in understanding the provisions of the Constitution and laws, and provide their observance.

The interpretation the Constitutional Court explains the real meaning of constitutional norms and laws, warning their different understanding. So, the Constitutional Court serves as the main tool for ensuring the stability of the Constitution, the protection of its norms. Thus, the Constitutional court reviewed the case on the interpretation of paragraph five of the first part of Article 6 of the Law on "Advocacy," due to the fact that the Republican research forensic center refused a request of advocates to issue the written expert opinions on matters necessary for the provision of legal assistance to clients. The Center cited the absence of the norm entitling this right to advocate in procedural code. And yet, this norm of the Law on "Advocacy" says that while exercising the professional activity, the advocate has the right "to seek with the consent of the client and to obtain the written expert opinions on the matters that they need in order to gain legal aid." According to the adopted law, in this case, the decision of the Constitutional Court is that "expert agencies or experts at the request of an advocate with the consent of his client should give him a written expert opinion on the matters necessary for the provision of legal aid."

In accordance with the Constitution, the Constitutional Court has the right of legislative initiative. This right of the Constitutional Court is realized by introducing the bill to the Legislative Chamber of the Oliy Majlis. In this case the Constitutional court bases on the priority of human rights and freedoms. For example, the first part of Section 536 of the Criminal Procedural Code of the Republic of Uzbekistan stipulated that parole from the penalty and replacement of the unserved part of punishment with more lenient penalties is applied by a judge upon presentation of the administration of the penal institutions. In other words, this rule did not provide a direct appeal to the court of the convicted person or his counsel with a request for parole from the sentence, or replacement of the unserved part of punishment with a more lenient punishment. Meanwhile, article 44 of the Constitution of the Republic of Uzbekistan stipulates that "Everyone is guaranteed judicial protection of his rights and freedoms." Following the adoption of the Constitutional Court's decision on this issue, all rules of law were amended by the Parliament in accordance with the requirements of the Constitution.

Thus, in the Republic of Uzbekistan, an effective system of checks and balances is created on the basis of the constitutional principle of separation of powers, which ensures the implementation of democratic principles in exercising state power and governance. The Constitutional Court of the Republic of Uzbekistan also has the final role.

Thank you for your attention.

Moderator :

Thank you the Excellency

In short I would like to summerize from the speech speaker from the republic of Uzbekistan. The Jackson checks and balances mechanism are based

on constitutional rights such as the separation of powers which guarantee the implementation democracy principal in order to run effectively . Constitution plays an important part in that country.

SPEAKER 2
Hon. Chalemporn Ake-uru,

Justice of the Constitutional Court of the Kingdom of Thailand

The Role of Constitutional Courts or Equivalent Institutions in Strengthening
the Principles of Democracy : the case of Thailand

Ladies and gentlemen

By saying that Thailand is a constitutional democracy with The King as Head of State. It is a democracy governed by a constitution. The current Constitution is the Constitution of the Kingdom of Thailand B.E 2550 (2007). Sovereign powers, belonging to the Thai people, which are separated into legislative, executive and judicial powers are exercised through the National Assembly, the Council of Ministers and the Courts respectively in accordance with the provisions of the Constitution. The performance of duties of the National Assembly, the Council of Ministers, the Courts, Constitutional Organs and State agencies must be in accordance with the rule of law.

The Constitution itself prescribes the purposes, powers and limits of a government and sets forth how a country is administered. It contains the provisions on the structure of state powers and the relations among these powers as well as provides guarantees of basic rights and liberties of the people. In constitutional democracy, the constitution is regarded as supreme. Thus, it is provided in the Constitution that the Constitution is supreme law of the state. The provisions of any law, rule and regulation, which are contrary to or inconsistent with the Constitution will be unenforceable.

In this connection, the Constitutional Court performs the important function of safeguarding this supremacy of the Constitution. It also serves as a judicial body which recognizes and protects the rights and liberties of the people and translates into reality the protection of rights and liberties by the exercise of adjudicative power.

The Constitutional Court was established by virtue of the Constitution. It consists of the President and eight judges to be appointed by the King upon advice of the Senate. Judges of the Constitutional Court are styled “Justices of the Constitutional Court”.

The Constitution provides for the Constitutional Court to have powers and duties in adjudicating and ruling constitutional cases. These powers and duties may be divided into the following nine categories:

(1) constitutional review of bills and draft rules of procedure of the legislative branch prior to their promulgation to ensure that they are not inconsistent with or contrary to the Constitution;

(2) constitutional review of a promulgated law to ensure that it is not inconsistent with or contrary to the Constitution;

(3) constitutional review of the prerequisites for the enactment of an Emergency Decree to ensure that it is not inconsistent with or contrary to the Constitution;

(4) ruling on whether or not members of the House of Representatives, senators or members of the committee are involved directly or indirectly in the use of the appropriations;

(5) ruling on disputes regarding the powers and duties among the National Assembly, the Council of Ministers or the Constitutional organs other than the Courts which arise between two or more of such organs.

(6) review resolutions or regulations of political parties, consideration of appeals of members of the House of Representatives and ruling on cases concerning the constitutional exercise of political rights and liberties by a person or a political party.

(7) ruling on the membership or qualification of a member of the National Assembly, Ministers and Election Commissioners.

(8) ruling on whether or not a treaty requires prior approval of the National Assembly. Ninth, powers and duties prescribed under the Organic Act on Political Parties, B.E. 2550 (2007).

Rulings by the Constitutional Court in the nine categories of constitutional cases help promote and strengthen the principles of democracy in accordance with the Constitution.

Since its establishment in 1998, the Constitutional Court has rendered several important decisions or rulings. But due to limited time available, in this presentation I will mention only some of these decisions or rulings.

(1) Ruling No. 21/2546 In this case, the Constitutional Court held that the Names of Persons Act B.E. 2505 (1962), was contrary to or inconsistent with the Constitution because it contained mandatory provisions requiring married women to use on their husbands' surnames only would be an inequality in rights due to differences in sexes and therefore contravened the principle of equality. This ruling sets a precedent on the equality between men and women in society.

(2) case is Ruling No. 18/2551, ruling No. 19/2551 and Ruling No. 20/2551, these about the three political parties. These three political parties were the ruling political parties at that time. There were governing coalitions at that time. In these three cases the Constitutional Court stated that the Election Commission or the Supreme Court of Justice, as the case may be, considered that there were reasonable grounds to believe that the members of the executive committees of the three political parties did

violate the Election Law resulting in the election of members of the House of Representatives and not proceeding in an honest and fair manner in order to acquire the power to rule the country by a means which is not in accordance with the modes provided in the Constitution. For it simply an electoral (8.45) by the member of the Executive Committee of political parties. The Constitutional Court therefore decided to dissolve these three political parties. The effect of the ruling is thus laid down as a principle that a democratic regime of government must always go through an honest and fair election in accordance with the Constitution.

Third, ruling No. 12-13/2551 This is a case of conflict of interests. In this case, the Constitutional Court held that section 267 of the Constitution prohibits the Prime Minister and Ministers from being employees of any person to prevent conflict of interests. The fact that the Prime Minister of that time, continued to act as a host for the TV cooking shows and accepted remuneration even after assuming the position of the Prime Minister, showed that he was employed as stipulated in section 267 of the Constitution. He therefore committed an act prohibited by or incompatible with the section 267 of the Constitution, resulting in the termination of his premiership.

(3) Ruling No. 12-13/2551 This is a case of conflict of interests. In this case,the Constitutional Court held that section 267 of the Constitution prohibits the Prime Minister and Ministers from being employees of any person to prevent conflict of interests. The fact that Mr. Samak Sundaravej, Prime Minister at that time, continued to act as a host for the TV cooking shows and accepted remuneration even after assuming the position of the Prime Minister, showed that he was employed as stipulated in section 267 of the Constitution. He therefore committed an act prohibited by or incompatible with section 267 of the Constitution, resulting in the termination of his premiership.

(4) Ruling No. 12/2552 This is a case concerning a Military Government Order issued in 1972 which prohibited owners or possessors of shops from operating food and beverage businesses between 1 a.m. to 5 a.m. without authorization. The Constitutional Court ruled that the Military Government Order issued in 1972 limited the liberties to run a business and to undertake a fair and free competition and held that that Military Government Order was against the provision on restriction of the rights and liberties of people as well as the right of engagement in a business or an occupation as provided by the Constitution. This decision therefore sets a standard on the protection of rights and liberties of individuals.

Regarding compliance with decisions or rulings of the Constitutional Court, it could be said that all constitutional organs and state agencies are enjoined by the Constitution to comply with such decisions. The Constitution stipulated that the decision of the Constitutional Court will be deemed final and binding on the National Assembly, the Council of Ministers, the Courts and other state organs. It is final in the sense that the parties may not file

an appeal to any court or body. It is binding in the sense that the decisions of the Constitutional Court will be binding not only to the parties but also to third parties. Thus, once the Constitutional Court passes a ruling, that ruling will be directly binding on the National Assembly, the Council of Ministers, the Courts as well as constitutional organs and state agencies in the enactment, application and interpretation of laws.

In practice, so far, there has never been a case of non-compliance with the decision of the Constitutional Court once the decision has been rendered.

However, during the process of the Court's deliberation of a case, there may be criticisms, diverse challenges or any form of political pressure from some quarters. Take for example, on the day that the Constitutional Court would read its ruling on the case of dissolution of the three political parties, there were a blockade of the courthouse of the Constitutional Court by a mob who supported the three political parties to prevent the Justices of the Constitutional Court and officials of the Office of the Constitutional Court from entering the courthouse to perform their duties. The venue for hearing and decision on these three political parties' dissolution cases had finally been shifted to the courthouse of the Administrative Court.

In facing these challenges and obstacles, the "state of mind" of the Justices of the Constitutional Court becomes all the more important. The Justices of the Constitutional Court must stand firm, in facing the difficulties with great fortitude, and also maintain the high level of resilience in the discharge of their judicial duties with impartiality.

Moderator-

The constitutional court has important role in protecting supremacy of Constitutional Court. Constitutional Court also judiciary body which provides protection of the freedom of the citizens and also realizes the rights and freedom exercised by judicative body. That would be the essence of the cases in Thailand.

Next, I'd like to welcome the Hon. Johannes Schnizer from Austria.

SPEAKER 3
Hon. Johannes Schnizer,

Justice of the Constitutional Court of Austria

My duty is to speak about the challenges and obstacles in enforcing authority in the constitutional court, in order to strengthen the democratic principles. The Austrian constitutional court is the world's oldest specialized constitutional court, structured with the federal constitution in 1920.

Now, I would like to illustrate our theme and offer you an example of our history

In 1933, it came to the abolishment of democracy and the establishment of a dictatorship. The background of what has occurred in the past becomes a lesson for today. It was the measures taken as containment of the budget deficit following the economic crisis of 1929 and the crash of the banking industry that happened in1931. The federal administration drew a law to cut down on salaries of the railroad men. The government's proposal was accepted with only one vote-passing majority in parliament. The speaker of the national council, who belonged to the opposition, determined that one of the parliament members had delivered two ballots and therefore the vote was not valid. After tough discussions he then laid down his position to be able to cast his own vote. Responding to the situation, both of his deputies also laid down their positions, in order to be able to secure the majority of votes for the government. The chancellor at that time described that the parliament had failed because of lack of incompetency of the chair to act and deliberate the administration unconstitutionally with an emergency decree.

The connection to the constitutional court: the Austrian constitutional court assembled to discuss about the constitutionality of the decision made by the chancellor - the proceeding was an evident of unconstitutionality, and the constitutional court had received calls from all sides. The chancellor ordered the police and paramilitary forces, which were apparatus of the government to the constitutional courts assembly to prevent the adoption of resolution. Historians say that it was the crucial point of violation of the constitution: It is possible that a State institution offended the constitution. Only if the constitutional court gets obstructed in their effort to prove the constitutional offence, then it would eventually come to a violation of constitution and a switch-off of the constitution.

It is not a coincident that in those years, in the late twenties and early thirties of the previous century, a controversy occurred in our scope of scientific based discussion of who should be appointed to protect the constitution. Standing side beside, as leading counterparties were two most influential German and Austrian guru of constitutional law during that era.

Carl Schmitt stated that the "guardian of the constitution" should be the President, because he inherit the power to dismiss the government, and because of his highest command of the federal military. Hans Kelsen is the one who often does the jurisdiction gives response. The ideal and independent constitution must have a decision. The constitution limits the authorization of the government institutions, only an organized Institution could decide when a government Institution outstrips its authorities or in other terms offends the constitution. The common constitution can exceed. It is like a paradox because the constitution court does not have any other place and it's able to determine the other institution. Furthermore the incident in year 1933 in Germany had shown that the President was not in the position nor has the will, to prevent the act of offence toward the constitutions that led to Hitler's dictatorship.

Now we have an important point: the basis of authority of a constitutional court is placed within respect of the constitution. Offence against the constitution may occur. Finally, constitutional court decision does not required regulations interpretation.

Like any legal interpretation even the code reason could develop to various results. It's unavoidable. Every organ or institution wants to extend their influence as far as possible. That is why an independent institution is very much needed. Respect towards the constitution exists, because of respect toward the constitutional courts decisions.

When it comes to the question of the governmental powers, every institution has the desire to extend its influence provided that it is required to have an independent institution. Respect for the constitutional court is then established due to the respect towards the constitutional courts decisions.

According to the Austrian constitution the president has the endorsement, to implement the decisions of the constitutional court, whereas all state institution including the military are under his authority (Art.146 B-VG). Except for the execution of financial payments, where the proper court is in charge, it has never come to such execution. Although it has never occurred, it surely does not mean that every decision of the constitutional court would immediately be implemented. A prominent example would be the dispute over locations of signboards. In a region south of Austria, in Kaernten, where minorities of Slovenian speaking minorities reside, according to the constitution (precisely adopted after the 1955 Treaty of Austria which brought freedom) these minorities have the right for bilingualism including the placement of bilingual signboards. Currently the population of this minority group exceeds certain figure. The constitutional court then ruled that the placement of the bilingual signboards must be available. The governor of Kaernten refused to do this, because politically he was succeeded by standing on the side of the majority.

This presented a huge discussion in the media. They posed questions like why such decisions could not be executed or implemented. This is a very difficult legal issues but the actual question is: Should the President order the military to enter the area, to place the signboards, and ensure that they would not be removed? This can destroy the rights of freedom and peace. This could actually worsen the conflict between the minority groups and others.

On the other hand – and this is very determining factor– the media shows a very deep understanding that they completely couldn't understand how a person could disobey the realization of the decision made by the constitutional court.

All state institutions – at least those outside of Kaernten – emphasized, that a person should comply with the decision of the constitutional court, even if it is against his/her desires. This is also the opinion of the majority of the people. There was a strong public pressure to the local government of Kaernten to comply with the decision of the constitutional court.

The bilingual signboards have been put up in accordance with the decision of the constitutional court. The new governor actually reached the popularity by showing that the authority of the constitutional court entirely depends on the people toward the constitutions and toward the decision made by the constitutional court itself. In this matter, the role of the mass media comes into play, - as well as the willingness of other government institutions to publically take side of the constitutional courts. A substantial prerequisite, for the function of the Constitutional Court's jurisdiction, is hereby the freedom of the mass media. They must be able to cover and bring up constitutional offence so that the principles of democracy can be protected, and at the same time to guarantee these principles of democracy and Institutions which are in conjunction with the measures constructed by the constitutional court.

Finally, I would like to deliberate the substantial obligation of the constitutional court in its direct responsibility in protecting the fundamentals of democracy. I mean the responsibility of the constitutional court to determine over the legal standard of election.

The constitutional court takes its obligation as the election court seriously, in correctly regulating the law of the election proceeding in its jurisdiction, to be able to inspect the representatives of political parties, in detail according the elections law.

Obviously it is recurring to the exclusion or dividing of election. In all these cases an immediate action is required to conduct new election, the decision of the constitutional court will always be respected. The reason is because it would be inconceivable for the people, a decision of the constitutional court concerns the rectitude of the election, which is not changeable, and it concerns the important democratic right of the people. Eventually the people embraced the reconstruction of democracy after the end of Hitler's dictatorship in 1945 through the allied forces, and wont let their rights be taken away anymore.

I'm coming to my last point, which I think would be the most substantial issue: the basis of authority of the constitutional court is the people's trust to the institution itself. According to opinion polls, the Austrian constitutional court belongs to the most respected instrument not only within the Republic, but also through out the entire Austrian society. The constitutional court should obtain this form of trust on its own: through comprehensive decisions, through constant decision practices and followed by foreseeable decisions, an alert decision, which would respond on substantial questions and through the irreproachable livelihood of the members of the constitutional court. This is a personal contribution of which every constitutional judge would contribute to the authority of a constitutional court.

I would like to thank you for your attention.

SPEAKER 4
Hon. Mykhallo Zaporozhets

President of the Constitutional Court of Ukraine

Good day Ladies and Gentlemen

I would like to give my upmost gratitude and appreciation to honorable President Mr. Bambang Yudoyono And constitutional court IN Indonesia for organizing this conference.

And next I will deliver the presentation in Russian.

In Ukraine basic principal is done by settling disputes and also on formal issues regarding Judicial cases . The constitutional court will concentrate on cases so that the people could follow and the cases not only related with the public but also regarding the sovereignty of the state and the government. This is in line with the Ukraine constitution and in line with the const where the people have the most power and anything regarding the general election , referendum both in the local government central government must be done in inline with the principal. Specifically, regarding referendum and about political issues the rulings are binding and it involves various parties related to that aspect. If there are cases where people are forced violence then this undermined justice and sovereignty. And during the referendum it must be certain that all rights of people are met, otherwise the change to the constitutional or the referendum will not be accepted under Ukraine constitution.

The ruling of referendum does not require higher ruling. therefore the constitutional court in Ukraine is the highest and it promote a clear and definite understanding of all constitutional aspects in the country. And all cases must be processed in a good manner by taking to account the sovereignty of the state and noting about the general public needs are met. And the regulation enforces this. Another case, regarding how to organized general election on how you elect the president, if the other electoral system, other than voting for the candidate … then we must ensure that other criteria or the measures taken are in line with the previous regulations. And the basic democracy principals, the freedom of speech are also stipulated in our constitution, specifically human rights. Because we honor human rights and this is not limited only to several cases but it applies to all case. And if the case is objected, the content is not in line or the restrictions and limitations towards the basics needs and the basic rights of the people as stated in article 20 then it will be decline, unless on specific cases only. The Ukraine constitutional court upholds the basic rights of all people and we prioritize on the aspect of justice and freedom for all. So, I noted that in order to increase the public's trust towards judicial system. It's not surely up to the Ukraine government to do that. It has to be a collected effort from all parties, from all organizations. And if you remember that all cases involving the police and the law applied these cases is the international law. And it often happens I receive questions regarding

how to socialize the regulations because we must follow the international regulations. How to socialize is our legal enforcement in order for them to act or to follow the certain conduct. And this applies in those cases, and the government must ensure that legal posses and also its entire people when they need judicial aid assistance they would be fulfilled. And Ukraine pays an important attention and heavy intention towards that issue.

And if you see we have other supporting cases, regarding this issue. There are about 30 cases on cases regarding the Ukraine constitutional aspects but one important aspect is that we protect the basic right of our people, and this also was addressed in the ….. (noise)

And if you remember regarding the case where the war criminals and the violation of the basic human right occurred in Europe, in any country that heading towards democracy indeed they are struggling with such issues. But I am sure that they are competent and will head towards a good and strong process. And the constitutional court also identify several important positions in judicative, executive levels. And this can be achieved with a clean and clear system also optimizing the checks and balances mechanism. And if all authorities abide by the regulations whether in judicative or executive level than it will ensure that all people will abide by the regulations, and it will maintain the stability of the government and the country.

If the people's voices are not considered the people council will consider this and take note and brings this to the government, so that they could find appropriate judicial mechanism how to deal with this case.We should say that the mechanism regarding the legal separation is to make a clear differentiation on judicative and executive level.

And in the last case, this applies with the legal aspect in political parties. And if the government could monitor this and maintain that every party they give constructive feedback and work accordingly, then we will run in effective manner. We don't recognize any other authority. While at the constitutional court places an important part in ensuring that the justice is prevailed. In this case, regarding the reformation stipulated in the basic constitution in the Ukraine, it is stipulated that any violation occurred in parliament will be considered and noted very carefully. And it must be brought forward to the constitutional council in the Ukraine.

And the issue that is still relevant now is about the legality of the aspect where we identify the prejudicial decision of such cases. I understand and fully aware that in Ukraine that there are several obstacles, that's the way they think . Whether under the supreme court or constitutional court or in other organization. But it does not affect the integrity. In order for us to promote the values of democracy, we are in cooperation with other international organizations. Therefore I would like to convey that after all we will become actively participated in international conferences related with the 15th anniversary of the constitutional court in Ukraine

SPEAKER 5
Hon. Ahmad Fadlil Sumadi,

Justice of the Constitutional Court of the Republic of Indonesia

STRENGTHENING THE PRINCIPLES OF DEMOCRACY IN INDONESIA

Good morning and warmest greetings for all.

I'd like to start by offering you. First of all, I will not read the whole paper, but I'd like to summarize by presenting the highlights.

First of all, I'd like to talk a bit about the establishment of the constitutional court of Indonesia. The constitutional court of Republic of Indonesia was established only for less than a decade, knowing we did reformation and this was in 2003. Indonesia has been independent since 1945. The Constitutional court was established in 2003and it started with changes to 1945 Constitutions. The constitutional court is present in government of Indonesia. The establishment was based on the fact that Indonesia wanted to establish a bound among some institutions. Constitutional court is able to test the constitution in order that the constitutional court carry out the constitutional views.

After the constitution court was established in the constitution and elaborated in the law of constitutional court. The constitutional court was given the authority to conduct constitutional views , then decide the conflicts between the institutions with the power given to them.

Second, the constitutional court is to decide conflicts between the institutions and with the power given to them through the constitution.

Third, to decide on the establishment of political parties

And Fourth, to decide on the conflicting opinions of the general election

Finally, Authority that belongs to the constitutional court is to provide sufficient on parliament sufficient on suspected violation done by the president and vice president according to the 1945 Constitution which generally is ratified by mass media as impeachment cases.

I would like to share about what has been done by the constitutional court in its first authority which is to review the constitution or to test the constitution. This case was the first one accepted by the constitutional court, and this is what the constitutional court deals quite a lot most frequently.

Provisions of law to do with democracy, was to declare the rights of citizens who have been involved in the forbidden party –Indonesian Communist Party. Now it is found in Article 60 Sub-Article g of Law Number 12 Year 2003 concerning General Elections for the Parliamentary members, the senate and Local Parliament which says that the requirement in order to be able to be a member of a senate, a member of a senate, national parliament and provincial

parliament or district parliament or the parliament at the municipality level, he or she cannot be a former member of banned organization which is Indonesian Communist Party. This article was abrogated because it was declared to contravene with the Indonesian 1945 Constitutions particularly Article 27 paragraph (1), Article 28D paragraph (1), Article 28I paragraph (2). This has been known as the illustration of the rights of citizens in political party participation. So, the article is declared unconstitutional by the Constitutional Court.

Next is the Decision Number 013-022/PUU-IV/2006 declares that Article 134, Article 136 up to Article 137 of the Criminal Code on defamation offenses against the President and Vice President declared to contravene the 1945 Constitution and that is why it has no binding legal power. This article is considered to cause legal uncertainty by the constitutional court. It is highly vulnerable at the interpretational level whether a protest or expression of opinion, or thoughts is a critique or an insult toward the president and/ or vice president. The essence of the problem is because that article is considered by the constitutional court to impede communication and cover information which is guaranteed constitutionally in Article 28, Article 28E Paragraph (2), and Paragraph (3) of the 1945 Constitution;

Next is the Article 155 of the Criminal Code on the Offense Hostilities , reads "(1) Anyone broadcast, perform or paste to be known by the public, writings or images which express feelings of enmity, hatred or contempt against the Government of the Republic of Indonesia, or to make them more commonly known, shall be punished with imprisonment for four years and six months or a fine of four thousand five hundred Rupiahs". This article according to the institutional court is seen to have a tendency to abuse power because it can be interpreted according to the ruling wishes, the consequence of this article is seen to obstruct individuals in order to express opinions and their points and so this article is seen to contradict with the 1945 Constitution.

The next one is on what the constitutional court rules as Individual rights to put themselves as candidates of the heads of the region.

The rights of Individual candidates in the election of the Regional Head

In 2007, the constitution court granted in article 56..and..article 59, Paragraph 2 and 3 on Regional Government. Both of these articles declare that the pair of candidates (the head of the region and the deputy head) can only be proposed by a political party and the combination of political parties. Since the constitutional court is ..(noise)…It was ruled that a pair of candidates could run without being proposed by a political party as long as they meet the minimum requirements that have been regulated in the legislation.

And, the Constitutional Court changed the system of election to the system of the acquisition of votes which allows the candidates with the most votes to be elected.

And then, it's concerning the quick count, which was actually the desire of the people, to find out the development of the tabulation of the votes of the General Election. The Constitutional Court through its decision in 2009

declared that sanctions were given only to the unconstitutional procedure. The constitutional court ruled out that this was not the case because it also contradicts with the freedom of expression which was guaranteed under the 1945 constitution.

There are several arguments that noted that the third article can cause interpretation that the institution which can give sanction could be an alternative solution, namely the Indonesian Broadcasting Commission (KPI) or the Press Council which allows the type of sanction to be different. Second, the formulation of these provisions also mixes the position and authority of the National Broadcasting Commission and the Press Body against the authority of the general election committee to impose sanctions on the committee who implement election campaign. And third, the sanctions by the National Broadcasting board should not be done by them (KPI), but it should be done by the government after the legal processing has been under taken or due process of law.

And, in the matter of the quick count, according to the constitutional court, even though it was not carried out by academics or universities, the quick count of the election activities which have a basis in science or scientific base and have to be protected because of academic freedom and freedom of academic expressions because these things are not just guaranteed by Paragraph 3 and Paragraph 4 of the 1945 Constitution but it is also a provision which is guaranteed by article 28F of the 1945 constitution which guarantees freedom to explore and to process and to declare information, including scientific information.

Next, it is still related to the general election, in this case the presidential election. There are problems to do with the Local House in certain cases. It causes someone to be not included in the local house so that a person who has the right to vote is not able to vote. Therefore, the constitutional court in its decision in 2003, they have said that if the voters are not registered even though they have the right to vote, they can vote as long as they can provide valid ID. In order for them to vote, they can use ID card or a valid passport.

The last thing linked to the election is the interpretation of the constitutional court regarding a different opinion in the total count. In the 1945 constitution, political parties of the constitutional court can appeal the regarding the outcome of the final count of the election.

And for the law of the Constitutional Court and the law of the Indonesian government concerning the disputes in the regional election. Its understanding has been now to interfere in the voting tabulation of the vote counts. So, the decision of the constitutional court is that the constitutional court does not just rule on the result of the general election in the form of …(noise)… but also interpret the result .one and only one of the disputes which arise in the general election. Therefore, the Constitutional Court expanded … oh sorry… we tend to use the definition of the disputes of the votes.. or in terms of conflicts of the outcome of the election …

Oh.. sorry, I think my time is up.

Thank you.

Moderator :

I would like to make A brief summary that the constitutional court was established due to the 1945 constitution and the constitutional court become final interpreter of the constitution. The constitutional court have made enormous contribution relating to democratic principal and to apply check and balances mechanism . After that the constitutional court has support, has given its full support to developing countries in relation to the ongoing process to democracy.

That's all free summary of the speakers and I open the floor for question and answer session.

All speakers have conveyed the presentations and again I would like to make a brief summary that

Historically , constitutional court was established due to social and cultural history of that related country

There is a need to protect the basic human right s and the freedom of the people . This ideal say is the main factor which support the establishment of the constitutional court.

The constitutional court overall plays an extremely important part to save guard traditional aspect in the respected countries

I guess those are the main three aspect I attained from the each main speaker this morning

Moderator :

And now we are entering Q& A session . Because the has told me at 11.00 o'lock we must wrap this up for coffee break . After that we will have the second session.

So I open the floor. I see a couple of hands raised

Yes please state your name and your institution .

Bukhari from House of Representative

QUESTIONS AND ANSWERS:

My name is Bukhari. I would like to convey my upmost gratitude appreciation for conveying presentation very well. There are two things I'd like to ask or I need clarification to all speakers

1. I believe that one of the main requirements to be constitutional judge has to be fair a, however the statementship of each candidate must be proven and because this is have relate with every case he or she deals

with and we also know that the constitutional court every ruling is final and binding so I think one final decision was made that that followed by subjectiveness of judge and this is the unfortunate . How do you anticipate the aspect of being subjective of the judge when you deal with the case. Plese enlighten me and please give your comments I'd like to hear from all speakers on this issue.

2. As a way of second balances mechanism in judicial system, We know there are positive legislature and positive legislature in this case the constitutional courts add the negative legislature and now my question the ruling and the verdict from the constitutional court and the negative legislature only dismiss a regulation in contradiction with the const court ..

Moderator :

Thank you Mr. Bukhari.

Comment from Thailand:

For the first questioner I don't, I understand you said about how do you anticipate subjective mass of each and every justice is that right. For in Thailand before we get office, we have to swear in front of This Majesty the king that we will perform our duties with impartiality without fear or favor or friction and we have each charge have to carry out when approaching the case of course we can't prevent this subjective mass of each and every charge but according to the constitution of Thailand, the chargement of the constitutional court.

I'm on the judges, I'm on the justices, and if (noise) every charge of the constitutional court have to prepare and in the middle opinion each one of them, the ruler we concur made the decision and has a descending so every opinion of every justices will be printed in the government cassette that prevent you know, the people can see whether the judge decide the case subjectively or objectively or in accordance with the constitution or not. Do I answer your question?

As a negative letters later, that is though in one sense because in accordance to the constitutional constitution of Thailand, the decision of the constitutional court would be final and body and all constitutional organs of the state and so the National Assembly as I just stated are here's to correct if the constitutional court decide that there is just nation one um let me put it this way, we have two type of acts, the first type we call it organic we have only four uh only nine organic acts. This kind of act which the act complimentary to the constitution. The national assembly has to ref to the constitutional court to have a priori review before become an act. If the constitutional court in this case can't review both the enactment process as well as the content of the act, if it found, that, let me process, that not in accordance with the constitution, that act will lapsed. If the constitutional court found that the content of the act is contrary to or inconsistent to the

constitution and if those probation and all probation of an act all of essentials, elements of the act itself, the act totally will lapse. But if only some probation is not that essential element of the act, only those probations will lapse. So the remaining will be forward and will be printed in the government cassette to become law. So in the a priori like that, we can say that the constitutional court is the negative letter later. And the national assembly has to follow the constitution, because in Thailand, we are all consider to know democracy, namely, each democracy govern by the constitution. Every organs of state has to follow the constitution. If the constitution says A-B-C, each constitutional organ all state has to follow in that way.

We come to the next question. Usually the conductment, uh the conduct of proceeding of our constitutional court is the inquisitorial system but we do, of course consider the … we usually follow this principal in giving our decision. Do I answer all the question? Thank you.

Moderator :

We humbly invites next speaker Mr. Schneizer

Mr. Fadlil Sumadi, the floor is yours.

Mr Fadlil:

I guess I agree, but anyone could not be fully submitted from being subjectiveness because ….. (noise) …(pause)…

When we first recruited, then the constitutional judges, first originated from 3 main powers..3 main powers in a country. By design, it was intended so that there are equality, there are balance, in delivering the ruling and …. (noise)…… the verdict.

Next, when we are talking about mechanism, when the constitutional court is viewed from certain perspectives can be regarded …. (noise) ….

…….. constructive arguments. And by conveying such arguments the purpose of that is to know what are constitutional reasoning behind it. This can be brought about during discussions. So, when we share our views, share our inputs of insights in this forum, then, the objective of each person in that forum, we see it as one means of achieving objectiveness.

One other thing, we know… the code of ethics, code of conduct, you are all familiar with it. Now, this could make possible for the people to give control and to monitor the process to see how the judges act, behave in performing their duties.

One example, when they give a ruling and we want to see whether it is being objective…. (noise)… When that particular judge give ruling, did they have strong constitutional reasoning behind it? And second, what about the judge in this case, is he/she free from any violation, free from conduct violation when

giving the verdict, or when they are mingling with the society? So those are more perspectives . Based on my experience, at this time, as a judge, whether in constitutional court or prior, so the role of the constitutional court of negative legislature are ….. wanted to be understood as …..(noise)…..

So, both of judges give a verdict quickly when related to reviewing regulations . We must see regulations as a system, meaning that every article is connected with other articles. Specifically in article one, article one is a general stipulation. It has strong connection with other articles. So when the next article, you want to review it, then that will have a strong implication towards other articles. So if you do not dismiss other articles … those articles… then automatically will lead to ULTRABETITA (?). Or you can say, the second reason, if those regulations are dismissed, than other implications would be there will be a vacant in power, judicial vacant you can say. And, therefore there must be solutions to this vacancy. And it's not just we look at it as black and white, but the implication of dismissing such regulations on the floor in real life, we must be fully aware of it as well.

So, if we keep up, if we let this vacancy or in justice prevails than it will be dangerous. …(noise)…. If the issues are not handled, and all people who are not …. (noise).. we need to agree that injustice... (noise)... but we need to all agree that we cannot let injustice continue and then finally in regard to applicatorial power (noise)…..

I would like to remind you that ruling…(noise)…. The court that requires to execute application in terms of asking the system from state power that they want to execute… condemn in nature ….. sometimes … if they cannot be executed, they have … they are able to able to appeal so that the court can assist them or they can ask for assistance from the court. But we do need to know that the ruling of the constitutional court of the Republic of Indonesia, in general, is equalotry in nature. So, if one article is declared to contravene with the constitution and then, if it is executed by a certain person or state institution, then that individual or state institution, … they have to ask support to be able to execute this. The first article is related to police investigation, for example, the legal aspects that have been undertaken can be directed to the court, so not just the constitutional court. They don't go to constitutional court and ask the constitutional court to order … (noise) …. (pause… no sound) ……

If one article….with the constitution, and then if the execution carried out or

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

SESSION TWO

Democratization of Lawmaking Process

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

VERBATIM OF SYMPOSIUM

The International Symposium "Constitutional Democratic State"

Jakarta-Indonesia, 11 – 13 July 2011

Venue: Shangri-La Hotel, Jakarta
Monday, Day Two : 11 July, 2011

SESSION II
DEMOCRATIZATION OF LAWMAKING PROCESS;

One of the necessities in the endeavors for democratization in the lawmaking process, is to involve the active participation of the people

PANEL I

MODERATOR
Zainul Daulay

SPEAKER 1
Hon. Claudio Ximenes,

President of the Tribunal do Recurso of Timor Leste

Section 95 from the Constitution established that is is (07:33) up to the Parliament to make laws on basic issues of the countries, domestic, and foreign policies. This section presents a long list of matters over which the Parliament has exclusive powers to make laws, such as borders of Timor Leste, the limit of territorial water, the exclusive economic area, and the rights to the adjacent area in the continental shaft, national symbols, citizenship, right,

freedom, and guarantees, a status and capacity of a person, family law, and inheritance law, et cetera.

Section 96 in the Constitution establishes that the Parliament may authorized the government to make laws on a list over matters over which the parliament has exclusive jurisdiction. Such as the definition of crime, sentences, security measures, and the respective prerequisites. Definition of criminal procedure, organizational judiciary, and status of magistrates, general rules and regulations for the public service, the status of civil servants, and the responsibility of the state, general bases on the organization of the public administration, monetary system, banking and financial system, definition of the basis for a policy on environment protection and sustainable development, general rules and regulations for radio and television broadcasting and other mass media, civil or military services, general rules and regulations for requisition and expropriation for public purposes, et cetera.

Laws authorizing legislation shall define the subject, sense, the scope and duration of the authorization which may be renewed. Laws on decisive legislative authorization should not be used more than once and shall lapse with the dismissal of the government with the end of the legislative term and with the dissolution of the national parliament.

Section 97 of the constitution establishes that the power to initiate laws lies with the members of the parliament, the parliamentary group, and the government. Although for the sake of the principle of separation of powers and institutional cooperation, there shall be no submission of bills, draft legislation or amendments involving, in any given fiscal year, any increase in State expenditure or any reduction in State revenues provided for in the budget or rectifying budget.

As the confirmation of the broad legislative power of parliament, section 98 establishes that Statutes other than those approved under the exclusive legislative powers of the Government may be submitted to the parliament for appraisal, for purposes of terminating their validity or for amendment, following a petition of one-fifth of the Members of Parliament and within thirty days following their publication. The parliament may suspend in part or in full, the force of a statute until it is appraised. Where termination of validity is approved, the statute shall cease to be in force from the date of the publication of the resolution in the Official Gazette, and it shall not be published again in the same legislative session.

The legislative process is a complex process involving a series of acts carried out by different state parish: the parliament, the government, the president of the republic, and eventually the supreme court. This process involves several stages : the phase of legislative initiatives, the presentation of a text of normative concepts, a piece sets, a bill called projecto de lei when presented by the parliament or a parliamentary group or proposta de lei when presented by the government, the phases of hearing, to collect data in order to analyze the content of the legislative process and whether or not the legislative procedure is appropriate, the phase of decision whether or not to approve the bill or propose the law. So, this included voting in general,

voting in detail, and final overall voting should take place in this phase.

Another phase is the phase of control. The control is done by the president of the republic and eventually by the Supreme Court. It is the responsibility to sign the bill pass by the parliament. The president may decide to promulgate or veto the bill pass by the parliament and sent for enactment. But before deciding whether to enact the bill or not, the president may request the Supreme Court to decide whether the bill pass by the parliament violates the constitution. When the Supreme Court decides that a bill sent to the president for enactment violates the constitution, the president may ask the parliament to redraft the bill in accordance with the decision of the Supreme Court. When the president of the republic does not promulgate a bill on the bases the Supreme Court has decided that the bill violates the constitution or by exercising the political veto, if the parliament confirms its vote by an absolute majority of its members in full exercise of their function, the president shall promulgate the bill. By the enactment of the bill by the president, the legislative process is complete, but in a democratic state, based on the rule of law, the citizens are entitled to know that the law exists. Publication of the law in an official gazette is prerequisite of its effectiveness.

Timor Leste is a 9 year young republic that holds many challenges for the government. The rate of illiteracy is high, the ignorance about the state institutions and their functioning is high, but so are the expectations of the people that those exercise on the power on their behalf to use this power for the benefit of the people. The heads of the state institutions have no long experience. It's a 9 year experience. Period. But in practice, both the government and the parliament had been involving the relevant institutions and other stakeholders in the law making process through public consultations. Despite the urgency to pass the laws required for the functioning for the various institutions and the regulations of the various activities in the country, the government and the parliament has been conducting public hearings and express openness to hear and accept contributions of the institutions directly concern nongovernmental organizations and other institutions of civil society as a practice.

In conclusion, I would say that the law making process in the young Timor Leste Republic has a highway of democracy either by the legislative in constitutional framework, either by the operation of the system, and either by external transparence. Thank you for your attention.

SPEAKER 2

Hon. Ignatius Mulyono,

Chairman of Legislation Board of The House of Representative of the Republic of Indonesia

Thank you for all fellows who attending this international symposium, mister moderator and all participants. As we all know, the function of Indonesian parliament has three parts, legislation, supervision and budgeting.

And with this remission, I would like to present only on law making process, democratization on law making process. From the parliament it's already stated that law quality has to have four issues mainly. But the law is needed as the need of the people that the law can support the implementation of the governance that the law is not contradictory to the 1945 basic constitution and not contradictory to the existing law and the last is to have elements related to Pancasila. It is no doubt about of the capability and knowledge of the founding fathers of Indonesia in relation to the democratic concept and the thoughts in any parts of the world. The terms of democracy will not be found in Pancasila. However, the concept of democracy was firmed from concept that was obtained from the culture of Indonesia. The skill and knowledge of Indonesia for statesmanship has been there for thousands of years as you can see from the kingdoms that we have in Indonesia. The Indonesian country was not founded by and for one person, not for and by one group, but for and by everybody. At least there are true three issues in the basis of Pancasila that support how democracy is implemented by the state. Mainly the wisdom, the consensus and representation that keywords explain the aking os parliament national assembly as the member has to discuss about all national issues to obtain wisdom for the benefit of everybody, not individual or group. These concepts give us opening of next discussion related on how democracy on the law making process. This presentation has shown how the development of law making process has developed that reflects the success and the challenges of suffered Indonesian parliament related to the law making process and development of democracy in Indonesia.

The democratization of law making process

The development that happens is that the sociological and political dynamics of Indonesia creates great influence and significant influence to the democratization development in Indonesia. Before the reformation era, the people's consultative assembly got bad stigma, which is only as formal approval providing legitimacy to all law that was submitted by the government. To have a proposal of law was a difficult thing to do at that time. And these could not be separated from the political and social condition in which the selection of parliament members was conducted through an election that was not, that did not put democracy upon everything. Political party that did not function optimally, member and also the freedom of opinion is very limited and we had limitation of the process as well. And then with this reformation was mark by the changes of 1945 basic constitution of Indonesia, where we have four amendments from 1999 to 2002. The changes of the basic constitution of the Republic of Indonesia later on became the basis and the turning points in the democratization of law making process. The changes of the basic constitution of Indonesian Republic article 20 paragraph1 explicitly stated that the people representative assembly has the power to draft laws. This basic principle, this basic law, changes the article 5 of basic constitution that stated that the president has the jurisdiction to form the law and with approval from the parliament, in which giving the president rights to give the proposal of law to the parliament. But with the changes of 1945 basic

constitution actually stated the swing of power making, the law making from the president to the parliament. An addition to the law making process was also followed by other democratic instrument mainly the election of honor and secretive manner and followed by the freedom of opinion and press. And the democratization process which the main purpose is to determine the representative of the people in the parliament which has been perfected by various processes and the process is with the elimination of limitation of political parties where there no longer parliament member appointed and also we have national independent election held routinely. The construction in the law making process also changed after the 1945 basic constitution with the formation of new institution which is the regional representative assembly and also constitutional court. Based on the article 22d paragraph 1 and 2 of 1945 basic constitution, DPD (regional representative assembly) can propose law to the parliament based on the regional autonomy, based on the area, related to the development of economy and also to the balance of budgeting of national and regional. And also, regional representative body started the discussion related to regional autonomy, relationship and also regional economy and regional resources management, and as well as balancing of budgeting between national and regional and also give those of parliament the draft of laws in regards to the state budget expenditure and also draft of laws in relation to tax, education and religion.

The authority of the constitutional court among them is to sit on the first and formal instance with final binding decision of judicial review almost against basic constitution. Based on this basic constitution, the formation of law does not only involve DPR and president but also involve the new institution namely the regional representative assembly, especially if those laws are related to regional matters as stated in the constitution. It the materialization of democratization in the law making process because the interest of the region represented by DPD which has space in the development of law itself where the institutional court that had got the authority to review the law against the basic constitution is the form of democratization in which we have the institution that creates interpretation and see whether there is contradiction between the law and the basic constitution.

In regards of public participation and transparency

The formation of democratic law generally links to the problems of transparency and public participation. In political normative, the underlying condition had been quite organized in the regulation and legislation namely law number 10 of 2004 on the formation of legislation that regulates the participation of the people in chapter 10 of article 53 which stated that society to give verbal or written inputs to prepare or discuss drafts of law. Next in article 153 of law number 27 of 2009 stated that in the completion of debate including the discussion of the budget, the public community has the right to give verbal or written suggestion to the house of representative through its members or the heads. The members of the house of representative or other organs that discuss the bills can conduct activities to obtain inputs from the

people. Further conditions about the procedures of inputs and also absolution of public aspirations in the preparation and discussion of the bills are regulated in the bylaws of the house of representative. The bylaws of the rule of codes of the house of the representative organized in the public participation in the article of 2000 article 208-211. Based on these, the public can give oral or written feedback to the house of representative of the process of 1) restructuring and setting on the motional legislation progress in which in the process DPR would obtain inputs from the stakeholders and the people as well as from the DPD, from other commissions and also from other institutions which later on will be discuss with the government representative of the ministry of law and human rights and then 2) in the process of dual preparation and discussion, DPR always conducts hearing with the people and also other stakeholders in regards to various inputs needed for the discussion of the draft of law conducted by DPR and the government and also will put the inputs and the existence of DPD when the discussion is related to what is the jurisdiction of DPD. Then next in the discussion of the dual on the state budget overseeing the implementation of the law and implementation of the government policy, if the inputs is given in writing and the inputs is delivered to the members and if it is in oral then the law has special committees and also other organs and budgets that will determine the number of people invited in for meeting which is in the hearing, public hearing meeting, the leaders of commissions and committees as well the budgeting head would convey the invitation to the people invited to attend this meeting. That person obtaining the inputs will inform these responses from the feedback through letters or through electronic media. Related to the transparency, article 200 of law number 27 of 2009 the people representative assembly, the house of representative and the regional representative council stated that the meeting in the house of representative are actually open unless the meeting is determined as closed. In the implementation, the house has conducted activities to absorb the aspiration of the society in all stages of legislation, starting from the planning, preparation and discussion. The absorption of aspiration among others may through public hearing, work visit and written inputs whether through mail or electronic mail. And the aspiration acceptation is going to be more optimized through the mechanism in the increase of capacity system so that they are able to collect and process the inputs and be presented to all members of the house as the topic to determine the attitude and decision. The transparency process can be more optimized by increasing the rule and cooperation of the mass media, both printed and electronic publications, to inform the developments of the discussion of the bills and do not only select certain plan which is attractive because all bills has equals importance in meaning.

Challenges that we face

Democratization in the legislation can be set to be on the track but unarguably there are problems and difficulties. Problems associated with the process of legislation cover two principal issues namely the process and the substance. Concerning the process, the process of the development of bill in the house of representative from planning, organization and discussion

takes relatively long time. With the member composition of the house of representative consisting of many fractions, the discussion to reach the consensus is more difficult and it will take time. In addition, many discussion of bill will be done in parallel in various parliament bodies provides/gives implication on the legislation itself. In regards acceptance, through the opinion and obligation of the house of representative as much as possible aspirations from the committee, the house gets a lot of inputs, but community aspiration is not always the same and sometimes they are even in conflict, therefore the house is often faced with the dilemma regards the differences of interests. The formulation of policy will always be associated with different interest to be considered. The employment management policy has aspects of interests of employers and workers, and also the aspects of trade policy of producers and consumers etc. In regards of this, with the existence of constitutional court, as the constitutional guards, one of its duties is to test the law of constitution has very important meaning. Passing of the law against the constitution is one of the reflections of democracy. The testing of the law against the constitution should be seen not to place the house of the representative and the president as the law maker, but as defendant and the applicant. As the prosecutor, constitutional court merely reviews to see whether there is contradiction formally or materially between the law and the basic constitution. And through the capacity of forming the law is to give explanation related to the background associated of formulation of the articles in the law.

As a closing, we can say that the democratization in the process of legislation is already in the right track. However, we still need to have more done regarding the process and the substance in the legislation. Democratization of legislation in Indonesian should be done in Indonesian context, which is not in the democracy for individual or group but democracy for all. In other words, laws are formed not for the benefit of individual or group but for all Indonesian people. Constitutional court according to its task and authority has a very important roles namely to keep laws made by the parliament and the president are still constitutional.

Thank you very much for your time.

SPEAKER 3

Hon. Stasys SEDBARAS

Chairman of Committee on Legal Affairs

The Parliament (Seimas) of the Republic of Lithuania

First of all, I would like to express my sincere gratitude Indonesian leadership, primarily the Constitutional Court and its Chief Justice as well as all the organizers for the perfect arrangements of this international symposium and the great hospitality.

My presentation on the issue of legislative procedures and further plans for democratization of the legislative process in the Republic of Lithuania has

been already published and distributed to you. Therefore, I am not going to restate this to you today. After listening to the keynote speeches of the President of the Republic of Indonesia and the Chairman of the Constitutional Court, as well as presentations of other speakers, yesterday and today at the Plenary Sessions , I would now like to moderate on a few ideas.

First, a few words on the relation of the parliament and the constitutional court of the Republic of Lithuania. While the parliament's function is a part of legislation, the constitutional court's role is the so called negative legislation. Elimination of laws and other legal acts that are not in conformity with the Constitution. The Lithuanian Constitutional Court started its activities back in 1993 and the basis for its organization and activities were set in the Constitution of 1992 that is still in effect in Lithuania today. I myself was honored to be one of the first justices of the Constitutional court. When starting our activities, we raised the questions to ourselves : what are we? What right do we, the justices appointed by the parliament, have to question decisions adopted by the parliament that was elected by the nation As a matter of fact, we found an answer to these questions in the constitution that was adopted

QUESTIONS AND ANSWERS :

Moderator:

Thank you Ms Lita. I think there are 3 questions and all of them addressed to Mr. Mulyono's presentation from our parliament as the legislative in Indonesia. So I give the floor to you Sir to answer the question.

Bpk. Mulyono:

Thank you Ms Moderator, Honorable delegates from the friendly nations who are here and ladies and gentlemen.

I would like to answer the last question first. And then after that I'll move up. About the follow up to the Constitutional Court's decision. Actually there is no detailed regulation about this and that's why the process has not done as appropriate. We are trying to amend Law no. 10 year 2004 and we have decided on how to follow up the decision of the Constitutional Court. So we already include that in the future amendment to our law, namely Law no. 10 2004. Secondly, we are more emphasizing on political interest for 2010 and 2011, we are more concentrating on finishing the political laws aside from other laws whereas laws related to legal product we are trying to concentrate on setting order on the institution of law itself. So it is about the Constitutional Court, Judicial Commission and the Supreme Court, so we are trying to complete laws on those three bodies this year. About the political laws we want to finish it two and half years before the next election. So, we hope for example the general election law and registration for election law and also the presidential election law and also the national and local legislative law and the local election law. All of them should be done in 2011. With relation to the substantive law namely the criminal court and the criminal

procedural court, that's actually, the draft is actually the responsibility of the government. So, if we see the process throughout the 2010 and 2011, we are trying to concentrate on those issues. *This is to answer Ms. Lita's question.*

To Ms. Gita, the allegation that it is very hard to get response to the public inputs when talking about the substantive law, well we can say that where are trying to make the national legislative program, we got 195 draft law from the public, and then 126 from the DPD and 136 from the political parties and a number from our members. What I am trying to say, is we are trying to give ample attention to the inputs of our people for our legislative program. So we are trying to accommodate those inputs and also incorporating 170 draft laws from the government. That is why we have these 270 laws that we have to complete in two years. And then about the input where we are trying to do our work plan and we go to the region and we meet our constituent, we put it in a matrix and we consider that in our deliberation. So, if you say about attention, we have given you undivided attention, until now we have even cooperating with universities in trying to draft a law. And from these universities scholars we get the academic papers and basic draft laws and after that we deliberate this amongst us and we tried to hand this to the commission if these laws have to be deliberated by the commission. After they deliberated that, they returned it back to the plenary and we try to harmonize it. So, with relation to, that we have to incorporate public opinion, I think we have tried as much as possible. So that we integrate all of that opinion in our work and sometimes we even engaged in direct cooperation with the universities and the problem is basically is to enhance the quantity. In the supervisory function of the parliament when one commission has twelve working partners that take more their time from Monday to Friday, compared to the time given by the legislative team to finish the law. The legislative team, when they finish they only deliberate on Wednesday and Thursday. And sometimes the time was taken up with the supervisory function. Because I think the parliamentarians are interested in their supervisory function rather than legislative function. So, that's one of the reasons. And secondly, we need to rethink about how can we formulate a quality law in the shortest time possible but not jeopardizing the process. Because we know that the process of law drafting is very long. For example, the draft law prepared by parliament than given to the president to get the decision from the president and then the president approves and then president will appoint which ministry that will be representing the presidential stance and they will have the deliberation in the ministry and within the second echelon of the ministry and then it will be sent again to the president in order to be promulgated by the president and then it will become a law and it will be publicly disseminated. So the process to draft law is very long, so we have to start to rethink about this, so maybe we can make this process to be shorter.

Mr. Nandang Alamsyah, what you are trying to say is something that we have been considering with regards to the Law no 10, 2004. Without any police force or enforcement power, indeed the law cannot be enforced. And also about the sanction, there has to be a clear sanction for violation. And we have also the expiry date for government regulation, we say that it should

be only one year, so if there is a law says that there has to be implementing government regulation, this has to be implemented or this has to be formulated within one year. And you all should be the supervisor of this process. If you see government regulation that should have been issued but it too delayed, it should be reported and we see there are even laws, they are nine year old but the implementing government regulation is not issued yet. So, this is something that we are to be concerned about in order to make a better laws and regulations.

PANEL II

MODERATOR
Fajrul Falaakh

SPEAKER 1
Hon. Renato C. Corona,
Chief Justice of the Supreme Court of the Philippines

Indonesia's transition to the democracy somewhat a kin to the path taken by the Philippines. Like Indonesia, which has been under three Constitutions since its independence, we have had three Constitutions in our relatively short history of a 20th century of democracy. Our first Constitution in the post 1900 era was a 1935 Philippines Constitution.

It came into being when our country was still a colony of the united states, a period which spanned 48years from 1898- 1946. The governmental structure therefore practically mirrored that of a U.S. government, with a president, vice president, a comdes made of an upper chamber called the Senate, led by the Senate President , a lower chamber called the House of Representative led by a Speaker and lastly a Chief Justice as the Head of Supreme Court.

We do not have a constitutional court, in the Philippines, the supreme court is also the constitutional court. The members of the cabinet are appointed by the president and report directly to him. Our colonial era 1935 constitution was replaced by the 1973 constitution which change the form of government from the presidential to parliamentary, it resulted in the abolition of the Philippines Senate and the creation of the office of a Prime Minister with an authoritarian President retaining his executive control and exercising legislative powers. Following the dismantling of Martial Law in 1986 in the political demise of former President Marcos, the nation witnessed the birth of a new Constitution, today referred to as the 1987 Philippines Constitution. The 1987 Constitution saw a return to the democratic, republican presidential form of government; the abolition of the unicameral assembly and reversion to a bicameral Congress and significantly, the expansion of the powers of the Supreme court among other amendments.

The 1987 Philippine Constitution states that : the Philippines is a democratic and republican state. Sovereignty resides in the people, and all government authority emanates from them.

This statement is the most important of our constitutional principles and it sets the stage for other principles to follow.

Our sovereign state is characterized as the "repository of legitimated authority" and is described as democratic and republican. The characterization, however, is by no means coincidental.

Democracy, in its direct or pure form, is one in which "the will of the state is expressed directly and immediately through the people in a mass meeting or primary assembly." Stated simply, this means the direct rule of the state by the people, which is a virtual improbability in today's modern democracies because of population growth, expansions of territory and complexities of modern-day problems, although vestiges of direct democracy in the form of people's initiatives and referenda still exist at present.

Republicanism, on the other hand, refers to the formulation and expression of the will of the state "through the agency of a relatively small and select body of persons chosen by the people to act as their representatives." A republican form of democratic government thus espouses an indirect exercise of political power by the majority of the people through their duly chosen representatives. The possibility of breeding political extremism in any form is therefore considerably minimized.

A bedrock constitutional principle upon which the Philippine government is founded, and certainly one of the most undisputable hallmarks of a democratic and republican state, is the "Separation of Powers" of the three great branches of government (the Executive, the Legislative and the Judicial) and its built-in the mechanism of "Checks and Balances."

Separation of Powers is clearly provided for in the Philippine Constitution, which in turn is the "written instrument by which the fundamental powers of government are established, limited and defined and by which these powers are distributed among the several departments or branches for their safe and useful exercise for the benefit of the people." The philosophy behind the separation of powers was explained by James Madison in Federalist paper no. 51

He said that it was necessary to perform the abuses of the government as well as to give each department the necessary constitutional means to flow out the gradual concentration of power in any of them.

In the same vein, John Adams expounded on the rationale of this principle, he said "It is by balancing each of these powers against the other two, that the efforts in human nature towards tyranny can alone be checked and restrained, and any freedom preserved in the constitution".

Delineating governmental power between and among the three great branches guarantees their independence and vests them with the cloak of coequality and coordination in constitutional scheme of government. But the fundamental law, in order to safeguard against the possible encroachment and abuse by one or two among the three branches of government, not only grants

each branch powers "to secure coordination in the workings of the various departments" but more importantly provides each one certain powers "to effectively check or restrain the others from encroaching upon its domain."

The accompanying precepts of separation of powers, independence and equality enable each one to check on the acts of the other two, thus maintaining the extremely important balance among them.

Specific mechanisms of checks and balances among the three branches of government are provided for in the Constitution itself.

On the part of the Executive Department, the President, in the exercise of his veto power, may disapprove bills enacted by Congress. And with respect to his pardoning power, he may modify or set aside judgments of the courts.

On the part of the Legislature, Congress (consisting of the Senate and the House of Representatives) may override the veto of the President by a vote of two-thirds of the House where the bill originated, and another vote of two-thirds by the other House. It may also reject appointments by the President, either revoke or extend the period for the proclamation of martial law or the suspension of the privilege of the writ of habeas corpus by the President, amend or revoke decisions by the courts by enactment of new laws or amendment of old ones, prescribe, define, and apportion the jurisdiction of various courts, prescribe the qualifications of judges of lower courts, determine the salaries of the President and Vice-President, the members of the Supreme Court and judges of the lower courts, and of course, as we have been talking about this morning, impeach the President, the members of the Supreme Court, or other impeachable officers.

The 1987 Constitution established a powerful Judiciary of the Philippines. This was done through the enlargement of the jurisdiction of the Supreme Court, particularly on the redefinition of "judicial power" under Article VIII, Section 1. It has given the Supreme Court the power to ensure that the equilibrium among the three branches of government is always on an even keel.

Under the 1987 Constitution, the Supreme Court plays a vital and primordial role in maintaining and strengthening constitutional or republican democracy. In the system of checks and balances, the Judiciary, with the Supreme Court at the helm as the final arbiter of conflicting interests, has the power to declare the acts of Legislative or Executive branch invalid or unconstitutional.

That judicial power, also referred to as the "power of judicial review," is not new to our Supreme Court. It first appeared in our 1935 Constitution, which conferred upon Philippine courts jurisdiction over "all cases in which the constitutionality or validity of any treaty, ordinance, or executive order or regulation is in question."

The power of judicial review is the power by which the Supreme Court protects and preserves the supremacy of the Constitution. Running alongside this principle is the re-oft-quoted phrase that although the judiciary does not have the power of the sword nor the power of the brace, it has the power to interpret the Constitution and to declare any executive or legislative act invalid.

Nevertheless, despite the provision's salutary intentions, historical events, particularly during the martial law period from 1972 to 1986, unmasked the gross inadequacy of the "power of judicial review" as it was understood under the 1935 Constitution. The Judiciary was powerless to stand its ground against the iron fist of the then martial law regime. Thus there was a need to give more teeth to the Judiciary, the Supreme Court in particular, after the dictatorship was dismantled in 1986.

When the new government took over in 1986, one of its full first acts was to form a Constitutional Commission to draft the new charter. To strengthen the courts in the future, the framers famous of the 1987 Philippine Constitution expanded the Court's judicial power by giving it the authority to inquire into political questions where grave abuse of discretion is alleged.

The late Chief Justice of the Philippines Roberto Concepcion, an eminent member of the Constitutional Commission of 1986, authored the expanded jurisdiction clause. He pointed out that the role of the judiciary during the deposed martial law regime from 1972 to 1986 was anomalously marred by the all too frequent invocation of the political question doctrine as a defense in challenges against the government's authoritarian acts. The government, which had no valid defense whatsoever, was thus able to successfully whether all challenges to constitutionality or illegality by simply raising the political question argument.

Thus, with its expanded judicial power under the 1987 Constitution, the Philippine Supreme Court can now determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the government.

Although the meaning and complexion of the power of judicial review have undergone a reconfiguration under the 1987 Philippine Constitution, its essence as a U.S. constitutional law concept continues to influence our legal system.

There are, however, limitations to our Court's power of judicial review and they are in the form of proscriptions against deciding questions pertaining to (1) legislative policy or the rules come of the legislature to pass lost and (2) acts, even political in nature, are not alleged to have been exercised with grave abuse of discretion.

Needless to state, it is through the exercise of this power of judicial review that our citizens are assured that their chosen form of a democratic and republican government will always operate within constitutional bounds.

In any democracy, conflicts within great branches of government inevitably occur. But it is well to remember that when the Philippine Supreme Court invokes its power of judicial review, it neither asserts its moral ascendancy or dominance over, nor encroaches on nor interferes in the powers of a co-equal branch of government. In the words of the late Justice Jose P. Laurel:

> "when the judiciary mediates to allocate constitutional boundaries, it does not assert any superiority over the other departments; it does not in reality can nullify or invalidate any act of the legislature, but

only asserts the solemn and sacred obligation assigned to it by the Constitution to determine conflicting claims of authority under the Constitution and to establish for the parties in an actual controversy the rights which that instrument secures and guarantees to them."

Various issues affect the Philippines at the present, concerning delineations of power and check-and-balance mechanisms between and among the three branches of government. These state institutions continue to be intentionally or unintentionally pitted against each another in a complex battle of wills. Taken positively, however, these are, to me, palpable and normal manifestations of a healthy democracy.

2010 saw significant changes in the Philippines. A new president stands at the helm of the governmental machinery. A new legislature has been elected to Congress. A new Chief Justice, yours truly, sits at the head of the High Court.

In the final analysis, only through proper respect and coordination among the three branches of government, vigilance in checking each other's possible constitutional transgressions and maintaining the desirable constitutional balance can we avoid the danger of a constitutional crisis and societal anarchy.

On that note, permit me to thank you once more for this opportunity to address you. A pleasant day to all of you.

SPEAKER 2

Hon. Benny K. Harman,

Chairman of Law Commission of The House of Representative of the Republic of Indonesia

Democratization of a Law Making Process

I was asked to present a topic considering democratization of a law making process; in this case we're talking about making law here.

I'm not going to read the paper but I'm going to save few highlights within this fifteen minutes and I hope that some of the issues that I'm going to raise can surface here within this fifteen minutes. I will start now with the introduction. I would like to say here that it is important to have a law in a constitutional democracy state just like here for example in Indonesia, there are three important principles here whilst the law is important, the first one is that a law can provide a principle or basic activities in conducting the power of state.

The second one it is because a law usually also has its vision and mission that the government would like to achieve and then the third one, since actually a law is reflection of a wish of the sovereignty of the people and therefore that's why the positional state is not only a state that base itself as a law, but it can also be understood as a state that runs based on the wish of its people, democracy. But the main issue here is how we can assure that a law can really reflect the wish of its people, of the public. In the country with

direct democracy system, it is not an issue since it is the people who directly taking the part of writing the law. But the problem will come up that, if we talk about representative democracy, in which that the one who produces the law is the representatives of the people who are elected by the people through the general election mechanism.

The powers of the legislatives are given through the mandates that given to them through the general election. Usually it is the quality of the general election that will also determine the quality of the representatives. So although the power or authority of this legislative are directly acquired from the general election, but it does not directly guarantee that the law produced will reflect the wish or reflect what people want in a state that implement democracy it can also happen that in which that the representative here misabuse the power that they acquire for the purposes that do not or are not in line with the wish of the people.

These opportunities for the misabuse of the power by the representative in the making of the law can take place if the political power dominates this house of representative and therefore, it is my opinion that as state that use this representative system in its process of making laws still needs a strict supervision by the people so that the law that they produce can really reflects the wish of the people so that the law produced by the representative who are elected through the general election can really reflect the wish of the sovereignty people and are not simply becoming instruments of a dominant political power in the house of representative.

And therefore I really, highly appreciate our constitutional court that chose this topic as the main important issue in this symposium.

And next I would also like to discuss a bit about the power for the making of the law. I think it's necessary to discuss because the difference, like in the Philippines for example, is different to the constitutional system that the Philippines has in which that it has a very strict definition between the legislative power and also executive power which one don't point to perform the law.

Indonesia, after the reformation era in 1998 has clearly stated in its constitutions that it is stated highly adhere the constitutional democracy.

This has also even been emphasizes in the 1945 Constitution that has been amended in 1999. Through this emphasize, it means that Indonesia, since the reformation, the democracy believes that we go through is not an absolute democracy anymore. The democracy that we adhere to it's not an absolute, it means that it's not limitless but it is limited and there is a limitation by the constitution.

The law that reflects the wish of the people should follow the constitution. It means that any laws that is produced by the legislative can be canceled if these laws, can be annulled if the law if it is against the wish of the people. Regarding the making of the law, in our constitution it is clearly stated the process, the question that often comes up is that who or which institution has this power to propose a bill in Indonesia.

In one of the articles in 1945 constitution article 20, clause 1, it is clearly stated that this authority is in the House of Representative has the full authority to make law. If we only refer to this article, the authority to make law that the legislative body is imposed on the parliament. However if we see this article again on the clause 2, we can conclude something else, it says that in Indonesia has submitted the power to make the laws to two institutions so we have 2 legislative bodies, which are the DPR or The House of Representative and the President.

Why? Because the clause 2 of the article stated that each bill shall be discussed by the house of representative and pres in order to get a joint agreement. This stipulation of the clause 1 and clause 2 of the article 20 emphasize two things.

The first one, the power to make the law is in the hand of House of Representatives and President. So, we talk two in one here. It's different like from the Philippines.

And then the second one, the constitutional system in Indonesia do not see the difference between executive and legislative power. There is no separation of power. Why so, because as I have already said before that in the clause 1 and 2 is said that the bill cannot be discussed or approved by the member of House Representatives themselves, no, it's not possible, but this bill has to be jointly discussed by the House of Representatives and the President. And then besides being discussed both by the House of Representatives and the President, this bill has to get also a joint approval by House of Representatives and the President in order to legalize it to become a law. Therefore this joint discussion and this joint approval from both the House of Representatives and the President are obligatory in order to pro legalize a law .. a bill to become a law.

Therefore it would be non constitutional if a bill is only discussed by House of Representatives or only discussed by President. The law produced through this process would clearly be unconstitutional. The system such a system that I said here, discussed here this is the constitutional system that we have in Indonesia do not see the separation between the legislative power and executive power. The system- the governmental system- that we have, such a governmental system we have like this has also the consequences- constitutional consequences- although the original idea to provide the legislative power to President and DPR actually aim at creating a good check and balance between an executive power and legislative power. However, in its realization, in its practice, this type of constitutional system also bring about its own complication.

The first one, the position of House of Representative and President in the making of the law is of the same strength. Since both House of Representative and President are directly elected by the people through a general election.

Secondly both have legislation from the people and therefore House of Representative cannot neglect the President as well as President cannot neglect the House of Representative in the making of or in the discussion of a bill.

And then next one, in the discussion of a bill can also create an issue since for president maybe it's not an issue because of president because in this case has no problem in the making of decision but for House of Representative we have an issue. Why? Because House of Representative of Indonesia as a result of previous general election consist of 9 fraction from 9 political parties and the members we have 560 members. So, you can imagine here how difficult it is for House of Representative to produce a law or a bill, to produce a bill

The third one, the political system that I have discussed before for us here in Indonesia in which that we use the presidential system with the multi parties has also its own constitutional risk. The first one is that there is a threat that the government become in effective. Why so it's because if the president comes from a political party that do not have the majority in the House of Representatives so it becomes in a way minor the government so there is a big possibility there is a compromy between the House of Representatives and the President and it's quite difficult to be in one. And if it happens then the President will have obstacle in running the government and the government becomes ineffective. Besides that in order to maintain the effectiveness of the government, President quite often in order to gain the support will conduct what so called transactional method that quite have potential to violate the democracy values. These are all theory-theories- that I am talking about. This is not based on our own experience. So I don't want people to think that as if this is what really happened here in Indonesia.

(is my time up?)

The time is up, maybe we can have further discussion during questions and answers that (after your) presentation you surely raise your questions.

SPEAKER 3

Hon. Mohammed Abbou,

First Vice President of the House of Representative of Morocco

(Presentation from the first VP of the House of Rep of Kingdom of Morroco, so it will be from Mr. Muhammad Ahram)

Democracy, it is a good valuable opportunity for us to share ideas and opinions on best ways to improve and strengthen a state that is based on the rights and law, based on participation on pluralism as well as good governance and equal opportunities, and I hope that we can learn few things here in order to help us in to dedicate our institutional state that can response to the wish of the people and our citizen.

On this opportunity, I would like to express gratitude to the Chairman of Indonesian Constitional Court, who have invited us to take part in this international symposium, since when we take into view that have a lot of challenges and please also allow me to express how proud I am that we are from the Kingdom of Morocco.

Bounds all of us here and also other people and we have good relations between both countries.

Ladies and gentlemen, participants of the symposium, I believe that symposium is very important because of transformation that is taking place in our world right now especially for the past few decades that really put the values of democracy and the principles of state of law become the biggest priority of the demand of the people that really become the struggle of all nations around the world.

This shows that we believe the importance of the decision of the people in the making of decision and also to keep the secret of the constitution. And for the past few decades this has changed improvingly in which that it becomes a central institution for a democracy system and create room for us to express our opinion. Members of parliament also play an important role in performing their constitutional rights and also, in order to control the performance of the Government as well as for the diplomacy that they conduct. Members of the parliament also provide a qualitative production such as legal text, be it in the discretion between discussion between the members of the parliament and also through the amendments as well as agreeing on expansion of the human rights as well as the participation of the people in managing their rights at the national scale and therefore, there comes up several components of the people of Morocco in which that they see there is additional value for the parliament in which that they can also realize the value of democracy or the mention of democracy there.

Ladies and gentlemen, for the past few days, Morocco has, I'm talking about at the beginning of July, in which that Morocco has produced a political milestone in which we reform our Constitution in order to strengthen the democracy building that we have in order also to improve the separation between authorities that we have in which we also try to dedicate pluralism as part of the identity of Morocco.

Another objective that has also taken part in our country is that our determination to uphold the values of differences and also the freedom of individuals as well as collective and the new Constitution that we have is a kind of quantum leap and also a transportation for us as part of constitutional journey of our country. Here, we always try to take into consideration any changes that may take place because of what we have done and also by taking into considerations any suggestions by political parties as well as any organizations, human rights organizations as well as civil society.

Ladies and gentlemen, I may not have enough time to talk about the most important implications of our new Constitution but I would like to emphasize here several things. First, there is the sovereignty of the nation. Second, there is separation from all of authorities. Third, there is an emphasis of a real agreement of the rights of the people as well as the freedom, the basic freedom for all. Fourth, strengthen of the control mechanism for a good governance and then to strengthen also the quality between men and women and then to approve the democracy option and it cannot be retracted in order to give more power to the parliament as law as become the single regulatory

system and if we have a democracy system to elect a prime minister and also improve strengthen its power to produce policy. And then ninth, to improve the supreme law system as independent nation. And then, the last one is to strengthen the protection of human rights.

Besides all these jurisdictions that we have produced, the Constitutional Court also has important for this new reengineering of constitution in which that it has its own chapter consisting of six clauses regarding how the appointment of the Constitutional Court in which that it will consist of twelve judges in which that each of them will have a tenure of nine years and cannot be extended and then six of them will be announced by the King, but they are also proposed by the other member and while the other half will be elected through an election by chamber in which that the majority of the two-third majority of each chamber will have to vote.

So here from these people, these judges, we have a court according to their own criteria and ethic and must have good education and have law competencies and also good management and also their integrities acknowledged.

Regarding jurisdiction, we have also expanded in which that people can complain to the constitutional system court if they have something to complain. This is in order to improve Constitutional Court become the highest supreme court. Before and after that, the court's decision can produce a law that will bind all authorities that they have in our country. And it's also important to know that the transition we have from this constitution to this new constitution we also have an extraordinary value, moral value, for those who want to challenge the decision that they have.

Ladies and gentlemen, maybe here I would like to say that greetings from the chair and also members of representatives from Morocco and this on their behalf, I would like also to say and express our proud of the democracy building that we have here in Indonesia in which that you celebrate the 8th anniversary of the Constitutional Court of Indonesia. And we really highly appreciate your achievement that you can really improve the sovereignty of the law and constitution in a severe society like here in Indonesia. And I'm sure that the communication channel that we have had so far in both countries will also become stronger through this constitutional court that we have produced in Indonesia and we state that we want to have a better bridge within both countries in order to serve for human rights. And we hope that it can produce a better result that will be satisfactory for both bilateral relation between both countries.

Because of the changes of the country in Morocco for the past days also in this year. And also because of the improvement of the constitution that here they have and I can see also the role of the constitutional court in Morocco is improved in order to maintain the rights of the people. Now, Morocco itself has already been presented for its constitutional democratic kingdom in reason that it has a system, the parliamentary system Mr.Mohammed Abbou also explained the roles of the parliament while also expressing the greetings from the parliamentary members to the parliamentary members in Asia and also third members of the constitutional court in Asia, and he also explained

that their parliamentary is the way of trying to improve their performance and also trying to supervise or monitor the roles or the acts of the government.

It is true that the country maybe we can say more or less alike Indonesia in which it also prioritize pluralism. It is also part of multi party country. And it is also very interesting when he explained how the constitutional court there follow the kind of like French system, in terms of its parliamentary member because it has like twelve constitutional judges, but six of them are appointed by the king and the other six are elected by the members of the parliament of both chambers through the tutored vote, and with the tenor of nine years.

And surely as an institution that needs to develop itself as well as to strengthen itself and power itself, he also said that it would be wonderful if they can work together with other colleagues from Indonesia and also from other countries in order to jointly improve the democracy and the constitution in the country.

QUESTIONS AND ANSWERS :

Moderator : Review and closing of Panel II Session two

Establishing the rule of law, distribution of power, abuse of power, fair and justice general election, also independent tribunal are required to establish a country. But because of different political backgrounds within countries, we have some kind of some similarities but also some differences to achieve the quality of applying the principal of democracy.

I think this is actually the closing remark of our discussion, and thank you very much I would like actually to give you warm welcome to all speakers and our participant. Would you please give welcome to our speakers.

The last but not least, I would like also to express my kind of regard to yourself. And also if there is some mistaken, language, expression, because of technical problem, mechanical problem. So we sometimes disturb by this kind of mistake technology. Thank you very much and assalamualaikum warahmatullah wabarokatuh.

PANEL III :

Moderator : Okky Burhamzah

I'd like to invite the delegate from Thailand, Hon. Prajit Rojanaphruk. I invite you. Please give applause.

Speaker : Hon. Prajit Rojanaphruk,
Speaker of the Senate of the National Assembly of Thailand

Democratization of Lawmaking Process in Thailand

Participants, ladies and gentlemen,

As far as democratization of law making process in Thailand is concerned, the present Constitution of the Kingdom of Thailand 2007 provides that the Thai National Assembly comprises the House of Representatives and the Senate which may hold joint or separate sittings in accordance with the Constitution.

One of the main duties of the National Assembly is to enact the laws of the land. The process of lawmaking begins with the House of Representatives, i.e., a bill shall be first submitted to the House of Representatives. In general, a bill may be introduced by the Council of Ministers, Members of the House of Representatives of not less than twenty in number, the Courts or independent constitutional organizations whereby the Presidents of such Courts or of such organizations are in charge of the act; or by not less than ten thousand eligible voters. In introducing a bill, it shall be submitted together with an explanatory memorandum which shall be open for easy access to the public.

When the House of Representatives has considered a bill and passed a resolution of approval, the House of Representatives shall submit such bill to the Senate. The Senate must, in general, finish the consideration of such bill within sixty days otherwise it shall be taken that the Senate has approved it.

In case the Senate agrees with the House of Representatives, the Prime Minister shall present the bill approved by the National Assembly to the King for His signature within twenty days as from the date of receiving such bill from the National Assembly and the bill shall come into force as an Act upon the publication in the Government Gazette.

If the bill approved by the National Assembly has not received the royal assent and the King returns it to the National Assembly or does not return it within ninety days, the National Assembly must reconsider such bill. If the National Assembly resolves to reaffirm the bill with the votes of not less than two-thirds of the total number of existing members of both Houses, the Prime Minister shall present such bill to the King for signing once again. If the King does not sign and return the bill within thirty days, the Prime Minister shall cause the bill to be promulgated as an Act in the Government Gazette as if the King had signed it.

If the Senate disagrees with the House of Representatives, such bill shall be withheld and returned to the House of Representatives. If there is an amendment and the House of Representatives disagrees with it, each House shall appoint persons, being or not being its members, in such equal number as may be fixed by the House of Representatives to constitute a joint committee for considering the bill. If both Houses approve the bill considered by the joint Commission, the bill will be signed into law. If either House disapproves it, the bill shall be withheld.

In case of enactment of organic of fundamental. Acts as specified in Section 138 of the Constitution totaling nine Acts of this kind altogether, such organic law bills are to be introduced only by the Council of Ministers,

members of the House of Representatives of not less than one tenth of total number of the existing members of the House of Representatives or members of the House of Representatives and Senators of not less than one tenth of members of both Houses; or by the Constitutional Court, the Supreme Court or other independent constitutional organizations whereby the President of such Court or of such organization is in charge of the organic act.

The consideration of an organic law bill in the House of Representatives and the Senate shall be done in here readings as follows:

1) Voting for adoption of the principle of a bill in the first reading and section by section scrutiny of a bill in the second reading shall be made by a majority of votes of each House;

2) Voting in the third reading shall require affirmative votes of more than one-half of the existing members of each House. Other provisions concerning the enactment of an Act shall apply mutatis mutandis to the consideration of an organic law bill.

With a view to enhancing the democratization of law making process, Section 165 of the Thai Constitution provides that a person having the right to vote in an election shall have the right to vote in a referendum which may be held on the following grounds:

(1) The Council of Ministers is of the opinion that any issue may affect national or public interests, the Prime Minister, with the approval of the Council of Ministers may consult the President of the House of Representatives and the President of the Senate for the purpose of calling a referendum by publication in Government Gazette.

(2) In case where a referendum is required by law.

Before the referendum, the State shall provide sufficient information for the public and provide equal opportunities for the people to make their own decisions

The rules and procedures for voting in a referendum shall be in accordance with the Organic Act on Referendum which was enacted in 2009 containing the details of procedures for voting, referendum period and the number of votes required for the final decision.

On the question of constitutionality control on the enactment of law, the present Thai Constitution delegates the authority in this respect to the Constitutional Court. Section 154 of the Constitution provides that after the approval of any bill by the National Assembly before the Prime Minister presents it to the King for His signature:

(1) if members of the House of Representatives, senators or members of both Houses of not less than one-tenth of the total number of the existing members of both Houses are of the opinion that

any provisions of the said bill are contrary to or inconsistent with this Constitution or such bill is enacted contrary to the provisions of this Constitution, they shall submit their opinion to the President of the National Assembly as the case may be, and the President of the House receiving such opinion shall then refer it to the Constitutional Court for decision and, without delay, inform the Prime Minister thereof;

(2) if the Prime Minister is of the opinion that the provisions of the said bill are contrary to or inconsistent with this Constitution, the Prime Minister shall refer such opinion to the Constitutional Court for decision and, without delay, inform the President of the House of Representatives and President of the Senate thereof.

During consideration of the Constitutional Court, the Prime Minister shall suspend the proceedings in respect of the promulgation of the bill until the Constitutional Court gives a decision thereon.

If the Constitutional Court decides that the provisions of such bill are contrary to or inconsistent with this Constitution and that such provisions of the bill constitute the essential element thereof, such bill shall lapse.

If the Constitutional Court decides that the provisions of such bill are contrary to or inconsistent with this Constitution other than in the case specified in paragraph three, such conflicting or inconsistent provisions shall lapse.

The provisions of Section 154 shall apply mutatis mutandis to draft rules of procedure of the House of Representatives, draft rules of procedure of the Senate and draft rules of procedure of the National Assembly which have already been approved by the House of Representatives, the Senate or the National Assembly, as the case may be.

Furthermore, as far as the organic law bill is concerned, after its adoption by the House of Representatives and the Senate it has to be submitted to the Constitutional Court for review of its constitutionality.

In view of the above, there are instances in which the public has played a role in democratization of lawmaking process either directly or indirectly through their representatives in the National Assembly. In case of the present Thai Constitution in particular, a referendum was held for its adoption. In conclusion, public awareness and participation in democratization of lawmaking process have been encouraged.

Thank you

Moderator:

Thank you Mr. Rajit Rojanaphruk for presenting quite well. And the point that I can quote from the presentation is that the law making process is done by the parliament together with the senate jointly or separately. Where dispute has initial recognition of a bill of the senate not to the senate but to the parliament. After the parliament gives some considerations about the affirmation bill, it was sent to the senate. And the senate after undergoing the process of consideration, the Prime Minister then submit it to the King for further act.

Speaker 2 : Hon. Hidayat Nur Wahid,
Chairman of Inter-Parliament Cooperation Board of The House of Representative of the Republic of Indonesia

Moderator :

In the second session was supposed Nurhidayat Wahid , the chairman of the Inter parliamentary collaboration board of the national representative assembly but he has been replaced by Mr. Azhar Abubakar. I'd like to have the presentation not more than 30 minutes

Mr. Azhar Abubakar :
Good Day to all of you.

My name is Azwar Abubakar the deputy of committee for inter parliamentary cooperation .Mr. Nurhiyat send his apology for not being able to be here today . I will not read the paper entirely, I will only convey all the important aspects in this paper written in Indonesia an d English.

Democracy and law in Indonesia.

In the new era the concept of democracy was established in a more organized way. The 1945 constitution started limiting the power of the president who hold the power of the government . and this is stipulated in article 7 in 1945 constitution. That constitution also also formally out line the separation of executive , legislative ,judicative bodies that support the separation of powers – the power of the president , the power of house of representative, regional of representative council , the state ordered board the supreme court and constitutional court including Judicial commission

The constitution ensure the variety human rights that must be protected by the state . It is clear that Indonesia is also a state law. And they are following characteristic that underline the relationship between the sate of the government with its people. The characteristic is that the division of state power between the government and the people . And the basis of must be on the legislation.

The process of law making in Indonesia, To organize the state activity as well as running day authority arising from the implementation of the constitution which is established by the state regarding legal norms. These norms will not be complete to ensure the implementation of the overall

function of the state because there are many other bodies that are formed as support agencies or the high state as the consequences of 1945 constitution. And this also inline with Hans Kelsen theory on the hierarchy of law which reveals the rule of law is the tiered structure whether law a structure from a lower to a higher principal

I repeat, that the rule of law is the tiered structure whether law a structure from a lower to a higher principal. In the legal system in Indonesia, legislation is structured in hierarchy. The state then sets the ladder in the hierarchy of legislation. So far, Indonesia has experienced several changes, in order of the legislations laid the ranging from MPRS no.20 and regarding sources of law sequence of legislation until later become the law No.10 Year 2004 the establishment of legislation. In the law, the hierarchy of legislation in Indonesia is described as follows: the 1945 constitution of the republic of Indonesia, were on the government regulation in Lieu of Law, and regulation of the president, local regulations, that include provincial, regency, city and village regulations. And there are also other types of legislation which are recognized and have binding legal forces as ordered by the higher level of legislation. Law No.10 Year 2004 also affirms the law making principles as well as the principle of the substance of the legislations. Article no.5 from the regulation No.10 Year 2004 stated the principal of the rights the way of establishing legislation which includes clarity of purpose, institutional or right-forming organs, correspondence between the type and material content, the applicability, versatility, and benefits, also clarity of formulation and openness. The product of legislation should the principals of the legal substance in line with article no.6. in regulation no.10 Year 2004 namely: shelter, humanity, nationality, country characteristic, unity in diversity, justice, equality in law and government, order and legal certainty, and/or balance, harmony and alignment. Legal substance's still open to other principles in accordance with the law throughout the legislation in question.

Democracy in law making process

Indonesia as a democratic state institutionalizes democratic values in a variety of institution which include the institutionalization of the process of law making process. This principles appeared in regulation no.10 Year 2004. For example, the principle of openness which became one of the principles in the formation of legislation. The spirit of this principle is also in line with the common values of democracy which is about community participation and government accountability. And as stated in law no. 10 Year 2004, all layers of society have the widest possible opportunity to provide input in the process of making legislation.

QUESTIONS AND ANSWERS

Moderator

Next we will start the question and answer session. We are discussing the paper presented by the delegates from Thailand, and Indonesia. Perhaps we can allocate more time because we supposed to have three sessions, but we have only two. So we have forty to forty five minutes for discussion.

Ahmad Sadiki , from Faculty of Law, Mulawarman University.

As you know that Thailand has the peaceful general election. So my question is what do you want to your Prime Minister who looks young, enhancing the role of your constitutional law. Thank you.

Thailand Delegation : Prajit Rojanaphruk

For this question, I have to refer to the present time constitution which is the supreme law of the land. According to the constitution, of course I have to see the legislative and judiciary to abide by the constitution. Of course any new prime minister of Thailand will have to respect the rule of law. This of course is governed by the rules of checks and balances. Thank you.

Moderator:

Is there any other comments? No. Thank you. I'd like to congratulate your participation in this symposium.

From Faculty of Law, National University Semarang:

I'd try to respond to the presenter from the Indonesia parliament. If we talk about the constitution as a whole, I think it's quite extraordinary and effective but in terms of its implementation. If we look at Indonesia at present, it is not really good in Indonesia. So, we would like to ask the presenter from Indonesia. Why is, in terms of implementation, not really good. I think this question is addressed to Mr. Abu Bakar.

Abu Bakar:

I'd like to answer. This is related to government regulation. The function of national parliament is oversee the prosecution of that law. Thank you.

From Faculty of Law, Mulawarman University:

I just like to add something, if I may, Ladies and gentlemen. Thank you. We all know that the function of the national assembly, legislative function and budgeting functions, as well as representing the people. So the job of the national parliament is. The implementation of the law is the executive. So the national parliament has the big function. The national parliament has more responsibilities. It's the party to oversee the government or the executive. The executive has responsibility to implement the law and create it jointly between the parliament and executive branch. This is the responsibility. If it was said that the law that we established, it means that one step of the main tasks of the national parliament has been completed in good manner. It's the responsibility of the national parliament

Indonesian delegate : Mrs. Martita

What if the constitutional rights of a citizen are violated meanwhile the constitution is not yet regulated? Who will trial this case? Second, what is the function of the Constitutional Court if there is no the law in the constitution itself? One of the provisions is to what would lead to be is to cancel some parts of the constitutions . let me determine some basic of replacement.

What happen if the national parliament comes up with something that is very similar to what the constitutional court has cared for? what is the solution if they come up with the regulations in ….

Moderator :

OK, this question is referred to the Thailand delegation. I would like to invite perhaps the delegate from Thailand to answer Mrs. Martita's question

Thailand Delegation : Prajit Rojanaprhruk

It's not so clear whether it involves my capacity as the senate , does it involve the capacity of constitutional justice so , the chairmain, would you kindly summarize the question ? Thank you

Moderator:

The question is how or what happens to the violated constitutional rights , Meanwhile the law themselves have not yet regulated them? The constitutional rights are violated meanwhile it is not yet regulated, ibu Martita maybe you can refine this, so the constitution rights are violated so the constitution has not yet regulated that so the authority to review it falls to the constitutional court or the constitution legislation … upon the constitution of Thailand? Yes?Could you answer if the constitutional rights are violated, which institution has the rights to decide if the regulation does not yet exist or there is not yet any legislation to translate it.

Thailand Delegation : Prajit Rojanaprhruk

I still don't understand the question. so the constitution in Thailand, the rights of the people are stipulated in the constitutions. This can be taken to the regular court, so we file the case in the administrative court. Or we can send the case to the Human Rights Commissions, and this has to be mentioned which rights are violated. Then the case can be put to trial, or administrative court , or ombudsman or the commission of human rights through the constitutional court whether the regulations is contravene or not consistent with the Constitutions. In our constitutions , it mentions the authority of the institutions or individuals, but the individuals should take the four ways aforementioned. If there is no way or solution, they can propose decisions to the constitutional court. But there are 4 other ways to file the case. It refers to the constitutional court or even to make an appeal. Do I answer your questions?

Moderator:

Perhaps the delegation from Indonesia can answer the question briefly, and in a very concise way.

Indonesia: (HM Azis Matta)

Thus, the constitutional court, when changing the constitution, .. so it was the assembly … so this came with the special desire of the parliament … or the assembly…. So, the constitutional court …I mean it will be a funny thing to have a constitutional court…if we fight against the constitutional court….it's

not logical….I would like to provide an illustration. In compiling laws, we are extremely cautious. We warn our advisors to make sure that the laws are not contradictory with or inconsistent with other laws. So, this is something that makes us … that makes us very very cautious and very careful….for example, when we hand it over to the Constructional Court and they said 'No'… we do not have a consultative function. … so we will be more cautious. We use different legal language. We will not make the same mistake twice.

Moderator:

One more question… one more question…from the floor. I think this is the last question because we don't have enough time, so…please make it very very short.

Question:

I would like just to have a little bit of information about law making process, such as the process of establishing rules based on the society, the formulation … the process of developing or establishing the laws based on the number of the society and considering the justice of the people. What about now…we see the fact that the civilization always undergoes a lot of changes. Does the law making process then viable? Is it progressive? So, can you provide an example to me on the law-making process that is oriented towards those changes?

Moderator:

This is addressed to the delegate from Indonesia….Because I don't really know much about justice in Thailand. To the delegate of Indonesia, could you please, perhaps, answer this briefly?

Indonesia:

I will just take an example on the law of intelligence. There is the fact that the sensitivity of people to the rights of charge has changed a lot, so their realization of human rights has fastly changed, so they're very sensitive. So that in developing the laws, we talk to people, we talk to universities…we talk to a lot of different people. .. this is one of the precautions that we've taken. The past traumas, lessons from the past….in trying to keep our nation secure without violating human rights. So, we put together so many different factors to keep our nation safe and secure.

Moderator: Review and closing of Panel III Session Two

So, I think it's enough. I would like to provide a conclusion on democratization in Thailand and Indonesia. What I can say in Thailand they seem to have representation of the people and we saw that it has affected democratization on lawmaking process has involved a lot of institutions. And, in Indonesia the process of democratization of law making was reflected in the moment of 2004. That's my conclusion. And, I would like to end this by saying thank you for the participation, for your participation. I would like to also express my gratitude to all of you and good afternoon. So, we have a break until 2.45…a quarter past two? I'm sorry… so it's a quarter past two.

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

SESSION III

The Mechanism of *Checks and Balances* Among State Institutions

SESSION III
DISCUSSION TOPIC

The Mechanism of *Checks and Balances* Among State Institutions,

PANEL I :

MODERATOR
Maruarar Siahaan

SPEAKER 1
Hon. Margarita Beatriz Luna
Justice of Supreme Court of Mexico

Moderator: Maruarar Siahaan

I think we have to stick to this task even though it is hard. And all of the sessions that are after lunch are always colored with deep sleepiness. But we have three very interesting speakers. First of all is the Honorable Margarita Beatriz Luna from Mexico, from the Supreme Court of Mexico. And the second is Honorable Gulzorova Muhabbat Mamadkarimovna. I am sorry if I mispronounced your name. And thirdly, my partner, Mr.Akil Mochtar from Indonesia. Before we start, I think there are two important characteristics that will be very interesting to talk about. First of all is from Tajikistan. It's a good comparison with us because it is a transitional democracy also. It's a new democracy, so there are things that can be compared to the context of Indonesia. And then in Mexico it's very interesting because the authorities that usually becomes the Constitutional Court is in the Supreme Court so that's why it's very interesting to see the prospect of Constitutional Court in the future in that country.

In order to shorten the preliminary remark, we give the floor to Miss Margarita Beatriz Luna.

Hon. Margarita Beatriz Luna :

We are just.. We want to say happy anniversary for the 8th anniversary of the Constitutional Court of Indonesia. This is actually very important in making sure check and balances between state institutions. And this shall be enriching our discussion for the purpose of the event and we believe this is going to be a very important experience for us all. We shall refer to the prominent role to be played by the Supreme Court of Justice of Mexico as an Constitutional Court and in general the Mexican federal judicial power in the process of consolidating democracy.

Democracy is a fundamental and essential value of the constitutional state whose sovereignty lies in the wheel of the people. In the same path, democracy has its objectives : the well –being of the governed, the unrestricted respect for their fundamental rights, and the principles of Constitutional supremacy regality, and division of powers. With this conviction, I wish to reiterate that the Supreme Court of Justice of the nation, Mexican Constitutional Court currently constitutes the balance in the settlement of many and varied conflicts subject to its jurisdiction. It is the guarantor of the preservation of conditions of social, peaceful, and harmonious coexistence. It is the safeguard of the fundamental rights of each person and their human dignity and it is in charge of strengthening the state institutions.

A community is a history creation and the social activity is inseparable from the continuity linking the present with the past and what it creates towards the future. In the Mexican constitutional evolution, historical reality, facts, and human behavior expressed through social economic, political, and legal relations favored the birth, formation, and evolution of our institutions. In this judicial material that is part of the constitutional control is as follows.

Among the institutions of constitutional control is the judicial review. The first legal procedure of control that it's appearance in the history of constitutional of my country. It was born and became purely a Mexican institution which aims to safeguard the constitutional and legal rights of the governed and goes far beyond our borders as a magnificent contributions to the legal cultures of other countries. So judicial review is the first legal procedure of control and it is first applied in the constitutional history of my country. This institution is a purely Mexican institution with the aim to safeguard the constitutional and legal rights of the governed and the judicial review goes far beyond our borders as a magnificent contribution to the legal cultures of other countries.

What is very important in the Mexican legal system was the 1998 constitutional reform. It was the beginning of the transformation of the Supreme Court of Justice towards a true constitutional court. This reform greatly reduce the power of the Supreme Court in matters of legality. It retain only the exercise of the power of attraction on relevant issues and through the

analysis of conflicting criteria issued by the collegial circuit courts. Allowing the high court to devotes itself to the study of the constitutional control.

Secondly, the constitutional controversy. Since February 5, 1917, the day when our constitution was enacted, the constitutional controversy was established as the procedure of the protection of the powers that this documents provides to each organ of the state derived from the federal system and the principle of separation of powers. The recognition of federalism and the safeguarding of the division of powers, are the elements that determined the existence of this means of constitutional control. With the constitutional controversy, an invasion of competence area set out in the constitution may be resolved. It constitutes a real trial between authorities, entities or bodies establish in our magna carta which can be promoted by the federation.

One of the powers the federal states, the federal districts, and the municipalities against general rules or acts involving the existence of the grievance to the detriment of the petitioner. The resolution of the constitutional controversy in order to have universal effects has to be approved by a majority of at least 8 out of the 11 Justices of the Supreme Court. This effect consists in the case of general rules to declare the invalidity of the law with universal effect when such provision of the federal state or municipalities were challenge to by the federation and when the municipalities are challenged by the state.

Thirdly, the action of unconstitutionality. In 1994, the action of unconstitutionality was also established. From then on, political minorities of the legislative bodies, both federal and local, as well as political parties and the general procurator of the republic were able to present themselves to the Supreme Court when they sustain through the argumentation of legal reasons that the majority position is not in line with our constitution.

The resolution of an action of unconstitutionality approved by at least 8 of the 11 justices may declare the invalidity of the general ruling and just like the constitutional controversy, it will have the general effects. After the relevant constitutional reform of 1996, the then autonomous federal electoral court become part of federal judicial power and settle in favor of the Supreme Court of the country the power to deal with the action of unconstitutionality on electoral loss.

For the control of the legality, another means of constitutional control that the Supreme Court of Justice of Mexico has its so called power of attraction or relevant issues.

It was established with the purpose of giving the High Court the faculty to resolve issues that by origin correspond to Collegial Courts. In order for the Supreme Court to study these cases they must have the characteristic of legal importance and significance and the legal problem arises given its significance, novelty or complexity requires a statement from the highest court in the country. The power to work with the inconstitutionality of the General Election is also the same. So therefore, now we are talking about

the control of legality. This is another means for the constitutional control namely the supreme court of justice of Mexico has the authority called attraction on relevant issues. This power is established with the purpose of giving the high court the means to resolve issues in accordance to the collegial courts. So that the supreme court can work on these cases, they must have characteristics of legal importance and significance and that the legal problem arising given its significance novelty or complexity requires the statement of the highest court in the country. Through the resolution of contradiction of presidence are collated by collegial courts, the Supreme Court also exercises an important control of legality and determines the criteria that should prevail and must be observed by the authorities. Even though the competence to resolve constitutional controversies has been established in the in the constitution since its enactment, the truth is that between 1917 and 1994, the supreme court resolved only 42 cases in this nature. This picture which meant a minimal intervention of the Supreme Court of

Justice in issues of such significance, has changed radically.

The constitutional reforms of 1994, the enactment of a Regulatory Act of Article 105 of the Magna Carta and the growing political pluralism in our country determine that from 1995 until now, there are 407 actions of unconstitutionality and 973 constitutional controversies were promoted. This increase corroborates the unquestionable need and importance of these procedures of constitutional control in a plural and democratic society. It should be noted that at least in this aspect, we have coincided with the clock of history that marks the time in other countries. In due course, we have joined the recognition and enrichment of the branch of government specialized law known as Constitutional Procedural Law.

The constitutional procedural law whose essential components namely the procedures arising from the new powers granted to the Supreme Court in addition to the traditional view of the judicial review. The evolution of the judicial system of control of the constitutionality has closed a formerly incomplete circle by the judicial review, the civil liberties or fundamental rights are defended through constitutional controversies, the separation of powers and the distribution of competence between the federations, states, and municipalities is guaranteed. And through the action of unconstitutionality it strengthens the pluralistic and democratic participation of members of legislative bodies. This circle has in addition the possibility of a challenge granted to political parties in the field of electoral laws. Over the past years, the supreme Court of Justice has implemented a policy of transparency that has contributed to the strengthening of its legitimacy as a Constitutional Court. With very few exceptions, the Plenary Court performs its meetings publicly. Any interested party may personally attend the chamber and witness the deliberations that justices undertook to solve the matters within the competence of the court. In addition, these sessions are transmitted live through the judicial TV channel and on the internet web page of the Supreme Court where they are stored so that anyone anywhere in the world can see

and hear any session they require. Also, hours after the meeting concludes the corresponding stenography version is published and stored. There is also a section in which all sentences issued by the Mexican Supreme Court are concentrated. The divergent paths that followed the policy and law in accordance with the previous state model make it possible today for the Judicial Power to resolve issues directly related with politics and law. In this regard, the supreme Court of Justice, the Constitutional Court of Mexico is a guarantor of effective separation of powers, of the validity of federalism and the defense of human dignity. Thank you.

SPEAKER 2

Hon. Gulzorova Muhabbat Mamadkarimovna

Justice of the Constitutional Court of Tajikistan

MODERATOR:

I think we can see what happened in Tajikistan, happened in Indonesia in the past. Next, we are going to have the next speaker, Mr. Akil Mochtar, speaking about the experience of Indonesia.

SPEAKER 3

Hon. Akil Mochtar

Justice of The Constitutional Court of the Republic of Indonesia

Ladies and gentlemen, I am going to talk about the check and balances mechanism among the state institutions in the experience and practice in Indonesia. The check and balances came up from the need to ensure that each power as talked in the separation of power doctrine that each power does not go beyond its limitation in the pandemus as well as to avoid excessive intervene from one power towards the other power. Indonesia as a country with legal supremacy that's building democracy is now also implement check and balances principles as stipulated in the Indonesian constitution. Although in practice of course it is impossible to implement the check and balance in a rigid manner. The practice and experience in Indonesia in upholding the check and balances principles, is that number one is the check and balances in drafting a law. The power to draft law according to the Indonesian constitution is held by the parliament or the Peoples Representative Assembly. However, every draft of law has to be discussed and approved together between the parliament and the president. If one law is not mutually approved then the law cannot be proposed in the hearing session. Parliament as a legislative body does not monopolize and the president as the executive body also do not have veto right in the formation or drafting of law. And the product resulted from both in the form of law can tested by the constitutional court whether

through formal review as well as immaterial review or the material of the law itself. And then according to the Indonesian constitution, representative body in addition to DPR, we also have what called as DPD or the Regional Representative, which is the representational of the people from provincial areas all over Indonesia. In the terms of if the draft of law proposed is related to the regional autonomy, the relationship between national and regional, the formation or integration of areas management of natural resources and other economic resources and also related to the balance of budget between central and national and regional and also related to tax, education and religion, the regional government is allowed to be there. But DPD is also limited in terms of parliament because Indonesia does not recognize bi-cameral or two chambers parliament. So the regional representatives have limited authority as stated before. And the Indonesian parliament has what we call as the people consultative assembly which consist of member of DPR and DPD. The people consultative assembly has the authority to change and determine basic constitution. And therefore the authority of MPR is the highest authority and it is only limited by the basic constitution itself.

And second, the check and balances in the implementation of executive power in Indonesia. The executive power is head by the president and assisted by State Ministers as well as by the presidential advisory board or advisory council. In conducting its power president is constantly monitored by the people representative assembly, regional representative assembly on certain cases. So it is continuously by the parliament by the DPR but only on certain cases by the DPD. The function of DPR monitoring and supervision among other is through interpellation right, the question right and also opinion right. And then for each parliament member or DPR member also has the right to submit the question, right to give proposal and to determine their opinion as well as immunity right. And in addition to that in case DPR found that the president committed certain violation of law according to what is stipulated by the constitution then DPR can propose the impeachment of the president and in regards to conducting the impeachment of the president by proposing this to constitutional court. Whereas for the regional representative council, they are only authorized to do supervision in a limited manner and the result of this supervision is submitted to the DPR or to the parliament. In several cases, in regard to the implementation of the presidential power, they have to go through a DPR's agreement such as determining war or signing peace agreement or any agreement with other countries, making international agreement which have got basic and wide spread impact toward the livelihood of the people related to the state budgeting and/or will make it necessary to make a new law. So for this kind of instances it has to be agreed by the parliament and there are also other powers of the president that needs to have consideration as well from the parliament. Such as for example, the appointment of the ambassador and console as well as receiving the appointment of ambassador from foreign countries. And also they need advice from DPR if the president is giving amnesty and abolition. Whereas for the granting the rehabilitation and grace president has to hear consideration from the supreme court. For

the management of the public responsibilities, president is supervised and checked continuously by the state institution which is the state auditory body. And the result from this is given to the DPR, DPD as well as the regional representative assembly according to its authority. The relationship between the central and regional government is not strictly regulated in the Indonesian constitution, but it only says that the provincial government, district or city government regulates and administers its own government based on the autonomous principles as well as assistant principles. The type and scope of authority exercised by the regional government is determined by the law and check and balances of the judiciary power. To balance the power of judiciary by institution it is implemented in the selection and appointment of supreme justice and constitutional justice. For supreme justice has to involve has to involve judicial commission, DPR and president. Whereas for constitutional court justice it is submitted by the DPR, parliament and we have three submitted by the president and three are also proposed by the supreme court. For the supervision on the conduct of the judges, judicial commission has the authority to supervise the judges outside the supreme justice and constitutional justice, according to the constitutional court decision no 5 of 2006. And then in the Indonesian constitution we have independent organ of the state. And based on the function the election commission and central bank conduct the governmental function but with it strategic position, constitution put them as an independent organs. In the development there are so many independent organs formed by the law as a supporting accelerate state organ which are independent for example the national commission on human rights, the witness and victim protection program and the anti-corruption commission, the broadcasting commission, etc.

Lastly, it's the role of constitutional court in enforcing the principles of check and balances. The first one is the authority on dispute among state organs, whose authority is provided by the constitution. The check and balances principles can open the possibility of dispute among state institutions or state organs, because constitution in formulating the authority of the institutions or organs are not fully explicit. So the possibility is quite big to have dispute on the interpretation of authority of an institution. As a consequence on the acknowledgment on the function of the constitutional court as the guard of constitution and as a legal interpreter of the constitution, then the constitution provide the authority to the constitutional court to solve the dispute between state institutions whose authority is provided by the constitution.

And the second mechanism is in the judicial review against the basic const. the Indonesian constitutional court has the role to promote the state government organs, The Indonesian institutional court has the role to promote state government organs, especially organs that draft law, not only to act based on the consensus of the democratic majority, but they also have to attend and to consider the constitutional limitation that had been agreed. The decision of constitutional court as a balance is a result on a check conducted through constitutional norms benchmark stipulated in the Indonesian basic constitution. Secondly, the development of judicial review of a law against

basic constitution conducted by constitutional court or similar institution which previously called as negative legislation is actually extended for certain issues into positive legislation. These changes are also conducted by Indonesian constitutional court. In some of its decision, constitutional court conducts judicial review on legislation product, so that the norms that were reviewed meet the constitutional standard. The constitutional court decision provides interpretation, guidance and redirection and even prerequisite or even new norms that can be classified as a conditional constitution decision. If the interpretation determined in the constitutional court is met than the norm or law is still constitutional. Therefore, its legality is maintained. But if the interpretation specified in the decision is not met then the law or the norm in the law becomes unconstitutional, so it has to be declared contradictory to the basic constitution and has no binding legal force.

The shifting of constitutional court into positive legislator was caused by the needs to balance proportionally between the legal certainty, justice and benefit. This kind of step taken by the Indonesian constitutional court avoid legal gap incase if constitutional court just can only say that a norm or a law is no longer enforced.

And lastly is the dispute of election result. Constitutional court as the holder of judicial power to settle election result dispute also conduct check and balances function of the implementation of the national election commission and election supervisory body in conducting election. Even in enforcing substantial justice, MK (constitutional court) also evaluates violation during election that can influence the quality of the election process and the end result.

Lastly is the impeachment of the president or vice president. The position of constitutional court is very important in the supervisory process of the president as the executive body. In article 7b and article 24c of the Indonesian constitution, constitutional court as the institution that has the obligation to evaluate and judge the opinion of the DPR or the parliament in allegation of violation conducted by the president or vice president that will be used as the basis for the people consultative assembly to terminate the position of the president or vice president in the case of impeachment of president of vice president. Constitutional court has the role to give legal evaluation so that the impeachment of the president is not only based on political reason.

QUESTIONS AND ANSWERS

MODERATOR
Maruarar Siahaan

I am going to open the Q and A session. First, Mr. Slamet Effendy Yusuf

Question 1: Slamet Effendy Yusuf

This is the former parliamentarian, so we will give you first to ask question , Sir.

Good afternoon, and God's peace be upon you.

Mr. Moderator and the honorable delegates, when we are talking about check and balances in a democratic system, often times the government system is based on the separation of powers between the legislative power, the executive power, and the judicative power.

In the US, when one is drafting a law, we see that the legislative will take the main role. When the President does not approve, then he has this power to put a veto on the law. In Indonesia, the check and balance in the process of making a law, the formation of law is unique. A law, although a legislative power is in the hand of the parliament as the legislative body, but for a draft law, the draft law is discussed together, deliberated together between the parliament and the government, namely the President or his representative. So, when the parliament pass the law, that means that law is issued. If within 30 days after the enactment of the law, and the president does not commend, then the enacted law will pass into the body of law. And so for the two speakers , Mehiko Kazakstant, and for the other speaker as well, oh from Tazekistan, and also the other participants, what do you think, should the separation of powers be very clear ? So when you do the law making process, the authority should be solely on the hands of the legislative? And if the executive power disapprove then they should just put on the veto on that. So that's my question to all of you and also to the constitutional court people from Indonesia. So what is best for us? Because of the deliberating together, this is actually the tradition before we amended the constitution. Before the amendment of the constitution the power to draft law is in article 5 point 1 of our constitution, namely in the hands of the President. And therefore, this is why, because the decision is in the hands of the parliament, then there will be a deliberation between the parliament and the President. But after the amendment, and we say that we adopt the separation of power , but yet this joined deliberation is still maintained. So, Mr Akil, do you agree with a fifth amendment? Could you just clarify this? That when we are talking about law making, that is in the hands of the legislative, and if the President does not like it, then he should just veto it . Thank you. God's peace be upon you.

Moderator: Maruarar Siahaan

Yes this is actually the question on the constitutional amendment but we give the floor first to Beatriz Luna to answer first. So should the legislative power only in the hands of Parliament ,

Margarita Beatriz Luna: Justice of The Supreme Court of Justice of the Nation of Mexico

Is there any change between the making of the law between one country and the other ? I would like to explain that in my country there is a clear separation of power which is limited according to the function where each organization has its own power. The executive power is the one that decides anything that has got to do with state administration. The legislative is the one that guarantees the law and the judiciary is about resolution on the existing law.

If we talk about the making of law, a law can only be implemented by the legislative power. In Mexico, we have a federal, we have a unification of congress, but we also have a local congress for each legislative unit for federation level. If we talk about federal congress, there is no active involvement from judicial power related to the law making . What happen is between the power of executive and the power of legislative . If there is any legislative power influencing a law, it will give initiative and discuss it in the related combination, and then they would like to have councils to have vote to determine whether it is agreed or not. But the power of executive in several instances, we have a special initiative, so that the presidential cabinet has direct influence of the law presented, because constitutionally it is allowed for the President to have an initiative and proposing a law. The judicial power, do not have this power. But there is something requested by the Supreme court from my country is that to have the initiative function for the law, but this is only for specific materials with then our competence, namely, those related to the function of our jurisdiction . We requested to have the initiative, but up until now we are not allowed to have such . In the local judiciary power on local level, there is a federal institution that submit participation from other power which is legislative or judicial according to the regulation that is stipulated so that when it is discussed there is a comparison between the executive and the legislative to hear their opinion. It does not need to have intervention through voting but only to give opinion.

Moderator: Maruarar Siahaan

Thank you and I shall give the time to the Tajikishtan delegation to address this case.to (Hon. Gulzorova M. Mamadkarivmovna, Justice of the Constitutional Court of Tajiskhistan)

Hon. Guizorova M. Mamadkarivmovna: Justice of the Constitutional Court of Tajikistan

The judicial power in our country begins from the parliament and also the local authority has rights to ensure local laws. So I cannot add anything to the previous speaker because of our system is approximately same. Maybe just to add, we also have such a tool of national referendum, because for the most important decision, we bring questions and we bring laws for discussion towards all the people of our country in our national calendar.

Moderator: Maruarar Siahaan

I think the first question had been answered. Maybe we can explore this further later on. Now I will give opportunity to the floor, if any of you have any question. Oh Mr. Akil had not given his response yet.

Hon. Akil Muchtar: Justice of the Constitutional Court of republic of Indonesia)

Okay. Thank you. The question from Mr. Yusuf, which is one of the architects of constitutional amendment in Indonesia), he used to be the chair

of ad hoc committee in the parliament. So he already understood the process of the amendment based on the recent constitution. Because this is a choice of whether we do the veto system or just the current system and the mechanism of law making according to our constitution does not change since we were first independent and even it got strengthen by amendment, amendment one, amendment two, amendment three and Mr. Slamet used to be the chair person of the committee, this mechanism has been strengthen because there are certain authorities given to the regional representative or DPD. That means that this model comes from our historical background as Indonesia nation. And this is the implementation of our value inscribed in Pancasila as our main norm and this is basically our umbrella norms in our constitution and one of the norms is that we are going to reach agreement through consultation, so that is why the check and balance conception cannot adapted purely based on the available theory. Because our national philosophy is Pancasila and one of our norms in Pancasila said that we have to try to resolve differences through consultation. That is why there have to be the dialogue process between the executive and legislative. And even though in our constitution stated that if a draft law is not approved collectively by the legislative and executive than that cannot be deliberately upon in the next session of the parliamentarian deliberation. This is basically a veto right obtain by one of the party, namely the president or the legislative. It must be the agreement of both parties for draft law to be deliberated upon. And legislative power actually has more power to make legislation and if the law is already agreed upon by two parties but the president stated that it, the president does not protest it means that it's an automatic enactment. So in my opinion the authority in the hands of DPD, especially in regards to the law that DPD can have a hand in, namely about the regional autonomy laws than maybe the authority of the DPD should be increased. So all laws that have relation with the autonomy relation between the central government and the local government, DPD has to have equal power with the people representative. And I think the system is already good and it doesn't create problem administratively because of the thirty day automatic enactment and also there are other constitution such as constitutional court that can pass the law against the constitution.

But I think this system is already good and it does not create problems administratively. Because of the 30 day automatic enactment and also there are other institutions such as the Constitutional Court that can test the law against the constitution. So what we should be thinking about is how to speed up the speed of producing laws because if we see from our daily activities, the conflict of interest between the DPR and the DPD is very high and it is very hard to give them equal powers because it will furthermore slow down the law making process. So this is my preference : let things be as it is because this is basically what we have historically and this is basically already in accordance to the Pancasila norms. I will give the floor to any other person who wants to pose questions. Yes, please mention your name.

Lailany Sungkar

I am Lailany Sungkar from Pajajaran University. My question is, theoretically we know that the check and balance mechanism is a relational mechanism that goes both ways. So we do not think that it should be one way. One way is not check and balance. Miss Marguerita from Mexico, the title of your paper is the mechanism of check and balance amongst the Mexican state institutions. And then in page 2 you mentioned about the evolution of our institution and you talk about judicial review, constitutional controversy, the action of unconstitutionality and the control of legality. My question is : do you understand this mechanism as a check and balance mechanism attained by the Constitutional Court in Mexico. Thank you.

Moderator: Maruarar Siahaan

Please Madam..

Hon. Margarita Beatriz Luna: Justice of The Supreme Court of Justice of the Nation of Mexico

The process that I wrote in my presentation actually is talking about the competence of the Supreme Court to control the constitutionality of legal instruments. From all of these procedures, that are related to each other in order to ensure good division of powers, especially in ensuring that there is no domination of interest between the Executive and Legislative, we have two means to do that ; one is the unconstitutional action. This action has the objective to balance between powers in all levels of the Government, for example between the Executive and the Legislative or other local judiciary powers and other legislative powers. If they have problems, than we can resolve it. If there is invasion of powers between one power and the other, than we can step in. This is what we mean by constitutional controversy.

If there are invasion of powers between one power and the other then we can step in. This is what we mean by the constitutional controversy because the division of powers stated that one power should not take over the authority of the other institution. And then also we can do this in other level of the government. We have a federal government in Mexico and we have the federal competence. We have one unified federal competence and we also have the competence of the states. And the states will have its own jurisdiction, but the federation government can give the authority to the provincial level or the state level.

Like for example, some years ago, we found that we discovered some archeological funding in Hoakka. So all of the artifact was brought to Mexico city and then we displayed it in the historical museum. And Hoakka is just a little administrative region in Mexico and they were angry. Why do they take our heritage to the federal city? So the local congress state pass a law that stated that all the archeological findings found in Hoakka should not been brought outside of Hoakka. It should not be taken outside of Hoakka. And but the constitution stated that the legislative had its own power. It

gives the power to the federal congress. So what happened? There is this controversial. There is this invasion between authorities between the local congress. The local congress is questioning the power of the national congress. Because the national congress has the authority to decide upon the artifact related questions. So this is where the constitutional court can help by way of constitutional controversy.

Through this process we try to maintain the balance because special competence given by the constitution should be acknowledge, should be respected by all governments in all levels, by all of the branches of power in the government.

Moderator: Maruarar Siahaan

I think this explanation is very clear. I don't know if you can get the interpretation or not, but it's very clear. Anybody else? Yes, Miss Falina. Can you tell us to whom you're addressing the question?

Valing Singka Subekti

I'm asking Mexico. But I'm sorry, this is not working, this interpretation device. So perhaps someone can help so that I can understand the explanations from the Mexico side. But, Mr. Slamet Effendi Yusuf, I think there's no presidentialism model that is uniform in the whole world. Every country has its own specific nature. The pure one, The pure separation of power you can find in the United States. But we also know, the United States now are complaining about this check and balancing system with the veto right model in the hands of the president because they think the system has delayed, has lengthen, the process of legislation in the United States.

So, I would like to ask Madame from Mexico. What is the nature of your presidential system in Mexico, especially with regards to the legislative process. What is the different between your system compare to the US system and the Indonesian system. Thank you.

Hon. Margarita Beatriz Luna: Justice of The Supreme Court of Justice of the Nation of Mexico

Talking about the United States system or its judicial system that has the roots in the Anglo-Saxon system. And Mexico, basically, the legal system is rooted from the Roman Catholic, the continental law. So both of them are different. The Anglo-Saxon system in the US is more related to, it's more based on the president. Basically to ensure there is an alternative dispute mechanism that is not in accordance. In Mexico, we have a lot of legislations. Like we had other alternative dispute, such as reconciliation, mediation and so forth. In Mexico we have this available. We have this lost, they think, in the first instance is not like the United States.

Before you brought a case to the court, we have to try to find.. have a news. In Mexico you have this important development lately so there is no specified implementation about this. So we need hard work as I already

mention we have the Roman Catholic tradition so we had the tradition that is different from the United States. Indeed, the United States are influenced by the anglo-saxon system, but in the judicial process in Mexico you see that there is the audience to public and that there is this the stipulation that we have to discuss things first. So we're going to have an act that is past and it will have to be consulted first and it has to be scribed in a written report and this written report will be something that will help make the decision outside the system. So what is important is the determination related to the involvement people who are involved in the court. In Mexico, we tried to use the oral system, the verbal system. And we need time to pass this phase and this is very different from the United States.

Moderator - Review and Closing of Panel I Session III

I think this is very interesting because the root of the system is different and maybe pretty much similar. We are also not based on Anglo-Saxon and the Supreme Court can also access the Constitutional Court power. I think this is a development outside the two models. We are following the Hans Kensel's model and the rest of the world is taking the United States' method. So I think Indonesia is more unique. If there's any other question? We still have time to accommodate another question. If not, perhaps I can close this interesting discussion. I would like to conclude. But I'm just basing my conclusion based on the translator papers. I can't really depend on the simultaneous interpretation.

But if we can see the constitutional court of Mexico is very interesting how many authorities they have aside from the traditional judicial review. They have the constitutional controversy power. It's the same with our constitutional court, namely to settle the disputes between state institutions. And then the action of inconstitutionality that gives the minority parties of the parliament to go to the supreme court who has the power for the constitutional review. But this is not a dispute. This is more like a request to do an analysis whether the decision of the majority in the parliament is constitutional or not. So this is actually an interesting power and for us the legal standing of the minority in the parliament. The constitutional court still see they don't the legal standing because they think that the minority will always agree with majority with regards to the law.

And then also with the control with the legality. This is very interesting because in order to submit a case to a supreme court, they have this criteria. Namely the six significance, the nunez and the complexity before a case can be accommodated by the supreme court. Perhaps this similar with the US. So they have a certain characteristics to be fulfilled first before the supreme court appeal can be processed. This is indeed something very new for us in Indonesia. This control of legality power and aside from determining a criteria,

a quantitative criteria. But also the qualitative criteria before the case can be processed by the supreme court in the US.

For Kajikistan, I am very interested with what you just said how Tajikistan just had a constitution that have human rights stipulation in 1994. And it is stated that the constitutional court is an innovation for them as the transitional society and the constitution of court has more burden and more tasks in order to build a constitutional democratic state because it has to transform the people who were still filled with problems and nihilism in institutional problem. So I think this is pretty much the same with Indonesia. But the Tajikistan judicial development knows something they call as Supreme Economic Court. Even though there is no further deliberation on this, I think this institution may also allow constitutional review against economic policies. For us, we have something like this, but more for the ombudsman condition, who will also pay attention the the human rights supervision.

Whereas for the Indonesian case as already presented by Mr. Akil Mocthar this is nothing foreign for us. But what was mention was that he wanted an amendment of legislation. But this not yet supported by Mr.Akil. But I would like to say, the shift being done by the Constitutional Court of Indonesia from the old model, the negative legislative model and then shifting towards the positive legislative model. This is actually a new progress that was forced because of the critical needs of our certainty of norms.

But whatever the system is and whatever our historical background is, I would like to say to Mexico because the Indonesian constitutional court feels that they are the most transparent, but what Beatriz Luna said, they also had the meeting of the justice to deliberate on the case is actually open to the public. This is I think is mindblowing. And I think this is indeed a control that will make us feel jealous right not. Because with that kind of openness, we don't need to have any controversy that you can watch in TV One, tv station, metro tv about the constitutional court nowadays.

So, whatever our historical background is, whatever our development is, I think all systems are moving to one direction. Namely to make an effective check and balance system, may it be by establishing a constitutional court, or to ensure the supreme court has the function of constitutional court, with the authority to check institutions of the state or balance out the power of the branches of the government.

I think that's my conclusion. And by this conclusion, I would like to extend my gratitude to all of the speakers in the panel. And let us show our gratitude by applauding the speakers. I think the session can be closed.

PANEL II –

MODERATOR
Djoko Priyono

SPEAKER 1
Hon. Carlos Hernandez Mogollon ,

Deputy of the Speaker of Parliament of Colombia

(speaking in his own language) no English translation.

SPEAKER 2
Hon. Fernando La Sama de Araujo

Speaker of the National Parliament of Timor Leste

Your Excellencies, ladies & gentlemen,

I am addressing you today in the spirit of respect, not only for the institution of Constitutional Court but for the ideas it embodies of the political system founded in moral and political principles, rather than arbitrary force. My very presence in this room, at this conference attribute to the spirit and the power of rule of law and triumph of the will of the people over a tyrant.

Today, I address you as President of Parliament of Timor Leste, will soon celebrate a decade of existence. What a significance shortly it has been for my country and for myself personally, for my administrative territory, to a constitutional democracy for my self, for my political activist, to law maker, and guardian of the spirit of the Constitution. For I believe that is what a democratic constitution are, in the best of times and in the most difficult times. In the short history my country has known both sometimes concurrently. Timor Leste experienced and demonstrated if ever there was no doubt that democracy can spring and in short time, even at the time the language of parliamentarism maybe familiar to us, the spirit of liberty for which parliament is one of the symbol is not. The language of Constitutionalism and balance of power might be admirable and clear, but the practice in realtiy requires willingness for political compromise and an acceptance of imperfect solution

I stand before you today, proud of a long way my country has come, I witness to the truth that the longing for freedom and fundamental quest for balance that Constitution and Body make them a powerful self against tyranny as well as perhaps the most solid foundation, for a strong relationship across, the sometimes trouble over water of the history. Democratic balance and the rule of law calls for separational power which cannot be seen in itself, but as a basic principle in a very democratic society that has proposes such as freedom ,legality and independence of certain organs, which exercises power as

entrusted to them by the Constitution. In accordance with our Constitutional system in Timor Leste, different organs are assigned different power and functions but not in an absolutely exclusive fashion, however, as evolution and experience of a modern state has also highlighted there are what might be called shortcomings of a transitional theory of separation of the three powers , Executive,Legislative, and Judicial. Indeed, the classic three parties division of power typical of liberal constitution become insufficient to ensure democratic exercise of power, been necessary to gradually build new ways to organize public and a state power.

This is a case of control of supervisory bodies such as the Timorese Public Prosecutor Office constitutionally and legally obligated to upheld democratic principles and the rule of law or the court of audit recently established in my country or activity essential for the affirmation of democracy in daily practice. When conducting public affairs, bodies of competence to ask the constitutional court to review legislation against the Constitution.

There can be no doubt that more democratic state requires a more sophisticated system to safeguard the integrity of governments ensuring openness, transparency, and democratized process of exercising public powers. The 2002 Constitution of Timor Leste recognizes the need for a new control function thus establishing a fourth function of a supervisory oversized function to save as a critical to guarantee democracy and to ensure the rule of law and to safeguard the constitutional principles.

Our constitution does not emphasize a Constitutional Court as judicial on per se, rather assert the authority of the Supreme Court of Justice, the rule of the guardian of fundamental law. Nevertheless, Timorese Constitution defines the Supreme Court as a judicial body of a specific competence to administer justice in matters of constitutional law nature. Those entrusting the court with explicit missions that justify the power given to the court regarding legislation review, trial review, successive abstract review, concrete review, and review of unconstitutional by omission. The most significant responsibility of the Supreme Court is that of monitoring whether legal rules comply with the Constitution. In this key rule of the court, and the one as a custodian or unlimited guarantor to the Constitution entrusted to it by the Constitution itself is clear.

In addition to the fundamental task of considering the constitutionality of legal rules, the Constitutional Court also possess a substantial range of competence concerning electoral dispute and political parties and performs other important functions in relation to the statute governing political agents. Ours is a new state, with less than a decade of experience as a sovereign and independence nation then our experience is still limited. However, in this short period of time, the Court has already been called to decide upon the constitutionality of certain provisions of the budget law and all the establishment by the decree law of the government of a special financial fund, the economy stabilization fund. The Court rules beside the judicial aspect had also repercussion vis-à-vis the constitutional dynamic and the balance

of power among different state institutions. The President of the Republic would refer the legislation to the Court, the parliament that had voted the same legislation and the government who saw its approval as necessary to put into practice its program. In those cases, the Court interventional decision generated intense public and political debate and had an important impact on the practical implementation of constitutional rule as well as the perspectives of the future development of our constitutional system. The clear significance of all these functions not only demands legitimate and the institutional charge with performance but also warrants informing the public, the citizens, about the mission of the Court.

According to the state of the current present debate, it can also be said that for a proper function in democracy to trip, there must also be a certain degree of separation between typical function of government of a political nature and those of the more technical nature or administrative function. In this sense, as we are witnessing in many compared democracy, it has been proposed to separate administrative function from political function due to the need to ensure management function in the administrative structure of the state and not allocated based on participants' political criteria which can compromise the efficiency and distort political dynamics.

How to safe guard the integrity of governments, how to ensure good governments under the rule of law while at the same time perceiving the principle of democracy legitimacy and representative governments is one of the important questions in this debate.

I develop an extra on constitutional culture is key to provide additional safe guard against any discretionally reaction by the executive or even the parliament. The constitutional judge urge respect the separational power between legislation and the judicial control of the legislation will take do account of the margin of appreciation, a political questions, and of the democratic legitimacy of the decision of parliament.

In turn, it should be entitled to expect the respect of parliament for its own decision which aim to reinforce the permanence of constitution over ordinary legislation and executive decisions. The situation may of course be significantly different in different state, as in the case of transitional society where this value still not entirely attained. Here, we need to build up condition that cannot be created by Constitutional Court where sometimes do not even exist.

However, institution as a constitutional courts are all equivalent. In Timor case, the supreme court of justice can contribute step by step develop the vehicle system and societal environment. There should be examples for other constitutional organs in a daring to the legal method when interpreting constitutional rules in respecting international standard and that may give support to citizen seek in protection of their fundamental rights.

In many countries, as in my own, constitutional rules might be still need some clarification in defining of what is the power of the state and their

rapport to each other. It is important that any diverse between the text of the constitution and the constitutional can be reduced, and democratic constitutional culture must break down big ground in all areas exercising public power. Indeed democratic state calls for dignify institution as their constitutional court or equivalent institution capable to interpret their constitution under the law in accordance with the dignity of its high responsibility.

Of course the separation of power does not imply antagonism between the various branches of the state, rather than represent a share in the power between organs which distinct functions, but those actions are complimentary and must act accordance with the principle of institutional cooperation in order to ensure consistency of public and its action within the established constitutional architecture.

Ladies and gentlemen, my time is gone. Let me conclude my short finery mark. Let me from rich experience of others and learning from each other contribution to the quality of the democratic institution and the constitution and the justice all over the world has become a decisive factor of success. This forum have a dual significance in supporting the exchange of views on common problems. Of course this is not justice and assisting institution as a constitutional court to hold an independent position in internal separation of power.

With my best wishes on the 8th anniversary of the Constitutional Court of Indonesia, a corner stone in the construction of democratic state based on the rule of law. I congratulate his Excellency deceive justice of the Constitutional Court of Indonesia for discrete initiative.

Thank you very much.

SPEAKER 3
Hon. Hamdan Zoelva,

Justice of The Constitutional Court of the Republic of Indonesia

Thanks to all participants. Allow me in this opportunity to deliver the presentation of Indonesia experiences and practices in applying democracy, especially in check and balances principle.

Indonesia has four types of democracy since the independence with along four constitutions. The first type is Parliamentary Democracy which is very liberal. After that the President, Soekarno, change it into lead democracy, where the President is the highest power. In 1965-1967, citizens toppled the government and make a revolution. Then the next democracy is Democracy of Pancasila. In this type the democracy is just only bureaucracy. Democracy is just the election in five years, no matter whether it's free or not, fair or not. After 1998, the constitution has a problem, which is very flexible and the highest power in National Assembly. This is not a good experience in check and balances. So we developed the change in check and balances in constitution since 2002.

Each state's organs are in equal power. Constitution gives Constitutional Court to resolve dispute between state's organs. The constitution of Indonesia is a process of check and balances among House of Representative, President and Constitutional Court. Indonesia has three house of representative, which are National Assembly, House of Representative and Regional Representative. National Assembly has a very limited authority.

How the process checks and balances to the executive? House of Representative control the President and able to impeach President. This is stated in the constitution of Indonesia. In the institution there's a state's organ that control the budget. There are no checks and balances between the region and the central. Judicative in Indonesia is independent. In the appointed of the judges, there's a process from executive, legislative and judicative. Three people appointed by the President, three people appointed by the House of Representative and three people appointed by Supreme Court.

Constitutional Court controls the policy making made by the President or House of Representative. Constitutional Court has authority to cancel the laws, partially or the whole of it, if the Constitutional Court decide the law is unconstitutional.

When there is a dispute between the President and House of Representative, the Constitutional Court can resolve it. The constitutional Court has the authority to resolve the dispute between the state's bodies as stated in the Constitution.

QUESTIONS AND ANSWERS :

Question :
PATANIARI SIAHAAN from FORUM KONSTITUSI

The first question is about the dispute among the state Institutions. What I want to know is the opinion of MK if the government propose legal Statutory Law to the House of Representative (DPR) and then DPR refuses. After that the government propose the design of legal Statutory Law to annul it but DPR doesn't discuss it. Is the legal Statutory Law still valid/ applicable ?

The second, MK reviews the Law materially and formality. How will MK react to the Law discussion done by DPR that based on the article 2 it should be done by DPR and the President But in fact the design (RUU) from President are discussed by Government and fractions. Is it contrary to the formal and constitutional Laws ? That's all, Thank you.

MODERATOR:

Please Mr Hamdan, your time to answer them.

Hon. HAMDAN ZOELVA from INDONESIA

In Indonesian Constitution we are familiar with the substitute for Government regulation Law. In this case, the President can issue emergency alike Laws. Even though it is a government regulation but substantially it is

Law. In the case of critical and forcing situation, if it is processed regularly in the Parliament, it will need time which won't give enough time to handle this critical situation which need decision and action done by the President, so if the President doesn't make the regulation, then he will violate the applicable Law. Therefore, to avoid violating the ordinary Law, the President then issues the substitute for Government regulation Law which is emergency alike Law. This Law, after being decided, then its norms could be directly executed by the President. So, this law must be agreed by the House of Representative.

After that, in the next council meeting period the President propose it to the House of Representative to be agreed on. The Problem will arise if the House of Representative doesn't agree on it. If that so, then the substitute for Government regulation Law won't be applicable anymore.

Government regulations which haven't got the approval from the House of Representative, if they have got the approval then they become ordinary Law, but if at that time the government annuls them the question is that that action will need an approval from the House of Representative or not. This is the question from Mr. Pataniari, so in this case the government regulation hasn't been approved yet. If they haven't been approved then the annulment doesn't need the approval. Implication when they were applicable has been expired. So, in fact, this is my personal opinion, it doesn't matter when the annulment doesn't need approval as the particular Government regulation hasn't got the approval yet.

MODERATOR:

My personal opinion, because it's a new case. There is one thing that needs to be observed, which is about the terminology at a critical situation, please explain.

Hon. Hon. HAMDAN ZOELVA from INDONESIA

In case of emergency, or a *rechtsvacuum* state, means that the President cannot do anything if there is no law because he will violate the law if there is a critical situation, whereas it has to be done instantly and needs to be quickly decided and cannot wait the long process at the parliament. So, up until this moment, what is the definition or terminology of emergency or critical situation, has yet existed a law formulation

But in practice, that critical situation can be happened if the President cannot do something. if he does something, he would violate the law. That's why he needs that law because what he needs to do requires an immediate time and requires the President to issue a law during a constrained situation.

MODERATOR :

The second, sir. About the testing of the formidable material is usually, as stated on act. 20 that the House of Representative submits and then approved by the President, but what if it the situation is reversed.

Usually the draft came from the executive function…. Please, Sir.

Question :
PATANIARI SIAHAAN from FORUM KONSTITUSI

Let us say it again. Section 20 article 2 of the basic constitution stated that a bill is drafted by the house of representatives and the president. Together. So it means the house of representatives and the president is one entity. If the house of representatives and the (not clear), the bill from the president is being reviewed by the house of representatives. Then the house of representatives is not seen as one. There are 10 fractions of the house of representatives against one president. If so, is it contradictory with section 20 article 2? Thank you.

Hon. HAMDAN ZOELVA from INDONESIA

Well, I suppose not. Section 20 article 2 sees the house of representatives as one institution even though it consists of several fractions and political party. It also sees the president as an institution. If there were internal disputes within the house of representatives about one norm, it shall not be conflicted towards the government. The house of representatives will have to solve the problems within themselves and comes into an agreement about a norm or a bill. So there is actually no contradictions. The contradictions only exist within the house of representatives' members because of the system that invites multiple political party to join the house of representatives. And it's normal to see the various political party there having conflicts about an issue. If there were any disagreements within them, they will have to resolve it first. Then they can address the issue to be in agreement with the government. That's where the dialog find its meaning.

MODERATOR:

Okay. So the next question will come from the gentlemen from the right. Please. Mention your name and your institution.

Question :
MUSLIH from FISIP Indonesia

Okay, thank you. My name Muslih from Faculty of Social and Political Sciences Universitas Jendral Sudirman, Purwokerto. I would like to address my question to the delegation from Indonesia and Columbia.

The short history of Indonesia mentioned by Mr. Hamdan told us that the process of check and balancing showed events of imbalance during the first regime as well as the second. And we were were whispering about the dominant role of the executive function compared to other institutions. But after the reformation, the 3rd, 4th, 5th, and now the 6th president showed indication, acquisition, or evaluation, ideally it should be in balance between the legislative, judicative, and the executive, but there are assumptions that the legislative function is more dominant than the executive.

And in other case, the judicative function, that is the constitutional court, is being questioned for being very dominant. In a case, about the PHP bill, which is a product of the legislative and the executive function, and the constitutional court has the power to cancel that. For this, we ask a commentary or explanations from Mr.Hamdan.

And then from Columbia, who has longer experiences than Indonesia, especially for the constitutional court. How is your court in matters of check and balancing between the institutions there. Especially in the real political situation. If I'm not mistaken, the examples mentioned earlier have a lot to do about the drugs mafia. But we want to hear more about the check and balance between the political powers in drafting the regulations or bills. I think that's it. Thank you.

MODERATOR:

Okay. Mr.Hamdan, please answer the questions.

Hon. HAMDAN ZOELVA from INDONESIA

Okay. Thank you. I think this is a very interesting question. Actually the constitution gives a balance in equality between the House of Representatives and the president. The House of Representatives drafted the bills because if the president rejected the draft of a bill, then the draft cannot be authorized. It hasn't been granted a cooperative decision. But the problem we see in the action, in action, because of the political configuration, this is a matter of practical issues not of constitutional issues. Sometimes the government won't put up with the house of representatives. But it doesn't mean it has never been done. During the time where Megawati reigns as a president, the ministry of justice, Yusril Ihza Mahendra, once rejected to authorize a draft. And during SBY's time, the president has once refused to have a discussion about a draft that is passed by the House of Representatives. It is guaranteed by the constitution. It is stated clear in the constitution. So the practical problem and the constitutional problem is a different thing.

For the second question, where is the logical reasoning on that? The bill is the product of the House of Representatives and the president and being rejected by the constitution court. That is the true proof of the governmental system by constitution. Section 1 Article two of the basic constitution; if we read it, then we'll realize there is a recognition of the people power and the power of the constitution. So the people power is being conducted based on the basic constitution. That is the people power and the power of constitution. So, the bill that is generated by the house of representatives and the president is also a product of the people power. But the constitution gives power to the constitutional court, if the bills authorized is in contradiction with the constitution, the constitution court by the power vested in them by the basic constitution, can annulled the bill. This is where the important process of check and balances takes place in the system of Indonesia. There is a the

people power, there is also the power of the constitution.

This is very much different, for example in a country that serves the importance of the parliament power. Whatever the parliament said, that it is cannot be revoked. Just like in France. In France, a bill of rights cannot be revoked by the constitutional court. It can only be reviewed by the constitutional court in a draft form before it is authorized. Why? Because they are implementing the power of parliament.

MODERATOR:

Okay, the second question addressed to the Your excelency Marsela. Could you please respond the question concerning the practice of check and balances in your country? Okay, check and balances in your country, in practice. Could you receive the earphone? The question addressed to you regarding the practice the check and balance in your country. Can you please respond the second question?

Hon. Carlos Hernandez Mogollon from Colombia

(answers in Spanish)

Moderator :

Okay, very well. Next question, please. Anyone wants to ask, please? Anyone?

Ni'matul Huda from UII Yogya:

I'm from Indonesian Islamic University, as mentioned by Mr. Hamdan about checking and balance on executive especially on Substitute for Government Regulation Law topic. My question is, according to the constitution, a Substitute for Government Regulation Law, since it's issued by the House of Representative and President, and when it's rejected, it has to be annulled. When it was still a Substitute for Government Regulation Law, is the Constitutional Court has the authority to test it. Because in practice, recently the Constitutional Court has tested two Substitute for Government Regulation Laws. If the testing basis of Constitutional Court is the Constitution, while the Constitution doesn't give the authority to test the Substitute for Government Regulation Law against the Legal Constitutionals, perhaps what is the basis of the argumentation? Thank you.

Moderator:

Mr. Hamdan, Please proceed.

Hon. Hamdan Zulfa from Indonesia

Actually the substance of Substitute for Government Regulation Law is legal constitutionals because it's what covered from the legal statutory law is legal constitutional norm. That's why according to the Constitutional Court, because it has legal constitutional norm, (21:38)

Moderator:

So the registration is same with legal constitutional law

Indonesia Hon. Hamdan Zulfa:

Indeed. The legalization process is different.

Moderator: Djoko Priyono

Very well. Please proceed Mrs. Retno Saraswati

Retno Saraswati from Undip:

Thank you. My name is Retno Saraswati from Law Faculty Diponegoro University. The first question I want to ask is the speaker from Colombia for the first one. In the process of doing Constitutional review at the Colombian Constitutional Court, is it also known formal reviews instead of material reviews? If material review is also known, what is it like, if, say, there is no such a thing in the constitution? The second question is, concerning checks and balancing in Constitutional Court in your country.

Translator:

Thank you. Your Excellency, My name is Retno Saraswati from Law Faculty Diponegoro University. The first question I want to ask is the speaker from Colombia for the first one. In the process of doing Constitutional review at the Colombian Constitutional Court, is it also known formal reviews instead of material reviews? If material review is also known, what is it like, if, say, there is no such a thing in the constitution? The second question is, concerning checks and balancing in Constitutional Court in your country.

Hon. Carlos Hernandez Mogollon from Colombia

(Speaks in Spanish)

MODERATOR

Review and closing of Panel II Session Three

Very well. I think there are some parts that can be understood, even though cannot be too satisfying because of the language barrier. So basically it is stated before that mechanism is existed, especially related to the formal laws which can be reviewed if it is contradicted with the constitution.

And then about the check and balances it is related with the fact that Constitutional Court cannot be intervened and is at the highest position and cannot be intercepted by any other higher state institutional.

I suppose that is all because the time is now up. So we will close the session, and please joins me to give applause to the speakers.

I would like to inform that there will be a break time until 14.30 in the afternoon and the next session will be held on the second floor.

So thirty minutes please enjoy your break time. Thank you.

PANEL III :

MODERATOR
Raudin Answar

SPEAKER 1
Hon. Tan Sri Arifin bin Zakaria
Justice of the Federal Court of Malaysia

MODERATOR:

Good afternoon,

Distinguished chairs, participants of the symposium allow me to introduce myself. My name is Raudin Anwar and I will act as a moderator of this afternoon session. We are honored to have the following panelists: Hon. Tan Sri Arifin bin Zakaria-Chief Justice of the High Court of Malaya, Federal Court of Malaysia, Hon. Engin Yildirim-Justice of Constitutional Court of Turkey., Hon. Priyo Budi Santoso-Vice speaker of the House of the Representative of Republic of Indonesia , Hon. Ali Huseynli-chairmain of Legal Committee of the National Assembly of Azerbaijan Republic.

Let me repeat, each presenter will be given fifteen minutes. This is just to make it easier so we can manage the time well and after that we have question and answer and the moderator will present the conclusion, approximately ten minutes.

Distinguished participants of the symposium, the first presenter, Hon. Tan Sri Arifin bin Zakaria. Please, the floor is yours.

Hon. Tan Sri Arifin bin Zakaria.

"The Mechanism of Checks and Balances among State Institutions"

Express many thanks to the Republic of Indonesia for welcoming us. I do not intend to read the whole paper since it's going to be very bulky and going to be time-consuming. Cause of that, I'll skip most of it and I will highlights some of the points.

INTRODUCTION

Malaysia gained its independence since August 31, 1957, has adopted a federal system of government. Malaysia comprises of 13 federated states and 3 federal territories (Kuala Lumpur, Putrajaya and Labuan, an island of the state of Sabah). The system of the Government in Malaysia is closely modelled on that of Westminster Parliamentary system. In United Kingdom where there is no written constitution, it is the fundamental principal of English Constitutional law that Parliament is supreme, that it may do anything it wishes; it can pass any law as it pleases so long as it conforms with the necessary legislative procedure. Unlike in the United Kingdom, in Malaysia, the Federal Constitution

is supreme, and not Parliament. This is spelt out in Article 4 paragraph 1 of the Federal Constitution which provides

> *(1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void."*

Thus the power of Parliament is circumscribed by the Federal Constitution. The Federal Constitution sets out the framework and the principle functions of the institutions of the state and declares the principles by which those institutions operate. That's our doctrine that is spelled out in the constitution.

THE DOCTRINE OF SEPARATION OF POWERS

In dealing with the given topic, one cannot avoid discussing the doctrine of separation of powers as the fundamental principles of modern democratic governments. It is a common believe that the doctrine of separation of powers has always been part and parcel of our constitutional fabric. Separation of Powers is the doctrine and practice of dividing the powers of a government among different institutions to guard against abuse of authority. On this question that great oracle; Montesquieu should always be consulted. This is what he said. Montesquieu recognized the need for and recommended the separation of the one institution into three. But the great modern formulation of the doctrine was that of Montesquieu in L'Esprit des Lois (1748), who contended that liberties were most effectively safeguarded by the separation of powers, namely the division of the legislative, executive and judicial functions of government between separate and independent persons and bodies. His view was founded on that of the British Constitution although his understanding of British politics was not wholly accurate. In fact, in the British Constitution there is no complete separation of powers, then or now; the Lord Chancellor is chairman of the House of Lords, an important minister and head of the judiciary. But this practice was no longer in written today

As far as Malaysia is concerned, the Federal Constitution provides for the separation of powers and actually speaks of three branches: the Executive (Part IV Chapter 3, Articles 39-43C), the Federal Legislative (Part IV, Chapter 4, Articles 44-65), and the Judiciary (Part IX Articles 121-131A). It would appear that the Federal Constitution contemplates the division of powers into three but in practice, there are overlapping functions or no clear separation of executive-legislative power since Malaysian system is more akin to Westminster Government. We can accept that, as in the case of the United Kingdom, there is something of an indistinct border between legislative and executive powers, but since no Malaysian judge is a member of any legislature, it can safely be affirmed that the judicial power of the Federation is, apart from a necessary power to prescribe rules of procedure, independent of executive and legislative authority.

In adherence to the said doctrine, there must be a systematic and effective checks and balances among the state institutions. This is to ensure that each institution plays its intended role in accordance with the rule of law.

Then I touch the various institutions. First, we have the Yang di Pertuan Agong (YDPA). But lately in the case of Dewan Undangan Kelantan that is Anor. V. Nordin Salleh & Anor page 40 on my paper, the plaintiffs were elected to the Dewan Undangan Negeri Kelantan (State Legislative Assembly) during the General Elections held on 21 October 1990 and subsequently sworn in as members. On 25 April 1991 the first defendant passed the State Enactment amending the state constitution which provides that if any member of the State Legislative Assembly who is a member of a political party resigns or is expelled from, or for any reasons whatsoever ceases to be a member of such political party, he shall cease to be a member of the Legislative body and his seat shall become vacant. The purpose of the act was actually to prevent people from jumping from party to party. The plaintiffs then resigned from their party and joined another party. The first defendant passed a resolution pursuant to the impugned legislation that the first and second plaintiffs had ceased to be members of the Dewan Undangan Negeri Kelantan and declared the relevant seats vacant. Abdul Hamid Omar, Law President, when delivering judgment of the court said, "In all the circumstances, we have arrived at the unanimous conclusion that the direct and inevitable consequences of Article XXXIA of the Kelantan State Constitution which is designed to enforce party discipline does impose a restriction on the exercise by members of the Legislature of their fundamental right of association guaranteed by Article 10(1)(c) of the Federal Constitution, and that such restriction is not only not protected by Article 10(1)(c) of the Federal Constitution but clearly does not fall within any of the grounds for disqualification specified under s. 6(1) of Part I to the Eight Schedule to the Federal Constitution. Accordingly, we agree with the learned Judge in the Court below though on somewhat different grounds that by virtue of Article 4(1) of the Federal Constitution, Article XXXIA of the Kelantan Constitution is to that extent void." So, that's why the federal court has declared as intervene the act has checked on the legislative Institution.

The significance of these cases is that it illustrates that in Malaysia, there is no parliamentary supremacy whatsoever. The Constitution is supreme. The powers of the Legislature are derived from and limited by the Constitution. Neither the federal nor the state Legislatures can make any law as they please. In this context, the cases are important examples of how rules of interpretations are employed to understand the meaning and the scope of laws. Again, this brings us back to the issue of 'ultra virus' as a backbone of judicial review. However the powers of the courts to review the decision of the legislative body has somewhat been curtailed by the amendment of Article 121 of the Federal Constitution. I should not go to that.

Now the time is zero. To conclude, I'll see this. In conclusion I am proud to say that the Malaysian judiciary represents a long and distinguished tradition of judicial independence. It has striven to maintain the rule of law and constitutionalism. However, its functions and powers must be exercised with wisdom and restraint. Without wisdom and restraint, the system of checks and balances alone may not prove to be sufficient enough safeguard. In the final analysis, it is imperative that all state institutions must respect the

supremacy of the constitution, with the court being the ultimate interpreter of the constitution.

INTERPRETER:

Before I finish my contribution, my paper, I have to the flower on the pipe separated, so basically he said if I made any mistakes please forgive me, and thank you, and basically now he says thank you very much and you invite me again then I'll come.

SPEAKER 2
Hon. Engin YILDIRIM,

Justice of Constitutional Court of Turkey

Moderator:

Thank you, Mr. Tan Sri Arifin for your comprehensive presentation. It's very clear and concise. And thank you very much for your 'pantun'. It helped to wake us up.

So, the next presentation is from Engin Yildirim, the justice of Constitutional Court of Turkey, who will give the presentation on Constitutional Courts and Democratization of Turkish Perspective. Hon. Engrim Yildirim, the floor is yours.

Hon. Engin YILDIRIM,

In a recent referendum on constitutional amendments, the Turkish Constitution now includes the procedure of "constitutional complaint" to be lodged under certain circumstances by individuals whose fundamental rights have been violated by means of legislative acts. The new constitutional complaint system is going to come into effect next year.

A constitutional complaint, as you all know, is a way to claim rights and is different from the examination of unconstitutionality of laws or of the inability of administrative acts, or the cassation and review of judgments. All individuals, claiming that one of their constitutional rights and freedoms in the scope of the European Convention on Human Rights has been violated by public power, are entitled to apply the Constitutional Court on condition that they have exhausted all legal remedies. The principles and procedures on admissibility of applications of constitutional complaints, on establishment and competence of pre-review commissions and on judgments of the Chambers shall be regulated by law.

The function of constitutional complaint is in principle the effective protection of fundamental rights by giving remedy to the individuals in case of violation of their rights by administrative or judicial decisions. This is the main (noise) justification for introducing constitutional complaint in Turkey.

Constitutional complaint system in Turkey is expected to be a domestic implementation similar to that of an individual application brought before the European Court of Human Rights. From this aspect, it provides a way to determine violations by the state of fundamental rights and freedoms on a factual basis and to take the necessary measures to redress violations. But besides this justification in principle, there is a more practical consideration in this case. According the expectations of the drafters – as formulated in the reasoning – "The introduction of constitutional complaint will result or is expected to result in a considerable decrease in the number of files against Turkey brought before the European Court of Human Rights". Currently Turkey ranks second following Russia in the number of files lodged for violation of right before the European Court of Human Rights. Thus the aim of the new regulation is to provide domestic remedy for the violation of fundamental rights. External dynamics has also begun to play a remarkable role in the recent judgments delivered by the Constitutional Court, especially with respect to controversial and crucial cases, like political party closure. Particularly, the European institutions

In 1990 in Spain. Between 1961 and 1988, 43 political parties were closed down by the Constitutional Court. So, as you can see from this figure, the court has acted on publicity in a very active way.

There is the recognition by the Turkish state system that membership to the European Union is an important aspect of the Turkish age-long ambition to modernize. As the result of this, Turkish institutions, even the most conservative ones … I'm afraid to say including the constitutional court….This allows the external actors, including the EU, to exert greater pressure for a more radical and determinative steps towards further democratization in Turkey.

It still, however, remains to be seen whether and in how far the TCC contributes to successful processes of democratization or the establishment of the rule of law. Constitutional justice applied by a court or a constitutional council or a specialized supreme court can only carry out its function of safeguarding in the respect for the constitution and protecting human rights it is genuinely independent from power, the activities from which it controls. Constitutional courts can indeed contribute to democracy and the rule of law, if the institutional circumstances support the work of the courts and if the courts show a democracy-friendly orientation.

Thank you for your attention.

SPEAKER 3
Hon. Priyo Budi Santoso,

Vice Speaker of The House of Representative of the Republic of Indonesia

MEASURING THE CHECKS AND BALANCES MECHANISM AMONG STATE INSTITUTIONS

We should go through the referendum process first , even the people representative assembly at that time has task to save guard the constitution can not be amended because of anything or any other reason. But changes has happened to our country . after the reform era in 1998 that was motored by democracy movement by the students and the youth and . after the authority or regime of Suharto ended Indonesia have amended its constitution for at least 4 times and the people consultative assembly as the holder of mandate at t hat time was assumed by Amin Rais number one opposition leader at that time,and nowadays he is no longer maybe . There are many reasons to amend the constitution allow me to mention it one by one because I was one of the members that consistently insist guarding of our constitution. The anatomy of the 2945 constitution tended to give big power to the president .

Even in appointing our military general, the chief of the police, the governor of our central bank, the governor of our provinces all of those decision should be approved by the president so the executive having no one is dominant in previous constitution . whereas the president is given some very broad authority .Even the executive is given authority to implement and to make legislation which actually the task of legislative . This legislation authority became strong hand that can potentially make the president dominate the power . Because of this system we had democratic failure and checks and balances failure.. Before we amend of the constitution the democracy was not effective. At that time democracy in our country is mere dream of activists so without checks and balances,, and without freedom access of information but at that time our country receive the predicate of a tiger of Asia in our economic development because we manage to build economic power in our country

Distinguishly Ladies and Gentlemen, I also need to mention the relation between the institutions before and after the amendments of our 1945 constitution. But I have to emphasize that Indonesia is a law state that the state is actually run based on the constitution and the 1945 constitution is the highest law. Refer the amendment of the constitution; our constitution was the highest law and people sovereignty is assumed fully by the people's consultative assembly as the highest constitution of the state. On the next, the people's consultative assembly then devolves their power to five state high institutions, namely the Supreme Court, president, the House of Representatives, the supreme consultative assembly and the supreme audit agency. In this model, the people's consultative assembly is an omnipotent and superpower

agency because it is defined as the absolute holder of people sovereignty, on behalf of the people. So because of that, in the history, the PCA made the decision to make a lifelong president and elect the same president seven times in a row.

President Soekarno, our Founding Father, was appointed as a lifelong president and then the predecessor , President Soeharto sit in the position for seven terms in a row. So they are both as the best leader of our country. Even though they are widely criticize democratically. The people of Indonesia want to have a total democracy with the strong government supported by the people power. That spirit that push reform era in 1998 that was motored by power of the youth and the student. After the amendments of our constitution, the relation and the structure of state institutions changed dramatically. The PCA that was the highest constitution in the country now become equivalent and equal to other state institutions like the House of Representatives and the president.

After the amendment of constitution, we still choose to have our 1945 constitution as the highest law and the power have been devolved to the constitutions. In the past, we had what we called people's consultative and people's advisory council and we no longer have the supreme advisory council and now we have the house of representatives. We also has a new institution called the constitutional court that become the host of this international symposium, so this high institutions of the state, the People's Consultative Council Assembly, the President, the House of Representatives, House of the Regional Representatives, Supreme Court, and other agencies in the constitutional courts.

Even so, of course there still many problems in building checks and balances among the state institutions that we currently have. Sometimes we can still feel some conflict between institutions. I with regret have to say that though we are proud in our democracy, I have witnessed that there are some conflicts and clashes among the inter state institutions on the name of democracy. On the other hand we know that what we should do is strengthening the role of the civil society, the people power in providing the control to state institution that sometimes creates clashes and social conflict .

The spirit of freedom that is gained to reform , the spirit of openness and transparency that mushrooming in our country has pushed the grow of the civil society movement … Aside from that we can also feel some clashes among institutions, and we also feel conflict within the state and the civil society.

Today, we are trying to find the most ideal for our democracy. The best way of democracy that we can implement in our country, the most ideal format, but until now we are still trying to review, and we are still trying hard to find the best democracy model for our country. We want democracy but we also want to safeguard our economic development.

This basic spirit is how to ensure that the spirit can be felt by all people. So by ensuring the maximum function of the checks and balances among institutions.

Thank you for your attention, peace be with you, may God give mercy and His blessings. Wassalmaualaikum warokhmatullohi wa barakatuh.

SPEAKER 4
Hon. Ali Huseynli,

Chairman of Legal Committee of The National Assembly of Azerbaijan Republic

Moderator:
The Hon. Ali Huseyni, the floor is yours.

Hon. Ali Huseynli,

The constitutional basis of the relationship of government in the Republic of Azerbaijan: system of checks and balances in the separation of powers

Assalamu alaikum warahmatullahi wabarakatuh,

On behalf of my colleagues, I'd like to thank the Constitutional Court of the Republic of Indonesia for this amazing symposium and I'm sure it will be useful for all of us in our future job.

Dear participants,

My report is concerning the constitutional basis of relationships of the Republic of Azebaijan, system of checks and balances in the separation of power.

Modern values of constitutionalism in Azerbaijan have deep historical roots. The first democratic republic in the east was established in Azerbaijan in 1918. Unfortunately, it lasted 23 months. While no constitution was adopted back then, the Parliament of Azerbaijan Democratic Republic (ADR) was able to enact a great number of the laws of a constitutional character. Among them was the Law of Incompatibility adopted on 25 January 1919. This Act contained the basic provisions on the complete separation of powers providing for the complete separation of the executive branch of the government from the legislative one. Pursuant to this Act, the members of the Parliament were not illegible to work as governmental officers, other than in a position of a minister. Azerbaijan's independence was restored in 1991. The Act "On the State Independence" of 1991 basically reinforced the fundamental rule of the separation of powers. The Constitution of the Azerbaijan Republic adopted as a result of the referendum held in 1995 stated the system of the separation of powers.

The Constitution of Azerbaijan represents a social and legal contract between the society and the state. As for the legal mechanism, the Constitution is supported by the system of the legal and governmental institutions, the constitutional law enforcement practices, and the public sense of justice and constitutional culture of the population. The value of the Constitution lies in the equitable distribution of social interests, the state power and the supremacy of the legal system.

At the present stage of the development of the Azerbaijan state institutionalism, the constitutionalism has a scientific and practical value. The constitutionalism, as a permanently evolving dynamic system, having its legal form, significantly affects towards the formation of the public legal consciousness. The development of the constitutionalism has resulted in the openness of the institutions of the government to public, eradication of the legal nihilism, and the dynamic boost of the constitutional provisions. This interrelationship of society with the state ensures the participation of public in government and actualizes the constitutional institutions. Ultimately, the entire political and legal system built on the constitutional values ensures the establishment of the civil society, guarantees the rights and freedoms for individuals and the stability of the constitutional order and state sovereignty.

Article 7 of the Constitution specifies that the branches of government should interact with each other and within their respective powers are independent from each other. Legislative power is vested in the Milli Majlis, the executive power – with the President, and the judiciary one – with the courts of Azerbaijan. This is a principle of the organization of the modern government - the unshakable foundation of statehood and democratic structure of society.

Milli Majlis of Azerbaijan - unicameral parliament is elected in general, equal and direct elections by secret ballot for a term of 5 years. It consists of 125 deputies elected by majority election system.

The President of the Republic of Azerbaijan represents the executive power and also is a head of state. In accordance with Article 8 of the Constitution, the President of the Azerbaijan Republic represents the unity of the people of Azerbaijan and ensures the continuity of the Azerbaijani statehood. The President represents the state in the country and in foreign affairs. The President is also the guarantor of the independence of the judiciary system.

The Cabinet of Ministers was created to implement the power of the President as the executive branch of the government. The Cabinet of Ministers of the Azerbaijan Republic is the highest executive body of the President of Azerbaijan Republic. The Cabinet of Ministers is also created by the President of Azerbaijan. However, under Article 119 of the Constitution, the Cabinet of Minister has a certain degree of the autonomy on the budgeting, operational matters of economic management and culture, and social issues. The Cabinet of Ministers is accountable to the President and reports to him.

The judicial power in Azerbaijan is carried out by the Constitutional Court, the Supreme Court, the appellate courts as well as the courts of the general and specialized jurisdiction. Judges may be persons not younger than 30 year old, with high legal education and has the legal experience at least 5 years. Judges are independent, not subject to any dismissal and immune from any legal actions during their tenure.

The constitutional model of a presidential republic has been created in Azerbaijan. The creation of a system of the separation of powers in a

presidential republic pursued the centralization of economic resources, the active development of public programs and strengthening the system of state authorities. In a referendum in 2009, after almost a 10-year-old process of economic and social reforms, the Constitution has been amended to indicate that the economic development of Azerbaijan has a social orientation. This was practically the transition to a new stage of development of the welfare state.

As we know, the public government is based on the strict control over the budget of the country. The parliamentary control over the budget is a key issue in the system of checks and balances. In accordance with the Constitution, the President, not a Prime Minister, submits the Azerbaijan's budget. The Parliament reviews the budget in the few last months of the calendar year. Like all other parliaments, member of parliaments frequently come out with proposals to increase expenditures on social needs. It is not always possible to ensure that the adoption of these proposals. However, the Audit Chamber which controls the budget is within the Parliament and this ensures an effective quality control over the budget.

Along with control over budget, the Milli Majlis is an active initiator of legislation. Almost half of laws the parliament has passed on its own initiative. However, given the budgetary costs and the subsequent enforcement issues, laws are drafted with the participation of the representatives from the relevant governmental ministries and agencies. Milli Majlis also has some supervisory functions over the presidential decrees. In particular, a presidential decree declaring a state of emergency and military requires a parliamentary approval. The parliament also approves the use of armed forces, etc.

Discussion of the draft laws proposed by the subjects of the executive power also as a policy of accord. Without the consent of the subject of legislative initiative, no amendments to the bill are allowed. And this is justified since the Parliament with any minor amendments made may change the nature of the bill.

In the system of relations of powers, the Constitution clearly defines the powers of the legislative and executive branches, and they cannot be extended. For the extension of powers of the supreme authorities, a complex constitutional arrangement is needed.

President of the Republic of Azerbaijan does not have a constitutional right to dismiss the parliament. However, as a control mechanism under Article 110 of the Constitution, the President has a right of veto.

The constitutional practice in Azerbaijan does not have any cases of investigations of high-level executives who have abused their powers. This practice had a negative result. The parliamentary committees created to investigate these matters would serve as means for fight in the parliament. However, the parliament under Article 95 of the Constitution, has jurisdiction over impeachment of the President, removal of judges by the President and motion of no confidence to the Cabinet of Ministers.

In conclusion, I note that there are different models and forms of separation of powers but they must all be designed to protect the important values of constitutionalism. The legal system of Azerbaijan is developing within a particular constitutional model, aimed at providing basic human rights and limited restrictions of power. This model is aimed at forming a strong government that is able to provide the civil, political and social human rights and ensure their protection.

Thank you very much

Assalamu alaikum Warahmatullahi Wabarakatuh.

Questions and Answers :

First question to first speaker from Malaysia, Hon. Tan Sri Arifin. Is there a tendency in the democratization process also strengthening in terms of authoritarian while consolidating the legal process, especially in Malaysia. How do you react toward the reformation that is happening in Malaysia.

To speaker from Turkey. How do you respond towards the legislative conflicts or the judicial conflict happening in Turkey, especially regarding the authoritarian, the code and conflict which occurred between Constitutional Court and the House of Representatives. When someone asks for the judicial review, they ask for two articles but the overall is being dismissed. The question is for the Constitutional Court. How far is the scope to what extend? I would like to know. Thank you Ms. Eva.

MODERATOR:

There are two questions which will be answered, first speaker from Malaysia and speaker from Turkey. And now to Pak Galang Asmara, your question. Thank you.

Galang Asmara:

I raised my hand three times but I just got this opportunity now. I have three questions. First and second questions are addressed to Malaysian delegation. And the third question is addressed to Azerbaijan delegation. But before I convey my questions to Malaysian, I would like to convey my own poem to you.

Because today is Tuesday,

And the sun is shining so brightly

But we are cold in Shangri-La Hotel

Your presentation is so unique

that make me to learn in Malaysia, to study in Malaysia

Delegation from Malaysia, on page 5 there's statement 'in Malaysia, the three principle institutions are the legislative, executive and judiciary. The

judiciary has distinctive but sometimes overlapping functions. I'd like to ask about the overlapping functions. What I mean is that you'd like to explain to us the overlapping functions among those institutions.

The second questions is on the same page that there's statement that the judiciary is an important institution of the Malaysian State. It has the power and duty of judicating, not only for disputes between citizens but also disputes between citizens and various institutions of the state. My question is what kind of dispute between state and federations.

Third question to Azerbaijan. You mentioned that one of the functions of the parliament is to impeach the president. And then my question, 'what are the reasons that you use to impeach the president in Azerbaijan?' On what reasons? What grounds? Reasons you can impeach your president. And thank you.

MODERATOR:

And lastly, I'd like to ask Mr. Suharsono, from UNS to convey your questions and whom you addressed.

Mr. Suharsono, from UNS:

First to Pak Priyo, Indonesian House of Representative. If Indonesia, for example, if our president is being impeached because of corruption, then I would ask. Does the corruption done by the president, can he be charged to court. If yes, during the trial, he's proven that he is not found guilty of corruption and is not being sanctioned or punished. It is so easy. You can get away with it.

So my question address to Malaysia and theoretically I don't know whether between Indonesia-Malaysia which is more democratize but here I assume that all democratic countries but if a monarch can go to tyranny, can it go backwards? The problem is Malaysia now is covered all over in the news. Why it is considered hot topic. My question is the same, how does the democracy country, such as yours can manage such issue, such aspect.

MODERATOR:

Thank you, Pak Suharsono for your questions. And now we asked the panelist to convey your answers and I would like to ask the honorary Mr. Tan Sri Arifin Zakariafrom Malaysia.

TAN SRI ARIFIN:

So it is difficult for me to convey the poems, because I'm not actually good in saying, but I get it in the internet, but I think we are all trying to learn from each other sincerely. So this is actually the second time for the constitutional court meeting in Asia, and I learned a lot from your experience in Indonesia. And I think we, the country of ASEAN share. Back to the question, I don't really understand the question, what was your question? I don't really understand your question. But what I get, the word "reform" in

Malaysia related to the opposition party. So the word "reform" and "justice" are sensitive in Malaysia because they are related to the opposition. So even though "reform" is just a word that signified "change" in Malaysia "change" lately happens in politic just like in other country. But we still maintain the same constitution from the day of our Independent until now. And even though we have some amendments, they don't come suddenly. The election time, at any challenge on the vote of the people, it can be directed to the court. That's my only answer.

QUESTIONER:

Your constitution like the way it is from the beginning, do you think that your existing constitution is irresponsive to the increasing reform.

TAN SRI ARIFIN:

So this question is related to politic, I re-judge, it's very difficult for me to answer because I don't dare to touch politic, not to be political, it's should be apolitical. Then only you'll be independent that reflects on the independent of the judges. And I as stated my office as a judge as a magistry of *dewan*. To be a high quality judge right to the federal court now, and chief of the lawyer for the past twenty years. So I've been fre very independent and very very apolitical to all. I try to keep away from politic. Thank you very much.

Malaysia:

In Malaysia, we are a federal state, so we have a federal constitution…we have the federation and the state. Sometimes there are conflicts between the federation and the state, for instance between the state of Kelantan and the state of Sabah, between the State of Tengganu and the State of Sabah, and this will be referred in the constitutional court. And, of course, we also have some cases where we have the conflict between the Federation and the State, where the Federation tries to challenge the decision of the State. So, this is inter-state and between the Federation and the State. Mr. Sudarsono, I forgot your question. What was your question? I didn't understand anything from the question. Can you please simplify?

Indonesia:

I also don't understand: Malaysia and Indonesia, which one is more democratic? Malaysia or Indonesia? But all representatives from various countries always claim that their countries are democratic because they implement the check and balance system. Madam Eva also said earlier, democracy can evolve and become tyranny or democracy. In Malaysia we have … based on the news we watch on TV is the movement. So, my question is the movement: to what extent, democracy can create riots and demonstrations.

Malaysia:

Oh, you're asking about democracy in Malaysia?

Indonesia:

Yeah, I heard the news about demonstration in Malaysia.

Malaysia:

I would like to remind us about what Azerbaijan said earlier.

So, what our Azerbaijan friend said earlier: even though we always claim that we have democracy and check and balance, but we adopt different models from one another. The model in Malaysia maybe can be used in Malaysia and is beneficial for Malaysia, but maybe it is not appropriate for Indonesia or for other countries. With regard to the riots, I think, this is political movement, so that's why I don't want to talk about it. That's why in Malaysia, if we want to meet… this is the British rule… if we want to congregate if we want to meet, even though we have freedom of expression, but this freedom should be done based on the written law enacted by the president, by the parliament. And based on the law, we have a police permit, community permit, society permit to unionize. So, this safeguards all the people in Malaysia. So, if you want to meet or to unionize.. so if you want to meet or organize a meeting of more than 5 people please inform the police. If the police deny giving it, then you can submit this case to the court. But if the police say that this can potentially become a riot, who am I to challenge the police, because the police knows better than us. Security is more important than freedom, to some extent, depending on circumstances. This is a very difficult question to answer for the legislators. For people who are elected by the people to decide, not me as a judge. so it's not up to me to decide. It's not up to me to judge to decide upon this. Because judges can make decisions on judiciary issues, but on political issues and police, and we don't want to be hyperactive or judicially hyperactive just like in India. That's my answer.

I am pleased pleased as a part of this country today I am proud . Indonesia is the most democratic country which runs democratic system which uses the closest system in Greece which is Indonesia . Because we elect president using direct system, we elect the governors and also head of sub districts through direct election. I have not seen a country more democratic than Indonesia while applying the procedure. And with that I would like to answer Mr. suharsono's question if a president of Indonesia have to resign , impeach due to corruption allegation how we proceed . Will he be put in court. ? I woul d like to answer this with my prespective as a politician . I am not an expert in constitution. In my opinion if one day and I hope this day never comes if Someday our president proven to commit corruption or conducted other criminal violation , like it or not then the house of representative will summon him . And then we will put the president through the trial . The problem is is it possible that , l The problem is is it possible that the presiden of the Republic Indonesia who was elected in a democratic manner by seven hundred and seventy million people , Indonesia people could he really commit such violation. I am not certain at all that would happen.

I would like to answer this, with my perspective as politician, I'm not an expert in constitution, in my opinion, I hope one day and this day never come, our president proven to commit corruption or conducted other criminal violation, like it or not, the house of representatives will summon him. And then we will convey this to the constitutional court, that we must put the president to trial, the problem is it possible that the president of republic of Indonesia which was elected in a democratic manner by 770million Indonesian people could be really commit such violation. I'm not certain that would happen. But if it did and he proven guilty of such crime then it is possible that that president or whoever sits as the president can be … it is valid, it is legal, but I disagree if the former president must be handcuffed and using uniform, I disagree. I was shocked when I saw several neighboring country such as Korea, the former president who was found guilty of corruption was handcuffed and used innate uniform, I disagree. For whatever cases, then I would close the case because I'm not a judge. If you judges in international court or in Supreme Court feel free to do so but if I take his place as the president then I will give him full amnesty, I will pardon him completely. I want to avoid the situation where we have to try a president or former president. It would be a great stain in our history. That is how I see it. Thank you to Malaysian Delegation. When you said by honorable Tan Sri that security. We have indulged such experience when president Soeharto was

in power. Our security was on the top of everything and that is more important than freedom. I don't know whether one day Malaysia is willing to follow previous experiences happened in Indonesia, I don't know. But previous experience when we observe it closely, we are aware that Malaysia are not intervene. We will pray for you that there will be a change in Malaysia. But there are prayers from several people maybe God will not grant them. Multiple events happen in Malaysia, in the Middle East and we have a dominant effect, so we must learn from our experiences. Thank you.

Moderator - Review and closing of Panel III Session Three.

With the answer conveyed by the Hon. Priyo Budi Santoso I concluded the question and answer session and I noted down that there are still many questions to be conveyed but I, as the moderator, would like to close Panel 3 and wrap it up. And I have noted several points and I would like to convey to all. I will read it in English.

(..power but they must all be designed to protect the important values of the constitutionalism which provide the protection of civil, political, and social human rights. And the last but very important on, its function and power must be exercised with wisdom and restraint. Without wisdom and restraint, the system of checks and balances alone may not prove to be sufficient enough to safeguard."

That's all that we can convey. So whatever check and balance mechanism they apply, it must be for the good of the people and to ensure that human rights are upheld to protect the state itself.

So in this occasion, again, I would like to ask us all to give applause to all the speakers who have conveyed a remarkable presentation. And I also would like to give utmost appreciation and gratitude for all your active participation and my apology if, during my time as the moderator, I made mistakes or still lacking here and there.

Next would be the drafting of panel resume. For the reports, third commission report who have commenced since this morning until today. So honorable speakers, please remain seated and we will compile, we will draft the report together with the steering committee. And we will convey this report shortly, may be it will take around ten minutes, so I ask delegations from Malaysia to Honorable Mr. Tan Sri Arifin bin Zakaria to convey the report.

"Thank you…"

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

CLOSING CEREMONY

The International Symposium on Constitutional Democratic State

MAHKAMAH KONSTITUSI
REPUBLIK INDONESIA

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

REPORT OF THE SECRETARY GENERAL OF THE CONSTITUTIONAL COURT AT THE CLOSING OF THE INTERNATIONAL SYMPOSIUM ON CONSTITUTIONAL DEMOCRATIC STATE

WEDNESDAY, JULY 13, 2011

Bismillahirrohmaanirrohim,

Assalamu'alaikum warahmatullahi wabarakaatuh.

A very good evening and peace and prosperity to all of us.

- Honorable Chief Justice of the Constitutional Court of the Republic of Indonesia, **Prof. Dr. Mohammad Mahfud MD**.
- Your Excellencies Chief Justices and Justices of Constitutional Courts and Equivalent Institutions from countries participating in this Symposium,
- Your Excellencies Speakers and Members of Parliaments of participating countries,
- Honorable Heads of State Institutions, Ministers of the second United Indonesia Cabinet and other State Officials,
- Your Excellencies Ambassadors and Representatives of countries participating in this Symposium, and
- Distinguished Ladies and Gentlemen.

Let us praise and convey our gratitude to the One Almighty God for his blessings and guidance enabling us to attend all events held in the **International Symposium on îConstitutional Democratic Stateî.** As this event is now drawing near its end, I would like to make a special mention of the 8th Anniversary of the Constitutional Court of the Republic of Indonesia, which we are also celebrating tonight.

Honorable delegations and guests,

For the past two days, since the opening of the International Symposium on "Constitutional Democratic State" by the President of the Republic of Indonesia on 11 July 2011, all participants have discussed about many issues related to experience and democratic practices of each participating country, not only the role of Constitutional Courts and other Equivalent Institutions in strengthening democratic principles, democratization of the Law making process, but also the mechanism of *Checks and Balances* between State Institutions.

We have compiled the entire process of the Symposium and paper presentations of speakers in the form of an "International Symposium Proceedings Book". It is our hope that the outcome of this International Symposium can be used as a major input for all parties, and more particularly for Constitutional Courts and Equivalent Institutions and Parliaments of countries participating in this Symposium.

Distinguished Delegations and Guests,

We are fully aware that the organization of this symposium has not been determined only by the preparations that we have made as the organizing committee, but also by the active involvement of symposium participants.

Perfection only belongs to Allah. Accordingly, from the bottom of our heart, we would like to offer the delegates and all symposium participants our sincerest apologies for any weaknesses and shortcomings in the organization of this Symposium. Particulary as regards any possible problems encountered by the simultaneous interpreting system.

Please allow me to bid farewell to the Honorable Chief Justices and Justices of Constitutional Courts and Equivalent Institutions, to the Honorable Speakers and Members of Parliament from countries participating in this symposium. I hope you have a very pleasant journey back to your homeland. Please convey our warm regards to your family members and colleagues. Thank you.

Billahi taufiq wal hidayah,

Wassalamu'alaikum warahmatullahi wabarakaatuh.

SECRETARY GENERAL,

JANEDJRI M. GAFFAR

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

REMARKS BY THE RIGHT HONOURABLE MR. CHUT CHONLAVORN PRESIDENT OF THE CONSTITUTIONAL COURT OF THAILAND

Your Honours, the Presidents, Chief Justices and Justices of Constitutional Courts and other Equivalent Institutions,

Honorable Speakers and Members of Parliaments of countries participating in the Symposium,

Excellencies Ambassadors of the countries participating in the Symposium,

Distinguished Participants,

Ladies and Gentlemen,

It is indeed a great honour and pleasure for me to be invited to make some remarks this evening.

First, I am certain that all particiants in this International Symposium on "Constitutional Democratic State" hosted by the Constitutional Court and the House of Representatives of the Republic of Indonesia on the 8th anniversary of the Constitutional Court of the Republic of Indonesia join me in *expressing* our sincere thanks and appreciation for the very warm welcome and bounteous hospitality extended to all of us by the hosts. My profound gratitude goes to His Excellency the President of the Republic of Indonesia who honoured this Symposium by delivering a keynote speech at the opening ceremony which inspired us all in our following meetings.

The Symposium, which are attended by a number of Presidents or Heads of the Constitutional Courts or Equivalent Institutions as well as Speakers or Presidents of Parliaments from various countries in Asia, Africa, Europe and America, proves to be a very successful one. I therefore would like to commend and congratulate the joint organizers for this success.

Second, I would like to congratulate the Constitutional Court of the Republic of Indonesia on the occasion of the 8th Anniversary of its establishment. In constitutional democracy, the Constitution is regarded as supreme. The Constitutional Court therefore performs the important function of safeguarding this supremacy of the Constitution as well as protecting the rights and liberties of the people. I have learned that since its establishment, the Constitutional Court of the Republic of Indonesia has accomplished a great deal of its missions as designed by the Constitution and has become one of the important institutions of the country.

I very much hope that the Constitutional Court of the Republic of Indonesia will continue to be one of the main pillars of the Indonesian society. On this auspicious occasion, I offer my best wishes to the Constitutional Court of the Republic of Indonesia and wish it every success in its tasks in the years to come.

Thank you very much. Terima Kasih.

MAHKAMAH KONSTITUSI
REPUBLIK INDONESIA

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

SPEECH OF
THE CHIEF JUSTICE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA AT THE FAREWELL DINNER OF THE INTERNATIONAL SYMPOSIUM ON CONSTITUTIONAL DEMOCRATIC STATE

JAKARTA, JULY 13, 2011

Bismillahirrahmanirrahim,

Assalamu'alaikum Warahmatullahi Wabarakatuh,

A very good evening and peace and prosperity to all of us.

- Your Excellencies, Chief Justices and Judges of Constitutional Courts and other Equivalent Institutions of countries participating in the Symposium,
- Your Excellencies, Speakers and Members of Parliament from countries participating in the Symposium,
- The honorable Leaders of State Institutions, Ministers of the United Indonesia Cabinet II and other State Officials,
- Your Excellencies, Ambassadors and Chief Representatives of countries participating in the Symposium, and
- Distinguished Ladies and Gentlemen.

Let us convey our gratitude to The One Almighty God for His blessings, enabling us all to attend the commemoration ceremony of the 8th Anniversary of the Constitutional Court of the Republic of Indonesia.

Distinguished Ladies and Gentlemen,

The symposium has now been completed, however that does not mean that our duties and responsibilities have also come to an end, in view of the future challenges in materializing constitutional democratic states ahead of

us, which will be increasingly difficult and complex. It is my hope, therefore, that the Symposium can provide enlightment to all of us in our endeavors for strengthening the application of the principles of constitutional democracy in our respective countries.

Distinguished Ladies and Gentlemen,

This international Symposium has been held in the context of the commemoration of the 8th Anniversary of the Constitutional Court of the Republic of Indonesia. At such a relatively young age, the Constitutional Court of the Republic of Indonesia, with the support of the entire Indonesian nation, has been able to position itself as a state institution playing a positive role in the application of the principles of constitutional democracy, through its 5 (five) constitutional authorities. With those five authorities, the Constitutional Court has the function as the guardian of the Constitution and democracy, as well as the protector of citizens' human rights and constitutional rights.

During the past 8 (eight) years of its establishment, the Constitutional Court of the Republic of Indonesia has issued decisions which promote the democratization process and respect for constitutional supremacy, and in fact, the Constitutional Court has been able to provide constitutional solutions for the various problems encountered in applying the principles of constitutional democracy.

We have also been making continuous endeavors to transform the Constitutional Court towards becoming a modern and credible judicial body through a free and impartial judicial process, as well as the implementation of transparent and accountable organizational management and administration.

We would like to convey our sincerest gratitude to all elements of the nation for all their support and encouragement to the Constitutional Court. Such support and encouragement have materialized in the form of respect for the Constitutional Court's final and binding decisions.

It has also been due to the Constitutional Court's existence that there has been a continuously growing and increasing awareness in our society of the citizens' constitutional rights. This has been a source of great encouragement, indeed, particularly in view of the fact that the efforts to enforce law and democracy are certain to face serious challenges unless they are supported by the people's awareness of their constitutional rights. Therefore, in line with the development and enhancement of the people's awareness, we also hope that the Constitutional Court will be able to perform its authorities even more optimally.

Distinguished Ladies and Gentlemen,

I do realize that the application of the principles of constitutional democracy must be constantly safe guarded in line with the increasingly complex developments of the state and nation. For that reason, I would like to humbly

ask for the prayers and support from all delegations and participants of the Symposium for the State of the Republic of Indonesia to be able to encounter all kinds of challenges towards becoming a modern and prosperous nation through constitutional democratic means, and for the Constitutional Court of the Republic of Indonesia to be able to remain on the right track in the future, hence it can play an even greater role in the endeavors to materialize a constitutional democratic state.

Once again, I would like to express our sincerest gratitude and highest appreciation to all delegations and participants taking part in the successful implementation of the Symposium.

To the delegations who are going to return to their respective countries, I bid you farewell and I wish you a safe journey back to your countries. May God The Almighty always protect and bless us all with His blessings.

Thank you.

Wassalamu'alaikum warrahmatullahi wabarakatuh.

CHIEF JUSTICE

Prof. Dr. Moh. Mahfud MD

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

SUMMARY REPORT
INTERNATIONAL SYMPOSIUM ON CONSTITUTIONAL DEMOCRATIC STATE

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

SUMMARY REPORT
INTERNATIONAL SYMPOSIUM ON CONSTITUTIONAL DEMOCRATIC STATE

A. Secretary General of the Constitutional Court, Janedjri M. Gaffar

1. This symposium is being held to share information among constitutional democratic countries. This symposium will be divided into three sub-themes: The Role of Constitutional Court and Equivalent Institution in Strengthening the Principles of Democracy, Democratization of Law Making Process and The Mechanism of Checks and Balances among State Institutions.
2. Furthermore, this Symposium was attended by 23 countries, also Indonesian participants from various different backgrounds. This Symposium will be supported online and streaming from the Constitutional Court's website.

   The complete report appears in **Content A.1.**

B. Chief Justice of the Constitutional Court, Mohammad Mahfud MD

3. Indonesia's success on constitutional system effected by the experience as a nation. For 8 years, the Constitutional Court has tried to put the democratization on its highest position, and internationally has been acknowledged to have a strategic position.
4. The principle of the Constitutional Court is Independency. This principle is universal for every judicial institution. For the Constitutional Court, independence is reflected by the immunity from the outside factor. It can be built not only because of the Justices, but also because there is no interference from the other institution. This independence is also reflected on how the Justices have their rights to act freely and based on

their opinion. Even though the Justices are from 3 different institutions, but as the Constitutional Court, the differences suddenly vanish and the Justices become statement that represents the law. To maximize this role of the Constitutional Court, let's watch and control the selection of the Judges to keep this independency lasts.

5. This Symposium tends to tighten the relationship among states, through sharing about the constitutional matters.

   The complete remarks appear in **Content A.2.**

C. The President of the Republic of Indonesia, Susilo Bambang Yudhoyono

6. The big theme of Constitutional Democratic State is appropriate, relevant and contextual to all countries. The theme invites us to synchronize perceptions as well as find breakthroughs, innovative solutions to improve qualities of democracy in our respective countries. This theme has become an interesting central issue in the revolving development of democracy which in practice emerged in variety of format, not only in Indonesia, but in most countries too. Democracy has long been believed to be the best system between option systems available, and been regarded able in guiding to materialization of an effective government with high legitimacy, as it place the people in a position as a determinant of state policies. Elegant collaboration between democracy and constitutional is the recipe for good governance.

7. To materialize a constitutional-democratic administration, a state should at least have an agenda: *First*, to guarantee power of judicial is independent in executing its functions; *Second*, to establish law and policies in various level through a democratic system and channel, both in procedural and substantial aspects; *Third*, develop a system and relation between state institutions in the checks and balances mechanism. In equality, each state institution exercises authority as defined in the 1945 Constitution and implement a mechanism of checks and balances among branches of state power, to create harmony and prevent superiority of a state institution. The mechanism of checks and balances allows state institutions to monitor and supervise each other on an equal basis, as well as limiting power of these institutions continuously. The Constitutional Court has the primary function of safe-guarding and maintaining the constitution. But more broadly, in carrying out these functions, the Constitutional Court of the Republic of Indonesia also play an important role to safeguard democracy and protect constitutional rights of citizens.

8. I realize that circumstances of the country are not always the same, but obligation of states to build and strengthen constitutional democracy is basically similar. On that basis, I hope that this international symposium can actually generate best practices in order to build a more democratic world order, secure, prosperous, and equal.

   The complete remarks and keynote speech appear in **Content A.3.**

PANEL I

A. Session One: The Role of Constitutional Court and Equivalent Institution in Strengthening the Principles of Democracy

9. This session was moderated by **Susi Dwi Haryanti**, Lecturer of University of Padjadjaran

10. **Hon. Rogov Igor Ivanovich**, the Chairperson the Constitutional Council of Kazakhstan, stated that every normative resolution of the Constitutional Council of Kazakhstan is directed to the safeguard of specific human rights and freedoms. The Constitutional Council orients the development of legal system, lawmaking and law enforcement practice in direction of their complying with modern understanding of human rights and freedoms, consolidated in fundamental international acts. The Kazakhstan normative resolutions are "the only source of state power is its people" means that the base of Kazakhstan, its sovereignty, independence and constitutional system is its people. The other normative resolution is concerning the date of the next Presidential elections, ascertained that the starting point of the cycle of will expression of people as the source of state power is the Presidential Election Day. In that very day the people of Kazakhstan realizes its will and displays its sovereignty, defining its democratic character of power, giving it the highest legitimacy.

11. He also stated that the principles and norms of the Constitution declare and consolidate the guarantee of rights of ownership at all the stages of its origin, change and break off and spread over the all the procedures of passing the resolutions by state organs and officials, ensuring steady and progressive development of society and state, firmness of human rights and freedoms. In exceptional cases, foreseen by law the expropriation for state needs can be done on the decision of court under conditions of its equal.

12. **Hon. Dugerjav Munkhgerel**, Member of the Constitutional Court of Mongolia presented a report that the Constitutional Court (*Tsets*) of Mongolia has the duty to safeguard the democratic constitution and has full powers to exercise supreme supervision over the implementation of the Constitution. The Constitutional Court was the first public institution established under the new Constitution which declares that assurance of democratic principle, justice, equality and national unity, and rule of law should be the fundamental principles of state processes. The constitutional Court (*Tsets*) shall be an organ exercising supreme supervision over the implementation of the Constitution, making judgment on the violation of its provisions and resolving constitutional disputes. It shall be the guarantee for the strict observance of the Constitution." The responsibility of the Constitutional Court to resolve constitutional disputes, procedures to settle disputes, competence of the decisions issued by the Tsets and the criteria

for examining disputes exclusively at the request of certain legal subjects highlight the fact that the Constitutional Court is an independent court.

13. In his presentation, he noted that the Constitutional Court of Mongolia shall examine the decisions of specific organizations and public officials as well as actions of some public officials, concerning laws, decrees of the President, other decisions of the State Great Hural and President, decisions of the government, international treaties concluded by Mongolia, national referendum, decisions by the central electoral body on the State Great Hural, its members, and on presidential elections are in conformity with the Constitution. The Constitutional Court examines and resolves constitutional disputes at its own initiative on the basis of petitions or applications submitted by citizens, or at the request of the Parliament, the President, the Prime Minister, the Supreme Court and the Prosecutor General. It is considered to be important for protection of personal and civil rights and freedoms in the country at this current stage of strengthening the foundation of democratic and legal state.
14. **Hon. Juan Carlos Henao Perez**, President of the Constitutional Court of Colombia presented an overview about the Colombian Constitutional Court, its system of constitutionality control, and recent jurisprudences. He mentioned that the composition of constitutional jurisdiction in Colombia poses a problem generated by the plurality of constitutional control mechanisms that exist in the Colombian legal system.
15. In this context, the control of constitutionality and fundamental rights are actually stronger in the Colombian legal system, since there are multiple pathways and organs with tasks related to the defense of the Constitution. Although Colombia is facing great challenges in the field of participatory democracy, public action of unconstitutionality has secured the full exercise of deliberative democracy because it has allowed citizens to exercise real power over decisions that potentially affect them besides the other checks and balances system designed in the 1991 Constitution which are automatic control of constitutionality, presidential objections of unconstitutionality and review of judgements of care.
16. Since the promulgation of the Constitution of 1991, Colombia has produced a constitution for all branches of law because the consecration of the fundamental rights and the creation of the Constitutional Court. As the result of the existence of mechanisms such as the application for protection and public action of unconstitutionality, which can be put in place without being represented by a lawyer, citizens have exercised power over the legislative apparatus and were able to demand fulfillment of their fundamental rights effectively. This has also enabled the Constitutional Court to rule daily on various subjects, creating a jurisprudence that has a binding effect and, consequently, has modified the system of sources of law in the country.
17. **Hon. Rudolf Mellinghoff**, Justice of the Federal German Constitutional Court in his paper said that the Federal Republic of Germany is a

democratic and social federal state. The principle of democracy is stated in the constitution that every organ of state authority and every act of exercise of state authority must find its basis in a decision by the people. The Federal Constitutional Court strengthens democracy in a variety of ways. In its function as the court with jurisdiction for cases involving the scrutiny of elections, the Federal Constitutional Court ensures that these standards are adhered to.

18. He then closes his paper by saying that democracy requires the free self-determination of citizens which have equal rights. Furthermore, a free formation of opinions must be possible, which is the essential precondition of the political process. Apart from this, it must be ensured in a parliamentary democracy that Parliament as the representative body of the people can effectively exercise its functions in its interaction with the other constitutional bodies. The Federal Constitutional Court therefore develops the principle of democracy not only in its decisions concerning electoral law, but also in its rulings with regard to the fundamental rights relating to communication and with regard to parliamentary law. In this context, the transfer of sovereign powers to supranational organisations poses particular challenges.

19. **Hon. Maria Farida Indrati**, Justice of Constitutional Court of the Republic of Indonesia in her presentation explained the history of the Constitutional Court formation in Indonesia, the relation between the Constitutional Court and democracy. The formation of this institution was meant for inter-departments' checks and balances principle strengthening by giving the major authority to review the law towards the constitution 1945 which never been enabled before. The Constitutional Court (MK) tasks takes on mostly review the law towards the 1945 Constitution by declaring unconstitutional articles on law that against the provisions on human rights and the article which very vulnerable to interpretation. Besides, Constitutional Court also has the authority to adjudicate on election disputes and disputes of authority between state institutions.

20. She stated that although sometimes there are obstacles in the implementation of decision, in general, the rulings of the Constitutional Court can be implemented by all parties, including the President and Parliament. Constitutional Court presence within the state system considered has given many contributions to the growth of democratic principles and the rule of law in Indonesia.

Discussion

21. During the discussion, there were questions proposed to the Germany representatives related to the strengthening democracy in the country through the authority given to the Constitutional Court and how the Germany facing the changing of the world as the European Union founded. Responding to the questions, panelist explained that in Germany there's no prohibition to any political parties and the country release part of its

competence for some universal rights that applicable for any citizen to the union so that the country could get along with the world changing.

The complete presentation of speakers appears in **Annex I.BI.1 – I.BI.5.**

B. Session Two: Democratization of Lawmaking Process

22. This session was moderated by **Zainul Daulay**, Lecturer of University of Andalas

23. **Hon. Claudio Ximenes**, Chief Justice of Tribunal de Recurso of the Democratic Republic of Timor-Leste, presented a brief presentation of Democratization of Lawmaking process in Timor-Leste. He mentioned that the Constitution defines Timor-Leste as a democratic State based on the rule of law, the will of the people and the respect for the dignity of the human person. Position of Supreme Court's President is appointed by the President ratified by the National Parliament. The power to initiate laws lies with the Members of Parliament, the parliamentary groups and the Government. The legislative process is a complex process involving a series of acts carried out by deferent State bodies: parliament or government, the President and, eventually, the Supreme Court and this process involves several stages. By the enactment of the bill by the President of the Republic the legislative process is complete. But in a democratic State based on the rule of law the citizens are entitled to know that a law exists. Publication of the law in the official gazette is a prerequisite of its effectiveness.

24. Furthermore he explained that Timor-Leste is holding many challenges for the Government such as the high rate of illiteracy; the high rate of ignorance about the state institutions and their functioning, also the short experience of heads of the State institutions. The lawmaking process in Timor-Leste has a high rate of democracy either by the legislative and constitutional framework, either by operation of the system and either by external transparency.

25. **Hon. Ignatius Mulyono**, the Chairman of the Legislation Body of the House of Representatives of Indonesia period of 2009-2011, explained that the amendment of Article 20 paragraph (1) of the 1945 Constitution explicitly states that the Indonesian legislative body holds the authority to establish laws. This law changes the earlier construction which the President held the power to establish the laws. The democratization of law making process also coincident with other democracy instrument, i.e. the direct, general, free, honest and fair election; the freedom to give opinion; and the media freedom. The institution construction in law making process also transformed by the establishing of the new institution, i.e. Regional Representative Council (DPD) and the Constitutional Court (MK).

26. Furthermore, the democratic law making process also related to transparent and public participation. The public participation in composing and determining the national legislation program; drafting and discussing the draft of the law; discussing the draft of the budget law; the control of the implementation of the law; and the control of the implementation

of the government policy. The absorbent of public aspiration done by the public hearing meeting, working visit, accepting aspiration in written through letter or email, and accepting the delegation visit the House of Representatives office. The transparent process conduct by declaring the House of Representatives meeting is open, except for specific things that declared close; the promulgation of the law making process development through paper and electronic media, also press conference. The presence and attendance of Constitutional Court as the guidance of constitution has the very important meaning. The judicial review of the law to constitution is the reflection of democracy.

27. **Hon. Stasys SEDBARAS**, the Chairman of the Committee on Legal Affairs, the Parliament (Seimas) of the Republic of Lithuania presented an overview of the Republic of Lithuania's Legislative Procedure. The procedure is regulated by the Constitution and the Statute of the Seimas (the Parliament). The Constitution prescribes that the Statute of the Seimas has the power of law so that the procedure of its enactment differs from the procedures of adoption of other laws such as in majority required and come into force. He also explained the types of legal acts adopted by the Seimas and the stages of the legislative process. He noted that the President of the Republic, the Government, Members of the Seimas, committees and political groups have the right of resolution initiative. A decision of the Seimas, resolution or other non-standard legal acts of the Seimas is adopted at the plenary sitting by a majority vote.

28. He further explained that, the Law on the Fundamentals of the Legislative Process is being drafted to further democratise the legislative process in Lithuania. Alongside a number of procedural provisions there are several principal proposals to make law-making accessible to the public to provide a possibility for the public so that the society representatives will also have a possibility to present their own proposals that will be considered by the drafting team, which is called the procedure of Consulting with the public. Another new idea proposed in the draft Law is the monitoring of the performance of a legal act to be carried out at certain intervals of time. This measure will help to identify the existing loopholes and regulatory problems and to improve the situation effectively. Monitoring results will be posted on the internet website mentioned above to enable society representatives' engagement in the process.

Discussion

29. During the discussion, the issue raised was democratization of lawmaking process in each participant's countries. In this session participants were interested in the method of the Indonesian legislative to supports the democratization in the country through the authority given by the constitution to the legislative, this shown in the questions proposed by the participants. In this regard, were explained that the Indonesian legislative is always and keep trying to take part in supporting and strenghtening democracy through implementing the existing regulations. Things happened

in practice is the Legislative were given targets to finished numbers acts so that this likely obstuct the Legislative to implement existing regulations/ decision by the constitutional court on the subject of democracy. Even so, the legislative have cooperated with the public such as academician to participate in the law making process through encourage inputs from them.

The complete presentation of speakers appears in **Annex I.BII.1 – I.BII.5.**

C. Session Three: The Mechanism of Checks and Balances among State Institutions

30. This session was moderated by **Maruarar Siahaan**, former Justice of the Constitutional Court

31. **Hon. Margarita Beatriz Luna**, Justice of Supreme Court of the Mexico stated that democracy is as a fundamental and essential value of the constitutional State and democracy requires adequate control of the constitutionality of the acts issued in the exercise of public powers. The Constitution and secondary legislation emanate from the bodies of representation and should be interpreted according to the benefit of the people that directly or indirectly has inspired them. She also stated that the Supreme Court of Justice of the Nation, Mexican Constitutional Court, currently constitutes the balance in the settlement of many and varied conflicts subject to its jurisdiction.

32. The judicial review aims to safeguard the constitutional and legal rights of the governed. The work developed by the Federal Courts, through the Judicial Review, has shown that the vocation for this constitutional procedure and calling for freedom, more than related, are identical, because the conviction of the need for legal and peaceful means exists, and not from violent subversions, to obtain the rule of law and the respect for the property of the person. Over the past years, the Supreme Court of Justice has implemented a policy of transparency that has contributed to the strengthening of its legitimacy as a Constitutional Court. Finally, she hoped that the results of this International Symposium will become a rewarding exercise for all of the participants that surely will enrich each country's effort to enforce democracy and equilibrium among the State Powers.

33. **Hon. Gulzorova Muhabbat Mamadkarimovna**, Justice of the Constitutional Court of Tajikistan noted that the Declaration of Independence and the State Constitution of Tajikistan, November 6, 1994 were recognized as natural human rights and freedoms at the level of the Basic Law was proclaimed the supreme value of human rights and freedoms. The new Constitution is fully consistent with the basic principles of democracy and was not only a guarantee of transition of Tajikistan to the new democratic level, but also with the approval of the basic law of the country. This new Constitution reflected the will and resolve of the people, determined to

progress and further improve society of Tajikistan. As the highest values, it has identified the objectives and content of the legislative, executive, local government and local authorities, meaning that laws should not impose such rules of conduct that do not comply with human rights and freedoms or violate.

34. She further noted that Tajikistan Constitutional Court was build to preserve and protect the standards of the Constitution and the rights and freedoms of individuals with the adoption of the Constitution in the government. Its activity is regulated by the Constitution and Constitutional Law "On Constitutional Court of the Republic of Tajikistan". According to the Constitutional law principles protecting human rights and freedoms through constitutional jurisdiction are: independence, collegiality, openness, competition and equality of the parties.

35. **Hon. M. Akil Mochtar**, Justice of the Constitutional Court of the Republic of Indonesia presented an overview on check and balances mechanism in Indonesia. The separation of power principle delivered variation in the practical of the state administrative; one of the practices is transformed through the implementation of check and balances principle in legislative power, executive power and judicative power. He mentioned about the role and contribution of the Constitutional Court of the Republic of Indonesia, as a state institution in the judicial branch of power, in creating harmonious relations within the framework of the mechanism of checks and balances among state institutions in Indonesia.

36. Constitutional Court has the authority to adjudicate the review of laws against the Constitution, rule on the dispute the authority of state institutions whose authorities are granted by the Constitution, decide upon the dissolution of political parties, and decide upon disputes on general election results.

Discussion

37. During the discussion, there was a question related to the time frame of the enactment of acts related to the political matters which are quicker compared to the enactment of other law products. Responding to this question, panelist highlighted that acts related to the political matters are limited with time. Issue related to the separation of power was also raised. There are differences in separation of power in different countries. In some countries president is given the right of veto on the draft of acts even though the parliament has agreed whereas the other countries don't.

    The complete presentation of speakers appears in **Annex I.BIII.1 – I.BIII.6.**

PANEL II

A. Session One: The Role of Constitutional Court and Equivalent Institution in Strengthening the Principles of Democracy

38. This session was moderated by **Jawahir Tanthawi**, Lecturer of the Faculty of Law of the Islamic University of Indonesia

39. **Hon. Min Hyeong-Ki**, Justice of the Constitutional Court of the Republic of Korea, presented the Constitutional Court of Korea continued to demonstrate the ideals and values of the Constitution of Korea. The Court also made persistent effort to bridge the gap between the constitutional norm and its reality by reinforcing the state's duty to safeguard the fundamental rights of individual. As such efforts gradually gained the confidence of the people who pursued the rule of law and guarantee of fundamental rights, the court was able to secure the status and influence as an independent institution adjusting constitutional cases. He also explained that the Constitutional Court has been exercising its power of constitutional adjudication as an institution independent from all political powers, acting as a guardian of the constitutional order and guarantor of individuals' fundamental rights. Besides that the Constitution provides for five areas of jurisdiction as follows: the constitutionality of law upon the request of the ordinary courts; impeachment; dissolution of political party; competence disputes between state agencies, between state agencies and local government, and between local government; and constitutional complaints.

40. Furthermore he highlighted that the Constitutional Court of Korea to date, has reiterated that all state powers, namely the legislative, executive and judiciary, should be exercised in conformity with the Constitution. Even in the case of highly-politicized state actions that were exempt from judicial review under the pretext of governance, the Constitutional Court ruled that such state action should rightfully be bound by Constitution. As such the Constitutional Court assisted all state powers conform to the Constitution by declaring those violating the Constitution unconstitutional. By doing so, the Court has worked hard to strengthen the rule of law based on the Constitution.

41. **Hon. Toma Birmontiene**, Justice of the Constitutional Court of the Republic of Lithuania delivered a presentation regarding the doctrine of the constitutional court of Lithuania as an instrument in shaping democratic institutions. The big role that has been played by the constitutional control institution while simultaneously restoring democratic institutes in most states of the eastern and central Europe. The issue of competences of judicial review is a complex and multifaceted problem, however, the issue could be solved in many ways.

42. Afterwards, the Constitutional Court of the Republic of Lithuania was explained in detail, particularly concerning the purpose of the Constitutional Court to guarantee the constitutionality of the legal system and features of the doctrine of human rights formulated by the Constitutional Court. Highlighted on the topic of constitutional doctrine relating to power of state institutions, which consisted of the Constitutional Court doctrine relating to the form of the State of Lithuania and the features of the constitutional doctrine of the Parliament and a member of a Parliament. Parliamentary control as one of the classical function of the Parliament, was considered an important instrument to ensure separation and balance of the State Powers. Some peculiarities of the constitutional doctrine relating to the constitutional status of the member of the Parliament and the President of the Republic were also mentioned. Moreover, features of the judiciary was explained, emphasizing on the function of administration of justice that determines the independence of the judge and courts, which is one of the essential principles of a democratic states under the rule of law, to guarantee the supremacy of law, and to protect human rights and freedoms.

43. **Hon. Christian Suarez Crothers**, Substitute Justice of the Constitutional Tribunal of Chile presented the Chilean constitutional justice in relation to the evolution of constitutional justice in the world. The first point was the observation that constitutional justice is not an end in itself, so that its existence can only be justified by reference to the strengthening of democracy and the protection of constitutional rights. Having these democratic goals in view, he pointed out that, though systems of constitutional justice may exist in the context of non-democratic institutions, the overall assessment of any system of constitutional justice will reflect the quality of democratic institutions that underpins it. In Chile, the idea of constitutional justice was introduced at the end of the 1960s, in a moment marked by a highly charged and polarized political process. The Constitutional Court introduced to the Chilean legal system in 1970, under the 1925 Constitution, was an attempt to keep Executive powers under constitutional check. The issue of constitutional justice under the 1980 constitution can be divided up into three periods: in the first, the Constitution existed in a context of military rule; the second was the "transitional" moment and the third which begins with the important 2005 constitutional reform as the powers of the Constitutional Court become more strengthen.

44. Hence, the movement from a diffuse (or mixed) system of review to a concentrated system in which the Constitutional Court becomes the main guardian of the Constitution, due in part to its new powers: that of declaring that in concrete cases a particular law cannot be applied because it is against the constitution and, as a consequence, its power to strike down legislation with general effects after it had been declared inapplicable in particular case and subject to more exacting majority requirements. The existence of these two powers (declaration of inapplicability and

declaration of unconstitutionality) has allowed the Constitutional Court to develop a doctrine that acknowledges as its most important point the protection of the freedoms secured by the Chilean constitutional catalogue, ranging from the right to life to the protection of intellectual property and copyright. Thus there has been a significant expansion of the issues on which the Constitutional Court can and will give judgment each year. The Constitutional Court nowadays has very wide powers to specify the content of constitutional provisions.

45. **Hon. Francisco Perez de Los Cobos**, Justice of the Constitutional Court of Spain presented an overview of democracy which has been the rule of the majority. The rule of the majority has been protected by the Spanish Constitutional Court in its various forms. The Spanish Constitution, in line with the constitutions of many countries adopted after the Universal Declaration of Human Rights of 1948, includes a broad statement of rights that all public authorities have a duty to respect.

46. In the thirty years of its existence since 1980, the Constitutional court has proven itself to strengthen and promote democracy as declared by the Constitution. A democracy where, essentially is governed according to the rule of the majority applies, the rule of law and respect for human rights, simultaneously. However, several rulings of the Court have ensured the respect for the minorities, even when their programs are contrary to the constitutional system. The Constitutional Court has always underlined the supremacy of fundamental rights. This concern for the fundamental rights involved in judicial proceedings has led to profound changes in all jurisdictional areas within the Courts in Spain. The Constitutional Court also serves a chapter for championing in the rights of all citizens to equality before the law. This give a special relevance of equality between women and men, preventing the discrimination against women based on historical origin, and can be fought vigorously by the legislator through the programs on equality.

47. **Hon. Anwar Usman**, Justice of the Constitutional Court of the Republic of Indonesia stated that the establishment of the Constitutional Court in Indonesia was stimulated from the amandment of the Constitution by the People Consultative Assembly of the Republic of Indonesia between 1999 to 2002. Through the addition of the Article 24C, the Constitutional Court exists in Indonesia's governmental system. This existence, cannot be separated from the idea of how important judicial review in a democratic law state.

48. Hence, he pointed out that, in Article 24C of the 1945 Constitution stated that the Constitutional Court is one of the judicial power that has four authority and one obligation. The authority is to give a trial on the first and the last level with a final decision to review Acts against the Constitution, settle the dispute of the state body which the authority is given by the Constitution, decide the dismissal of a political party, and settle the dispute in an election. Meanwhile the obligation is to make a

decision for the House of Representatives' opinion on alleged violation by the President and/or by the Vice President based on the Constitution. The Constitutional Court has to work independently and imparcially in order to do the function and the authority. With the existence of the Constitutional Court, the strenghtening of the democratic principles hopefully can be established.

Disscussion

49. All countries have put a lot of efforts to keep the constitutional goal on track. Several breakthrough were made in order to make this efforts up to date. Different political background of the countries effects some differences among the countries in achieving the goal of the constitutional democratic countries.

50. An issue rising about the controlling mechanism to the judges in judicial review as well as impeachment, since the decision of the Constitutional Court in Korea and Lithuania (similar to Indonesia) is final and binding. The bottomline in the controlling the judges of the Constitutional Court primarily is in the procedur during their selection which is transparant and involved a lot of disscussion. During this process there are a lot of phases that they have to pass through before they are appointed by the Parliament as the justice of the Constitutional Court.

The complete presentation of speakers appears in **Annex I.CI.1 – I.CI.3.**

B. Session Two: Democratization of LawMaking Process

51. This session was moderated by **Fajrul Falaakh**, Lecturer of the Faculty of Law, University of Gadjah Mada

52. **Hon. Renato C. Corona**, Chief Justice of the Supreme Court of the Philippines presented that Separation of Powers is clearly provided in the Philippine Constitution, but separation of powers is in no way absolute and is purposely described in an abstract and general form, rather than a rigid one in our Constitution because it is intended for practical purposes and adopted to common sense. In the system of checks and balances, the Judiciary, with the Supreme Court has the power to declare the acts of the Legislative or Executive branch invalid or unconstitutional. With its expanded judicial power under the 1987 Constitution, the Supreme Court can determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.

53. Furthermore he explained that various issues affect the Philippines at present concerning delineations of power and check-and-balance mechanisms between and among with the three branches of government. Only through proper respect and coordination among the three branches of government, vigilance in checking each other's possible constitutional

transgressions and maintaining the desirable constitutional balance can we avoid the danger of a constitutional crisis and societal anarchy. The separation of powers with an ingrained system of checks and balances was one of the underlying features of our government even before we placed ourselves under a constitutional democratic regime, a regime which at present has been in place in our country for 112 years. The Philippines has, for more than a century, kept the spirit of constitutional democracy alive and burning. Whenever our state institutions faithfully and assiduously keep the exercise of their duties and responsibilities strictly within the distinctly defined bounds of the Constitution, they cannot but tend to the bright flame of constitutional democracy and light the way for a truly democratic constitutional state.

54. **Hon. Benny K. Harman**, Chairman of the Law Commission of the House of Representative of the Republic of Indonesia stated that the Republic of Indonesia is a constitutional democratic country based on the Constitution, meaning that the democracy in the Constitution is not absolute and has been given limitation by the Constitution itself. The Constitution does not apply separation of powers between legislative and executive institution because the power of the law making process are given to these 2 institutions in order to keep checks and balances between the 2 powers.

55. Eventhough the power given to the legislative and executive institution have accomodate democracy principles, but the possibility of the abuse of power to occur in the law making process cannot be neglected. The existence of the Constitutional Court is essential to keep the equilibrium between the democracy principle on one side, and the constitutionalism priciple on the other side.

56. **Hon. Mohammed Abbou**, First Vice President of the House of Representative of Morocco presented the development of constitutional engineering in Morocco and the importance of citizen participation in the management of public affairs and decision-making, as well as the sanctity of democratic institutions. The development has given significant impact on the performance of the legislative institutions. The parliament have played a crucial roles on the implementation of their constitutional duties and controlling the performance of the government as well as contributed in formulating legal texts for the state.

57. He pointed out that for the last few days, Morocco has become a political station, which reflected in a deep constitutional reforms aimed at the strengthening the building of national democracy, and strengthening the principle of separation and balance of authority, dedicating the pluralistic nature of the united Moroccan identity. Hence the new constitution is a quantum leap which is simultaneously a prominent transformation in the course of the democratic constitutional state and continue to consider major development, as well as to respond to proposals put forward by national political parties and union organization and human rights, scientific agencies and civil society. The Constitutional Court occupies a

special position in the process of engineering a new constitution, both in terms of shape, for which the Constitution has been specializing a separate chapter or in appointing the Chief of Constitutional Court. The transition from the Constitutional Council into the new Constitution would provide tremendous positive impacts on moral values that are mandatory, in the minds of the plaintiffs before the Council and its decisions.

Discussion

58. An issue rising about the interference by the Constitutional Court to the law making process by making conditional constitutional or conditional unconstitutional decision and also on the electoral formula. Philippines clearly states that when it comes to Declaratory Relieve, the Court is prohibited by the law, but Philippines are also very liberal on legal standing. The similarity occurs between Indonesia and Korea which have made such conditional constitutional or conditional unconstitutional decision. For Korea, the call to make such decision is based on the thoughts that the Court hesitates to declare a decision unconstitutional or constitutional totally.

    The complete presentation of speakers appears in **Annex I.CII.1 – I.CII.2.**

C. Session Three: The Mechanism of Checks and Balances among State Institutions

59. This session was moderated by **Djoko Priyono**, Lecturer of the Faculty of Law, University of Diponegoro

60. **Hon. Carlos Hernandez Mogollon**, Deputy Speaker of Parliament of Colombia explained that since the Constitution of 1991 as a democratic state any citizen, of political party are eligible to elect and be elected and all legal constitutional structure of the State guarantees the right of citizens to participate. In fact the constitutional development has not been peaceful, due to the existence of strong differences and oppositions, in terms of organization, ideology of professional practices. Therefore it is the need to build the causal links between public participation and the defense of constitutional rights as provide in paragraph 6 of Article 40 of the Constitution. The Public Action against Unconstitutionality in Colombia without doubt is an effective tool for an effective democratic participation. Furthermore he emphasized that the constitutional control in modern states is a basic guarantee in the rule of law aimed at implementing the principle of integrity and supremacy of the Constitution, a principle that is enshrined in Article 4. The Constitution stands in the supreme and final framework in determining, both the legal order and the validity of any rule, regulation or decision.

61. In accordance with the public action for unconstitutionality, he stated that it can be understood as the political rights which the Constitution, grants to every citizen to present to the Constitutional Court of any

violation of the constitutional provisions, laws, decrees and acts. In the other hand, the active participation by citizens in the constitutional due process, are mostly aimed to cases of institutional models that thrives to provide strong guarantees for fundamental rights, since institutional model will focus on settling conflicts and disputes between different branches of the government, therefore, it does not offer space for the citizen to participate directly. The potential involvement of the citizens in the public duties, not limiting their political action solely through elections and the legislative (popular initiative), but goes beyond to the extent that due to their watchfulness and becomes holder of the judicial control, by which it is possible to participate in the annulment or invalidation of a Law, in which in due time and through its political action (representation in parliament) may have been contributed. The new constitutional court emerges as a pioneer of the "social revolution" of the country, its controversial decisions in the defense of fundamental rights: euthanasia, abortion, drug use, housing, religion, indigenous rights and now economic and social rights, have made the dream come true to many Colombians in seeing the effective protection of their rights by respectable institution; but neither can one deny to institutional impact it has caused.

62. **Hon. Fernando La Sama de Araujo**, President of the National Parliament of Timor Leste delivered a presentation relating to the separation of powers and a system of checks and balances in Timor Leste. He stated that in accordance with our constitutional system, various organs are assigned different powers and functions, but in an absolutely exclusive fashion. In Timor-Leste, the legislative power, which is divided between the Parliament and the Executive. The evolution of the modern States has also highlighted what might be called shortcomings of the traditional theory of separation of the three powers, Executive, Legislative and Judicial. Indeed, the classic tripartite division of powers, typical of liberal constitutions, became insufficient to ensure democratic exercise of power, being necessary to overcome it and gradually build a new form of organization of public and state powers. This is the case of the supervisory bodies and the public prosecutor or the Court of Auditors, whose supervisory activity is essential for the affirmation of democracy in daily practice, when conducting public affairs. There is no doubt that the state currently requires a more sophisticated system of office to safeguard the integrity of governance, ensuring democratic processes.

63. He highlighted that the East Timorese Constitution of 2002 recognized ths need for a new supervisory function, thus establishing a fourth function, a supervisory or oversight function perceived as critical to guarantee democracy and to ensure the rule of law and the safeguard of constitutional principles. According to the state of the current debate, it can also be said that for a proper functioning democracy to thrive, there must also be a certain degree of separation between typical functions of government, of

a political nature, and those of a more technical nature, or administrative functions. However, institutions as the Constitutional Court or equivalent, as in Timor-Leste's case the Supreme Court of Justice, can contribute to a step-by-step development of the legal system and the societal environment. They should be an example for other constitutional organs in adhering to the legal method when interpreting constitutional rules, in respecting international standards and in that way give support to citizens seeking the protection of their fundamental rights. The East Timorese Constitution also enshrines the separation of powers and a system of checks and balances, which is reflected in the dual accountability of the Executive before Parliament and the Head of State, or in the powers granted to the President to ensure smooth functioning of democratic institutions, as in the independence of the judicial power, the establishment of the Ombudsman or the existence of an autonomous prosecution office, among other examples.

64. **Hon. Hamdan Zoelva**, Justice of the Constitutional Court of the Republic of Indonesia delivered an overview of the mechanism of checks and balances principle which come up from the basic needs to ensure that each power in a state that holds a principle of divided powers will not surpass its power, as well as to ensure the existence of freedom for each state power while avoiding too many interference from one power to another. In other word, this principle have a purpose to create balance in the socio-political interaction without weakening the function and the independence of the other institution.

65. On the terms of checks and balances, the development of judicial review of the Acts against the Constitution (Constitutional Review) held by the Constitutional Court or the similar institution is called negative legislation, in some other cases it is broaden into positive legislation. This is caused by the need to equalize proporsionally between the assurance of the justice law and the use of the law. These steps taken by the Constitutional Court to avoid the legal vacuum if it only cancel a norm of an Act.

Discussion

66. Issues on the practice of the checks and balances were raised. The Constitutional Court of the Republic Indonesia has the power to terminate a legal product made by the President and the legislative when it is against the Constitution, this is the part where the checks and balances among the institution in Indonesia take part. In Colombia, formal examination can be executed if its against the constitution. The Colombian Constitutional Court is the highest tribunal that cannot be interfere by other institution.

    The complete presentation of speakers appears in **Annex I.CIII.1 – I.CIII.3.**

PANEL III

A. Session One: The Role of Constitutional Court and Equivalent Institution In Strengthening the Principles of Democracy

67. This session was moderated by **Paulus Hadi Suprapto**, Lecturer of the Faculty of Law of the University of Diponegoro

68. **Hon. Uzak Bazarov**, Justice of the Constitutional Court of Uzbekistan, delivered a presentation regarding democratic reforms, development of civil society, and democratization of the state power in the Republic of Uzbekistan. He stated that as proclaimed in the Constitution of the Republic of Uzbekistan, Uzbekistan has set the goal of creating a humane and democratic state of law; the Constitution stipulates that Uzbekistan is the sovereign democratic republic, and the system of state power in Uzbekistan is based on the principle of separation of powers into legislative, executive and judicial branches.

69. He explained the development of Oliy Majlis, the parliament of the country, and its role in forming an effective system of checks and balances between the subjects of power. To ensure such system, the Constitutional Court of the Republic of Uzbekistan plays a significant role. Subsequently, the responsibility of the constitutional court is highlighted in detail, inter alia: its rights and jurisdiction, its basic principles of operation of the court, the independency of its judges, and its decisions – that are final and binding for all bodies. Two example cases related to the role of the constitutional court are also mentioned, the interpretation case and legislative initiative right case. In conclusion, he stated that the Republic of Uzbekistan has created an effective system of checks and balances which ensures the implementation of democratic principles in the exercise of state power and governance – and this important role also attached to the Constitutional Court of the Republic of Uzbekistan.

70. **Hon. Chalempon Ake-uru**, Justice of the Constitutional Court of the Kingdom of Thailand, delivered a presentation regarding the role of constitutional courts or equivalent institutions in strengthening the principles of democracy. He stated that legislative, executive, and judicial powers in Thailand is exercised through the National Assembly, the Council of Ministers, and the Courts respectively, in accordance with the provisions of the Constitution of the Kingdom of Thailand B.E 2550 (2007). Constitutional court plays an essential role in safeguarding the supremacy of the constitution, and in protecting the rights and liberties of the people.

71. Furthermore, the nine categories of powers and duties of the constitutional court are explained, including several important decisions or rulings that have been rendered since its establishment in 1998. All constitutional organs

and state agencies have to comply the decisions or rulings published by the constitutional court. In addition, as stipulated by the constitution, such decisions or rulings should be deemed final and binding on the National Assembly, the Council of Ministers, the Courts, and other state organs. He mentioned an example of encountered challenges and obstacles in a case of dissolution of three political parties in Thailand, and concluded that the justices of the Constitutional Court must stand firm in discharging their judicial duties regardless of any difficulties encountered.

72. **Hon. Johannes Schnizer**, Justice of the Constitutional Court of Austria, delivered a presentation regarding the challenges and obstacles in enforcing authority in the constitutional court, in order to strengthen the democratic principles. He explained the history of Austrian constitutional court that is regarded as the world's oldest specialized constitutional court, structured with the federal constitution in 1920. Afterwards, he stated that in present fact, an independent institution is very much needed.

73. According to the Austrian constitution, the president has the endorsement, to implement the decisions of the constitutional court, whereby every state institution including the military are comprised under his authority (Art.146 B-VG), except for the execution of financial payments. However, he mentioned a prominent example regarding the decision of the constitutional court that was not immediately implemented – a dispute over locations of bilingual signboards in Kaernten. Furthermore, the independency of the mass media was highlighted, as a substantial prerequisite for the function of the Constitutional Court's jurisdiction. Subsequently, the responsibility of the constitutional court to determine over the legal standard of election was exposed, most importantly regarding the obligation of constitutional court in correctly regulating the law of the election proceeding in its jurisdiction. He emphasized the most substantial issue, the basis of authority of the constitutional court: the people's trust to the institution itself. The Constitutional Court should obtain this form of trust on its own; through comprehensive decisions, through constant decision practices and followed by foreseeable decisions, an alert decision, which would respond on substantial questions and through the irreproachable livelihood of the members of the constitutional court.

74. **Hon. Mykhailo Zaporozhets**, President of the Constitutional Court of Ukraine, explained that democracy is one of the most important social values, which provides individual involvement in shaping the authority; therefore it is a necessary prerequisite for personal freedom and relative independence from the authority. Article 1 of the Constitution of Ukraine proclaimed Ukraine as a democratic state. He also stated that the principle of people's sovereignty is primary in the development of society, formation of democratic principles of all political life. Article 5 of the Constitution of Ukraine stipulates that the people are the bearers of sovereignty and the only source of power, who exercised power directly and through bodies of state power and bodies of local self-government.

75. Furthermore, he mentioned that the most important principle of democracy is the "principle of division of powers", drawn up by the international community within the process of development of democratic states. The Constitutional Court of Ukraine is based on the principle of the division of powers when resolving competence disputes between the constitutional bodies of state power, bodies of Autonomous Republic of Crimea, bodies of local self-government. "Principle of legality" is also stipulated in article 19.2 of the Constitution of Ukraine, according to which state bodies and bodies of local self-government and their officials are obliged to act only on the grounds, within the limits of authority, and in the manner envisaged by the constitution and laws of Ukraine. Another fundamental principle of democracy "the priority of human rights and freedoms" is also recognized by the Constitution of Ukraine as a fundamental principle of public policy. In Addition, other principles that have been developed in the jurisprudence of the Constitutional Court of Ukraine are: ensuring the right to freedom of association in political parties and civil organization, freedom of thought, freedom to express one's view and belief, freedom citizens to appeal to state bodies.

76. **Hon. Ahmad Fadlil Sumadi**, Justice of the Constitutional Court of the Republic of Indonesia, delivered a presentation regarding the role of constitutional court in strengthening the principles of democracy in Indonesia. He began by explaining the course of history concerning the establishment and development of the Constitutional Court of the Republic of Indonesia, followed with an overview of its renowned task – the judicial review – in accordance with the principles of checks and balances.

77. He specifically explained that the constitutional court, as regulated in Article 24C of the 1945 Constitution, shall possess the authority to try a case at the first and final level, and shall have the final power of decision in reviewing laws against the Constitution, determining disputes over the authorities of state institutions whose power are given by the Constitution, deciding over the dissolution of a political party, and deciding disputes over the results of general elections. These jurisdictions are supported by the fact that constitutional court works independently and impartially. He also mentioned some handled major cases and decisions that have been issued by the constitutional court, complete with the most updated data and statistics. He stated that the presence of constitutional court in Indonesia has given many contributions to the growth of democratic principles and the rule of law in Indonesia, and in other words, it has also encouraged and stimulated the development of democratic constitutional state.

Discussion

78. During the discussion, issues were raised on the subjectivity of judges in imposing sanctions, the nature of constitutional court as a negative legislator, and notion of "Ultra Petita" as one of the principle of constitutional court. In answering the respected issues, the panelists highlighted that Justices

who are elected in constitutional court are numerous in number and have obligations to make descending opinions. Moreover, Justices are sworn and guided by their code of conduct and code of ethics. The judgment imposed by the court is the result of collective agreement of the Justices. These steps are being taken to make sure that the decisions which are made by the court are objective and in line with the prevailing law.

79. From the discussions, the moderator concluded that every Constitutional Court has the authority to interpret, define, and prosecute cases of constitutionality of laws governing the legislative, executive, and judiciary power, including the protection of human rights and freedom of citizens. He noted that the Constitution Court is fully dedicated to work independently and impartially, not to mention to uphold the transparency and equality of the Justices. Moreover, the decision of Constitutional Court is binding on all bodies of state authority, and cannot be appealed. Constitutional Court plays an essential role in maintaining Constitutional Democracy, particularly to exercise the system of checks and balances, judicial review, based on the human rights and freedom of citizens.

    The complete presentation of speakers appears in **Annex I.DI.1 – I.DI.3.**

B. Session Two : Democratization of Lawmaking Process

80. This session was moderated by **Okky Burhamzah**, Lecturer of the Faculty of Law of the University of Hassanuddin

81. **Hon. Prajit Rojanaphruk**, Member of the Senate of the National Assembly of Thailand, stated that the Thai National Assembly comprises the House of Representatives and the Senate which may hold joint or separate sittings in accordance with the Constitution. One of the main duties of the National Assembly is to enact the laws of the land. The process of lawmaking begins with the House of Representatives, i.e., a bill shall be first submitted to the House of Representatives. When the House of Representatives has considered a bill and passed a resolution of approval, the House of Representatives shall submit such bill to the Senate. The Senate must, in general, finish the consideration of such bill within sixty days otherwise it shall be taken that the Senate has approved it. In case the Senate agrees with the House of Representatives, the Prime Minister shall present the bill approved by the National Assembly to the King for His signature and the bill shall come into force as an Act upon its publication in the Government Gazette.

82. Furthermore, with a view to enhance the democratization of law making process, Section 165 of the Thai Constitution provides that a person having the right to vote in an election shall have the right to vote in a referendum. Moreover, as far as the organic law bill is concerned, after its adoption by the House of Representatives and the Senate it has to be submitted to the Constitutional Court to review its constitutionality. The people of Thailand have played their role in democratization of lawmaking process, either directly or indirectly through their representatives in the National

Assembly. Hence, public awareness and participation in democratization of lawmaking process have been encouraged.

83. **Hon. Hidayat Nur Wahid**, Chairman of the Committee for Inter-Parliament Cooperation of the House of Representative of the Republic of Indonesia, which was represented by Mr. Azwar Abubakar delivered a paper regarding the democratization of lawmaking process. He started with explaining a brief course of history of the 1945 Constitution, the constitutional law of the Republic of Indonesia, followed with an overview of democracy and law in Indonesia as a constitutional democratic state. The 1945 Constitution explicitly outlined the separation of power consisting of exclusive, legislative, and judicative power, and at the same time confirmed the existence of the state's higher institutions.

84. He explained the lawmaking process in Indonesia, as stipulated in Law No. 10/2004, and emphasized in the democratization of lawmaking process. He stated that all layers of society have the widest possible opportunity to provide input in the process of making legislation, as stipulated in Article 53 regarding public participation. In addition, Law No. 40/1999 about Press and Law No. 14/2008 about Public Disclosure were also mentioned, due to their role in encouraging the society to participate in public policy-making process. Judicial review of the Constitutional Court plays an essential role in democratization of lawmaking process, as well as executing checks and balances, and the decision shall be deemed final and binding. He concluded that even though there are many accomplishments that have been achieved since the reformation, efforts to democratize legislation still need to be refined to perfection.

Discussion

85. During the discussion, participant raised a question related to the implementation of the act on the constitutional court which is not as good as the content of the act itself and issue related to the lawmaking process which is closely linked to the change of civilization. In responding to the following issues, the panelists explained that the role of the House of Representative is to create regulation and to conduct surveillance on the implementation of the law. Implementation of constitutional law is conducted by the related authorities, not by the House of Representative. To answer the second issue, panelist stated that the House of Representative observes the changes in civilization. As for example act on intelligent, during the process of inviting the law, members of the House of Representative have accommodated inputs and aspiration from the related parties.

86. Issues related to the mechanism of checks and balances in law making process in regards to the constitutionality of the law in Indonesia and Thailand was also raised. In answering the following issue, the panelist highlighted about the importance of having institution, especially the constitutional court to review the constitutionality of Law. Since both, Indonesia and Thailand, have established the Constitutional Court, each

country has experience the advantage of adopting the constitutional review mechanism to safeguard the enactment of Laws. Before a bill was sign, the democratization process in the Parliament symbolized the checking mechanism by applying steps for approval. Different approaches are taken as the steps for approval both parliaments. Although, both countries have adopted bicameral system in their parliament, nonetheless in reaching consensus for the approval of a bill each country implemented different ways.

87. Moderator concluded that democracy has been the idea that covered the law making process in Indonesia and Thailand Parliaments. Both parliaments introduce different approach as a checks and balances mechanism before a bill was pass. These approaches are meant to safeguard the interest of the people and not for the interest of the ruling party or the government.

The complete presentation of speakers appears in **Annex I.DII.1 – I.DII.3.**

C. Session Three : The Mechanism of Checks and Balances among State Institutions

88. This session was moderated by **Raudin Anwar**, Official of the Ministry of Foreign Affairs

89. **Hon. Tan Sri Arifin bin Zakaria**, Chief Judge of High Court in Malaya, Federal Court of Malaysia, presented that the system of the Government in Malaysia is closely modelled on that of Westminster Parliamentary system. But unlike in the United Kingdom, in Malaysia, the Federal Constitution is supreme, and not Parliament. Thus the power of Parliament is circumscribed by the Federal Constitution. The Federal Constitution sets out the framework and the principle functions of the institutions of the state and declares the principles by which those institutions operate. In a democracy, it is necessary to ensure that institutions are independent. They must function and must be perceived to be functioning independently, honestly, true to the doctrine of separation of powers. As far as Malaysia is concerned, the Federal Constitution provides for the separation of powers and actually speaks of three branches: the Executive (Part IV Chapter 3, Articles 39-43C), the Federal Legislative (Part IV, Chapter 4, Articles 44-65), and the Judiciary (Part IX Articles 121-131A). It would appear that the Federal Constitution contemplates the division of powers into three, but in practice, there are overlapping functions or no clear separation of executive-legislative power since Malaysian system is more akin to Westminster Government.

90. Malaysia does not have a Constitutional Court as such, but the Federal Court, as the Apex Court, is the final arbiter on the meaning of constitutional provisions. The Federal Court plays a dual role; as the interpreter of the

Constitution and also as the highest appellate tribunal. Therefore, the Federal Court can be regarded as the constitutional court of the country. The courts in Malaysia have not directly reviewed the decision of the legislative body. Nevertheless the courts had on numerous occasions indirectly controlled Parliament and State Legislative by determining the constitutionality of the latter's decision whereby any laws passed by the Parliament or State Legislature which is inconsistent with the Constitution shall be avoided. In addition, he stated that the Malaysian judiciary represents a long and distinguished tradition of judicial independence. It has striven to maintain the rule of law and constitutionalism. However, its functions and powers must be exercised with wisdom and restraint. Without wisdom and restraint, the system of checks and balances alone may not prove to be sufficient enough safeguard.

91. **Hon. Engin Yildirim**, Justice of Constitutional Court of Turkey, explained that Constitutional Courts are important actors in modern democracies. Although their legitimacy is still controversial in political theory and philosophy, their major role in democratization and furthering democratic governance cannot be ignored. He further explained that the literature on judicial empowerment is divided into two basic categories: those seeing the expanded political role of the courts as the manifestation of a "rights revolution" and those that see judicialization as part of a conscious attempt by the dominant elite to safeguard their privileges against emerging counter elite. A constitutional court can play a positive role in democratic governance if it makes use of its powers and if it acts in a way that is functional for democracy.

92. Furthermore, Turkey did not have a system of constitutional review until 1960s; Turkish constitutional court was created by the constitution drafted after the military coup on May 27, 1960. The Constitutional Court occupies a central and controversial place in Turkish politics and legal system. Its role and functions have attracted different reactions and responses. The court's roles throughout its history point to a regular and consistent pattern, fostered by the motive to protect the regime and institutional setting created after the introduction of the republican order. He stated that in a recent referendum on constitutional amendments, Turkish Constitution includes the procedure of "constitutional complaint" to be lodged under certain circumstances by individuals whose fundamental rights have been violated by means of legislative acts. He added, the external dynamics has also begun to play a remarkable role in the final judgments delivered by the Turkish Constitutional Court, especially with respect to controversial and crucial cases. Particularly, the European institutions have a visible influence on the court's actions and decisions. It still, however, remains to be seen whether and in how far the Turkish Constitutional Court contributes to successful processes of democratization or the establishment of the rule of law. Constitutional courts can indeed contribute to democracy and the rule of law, if the institutional circumstances support the work of the courts and if the courts show a democracy-friendly orientation.

93. **Hon. Priyo Budi Santoso**, Vice Speaker of the House of Representative of the Republic of Indonesia, mentioned that absolute authority which was arranged with restrictions is now replaced by a power concept of check and balances. History has several times noted how furiously the Authority dominated single-handedly, without control and without balance. For this reason, after the fourth amendment to the Indonesian Constitution, it has been clearly regulated in the government system of Indonesia, how to separate the power check and balances. He added that the Legislative Authority is carried out by the House of Representatives and the Regional Representative Council. The Executive Authority is carried out by the President. Whereas the Judicial Power is being carried out by the Supreme Court and the Constitutional Court.

94. Indonesia has undergone various kinds of changes and relations in carrying out interstate institutions checks and balances. In the New Order Era (1966-1988) the highest institution was the MPR which fully carries out the people's sovereignty. Reformation has replaced the political system which was not fully exercised, by total democracy system. One of the steps taken is the formation of the Constitutional Court. However, there are still a number of problems concerning the existing inter-state-institution Check and Balance mechanism. The basic spirit is that how to make the people of Indonesia really feel the presence of the state through the optimal function of the inter-state-institution Check and Balance mechanism. Building an ideal mechanism in reliving the inter-state-institution control function is needed as a means of managing the effective running of democracy. He explained that the spirit of freedom achieved through the reform process drives the flourishing of organized people movements to put control over the state. In achieving this, Indonesia faces various challenges and conflicts that are not small in size. However, these conflicts are seen as collisions of earth's plates which aim to find synergy, not anarchy.

95. **Hon. Ali Huseynli**, Chairman of the Committee for Legal Policy and State Building, Milli Majlis of the Republic of Azerbaijan, delivered a presentation regarding the constitutional basis of the relationship of government in the Republic of Azerbaijan in connection with with the system of checks and balances in the separation of powers. He briefly explained the history of constitutionalism in Azerbaijan and its development at present. Currently, having its legal form, the constitutionalism significantly affects towards the formation of the public legal consciousness. He stated that as stipulated in Article 7 of the Constitution, different branches of government should interact with each other and, within their respective powers, they are independent. The Constitution clearly defines the powers of the legislative and executive branches, and they cannot be extended, unless a complex constitutional arrangement is regulated.

96. Furthermore he explained that in the Republic of Azerbaijan, Legislative power is vested in the Milli Majlis, the executive power entrusted to the President, and the judiciary power attached with the courts of Azerbaijan.

The Milli Majlis is an active initiator of legislation, budget controller, and also has supervisory functions over the presidential decrees for certain cases. The President of the Republic of Azerbaijan is a head of state and represents executive power, assisted with the Cabinet of Ministers. The judicial power in Azerbaijan is carried out by the Constitutional Court, the Supreme Court, the appellate courts as well as the courts of the general and specialized jurisdiction. He highlighted that the public government is based on the strict control over the budget of the country – exercised by the Milli Majlis – and this budgetary control is a key issue in the system of checks and balances. In conclusion, he annotated that there are different models and forms of separation of powers, but they must all be designed to protect the important values of constitutionalism. The legal system of Azerbaijan is aimed to form a strong government that is able to provide the civil, political, and social human rights, and ensuring their protection.

Discussion

97. During the discussion, issues related to the relation between legislation and constitutional court, overlapping function of the judicative body and the impeachment of the president due to corruption were raised. Answering these issues panelist highlighted that the relation between governmental bodies is governed by the prevailing law. Panelist clarified that overlapping in this context refers to the membership of some of the member of legislative are also members in the executive body. Related to the issue of impeachment, panelist explained that the Indonesian law regulates the process of impeachment for President if legally proven conducting corruption.

98. Moderator closed the last session by summing up the main idea of every state's presentation, emphasizing that even though there are different models and forms of separation of powers, as well as the implementation of principles of check and balances, they must all be designed to protect the important values of constitutionalism, to form a strong government that is able to provide the civil, political, and social human rights, and ensuring their protection. However, the courts must always execute its functions and powers with wisdom and restraint. Without wisdom and restraint, the system of checks and balances alone may not prove to be sufficient enough safeguard.

    The complete presentation of speakers appears in **Annex I.DIII.1 – I.DIII.4.**

CLOSING CEREMONY

A. Secretary General of the Constitutional Court of the Republic of Indonesia, Janedjri M. Gaffar

In the International Symposium on Constitutional Democratic State, the participants have discussed various aspects related to the practice and experience in implementing constitutional democratic principles in various states, namely the Role of Constitutional Court and Equivalent Institution in Strengthening the Principles of Democracy, Democratization of Lawmaking Process, The Mechanism of Checks and Balances Among State Institutions.

This symposium has also been supported by the active participation of all symposium participants and the results of this International Symposium can be used as valuable input by all parties, particularly Constitutional Courts or Equivalent Institutions as well as the Parliaments of the countries participating in the Symposium. The Constitutional Court would like to express its greatest gratitude and highest appreciation to all participants for their good cooperation in the course of this symposium.

The complete report appears in **Content C.1.**

B. The President of the Constitutional Court of Thailand, Chut Chonlavorn

Hon. Mr. Chut Chonlavorn, President of the Constitutional Court of Thailand, express his sincere thanks and appreciation to the Constitutional Court of the Republic of Indonesia for the warm welcome and bounteous hospitality extended to all the participants. He also gives his profound gratitude to His Excellency the President of the Republic Indonesia.

Secondly, he would like to congratulate the Constitutional Court of the Republic of Indonesia on the occasion of the 8th anniversary of its establishment. The Constitutional Court therefore performs the important function of safeguarding this supremacy of the Constitution as well as protecting the rights and liberties of the people. He hopes that the Constitutional Court of the Republic of Indonesia will continue to be one of the main pillars of the Indonesian society.

The complete remark appears in **Content C.2.**

C. Chief Justice of the Constitutional Court of Indonesia, Mohammad Mahfud MD

This International Symposium has been held in the context of the commemoration of the 8th Anniversary of the Constitutional Court of the Republic of Indonesia. At such a relatively young age, the Constitutional Court of the Republic of Indonesia, with the support of the entire Indonesian nation, has been able to position itself as a state institution playing a positive role in the application of the principles of constitutional democracy, through its 5

(five) constitutional authorities. With those five authorities, the Constitutional Court has the function as the guardian of the Constitution and democracy, as well as the protector of citizens' human rights and constitutional rights. The Constitutional Court has been able to provide constitutional solutions for the various problems encountered in applying the principles of constitutional democracy.

The Constitutional Court would like to convey its sincerest gratitude to all elements of the nation for all their support and encouragement to the Constitutional Court. Such support and encouragement have materialized in the form of respect for the Constitutional Court's final and binding decisions.

The complete remark appears in **Content C.3.**

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

ANNEX I: PAPERS

The International Symposium "Constitutional Democratic State"

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

PLENARY SESSION

The International Symposium "Constitutional Democratic State"

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

FOUR PILLARS OF NATIONAL AND STATE LIFE AS THE FOUNDATION FOR THE MANIFESTATION OF A CONSTITUTIONAL DEMOCRATIC STATE

Hon. H.M. Taufiq Kiemas
Chairman of the People's Consultative Assembly of Indonesia

I. INTRODUCTION

The constitutional reformation as one of the reformation agenda points is part of the national initiative in putting into order the state concept towards the implementation of a more democratic and constitutional national and state life.

The basic implication of the constitutional reformation is the confirmation of people's sovereignty concept, which no longer is conducted centralized by one institution, that is the People's Consultative Assembly, but by various state institutions in accordance with their tasks and authorities as regulated in the Constitution of 1945 of the Republic of Indonesia (1945 Constitution).

Article 1 paragraph (2) of the Constitution of 1945 prior to being amended stated that : "Sovereignty is held by the people and implemented by the People's Consultative Assembly", this was further amended to read: "Sovereignty is held by the people and implemented in accordance with the Constitution."

As collectively understood, democracy is a never-ending ongoing and continuing reformation process, never completely finished. Therefore, all democratic systems, of whatever form, maturity, as well as perfection require the continuing reformation efforts.

Within the context of the democratic development, constitutional democracy becomes a huge step forward in the democratic history in Indonesia, since it has given birth to a constitution with its basic concept resting on the sovereignty of the people (democracy), and places the constitution at the highest level as the state's basic law (constitutionalism).

With the constitutional concept of a democratic and constitutional nature, the implementation of the democratic values in national and state life changes by adjusting to the democratic development itself.

Linked to the implementation of the constitutional democratic values, even though the (PCA) experienced up and downs in its function and role together with the development and understanding of democracy of a number of governments, however, the PCA remains in existence accompanying the democratic development up to the present day, since the existence of the PCA holds a strong ideological concept based on the four principles of the Pancasila, which are stated in the fourth alinea of the preamble of Constitution of 1945 of the Republic of Indonesia.

Therefore, the existence of the PCA in the system pertaining to matters of state is not restricted to a sociologic background as a space of deliberations in the interest of the people in drafting state policies, but in a philosophical way is the manifestation of the Pancasila ideology holding the aspiration that the people shall be led by the wisdom of deliberations among representatives of the people.

In his speech of June 1, 1945, the Pancasila Delver, Bung Karno was convinced that the "absolute condition for a strong Indonesian State are deliberations/ representatives. People's Consultative Assembly (PCA)

II. PCA POST CONSTITUTIONAL REFORMATION

The post reformation position of the PCA institution, that is being no longer the highest state institution and therefore hierarchically no longer above the other state institutions, is the implication of the confirmed understanding of the people's sovereignty concept to prevent the concentration of sovereignty in one state institution PCA which has the potential of giving rise to authoritarian.

Placing the position of the PCA as a state institution is a factual huge improvement for the democratic development in Indonesia as places the people in the highest position in the state in accordance with the basic concept of people's sovereignty in accordance with the aspiration of the founder of the nation.

The duties and authorities of the PCA after the reformation are regulated in Article 3 paragraph and Article 8 paragraph (2) and paragraph (3) of 1945 Constitution, which are :

1. Amendment and enforcement of the Constitution;
2. Inauguration of the President and/or Vice President;
3. Dismissal of the President and/or Vice President during their period of duty according the Constitution;

4. Electing of the Vice President in case of a vacancy of the Vice President;
5. Electing the President and Vice President in case the President and the Vice President are jointly permanently hindered;

Although the duties and authorities of the PCA are very limited, however, these duties and authorities are of a fundamental and strategic nature, because they are related to the basic law of the state, election and dismissal of the President and Vice President.

In addition to the duties and authorities that are constitutionally instructed by the 1945 Constitution and Law Number 27 Year 2009 in Article 15 paragraph (1) letter e assigns to the Chairman PCA the coordination of all PCA members to socialize the Constitution of 1945 of the Republic of Indonesia.

In relation with the duty of the PCA to socialize the 1945 Constitution to all components of the people as the enforcement of the instructions in Law Number 27 year 2009, the PCA has implemented a number of socialization programs of the 1945 Constitution to all the regions of the country with various target communities.

III. FOUR PILLARS AS THE FOUNDATION FOR REALIZING THE CONSTITUTIONAL DEMOCRATIC STATE

The four pillars of state life forming the foundation in the development of the Indonesian people at present and in the future are the Pancasila, the Constitution of 1945 of the Republic of Indonesia, the Unitary State of the Republic of Indonesia, and Unity in Diversity (Bhinneka Tunggal Ika.).

Said four basic principles are the basic values existing in the Pancasila and stated in the preamble of the Constitution of 1945. It are also these four fundamentals that are able to unite the people of Indonesia in facing various challenges and the dynamics of national and state life.

The four pillars of national and state life is the re-conceptualization of the development of the people, which cover development of character, understanding of the basic ideology and basic regulations, changes in the nation's paradigm as well as its aspects of implementation in national and state life.

The conducive value in the socialization of the four pillars in the life of the people and the state is the spirit already implanted in the should of the people together with the nation myth living in the structure and culture of the Indonesian community. Therefore, re-inspiring said commitment of the people should be understood as efforts in delving and rebuilding the awareness in up keeping the four pillars in remaining the foundation in the life of the nation and the state in the manifestation of the welfare of the Indonesian community life.

Efforts to cultivate the awareness for implementing the values of the said four pillars of national and state life is not the sole responsibility of one party, but our collective responsibility. The duty of socializing the four pillars of national and state life is also not a simple matter, but requires the support and

example of various components of the people and in particular that of the state operators.

In the collective understanding, the center of exemplification and adherence is the spirit of the state operators. Whatever the goodness of the values stated in the Pancasila and in the Constitution of 1945 as its derivative, these remains nobleness on paper, if not with the sincerity to manifest said values in the state operations.

Therefore, the constitutional democratic state shall arise only if the state operations, which in this matter are carried out through the implementation of duties and authorities by the state institutions, are able to give consistency and exemplification of the implementation of the said four pillars of national and state life in daily life.

IV. CONCLUDING REMARKS

Exemplification and socialization of these four pillars that has become the permanent fortification of the Unitary State of the Republic of Indonesia at present and in the future, because in fact it is in those four pillars contains the aspiration for the manifestation of a free Indonesian state.

Through the four pillars of national and state life, the plurality of the Indonesian people is united by one and the same view regarding the aspiration of Indonesia, that is the welfare of the people that can be realized if we have the foundation of a strong ideology, constitutional foundation as the basic regulation, and national commitment as the unitary adhesive, and the appreciation of Unity in Diversity as the means for unity.

With the understanding, exemplification and implementation of the four pillars by all components of the people, we are sure that a strong national commitment will be realized, enabling us to benefit of each opportunity and to overcome challenges of a national as well as global nature.

The importance of understanding the four pillars of national and state life, cannot be effected by physical development only, however, through the development of the spiritual aspects. The natural, cultural wealth and the wealth of diversity of Indonesia has the ability to provide a living for the Indonesian people, but if managed by state operators with poor nationalism, surely this will not ring any benefit for the people and the country of Indonesia.

With the excellent understanding and exemplification regarding the four pillars of national and state life, it is expected that all components of the people and the state in life of the national and the state shall refer to the values of the Pancasila, the Constitution of 1945 of the Republic of Indonesia. Guarding the unity of the Unitary State of the Republic of Indonesia, and its Unity in Diversity, so that each policy either at central as well as in the regions have the same ideal aspiration to manifest the welfare of all the people of Indonesia.

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

THE HOUSE OF REPRESENTATIVES OF THE REPUBLIC OF INDONESIA AND THE STRENGHTENING OF DEMOCRATIC VALUES

Hon. Marzuki Alie
The House of Representatives of Indonesia

Assalamu'alaikum Warahmatullahi Wabarakatuh
Excellencies, Speakers of Parliaments,
Excellencies Chairpersons of Constitutional Courts,
Distinguished participants,

"Sovereignty belongs to the people and is carried out according to the Constitution". Those words are clearly stated in The Constitution of The Republic of Indonesia, article 1 paragraph 2. It means that the highest power in this Republic is in the hands of the people. A democratic country is a state where people's sovereignty is above all. In a democratic system, the popular sovereignty is represented by a government. The government has the power to control the sovereignty. But, the power needs to be regulated and limited in order not to create an absolute power or a dictatorship[1] and laws that only belongs to the rulers. An absolute power will certainly be abused, as stated by Lord Acton: "power tends to corrupt, and absolute power corrupts absolutely".

The idea to limit the government's power is known as a constitutional democracy. It has the characteristic where the government has a limited power and does not perform an arbitrary action against its citizens. As the government's power is limited by the Constitution, it is often called a constitutional government[2].

1 Machtsstaat.
2 Constitutional government or restrained government.

In a constitutional democratic country, the power is distributed to state institutions in accordance to their functions. The distribution of power is performed in order to avoid the abuse of power. To avoid a one-man power where the centre of a power relies on one person or one institution, the power of the government is limited by the Constitution. This concept has generated various concepts of the distribution of power, like "Trias Politica".

According to "Trias Politica", the power of the government should be divided into three separate branches, namely the legislative, the executive and the judiciary branches. The legislative branch has power to make laws, the executive branch implements the laws and the judiciary prosecutes on behalf of the laws.

Starting from 1999 to 2002, the 1945 Constitution has been amended four times. Compared to previous times, those amendments have resulted in different state institutional structures. Following those amendments, besides the House of Representatives (DPR), there are also Regional Representatives Council (DPD), whose Members are directly elected by the people and a new state institution, namely Constitutional Court. The changing of the institutional structure makes the function of all state institutions is redefined.

The executive power is held by the President[3], the legislative is under the authority of DPR[4] and DPD[5], and the judiciary power are held by Supreme Court, its judiciary institutions affiliated to the Supreme Court and Constitutional Court[6].

Excellencies Speakers of Parliaments,

Excellencies Chairpersons of Constitutional Courts,

Distinguished participants,

Indonesia is the third largest democratic country in the world. It is characterized by a democratic process that has been running since the reform era in 1998. Direct elections to elect Members of representative institutions, the President and Vice President and Regional Head, have been implemented.

However, we realize that the democracy that has been running is not without shortcomings. Democracy must be executed within a framework and legal corridor. The established law is not interpreted as a command of the authority, but rather as a manifestation of the will of the people.

Distinguished Participants,

The Indonesian House of Representatives has three main functions, namely legislative, budgetary and oversight functions[7]. The legislative function is implemented as a manifestation that the Parliament has the power to make

3 UUD 1945 (Indonesian Constitution) Article 4 paragraph 1.
4 UUD 1945 (Indonesian Constitution) Article 20 paragraph 1.
5 UUD 1945 (Indonesian Constitution) Article 22D paragraph 1.
6 UUD 1945 (Indonesian Constitution) Article 24 paragraph 2.
7 Article 20 A paragraph (1) of the 1945 Constitution.

laws[8]. The power of the Parliament to make laws is conducted jointly with the President, as stipulated in Article 20 paragraph (2) of the 19545 Constitution[9]. The provision on mutual agreement in the deliberation of a bill means that the power of Parliament to make laws is not infinite.

Having the power to make Laws, the House has to put into consideration the 1945 Constitution and other legislations.

Law Number 10 of year 2004 stipulates that the substance that should be regulated by the Law contains further provisions of the 1945 Constitution. The provisions covers human rights, the rights and obligations of citizens, the implementation and enforcement of the state's sovereignty and the distribution of state's authorities, state's areas, regional authorities, nationality and citizenship, the State's finances; or contains provisions mandated by a Law to be regulated by a Law.

The process of implementation of legislation which is run by the Parliament as a legislative institution and the President as the executive institution should be in the corridor of democracy and constitution-oriented, both in terms of procedures and in substance. However, it should be understood, in accordance with the Indonesian legal systems, Laws that have been enacted is open for a judicial review by the Constitutional Court, so as not to conflict with the Constitution of the Republic of Indonesia.

Distinguished Participants,

The House of Representatives also has the function to determine the State Budget and carry out oversight function. In carrying out its duties and authorities, the House carries out its budgetary function by deliberating the bill of State Budget proposed by the President. In the end of the deliberation, it can approve or reject the bill, by taking into consideration the input from the Regional Representatives Council.

In addition, in carrying out its oversight functions, the House oversees the implementation of the Law and the State Budget. The implementation of the House's oversight function over the executive institution is carried out within the framework of the checks and balances mechanism based on the prevailing laws.

Excellencies,

Distinguished participants,

The strengthening of democratic values in the implementation of the three functions of the House of Representatives is performed by opening the space for public participation.

8 Pursuant to Article 20 paragraph (1) of the 1945 Constitution which says "The House of Representatives has the authority to make laws."

9 Which says "Every bill is deliberated by the House of Representatives and the President to reach a mutual agreement."

Public involvement is very crucial for law-making process, budget discussion, and supervision.

Public involvement in assisting the implementation of the Indonesian House of Representatives' functions should be perceived as a process of interaction, relation, and mutual assistance which involves both central and local governments, supra-structural institutions, infrastructural institutions, social institutions, academics, professional organizations, community organizations, and other members of society as its stakeholders.

The Indonesian House of Representatives realizes that public involvement is very important to give input to the House[10], improve the readiness of the public to accept decisions[11], provide legal protection[12], and democratize decision-making process[13]. Public involvement will involuntarily improve the effectiveness of the enforceability of the statutory law in the community and provide legitimacy as well as political support to the establishment of a regulation.

Distinguished participants,

In order to meet the third amendment of the 1945 Constitution, the Indonesian House of Representatives makes a law on Constitutional Court. This institution is new in the structure of the state, as stipulated by Law Number 24 Year 2003.

The aim of establishing the Constitutional Court is to give protection on the citizens' constitutional rights and support the spirit of enforcing the constitution as the basic norm, which means every regulation having less power than the Constitution must not conflict with the Constitution. In short, Constitutional Court has to perform its roles and functions related to the maintenance of the constitution in order to enforce the principle of constitutionality of law. The Law on Constitutional Court has been amended by the Indonesian House of Representatives in order to help the institution perform its roles and functions better.

Distinguished participants,

In concluding my speech, *first*, I would like to inform you that the Indonesian House of Representatives as a democratic institution has performed ceaseless efforts to strengthen Indonesian democratic values. Those efforts are performed by maintaining the democratic values in every implementation of the Indonesian House of Representatives' function. Public criticism towards the Indonesian House of Representatives' performance should be perceived as a collective effort to strengthen the democratic values.

10 Informing the administration.
11 Increasing the readiness of the public to accep decisions.
12 Supplementing judicial protection.
13 Democratizing decision-making.

Second, the Indonesian House of Representatives perceives the Constitutional Court as a newly established High State Institution, as stipulated in the amendment of the 1945 Constitution. This institution will be the House's counterpart in the efforts of strengthening democratic values. The Indonesian House of Representatives and the Constitutional Court, therefore, should always be in "check and balances" position in the area of legislation. By maintaining good relationship between institutions, public will hopefully enjoy the benefit from the strengthening of democratic values as it will no longer be a mere jargon. The values should benefit the public through the realization of the state's goals as mandated in 1945 Constitution.

Wassalamualaikum Warahmatullahi Wabarakatuh

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

THE STRENGTHENING OF INDONESIA'S CONSTITUTIONAL DEMOCRACY

Hon. Irman Gusman
Chairman of the Regional Representatives Council of Indonesia

Assalamualaikum Wr. Wb.
Peace be with you all,

Let us pray the only God, Allah Subhanahu Wa Ta'ala, for His blessings and hidayah, so that we can gather here in Jakarta to participate in today's event, the International Symposium entitled "Constitutional Democratic States."

First of all, I would like to express our gratitude and highest appreciation to the Constitutional Court for its initiative to organize the International Symposium with the theme, "Constitutional Democratic State" which was officially opened by the President.

This symposium is held to celebrate the 8th anniversary of Constitutional Court. Therefore, on behalf of the House of Regional Representatives (DPD), we would like to say happy anniversary. We hope that in its 8th year, the role of Constitutional Court or *Mahkamah Konstitusi* (MK) as the guardian of our Constitution (UUD 1945) will contribute significantly to the development of democracy and the strengthening of rule of law in Indonesia.

In the past 8 years, form the time when the MK was established based on Laws No. 24 year 2003, there have been lots of cases that ruled by MK, which included local election disputes, as well as disputes among state institutions and judicial reviews of laws towards our Constitution. The role of MK has given important contribution to the life of democracy, especially those related to the state power governing based on law and 1945 Constitution.

Hence, this international symposium has strong relevance with the political development in Indonesia. Since the 1998 Reform, an era which is a power

transition from authoritarian regime to democratic one, the development of Indonesian politics is actually going to the consolidation process of the democratic constitutional good governance.

Although until now, the development of Democracy in Indonesia have suffered from fluctuations from one regime to another, ever since Soekarno, Soeharto, Habibie, Gus Dur, Megawati, until Susilo Bambang Yudhoyono, however as an archipelagic country that consists of thousands of islands, and various ethnicities, languages, and religion, Indonesia is able to be united by the fundamental national ideology of Pancasila, a true resemblence of Indonesia's attributes, which have been extracted form our Founding Father, Soekarno.

This is truly unique for Indonesia due to its four state pillars consisting of Pancasila as a state ideology, the 1945 constitutions as the political consensus and highest source of law, the Unitary State of the Republic of Indonesia (NKRI) as the form of a state uniting various ethnicities, race, and religon, and also Bhineka Tunggal Ika, as the plural identity, being able to strengthen the democratic life although facing changes from one governmental regime to another.

During the authoritarian and militaristic regime of the New Order era which lasted for 32 years, and finally collapsed in 1998 due to the movement of reformation, the practice of centralized power have resulted in the gaps between region, thus finally causing disappointment from several social communities whom protested the injustice authoritarian regime of Soeharto by demanding to become separated and sovereign.

In those many political dynamics, one of them is the 1998 reform, Indonesia was able to avoid Balkanization, which existed in the ex countries of Soviet Union in Eastern Europe, such as Yugoslavia that was finally disbanded and it became six new countries, such as Serbia, Bosnia, Croatia, Montenegro, Slovenia, and Macedonia.

The separation of South Sudan, which has the majority of Christians, from Sudan, which has the majority of Muslims, some time ago, has proven that it is difficult to manage diversity.

What do I want to tell you? Managing diversity is indeed difficult. However, Indonesia has interesting experience. Indonesia has managed to preserve its existence as a unity of diverse ethnicities, race, and religion until present time, ever since its independence on August 17 1945. This is what have made the Pancasila, as appreciated by President Barack Obama, as the main ideology to strengthen Indonesian unity.

What is even more interesting is the fact that the democratic ideologies in Indonesia have become more enacted and realized in its political life, which has the largest Muslim population in the world. Perhaps for all these years, there have been several points of view thinking that democracy is very difficult to be accepted in the Muslim social communities, but it is actually proven in the democratic journey of Indonesia, that the values of Islam are relevant with the principles of universal democracy, such as tolerance, harmony, freedom, justice, and equality.

Distinguished Delegates, Ladies and Gentlemen,

To some transitional state, the difficult work they are facing is how to find the ideal democratic format. However in Indonesia, the ideal of democracy was designed in the 1945 Constitution, which was amended four times (1999, 2000, 2001, and 2002).

The implication of the 1945 Constitution amendment is that there are fundamental changes in the constitutional democratic system in Indonesia.

First, the transition of the supremacy of the People Consultatives Assembly (MPR) towards the Constitutional supremacy where sovereignty lies on the hands of the people and is conducted in accordance to the constitution. Second, emphasizing on the fact that the relations between state institutions are in an equal and balanced level, having none to be superior over others. The President, People's Consultatives Assembly (MPR), House of Representatives (DPR), Regional Representative Council (DPD), Constitutional Court (MK), Supreme Court (MA), Judicial Commision (KY), and Supreme Audit Board (BPK), are the state institutions possessing rights that differ, but are in equal levels.

Third, an explicit check and balances emphasis between the state institutions' branches of power. The birth of the DPD in the legislative family have given significant impacts on the operation of the check and balances system, both in the legislative-executive institution relations, and in the context of the relations between the legislative institutions itself (DPR and DPD).

Ladies and Gentlemen,

1945 Constitution is our national political consensus that is actually our common agreement. The Unitary State of Republic of Indonesia is our state's form that can unite many ethnics, tribes, races, and religions. Bhinneka Tunggal Ika is the identity of Indonesia as a plural state.

In the New Order Era, homogeny over differences existed. Democracy was even prohibited. Thus, there were lots of demands from the community to have freedom. Some of them were trying to separate from Indonesia. Finally, the 1998 reform produced several prominent agendas; the amendment of 1945 Constitution, the elimination of dual function of military, autonomy and decentralization, promotion of law, eradication of corruption, freedom of press, and freedom of expression.

That is why, it is true to state that these amendments have allowed us to feel the significant changes to our constitutional system, where it has brought Indonesia into a democratic nature with several strong characteristics, among others: equality of positions in the face of the law, the conducting of a free and democratic election, the recognition of civil rights (freedom of thought, freedom of allegiance, freedom to chose a religion, and freedom of press), the openness towards political participation, and also the existence of check and balances between the state branches of power.

In the scope of legislative institution, besides DPD that represents regions, and DPR that represents people, there is also MPR that consists of the members of DPR and DPD that has necessary functions in the 1945 Constitution. Therefore, Indonesian parliament system has unique term, that is Bicameralism + 1 or in other term we can say Tricameralism.

The presence of DPD that is established from the third amendment of 1945 Constitution in November 2001 has transformed representation system, so that the representation function or the mandate function is not only in the hands of DPR. The representation function of parliament is now including political party function and regional function.

DPD is established in order to strengthen the checks and balances mechanism in the legislative institution, besides other state institutions; executive and judiciary. The existence of DPD is also meant to guarantee regional representatives in order to fight for their aspirations and regional interests in the legislative institution.

In the nation's perspective, the occurrence of DPD reinforces regional bounding in the scope of the Unitary State of the Republic of Indonesia, builds up unity in all regions, increases aggregation and accommodation of aspirations and regional interests in producing national policy, accelerates democracy process and development of the regions in fairly and sustainably.

DPD bridges regional interests and states policies through legislation rights, oversight rights, and budgeting rights. The creation of DPD has actually stimulated people's hope in regions whereas regional interests and problems can be fought in the national level. DPD has also participated in legislation products and other political outcomes that are produced in the parliament, particularly those related with regional interests.

Therefore, democracy as a political system is actually the precise choice for Indonesia that has terrible experience with the authoritarian regime during the New Order Era.

In the constitutional democratic system, the state's power is in people's hand. The power holder is limited by the Constitution in order to prevent the abuse of power. There is also check and balances system among executive and other branches of power. Legislative institution controls executive power to keep the power directed by the Constitution.

Thus, constitutional democracy is built based on the ideas that the democratic government is the government that has limited power and is based on the people's sovereignty, meaning that the highest power is actually in people's hand.

Distinguished Guests, Ladies and Gentlemen,

Democracy has given impact to the political and economic development. Indonesia now is in the membership of Great 20 (G20) that controls 85% of the world's Gross Domestic Product (GDP). Indonesia is also appointed as the Chair of ASEAN that has tasks and responsibilities to strengthen ASEAN as a regional institution.

It means that democracy has given positive impacts towards Indonesian development, including in economic sector. In the economic perspective, democracy also increases economic growth. In these two years, economic development has increased from 5.5% in 2009 to 6% in 2010 and will be predicted to reach 6.6% in 2011. Even when the world was facing economic recession in 2008, Indonesian's economy was growing positively with India and China.

In the future year of 2025, Indonesia is forecasted to become one of the 10 world economic power with the estimation of income that reaches USD 15,000. Also in the global economic order, Indonesia, along with Brazil, China, India, South Korea, and Russia, will be predicted to control half of the global economic development.

In other perspective, democracy also supports national competitiveness. In 2011, according to the Global Competitiveness Index published by World Economic Forum (WEF), Indonesia's competitiveness has increased in the rank of 44th from 139 countries. If we compare this rank to the members of BRIC (Brazil, Russia, India, and China), Indonesia's competitiveness is above India (51), Brazil (58), and Russia (63). Meanwhile China ranks 27. The same thing also happens with the members of G20, where Indonesia's competitiveness places 10th.

Of course, all of these accomplishments are very significant to Indonesia that has just established democracy and reform for only 13 years. This achievement is actually the logical consequence as a result of the transition from authoritarian regime to democratic system and from centralized system to decentralization and autonomy.

Distinguished Guests, Ladies and Gentlemen,

As a new democratic state, Indonesia continuously develops its democracy. Since 1998, Indonesia has had a new national political foundation; that is we call it democratic regime, which is now still in the consolidation process.

As stated by the Global Democracy Index, the quality of democracy in Indonesia has reached a positive step, mainly in the five pillars that includes election and pluralism, the function of government, political culture, civil rights, and political participation.

According to the Global Democracy Index issued by the Economist Intelligence Unit 2010, Indonesia's democracy index places 60th out of 167 countries. If we compare to South Korea (20), Spain (18), Chile (34), Austria (13), Columbia (57), South Africa (30), Germany (14), Thailand (57), Lithuania (41), and Hungary (43), Indonesia's democracy index is still low.

Nevertheless, if it is compared to Mongolia (64), Kazakhstan (132), Venezuela (96), Azerbaijan (135), Ukraine (67), Uzbekistan (164), and Russia (107), Indonesia's democracy is actually in a good range.

It means that democracy also gives chances and easiness to the society, business people, Non-Governmental Organizations (NGOs), media, for participating in the development. In this context we can find strong relation

between democracy and development. Without democracy, it will be difficult to achieve progress, including in attaining law supremacy.

According to the Rule of Law Index 2011 published by World Justice Project, Indonesia is in the rank of 22th out of 66 nations in the category of power limitation. In terms of the fulfillment of fundamental rights of the citizens, Indonesia places 30th out of 66 countries.

It means that democracy has contributed positively towards the law development in Indonesia, whereas law supremacy is established in order to guarantee the fundamental rights of the citizens as stated by the 1945 Constitution.

Therefore, the choice to have a democratic system is actually the right choice. As a country with the constitutional democracy, efforts to further improve the constitutional and good governance system is essentially needed.

to assert relations between state institution, including reinforcing checks and balances system in Indonesia are essentially needed, since a perfect democracy is the main asset to support improvement and development.

In order to further strengthen constitutional democracy in the future, an effort of perfection towards the state system, which currently has been part of the public opinion, is essentially needed. That is why the concept of perfection towards the 1945 constitution is considered to be the result gained from perfecting the presidential system, strengthening the parliamentary system, autonomy and decentralization, and also strengthen the relations between the three state institutional branches of power consisting of the executive, legislative, and judicative branches.

This is due to the fact that Democracy is one of the main assets in increasing growth and development. One of the strong assets for Indonesia in the future is the upholding of democratic principles. As the country with the largest Muslim population, approximately 247 million inhabitants, Indonesia has great potential to become a developed country, since the Indonesian people are able to live together in the constitutional democracy values, which includes diversity, tolerance, equality, and justice.

Ultimately, this symposium has great contribution for the development of Indonesia's democracy in the future. I hope that this symposium will produce new thoughts and ideas that can be contribute by the participants who come from several countries.

I wish you all the best in this symposium. Thank you.

Wassalamu'alaikum Wr. Wb.

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

THE ROLE OF CONSTITUTIONAL COURT IN REALIZING CONSTITUTIONAL DEMOCRACTIC STATE IN INDONESIA

Hon. Moh. Mahfud MD

Chief Justice of Constitutional Court of Indonesia

A. Introduction

The 1998 political reform in Indonesia ensuring the constitutional reform. Why? Because, constitution is the basis of a country which will determine the country's design and its management, including politics. Therefore, reforms requires the improvement of Constitution matters. One of the strong reasons was the 1945 Constitution which was valid. It was considered as too many loops and weaknesess, therefore it was cosidered it could not be put as a more democratic Indonesia's development basis. Based on this, the constitutional reform was taken as a main agenda to start the reform process in Indonesia.

During 1999 – 2002, the 1945 Constitution has gone through four stages of change in one series of amandement. The constitutional changes affected various basic changes in governance system both in paradigm, format, structure as well as relationship among state's institutions. In addition, the 1945 Constitution amendment also formed new state's institutions, one of them is the Constitutional Court (CC)

CC was assigned as one of the judgetial implementing authorities beside the Supreme Court (SC) which was designed to safeguard the Constitution. The establishment of CC to complement the paradigm of constitutional supremacy where the 1945 Constitution in accordance to its nature and position as a basic and the highest law in governing the Indonesian state. This paper will present the idea and background of establising, function and authorities as well as the role of Indonesian CC in realizing the constitutional democratic state.

B. The Idea in Establishing the Constitutional Court

The trailing of historical ideas was come from the early judicial review, that could not be avoided while in discussing the idea of CC establishment in Indonesia. Because, the authority to do the judicial review was the first and main authority of CC, even in other Constitutional Courts in many countries. Based on this, there were four important moments that influenced the CC's establishment, i.e. (1) Madison vs Marbury case, (2) Hans Kelsen initiative, (3) Mohammad Yamin's idea in the Intelligent Body in Indonesia's Independent's Efforts conference, and (4) the discussions of Ad Hoc Committee I MPR in various meetings to amend the 1945 Constitution.

The first moments was the popular case of Madison vs Marbury as the starting poing of judicial review authority. The judicial review history was started in 1803 in United States of America when the US Supreme Court took a shocking decision. The decision stated that court was authorized to cancel regulations that in contrary to the USA constitution. The courage showed by John Marshall and the other four supreme judges in taking the decision became a precedent in USA history which widely influenced in practical laws in many countries. Since then, many laws, both federal and state laws were stated, by the Supreme Court, were in contrary to the constitution.

The next moment was the Hans Kelsen's concept in establishing the Austrian's CC in 1920, as the first CC in the world. Kelsen stated that there was a need to monitor the laws constitutional, by establishing the special court which is called the Constitutional Court, or could be given to the ordinary court. The Kelsen's concept influenced that establishment *Verfassungsgerichtshoft* or Austrian Constitutional Court. Furthermore, the existence of Austrian CC has a wide influence in other countries which later adopted the CC in their governance system, especially on the constitutional review.

The other next important moment was resulting from the dynamic discussions in drafting the Indonesian Constitution in the course of the Indonesia's independent. In one of the plenary meetings of BPUPKI, Mohammad Yamin, member of BPUPKI, presented the important of *materieele toetsingrecht* against Laws. In this regard, Yamin presented the concept of the need to have an institution to resolve disputes in the constitutions implementation. Yamin's concrete proposal was to form the Balai Agung or Mahkamah Agung (Supreme Court) which was authorized to review laws.

However, the proposal was denied by the other member, Soepomo. Soepomo said that basic concept of the current drafted Constitution was not the separation of authorities, but the distribution of authorities. In that concept the judges' authorities was to implement the laws not to review the laws. The authorities of judges to review the laws was in contrary to the supremacy concept of People's Consultative Assembly (PCA). Soepomo also said that as a new-independent country, it did not have the experts and experience in judicial review. At that time, Yamin seemed to be reluctant to further discuss it, and the idea was dropped, and failed to be accomodated in 1945 Constitution.

Muhammad Yamin's concept to establish the CC was revived decades later, during the amendment process of the 1945 Constitution. The concept was positively responsed by all makers of 1945 Constitution amendment which in principle accepted the concept of establishing the CC to be accomodated in the constitution. During the early discussion, CC would be seated within the Supreme Court, with the authority to materially review the laws, decides solution against laws dispute and other authority as granted by laws. There was other proposal, which is to authorize CC to resolve disputes between state institutions and between the central and regional governments.

After an indepth studies, CC was established and was accomodated in the 3rd Amendment of 1945 Constitution. The 3rd Amendment of the 1945 Constitution decided an institution named Mahkamah Konstitusi (Constitutional Court), in Article 24, Paragraph (2) and Article 24C of 1945 Constitution. Therefore the CC history in the Indonesian governance was started, exactly upon the acceptance of the 3rd Amendment of 1945 Constitution in Article 24 paragraph (2), Article 24C, and Article 7B, on 9 November 2001.

C. The Background of CC Establishment in Indonesia

Based on the governance practical dynamic and political experiences undergone by Indonesia, the establishment of CC was more motivated and inspired at least by three issues. **First,** CC was established as a consequent to realize a democratic and lawful country, based on laws as contained in the 1945 Constitution. In the context of democratic country, it is possible that a law or regulation was formed based on democratic procedures and mechanisms but the substance was not in accordance or in contrary to the democratic, which means in contrary to the Constitution. Therefore, it is necessary to have the authority to review the constitutional laws.

Second, the Amendment of 1945 Constitution implied moves and changes in the relationship of state authorities from distribution of power system to the *separation of powers system* in framework of *checks and balances*. The relationship moves will possibly create conflicts or authorities conflicts among the state institutions. However, it was not only because of the change of relationship, but it also because of the many state institutions that were established based on the 1945 Constitution, provided the increase of potential disputes between the state institutions. Considering that the status of those institutions are equal and there is no supreme institute, therefore it is deemed necessary to have an institution that has function and authority to resolve authority disputes among those institutions.

Third, the impeachment of President Abdurrahman Wahid by People's Consultative Assembly during its Special Meeting in 2001, was a governance phenomenal which was considered inconsistent against the presidential system. In the presidential system a president cannot be impeached during its tenure as it is a fixed term, particularly due to the political reasons only. President can be impeached only if the president was proofed guilty against certain laws as regulated in the Constitution.

That phenomena inspired to amend the Constitution to find mechanism process on how to terminate the President and/or the Vice President not to only based the impeachment only for the political reasons. In this regard, it was agreed to have a mechanism as well as the law body which has the responsibility to first review the law violation by the President and/or Vice President which will result in the termination of the President and/or Vice President during their tenure.

D. The Position of CC in the Indonesian Governance

The separation of authorities resulted in basic changes of state institutional format after the 1945 Constitution amendment. Before, the state institutions was formed as vertical-hierarchis, and People's Consultative Assembly (PCA) being at the top structure as the highest state institution. Article 1 Paragraph (2) of 1945 Constitution prior to the amendment stated that the highest authoritiy was in the hand of people and PCA as its implementor. As the people's presentation which was in the hand of PCA, PCA was always regarded as the people's incarnationand PCA distributed its power to various state bodies, such as President, House of Representative, Regional Representative Council, Supreme Audit Board and Supreme Court. Those five bodies have equal position as high state bodies.

In the power distribution system, those state bodies were not classified as highest and high state bodies. It was because those bodies have its authorities based on the Constitution and at the same time was also limited by the Constitution. After the 1945 Constitution amendment, the people's power was not wholly casted upon only one state body. It was now placed based upon the Constitution. In other words, the power was distributed among state bodies in accordance with the 1945 Constitution.

In that context, the state bodies were differentiated based on its role and function as stipulated in the 1945 Constitution. As one of the judges implementor, CC has equal position with other bodies in different power branches, i.e. executive and legislative. Those equal positions imply no other reason to consider that a state body as superbody or superior compared to other state bodies. Based on that, there was no reason to say that CC has higher position compared to ther state bodies, especially if only seen based on CC's authority to cancel laws that were issued by legislative and executive bodies. CC can cancel those laws not because of its higher position but it was mandated by the constitution.

E. CC Functions and Authorities

The role and function of CC are to safeguard the constitution as the highest basis of constitution and laws implementation in the course of state management. In that function and role, its main authority is to review the law which has to be owned and implemented by CC. In this regard, CC was formed to guarantee that there is no more, or at least minimize, the unsuitable law products that is not in accordance, contradict, or out of the constitutional corridor as those law products can not be regarded as to realize and safeguard the citizen's constitutional rights.

In order to review whether a law is contradicted with the constitution, it was agreed to use the judicial review mechanism. If a law or article, paragraph and/or part of that law was proofed not in accordance or contradicted to the constitution, CC will declare that the law product will not legally bound. In that case, all law products should make reference and should not contradict to the constitution, in any case. By the judicial review authority, CC will safeguard the constitution.

In addition to judicial review, Indonesian CC will have other functions, i.e. (1) to take decision on inter-state institution disputes, (2) to dissolve a political party, and (3) to resolve electoral disputes. Those functions provide the mechanism to resolve various disputes (inter-state institutions) which can be resolved by ordinary court process, such as electoral disputes, and claim for political party liquidation. This kind of disputes are closely regarded as citizen's right in the democratic political dynamic which is ensure by the Constitution. Because of those, the functions to resolve the electoral disputes and political party liquidation was regarded as CC's authorities.

Based on Articles 7B and 24C of 1945 Constitution, CC has four authorities and one constitutional obligation. Its constitutional authority is to do the judicial review against the 1945 Constitution, to take decision on authorities disputes among state bodies, as casted by the 1945 Constitution, to decide on political party liquidation and decide on the result of an election. CC is constitutionally obliged to decide the House of Representative's opinion if the President and/or Vice President has violated the law or misbehaved or was not fullfilled the requirement to be a President and or Vice President as stated in the 1945 Constitution.

F. The Role of Constitutional Court in Realizing Constitutional Democracy

In accordance to the effort to realize constitutional democratic country, implementations of four authorities and one Constitutional Court's obligation have a strategic role and contribution. The role of Constitutional Court in realizing constitutional democracy through authorities and constitutional obligation was explained as follow:

1. Judicial Review of Laws against the 1945 Constitution

Judicial review mechanism is an effort to ensure and guarantee that the laws are consistent and doesn't contrary to 1945 Constitution. Laws as politics' product are crystallization of political interests of the makers in political institution authorities.

As a politics' product, the law's substance is just an accommodation or compromise for certain political interest, even political domination which is not consistent or against constitution clause or will.

According to laws hierarchy principle, the substance of lower laws must not contrary or not refer to the higher laws. In this regard, Constitutional Court has authority given by the constitution to test and judge a law

whether it is contrary to constitution or not through the law test. If the law or part of it stated inconsistence with the Constitution then the law product will be cancelled by Constitutional Court. Through judicial review, Constitutional Court become a safeguarding institution so there won't be a statute inconsistence against the Constitution corridor.

Several Constitutional Court's rules in implementing the Judicial review authority were made by the passion to support the effort of strengthening the constitutional democratic principle. Constitutional Court has and will make rule to strengthen democracy. Constitutional Court rule rehabilitated the right to vote of former Indonesian Communist Party members, rule to allow the independent candidates in the Head of Regional Election, to revoke Legal Education Entity Act, and also the rule for using citizen identification card and passport as a requirement to vote, are a few from many of the Constitutional Court concrete role in encouraging democratization.

2. Resolving Constitutional Dispute among State Institution

Constitutional Court authority to resolve constitutional dispute among state institution basically is to provide the protection so the state institution move by constitutional track. This authority is an effort to prevent a state institution to take over, over step, or dominate other state institution in governing country. Whenever there is a dispute, the resolving mechanism is provided in Constitutional Court.

Constitutional authority dispute among state institution is the different opinion with a dispute or another claim about authority of each state institution. It is occur regarding our relation system from one institution to another that have check and balances mechanism and principle, meaning equal but monitoring and balancing each other. In consequent to that kind of relationship, there is possibility of dispute in interpreting the distribution of authorities as contained in the 1945 Constitution. In this regard, CC will be the referee to solve this within the law and constitutional mechanism.

3. Decision to Dissolve a Political Party

The authority to dissolve a political party was authorized by the 1945 Constitution to CC, in order to safeguard democracy, especially to maintain the political party as pillar of democracy. Political party reflects the freedom to organize openly and has its own place in the democratic country.

As a democractic pillar, the existance of the political party itself should not jeoperdize the democracy itself, and it should not endanger the nation existance. If there is a violation, the political party can be dissolved. The political party liquidation cannot be done by the government, as in principle, the government was also formed by the political parties. Based on this, the liquidation of a political party should be done the judicial body, in this case by CC, on the basis of strict laws and constitutions.

The claim to dissolve a political party can not be submitted by private entities or individuals which might be disappointed or had different opinion with the political party's executive. Therefore, the political party liquidation

can only be submitted by the Government on the reasons as stated in the Constitution and Law. In addition, a political party can be dissolved if that party's activities are proofed to be contradicted against the 1945 Constitution, in its ideology, principles, activities, goals and programmes. The proofing will done in the CC. Therefore the liquidation of political party can not be based only on the political motives and authority's approach.

In this regards, CC will safeguard political party from power abuse, authoritative, arogant and un-democratic as well as to maintain the constitutional democratic from political party that does not have synchronize ideology, principles, activities, goals and programs with the constitution.

4. Decision on the Result of Electoral Disputes

The election is the main way to form and manage the government, from, by and for people. Therefore, election should be done in a very fair and just ways. There should not be a vote that was not counted for, manipulated as this meant manipulating the people's power.

In Indonesia, the elections were categorized as election for members of legislative, President and Vice President election and the election of Head and Vice of Regions. These elections are very volatile to disputes. Therefore, any disputes should be resolved through a fair court, in this case by CC as well.

The election disputes are between the National Electoral Commission (KPU) and the election participants regarding the decision on the election national result. The dispute can happen if the KPU's decision can affect 1) the election of Regional Representative Council members, 2) the decision of President and Vice President candidates that entitled to the second round as well as the election President and Vice President, and 3) The result of political party seats in one of electoral region. By its decision, CC will not have any doubts to instruct the recalculation of vote counting or re-conduct the election, if there is violation against the democratic principles.

In this case, CC will not only judges the votes counting, but also safeguarding the election process and quality to ensure that election is conducted in directly, general, free as well as secret and honest ways. The result of election is influenced by its process, the issue is whether it is significantly changed the result of the election or not. The significancy can be measured by the result difference and/or is there any structured, systematic and massive violation.

In connection with the safeguarding the election, since the enactment of Regional Administrative Act Year 2008, CC authorities were increased by reviewing, judging and deciding the dispute in head of region elections. Those authorities were belong to the Supreme Court. The increasing these authorities were the consequence of the Election implemention regulation which put the election of the head of regions fall under the election.

5. Decision on House of Representative's opinion regarding the possible violation done by President and/or Vice President

In the presidential system, the president cannot be impeached during its tenure prior to the completion of its term, as the president was directly elected by people. However, based on the principle of supremacy of law and equality before law, president can be terminated if proofed violates certain laws as stipulated in the Constitution. The termination can only be done based on certain reasons as stipulated in the 1945 Constitution, that is violation of laws, traitory against the state, corruption, bribery and other heavy criminalism or misconduct behaviour as well as does not fit anymore to act as President and/or Vice President.

Hoever, the termination process should not be against the law principles. Therefore, prior to the court decision that decided a president is found guilty, the president cannot be terminated. That Court is CC which judge the case put forwarded by the House of Representative. However, prior to that, in taking stance on that kind of opinion, the process of decision making in the House of Representative should be supported by 2/3 (two-third) of all House of Representative members present during the plenary meeting which should be attended by at leaset 2/3 (two-third) of the House of Representative members.

G. CC's Decision is Final and Binding

The CC's decision in discharging its authorities and constitutional obligation as above, is final and binding in nature. That means, there is no other law's efforts available, such as review or other efforts as in the general court. The CC's decision has the legal binding since it was announced in the CC's plenary court which is opened to public. The court's decision which has already had permanent legal binding, means has a legally binding to be executed. Therefore all parties, including the concerned state apparatus have to abide to the CC's decision.

In the judicial review, for example, the norms of Law to be reviewed is abstract and publicly bound in nature, although the request was based on the individual's right that was violated, in fact it presents the community's interests, to implement the constitution. The position of Laws maker, the House of Representative and President, not as defendant or the requester should be responsible on the wrongdoings. The Laws maker is the concerned party in providing background information and interpretation of the submitted Law, in order that the interpretation was not done only by the requestor and CC, but also by the Laws maker to have a law certainty that is not in contrary to the constitution. Therefore, the binding parties to the CC's decision was not only the Law maker, but all parties concerned to the CC's decision.

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

SESSION ONE

The Role of Constitutional Court and Equivalent Institution in Strengthening the Principles of Democracy

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PANEL I

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

THE ROLE OF THE CONSTITUTIONAL COUNCIL IN THE REALIZATION OF PRINCIPLES OF THE DEMOCRATIC STATE IN THE REPUBLIC OF KAZAKHSTAN

Hon. Rogov Igor Ivanovich

Chairperson of the Constitutional Council of Kazakhstan

GOOD DAY, DEAR LADIES AND GENTLEMEN!

Let me on the behalf of the Constitutional Council of the Republic of Kazakhstan greet the participants of the conference and express our gratitude for invitation.

Today's forum is devoted to actual theme. In the legal state, which is Kazakhstan poses itself to be, the decisions of the organs of constitutional control are the clue factor of development of country in accordance with democracy ideas and principles, laid in the Constitution. The decisions of the given state organs, standing on the guard of the Constitution and ensuring its supremacy over the territory of country act is the logical continuation of the Main Law.

This year Kazakhstan celebrates 20th anniversary of its Independence. Owing to reasonable, constant and purposeful actions on consolidating the constitutionalism, Republic of Kazakhstan became the country of ascending democracy. And the democracy is not conceivable without highest lawfulness. For the years of its independence Kazakhstan seriously advanced to the achievement of this ideal.

Touching upon the questions of realization of democracy principles in Kazakhstan, I would like to start my speech with highest constitutional values of the state – human rights and freedoms. Practically every normative resolution

of the Constitutional Council is directed to the safeguard of specific human rights and freedoms. The Constitutional Council orients the development of legal system, lawmaking and law enforcement practice in direction of their complying with modern understanding of human rights and freedoms, consolidated in fundamental international acts. Thus, on appeal of the President of the Republic of Kazakhstan as an preliminary constitutional control the subject considered by the Constitutional Council was the law of the Republic of Kazakhstan "Of mass media", adopted by the Parliament and presented to President to be signed by him. In its resolution of 21 April 2004 No. 4 the Constitutional Council clarified, that the right for freedom of word supposes the freedom of opinions, points of view, ideas expression in different kinds and forms, in mass media as well. The Constitutional Council found this law not complying with Constitution, as it limited the sphere of realizing the word freedom, entitled to disprove the unrealistic information only to the citizens of Kazakhstan, allowed the possibility to limit the freedom of word by normative legal acts, and cease the activity of mass media in extrajudicial order.

One of the most important ways to ensure the supremacy of democratic principles is the official interpretation of Constitution norms. For the years of work of the Constitutional Council, the constitutional norms, concerning the questions of general elections, republican referendum, forms of delegating by people their authority to state organs, legal status of political parties and other social associations, private property regime and others. The normative resolutions of 1 December 2003 No. 12 and of 31 January 2011 No. 2 the Constitutional Council ascertained, that point 1 article 3 of the Constitution "the only source of state power is its people" means that the base of Kazakhstan, its sovereignty, independence and constitutional system is its people. Being one of the fundamental constitutional values, the act of expression of popular will acquires the compulsory juridical power by means of voting at the republican referendum or at the Presidential elections and Parliament deputies, periodically held in the country. In the other normative resolution of August 19 2005 No. 5 the Constitutional Council, having considered the appeal of the group of the deputies of Parliament concerning the date of the next Presidential elections, ascertained that the starting point of the cycle of will expression of people as the source of state power is the Presidential election day. In that very day the people of Kazakhstan realizes its will and displays its sovereignty, defining its democratic character of power, giving it the highest legitimacy.

So, the shown stable principles of democracy, composing the base of constitutional system of overwhelming majority of the world states, amongst them Kazakhstan, were interpreted by Constitutional Council. Its legal positions on the given questions penetrates the contents of the whole Kazakhstan legislation.

One of the base principles of the democratic state is the private property, the regime of realization of which was the subject of study in the Constitutional Council. In result, the legal positions, which allowed to approach the questions of limitation of title in another way were worked out. In the opinion of the

Constitutional Council, the positions of the Basic Law of property make the political legal basis of establishment of Kazakhstan as the democratic, temporal, legal and social state, the highest values of which are man, his life, rights and freedoms. The principles and norms of the Constitution declare and consolidate the guarantee of rights of ownership at all the stages of its origin, change and break off and spread over the all the procedures of passing the resolutions by state organs and officials, ensuring steady and progressive development of society and state, firmness of human rights and freedoms. In exceptional cases, foreseen by law the expropriation for state needs can be done on the decision of court under conditions of its equal compensation (normative resolution of 23 April 2008 No. 4 and of 28 May 2007 No. 5).

Certainly, this is not the full list of what Constitutional Council has done for democratic values realization in Kazakhstan. But they clearly indicate that Constitutional Council in its activity develops defined by Constitution vectors of democracy.

I think, that today's conference will help to all of us to comprehend these questions deeper, exchange positive experience and aim the ways of further work to ensure the supremacy of Basic Law of our countries and the ideas and principles of sovereignty of the people.

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

DEMOCRACY AND THE CONSTITUTIONAL COURT OF MONGOLIA

Hon. Dugerjav Munkhgerel

Justice of the Constitutional Court of Mongolia

DEAR LADIES & GENTLEMEN,

Let me first convey congratulations on behalf of the Constitutional Court of Mongolia to the Indonesian Constitutional Court on this historical occasion. I would also like to express my deep appreciation of the importance and reach of the present symposium.

1. Mongolia made a transition from the communist regime to democracy, and with the endorsement of the new democratic constitution in 1992 established the Constitutional Court /Tsets/ which has the duty to safeguard the democratic constitution and which has full powers to exercise supreme supervision over the implementation of the Constitution. The Constitutional Court was a completely new institution in Mongolia's history at that time. It was not a mere chance that the Constitutional Court was the first public institution established under the new Constitution which declares that assurance of democratic principle, justice, equality and national unity, and rule of law should be the fundamental principles of state processes, and the Constitutional Court ensures that the activities of the State Great Hural /Parliament /, the government and the President to be formed under the Constitution, and the laws, decrees and resolutions to be issued by the above bodies are in conformity with the Constitution.

The judiciary plays an important role in strengthening democracy through separation of powers among all level of governance, which is the main condition of a constitutional state. Section 1 of Article 64 of the Constitution of Mongolia says: "The Constitutional Tsets shall be an organ exercising supreme supervision over the implementation of the Constitution, making judgment on the violation of its provisions and resolving constitutional disputes. It shall be

the guarantee for the strict observance of the Constitution." The responsibility of the Constitutional Court to resolve constitutional disputes, procedures to settle disputes, competence of the decisions issued by the Tsets and the criteria for examining disputes exclusively at the request of certain legal subjects highlight the fact that the Constitutional Court is an independent court.

2. A vital principle of the state structure in a democratic society is creation of a legal environment and implementation mechanism of interdependent, mutually monitored and balanced actions of legislative, executive and judiciary bodies.

As indicated in the Constitution of Mongolia, the Constitutional Court of Mongolia shall examine the decisions of specific organizations and public officials as well as actions of some public officials.

The Constitutional Court shall consider and resolve disputes concerning whether

- laws,

- decrees of the President,

- other decisions of the Parliament and President,

- decisions of the government,

- international treaties concluded by Mongolia,

- national referendum,

- decisions by the central electoral body on the Parliament, its members, and on presidential elections are in conformity with the Constitution. If the Constitutional Court decides that the decisions of the above legal subjects are in compliance with the Constitution, decisions in question, as indicated in Section 4 of Article 66 of the Constitution, shall be considered invalid.

Also, the Constitutional Court has the full power to consider

- whether the President, the Chairman and members of the Parliament, the Prime Minister and members of the Government, the Chief justice of the Supreme Court and the Prosecutor General have committed a breach of the Constitution,

- whether the legal grounds exist for the removal from office of the President, the Chairman of the Parliament, or the Prime Minister, and for recalling members of the Parliament. Once the Constitutional Court decides that the given legal subject violated the Constitution and that legal grounds exist for their removal or recall, the parliament should approach the matter according to the decision of the Constitutional Court.

The disputes to be considered and resolved by the Constitutional Court or the range of dispute consideration by the Constitutional Court, as specified above are restricted to certain high state and government bodies and some high ranking public officials. Although it is obvious that high ranking state and government officials are more likely to breach the Constitution, the judicial power as a major pillar of democracy should be required to more broadly supervise

decisions of public official who violated the Constitution for consideration by the Constitutional Court. If the range of disputes to be examined and resolved by the Constitutional Court were to be expanded, for example to apply to decisions of local governors and government agencies, the Constitutional Court would play a greater role in the process of implementation of the principles of democracy and in safeguarding the values of democracy.

3.The Constitutional Court examines and resolves constitutional disputes at its own initiative on the basis of petitions or applications submitted by citizens, or at the request of the Parliament, the President, the Prime Minister, the Supreme Court and the Prosecutor General. In other words, a judge has an independent power to start examining disputes on the basis of petitions or applications submitted by a citizen and if the above mentioned public officials submit a request the dispute should be considered and settled compulsorily. This differentiated regulation in our law is said to be due to the level of legal knowledge and education of the citizens.

Under the Constitution of Mongolia, every citizen of Mongolia, as well as foreign citizens and stateless persons residing lawfully in Mongolia have the right to submit a petition or a complaint to the Constitutional Court of Mongolia. Also, it is one of the specific features of the Constitution of Mongolia that every citizen enjoys a constitutional right to submit a petition or a complaint concerning any body indicated in Section 2 of the present report irrespective of the relevance of the dispute to an individual personally. It is considered to be important for protection of personal and civil rights and freedoms in our country at this current stage of strengthening the foundation of democratic and legal state.

4.The principle of equality which declares that every person has an equal right before the law and the courts, and the principle of democracy of decision-making by the majority with due consideration of minority's votes surely holds an important place among fundamental principles of strengthening a democratic lawful state. Let me introduce how the Constitutional Court of Mongolia resolved a case of distortion of equality, and the majority-minority principle. This dispute concerns Mongolian law protection organs not being able to investigate the case of a member of the Parliament involved in a crime.

Content of the dispute is as follows: Section 24.7 of Article 24 of the Law on the State Great Hural states that "the sub-committee on the Immunity of Members of Parliament shall comprise four members who have been elected to the Parliament the most number of times, and these members shall review the proposals submitted by relevant bodies and authorities mentioned in this law to suspend or terminate the mandate of a Member of Parliament. They should reach a unanimous conclusion on the issue and present their conclusion to relevant Standing Committees and the plenary session of the State Great Hural." The petitioner argues that the section concerning the "unanimous conclusion" violates Section 1 of Article 14 of the Constitution which says "All persons lawfully residing within Mongolia are equal before the law and the courts."

Thus, Section 3 of Article 29 of the Constitution which states that "if a question arises that a member of the State Great Hural is involved in a crime, it shall be considered by the session of the State Great Hural to decide on the suspension of his/her mandate" could no longer be executed because of the above provision which indicates that the given issue should be considered by relevant Standing Committees and the plenary session of the Parliament only after the four members of the parliamentary sub-committee reach a unanimous conclusion.

The Constitutional Court of Mongolia began the dispute review upon the receipt of the petition and found out that the violation mentioned in the petition was obvious in the operations of the Parliament. On two occasions the sub-committee on the Immunity of Members of Parliament has declined to submit to the Standing Committee and the plenary session the proposal submitted by the State General Prosecutor to suspend the mandate of a Member of Parliament involved in a crime on the basis that one member of the sub-committee failed to agree with the General Prosecutor's proposal.

This means that instead of 76 members of Parliament only one member was powerful enough to issue a decision in violation of one major principle of democracy to decide any matter at equal rights of all or by the decision of majority. This action restricted the possibility to investigate and resolve according to the law the case of a Member of Parliament who is under suspicion. In other words, a condition has been created that the Member of Parliament under investigation could lobby one of the four members of the sub-committee on the Immunity of Members of Parliament by any reason thus making legal organs incapable to complete the investigation. Furthermore, the legal condition was created to avoid legal responsibility. Consequently, it would be possible for parliamentary members to avoid the principle that every person is equal before the law and the courts.

The Constitutional Court of Mongolia examined the dispute and came to the conclusion that the above mentioned 2 provisions of the Constitution were violated and therefore declared invalid the part of the law which states that the sub-committee on the Immunity of Members of Parliament should "reach a unanimous conclusion."

In conclusion I would like to say that the Constitutional Court of Mongolia carries an important duty in the practical implementation of principles of democracy.

Let me wish success to the present symposium.

Thank you for your attention.

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

THE COLOMBIAN CONSTITUTIONAL COURT, ITS SYSTEM OF CONSTITUTIONALITY CONTROL, AND RECENT JURISPRUDENCES

Hon. Juan Carlos Henao Perez
President of the Constitutional Court of Colombia

One of the most important innovations introduced by the Constitution of 1991 (hereafter CP), in relation to the constitutional court, was the creation of the Constitutional Court which is part of the judicial branch of public power. It is a collegiate body composed of an odd number of members specified in the law chosen by the Congress for eight years without the possibility of reelection, "from lists submitted by the President of the Republic, the Supreme Court and the State Council "(CP, art. 239), so that their formation involve all three branches of the government. The nine lawyers must have various specialties of law to ensure diversity in its composition (Statutory Law on the Administration of Justice, art. 44), who must certify compliance with certain requirements (CP art. 232, 240 and 245). This Corporation, which serves to uphold the integrity and supremacy of the Constitution, has been assigned a number of powers relating to the judicial and defense of fundamental rights. Given the importance of their functions, this body has an indirect democratic legitimacy to the extent that its members are elected by Parliament.

To understand what the role of the Constitutional Court in the Colombian legal system, first, we have to explain the main mechanisms in which the Constitutional Court intervenes to defend the Constitution and fundamental rights and then we will analyze the main features. In the second part, we will look into recent developments acknowledged as constitutional jurisprudence.

I- MAIN MECHANISMS ESTABLISHED IN THE LEGAL SYSTEM FOR THE DEFENSE OF THE CONSTITUTION AND FUNDAMENTAL RIGHTS INVOLVING THE CONSTITUTIONAL COURT.

Before addressing the analysis of the issue to be developed in this first part, it is necessary to clarify that, from a structural standpoint it, the composition of constitutional jurisdiction in Colombia poses a problem generated by the plurality of constitutional control mechanisms that exist in the Colombian legal system.

In this context, the control of constitutionality and fundamental rights are actually stronger in the Colombian legal system, since there are multiple pathways and organs with tasks related to the defense of the Constitution.

However, as the law states that the only body of constitutional jurisdiction is the Constitutional Court, then I will just state the essential features of the public action of unconstitutionality, the automatic control of constitutionality of the presidential objections over unconstitutionality and tutelage proceedings, which are procedures in which the Constitutional Court has jurisdiction to intervene. Finally, describe the effects of the judgments of the institution.

A) PUBLIC ACTION FOR UNCONSTITUTIONALITY

According to Article 40 of the Constitution, to enforce the right to participate in the establishment, exercise and control of political power, every citizen has the possibility to file before the Constitutional Court, a public action of unconstitutionality, without being represented by any legal representative.

This figure, which is a stronghold of Colombia's constitutional right, was not a creation of the National Constituent Assembly of 1991, for its establishment in the Colombian legal system goes back to the Constitution of Cundinamarca of 1811, which established a public action of unconstitutionality. But, it was in the Legislative Act 3 of 1910, which outlined the current characteristics of the public action of unconstitutionality enshrined in the current Constitution, which basically reproduced the policy statement of 1910.

Although Colombia is facing great challenges in the field of participatory democracy, public action of unconstitutionality has secured the full exercise of deliberative democracy because it has allowed citizens to exercise real power over decisions that potentially affect them.

Indeed, through this action one can sue not only the laws issued by Congress but also acts for amending the Constitution, as well as referendums, popular consultations, plebiscites and decrees issued, and in exceptional case, the President of the Republic when Congress does not pass within the term established the National Public Investment Plan and other issues to be exercised by the of the delegation with legislative powers.

Depending on the type of act or rule being requested, the Constitution will establish the scope of judicial review. For example, laws can be sued for errors in content or in its forming, while the actions of constitutional reform

can be studied only on procedural grounds. In any case, if a public action of unconstitutionality on procedural grounds, an expiration of one year is applied, counted from the date of publication of the respective act. Consequently, when it comes to material defects, the action is not subject to any term of expiry (CP art. 242-3).

The procedure for this action, which is regulated by Decree 2067 of 1991, is relatively short to the extent that since the enactment of the taking of evidence, the Court has four months to take the final decision on the constitutionality or unconstitutionality of the provision or case. Additionally, it is a highly participatory process, not only because it is mandatory that the Attorney General's Office to rule on the demand for its passage but any person, including the Public Defender may intervene to defend the constitutionality or unconstitutionality of the act or law.

Consequently, the control system of the constitutionality of Colombia is one of the oldest in the world and the public nature of the constitutional motion makes it unique and original. From this perspective, the public action of unconstitutionality is a tool that has allowed the development of deliberative democracy, as any citizen can exercise real control over the production of law.

B) AUTOMATIC CONTROL

As the purpose of safeguarding the Constitution of 1991 is so important, there is the figure of the automatic control of constitutionality, unlike the public action of unconstitutionality, it operates without the need for a lawsuit to the extent that the Constituent determined, base on its relevance, which norms cannot be demanded for it to be controlled.

Thus, under Article 241 above, the Constitutional Court automatically should consider the constitutionality of statutory bills, which are a kind of structural laws governing issues such as fundamental rights and the functioning of the administration of justice, both content and form on procedural grounds. Likewise, one should review the legislative decrees issued by the executive branch of government during the states of emergency when there is external war, internal disturbance or state of emergency of social, economic or ecological. It also analyzes the constitutionality of international treaties and laws that approve them as well as the call for a referendum and constituent assembly to amend the Constitution, through a prior popular announcement.

For projects of statutory laws, the jurisprudence of the Constitutional Court has indicated that the control of constitutionality applies with the following characteristics: a) jurisdiction, as the Court does not act as a legislator but as a judge to the extent that it fails the law and does not judge the appropriateness or timeliness of the controlling norm, b) automatic, because it starts by sending the bill passed on second debate by the Congress, c) integral, to the extent that all provisions of the bill are confronted with each of the constitutional requirements, d) final, meaning that once issued by the statute, it can not be sued again,

unless the defect arises after a constitutionality case or where the provisions of the Constitution which confronted the bill have been modified, and finally e) prior participative, since during the process citizens may intervene and the control is done before the project is sanctioned by the President of the Republic. On the other hand, in the case of international treaties, there are two different situations, depending on whether a treaty adopted after or prior to the 1991 Constitution.

Indeed, in the first case, the control, which is comprehensive, takes place prior to development and after the presidential approval of the approving law, so the President can only ratify the clauses of treaty which is conformity with the Constitution and if it is a multilateral instrument, must make reservations for the clauses to be declared unconstitutional by the Court. In this scenario, the control of constitutionality covers both material respects, i.e., the confrontation of the contents of the international instrument with the Constitution, as the material aspects, referring to the review process set by passing laws in Congress. Meanwhile, the constitutional control over international treaties ratified prior to the effective date of the 1991 Constitution, is not automatic but plead and extends both the substantive content of the treaty and the law approving. Furthermore, the Constitutional Court has established that the control exercised over the decrees has a comprehensive and definitive character "rests on the legal acts produced by the executive under the states of emergency, thus comprises the decree declaring it as well as the decrees issued as measures to avert the exceptional situation and the decrees for suspension." So, unlike the provisions of the previous Constitution of 1886, today the exercise of the power to declare states of emergency and legislate it through legislative decrees is very limited. Therefore, the Constitutional Court has an automatic constitutionality that at times is preliminary, as occurs prior to the enactment of the act, as in the case of international treaties and statutory laws, and sometimes is later; it is exercised after the effective date of the norms being studied, as in the case of legislative decrees.

C) PRESIDENTIAL OBJECTIONS OF UNCONSTITUTIONALITY

According to Articles 32 to 35 of Decree 2067 of 1991, when the Chambers insist that when a bill objected by the President as unconstitutional is sanctioned, it must be registered with the Constitutional Court to take control of the constitutionality.

The procedure applied to the case is similar to automatic control. If the Court finds that the project is partially unconstitutional, it returns the bill to the House of origin to remake the inapplicable provisions. Having completed this step, the project returns to the Court for final adjudication (Article 33). However, if the Court determines that the project is consistent with the Constitution, the decision takes effect of *res judicata* on rules invoked by the government and considered by the Court and requires the President to sanction (Art. 35).

Therefore, the way of judicial review of presidential objections is an example of checks and balances system designed in the 1991 Constitution, allowing the executive branch to limit the legislative branch of the public objecting to a bill believes to violate constitutional norms.

D) REVIEW OF JUDGMENTS OF CARE

Beyond the establishment of the Constitutional Court, the other major innovation of the 1991 Constitution, was the consecration of a writ of protection (CP art. 86).

In the words of OSUNA, "from the time of operation, has been the most dynamic figure who has given the new constitutional order, while the tool has proved more of a popular legitimacy that has given the Constitution [because] the public has received it as an important achievement for the protection of their rights."

It is a preferential and summary procedure under which any person may bring proceedings in any court of the place where the violation occurred or threatens fundamental rights or where their effects occur, to claim protection in writing or verbally, when they want to be violated or threatened by acts or omissions of public authorities, and even certain individuals.

The characteristics of this action, which are determined in Article 86 of the Constitution and the Decree - Law 2591 of 1991, the regulations are as follows: a) informality as it is "not subject to special requirements or sacramental formulas "and to this extent, the petitioner should only narrate the events that occurred and identify" sufficiently, which right was allegedly violated or threatened", b) is a preferential and summary procedure, it must be substantiated with priority for which it will postpone all matters of a different nature, except for habeas corpus and apply short term, unextendable and urgent, c) informality, to the extent that the guardianship judge must play an active role in driving the process, "not only what to do with the interpretation of the injunction request, but also in finding the elements that help understand fully what the situation presented to their knowledge to make a base decision for justice,"and finally, d) subsidiary, it is appropriate only if no other appropriate judicial procedure available.

Regarding the processing of this action it is necessary to consider all sentences handed down by judges, are sent to the Constitutional Court for possible selection (CP, art. 241-9 and Art. 31 to 36 of Decree 2591 of 1991). This is a discretionary power of review providing the freedom to choose, independently, "according to the criteria and objectives to be determined or that it considers relevant for the protection of fundamental rights. This discretion means that the Court has full discretion to determine which processes are studied by itself, without the law, regulation or other lower-level, to force it to choose a particular case of guardianship, or a certain amount of them."

In this sense, the review of judgments of guardianship does not constitute a third instance in which the parties can attack the judicial determinations of

first and second degree, as the primary objective of the review of sentences is not ruling on the case but unifying the jurisprudence surrounding the interpretation and application of the Constitution and lay the foundations upon which the other legal operators must rely upon to decide on fundamental rights.

To exercise any power of review, each month the plenary of the Constitutional Court designated by lot and on a rotating basis, two of its members to form the Selection Board of the Guardianship, which determines what the records will be selected without express motivation and according to their discretion. Selected items are distributed to the judges of the Court on a rotating basis and by lot, who will make up the respective Boards of Review (Decree 2591 of 1991, Art. 33 and Rules of Procedure of the Constitutional Court, Art. 49). However, when it comes to a change of law or a matter of great importance, it is the Plenary Chamber of the Corporation to decide, not the respective Board of Review, composed of three judges (Decree 2591 of 1991, Art. 34).

When a file has been excluded, i.e., not selected by the Board of Selection, any of the judges composing the Constitutional Court, the Attorney General's Office and the Public Defender are empowered to make a request of insistence for it to be selected before the next Board of Selection without request being binding (Decree 2591 of 1991, Art. 33 and Rules of Procedure of the Constitutional Court, Art. 49).

In this regard, "as a complementary tool to the selection process, it may be filed with the Court a written request for review which sets out the reasons for the failure of the request as wrong."

In this context, it is necessary to note that the 1991 Constitutional Convention was wise to give it to the Constitutional Court the power to review the records of protection that are relevant to the extent that, using its position of hierarchy, the great changes that have occurred in the area of direct application of fundamental rights, have come from adjudication of this Institution, as demonstrated in the next part of this essay dedicated to the latest developments of jurisprudences. It is precisely thanks to the jurisprudence of the Constitutional Court that has applied genuine constitutional norms, to change, incidentally, the legal culture of the operators of law.

E) EFFECTS OF THE JUDGMENTS ISSUED BY THE CONSTITUTIONAL COURT

In accordance with the foregoing, it is clear that in Colombia the Constitutional Court exercises control over constitutionality of pre-or post, and plead to the extent that there is a public action of unconstitutionality. In both cases, decisions are taken by the Plenary Chamber of the Institution and carry an *erga omnes* effect, as the control exercised over the acts and norms are abstract. In any case, it is only the Constitutional Court to establish, in each case, the effects of the judgments of constitutionality, as a rule, may have its effect in the future. In this regard, the Court can not only modulate

the temporal effects of its judgments, but also can modulate their content, uttering manipulative sentences. According to constitutional jurisprudence, constitutional decisions that make constitutional *res judicata*, "are a formal source of law and constitutional are mandatory doctrine," so that must be addressed by all legal operators.

Moreover, as noted above, the Constitutional Court also exercises its role as guarantor of the Constitution by reviewing the judgments of guardianship. In this respect, where in general term the sentences produce *inter partes* effects, the Court may modulate their effects, with the aim of linking people who were not part of the custody or because the declaration of the unconstitutional state of affairs, appear to be studied later. Additionally, the protection granted may be permanent or temporary, depending on whether the writ of protection is appropriate as transitional mechanism to prevent the occurrence of irreversible harm or in the absence or ineffectiveness of the ordinary mechanisms of defense. Finally, the Constitutional Court has indicated that the *ratio decidendi* of the sentences of guardianship it uttered "constitute a binding precedent on the judiciary, which alone can deviate from the position of the Court when it is verified that there are facts in the process they do not apply in the precedent case or evidence that were not considered in due course by the upper order to develop a more coherent and harmonized legal institution, in which case it requires a proper and sufficient justification."

II- EXAMPLES OF RECENT JURISPRUDENCE DEVELOPMENTS

After analyzing the powers conferred to the Constitutional Court, it went on to describe four examples of recent jurisprudence developments of the Constitutional Court. First, I will refer to the declaration of the unconstitutionality state of affairs with regard to IDPs. Secondly, I will argue for a declaration of unconstitutionality of the possibility of re-elect the President for three consecutive terms. Then analyze the sentences studied on the declaration of state of emergency of economic, social and ecological enacted in December 2010 and January 2011 by the National Government and, finally, display the case of a custody sentence handed down by the Constitutional Court by which stated that labor norms are applicable to the case of sexual services, provided that the essential elements of the labor contract are met.

A) Judgment T-025 2004. Unconstitutional state of affairs in terms of assistance to IDPs

Since its inception, the Constitutional Court has spoken regularly on the most important aspects of social life in Colombia and its jurisprudence has been "a major impact on the overall development of the country." In this context, it is necessary to cite the decision T-025, 2004, by which accumulated 108 guardianship cases filed against various state agencies by displaced persons for violence, "considering that these authorities were fulfilling their mission of protecting the displaced population and the lack

of effective response to their requests for housing and access to productive projects, health care, education and humanitarian aid."

After analyzing the various legal issues raised in that event, the Court concluded that "conditions of extreme vulnerability in which the displaced population, as well as the repeated failure to offer timely and effective protection by the various authorities responsible for their care, they have violated both the actors in this process, as the displaced population in general, their right to a life to dignity, integrity, equality, petition, for work, health, social security, education, minimum living standards and special protection for elderly persons, female heads of families and children."

Additionally, because the violation of fundamental rights mentioned above is massive, prolonged and repeated due to a structural problem that affects not only the petitioner but to all people in the same condition, to the extent that there is a failure of resources to finance public health care policy designed by the State, the Court declared unconstitutional state of affairs in terms of attention for the displaced population.

Through this statement, two different types of orders were adopted. On the one hand, to solve specific cases of the petitioners, it issues a series of simple commands. On the other hand, as was declared as unconstitutional state of affairs, the Court issued a set of complex orders of execution to ensure the effective enjoyment of the rights of the displaced population, under which the entities are obliged to attend, adopt "within a reasonable time, and within the scope of their powers, the corrective measures that are necessary to overcome the problems of insufficient resources and instability of the institutional capacity to implement the state policy of care to the displaced population."

Subsequently, to ensure compliance with the order in the ruling, the Constitutional Court created the Special Chamber for Monitoring the decision T-025, 2004, which has issued a series of self follow-ups where the measures to overcoming the unconstitutional state of affairs have been studied. For example, the self measures on this matter issued, was the A-385, 2010, by which the Court found "that despite progress, the status of the information submitted by the national government and level of implementation of the corrections raised, it indicates that the status quo remains unconstitutional, as it still has not been systematic and comprehensive for the progress in the enjoyment of all rights of the victims of forced displacement, or has effectively guaranteed the minimum protection that should ensure at all times. "

Thus, by ruling T-025, 2004, the Constitutional Court ruled on internal displacement in Colombia as one of the major social problems as it affects over four million people, according to figures from the United Nations High Commissioner for Refugees (UNHCR). While the unconstitutional state of affairs persists, there is no doubt that this ruling has had a major impact on the implementation of public policy attention to the displaced population, an issue that is now a priority for the Colombian state and which is moving slowly.

B) Case C-141, 2010, referendum on re-election

Another important recent ruling of the Constitutional Court is the C-141, 2010, which changed the political landscape in Colombia.

Indeed, by this ruling, the Plenary of the Constitutional Court decided to declare the unconstitutionality of the whole Law 1354 of 2009, "By which it calls a constitutional referendum and submit to the people in a constitutional reform project." In other words, under the decision in this statement, presidential reelection was banned for three consecutive terms, requested five million signatures and endorsed by the Congress.

In a landmark ruling by a vote of seven votes to two, the Court concluded that the 1354 law unconstitutional 2009 was the occurrence of a number of flaws in the processing of the citizens' legislative initiative and the legislative process.

Thus, the Court found that the Committee of Promoters of the legislative initiative used a third party to perform some tasks that were proper and related to the financing of the campaign to collect signatures for constitutional reform. Additionally, the committee "spent a sum that exceeds more than six (6) times as authorized by the National Electoral Council," so the Court concluded that it constituted a serious violation of the principles of political pluralism and transparency, which are basics in a democratic system.

In this sense, the law was considered unconstitutional because its process was initiated without the certification of National Registrar of Civil Status. Similarly, in the third debate substantial changes were introduced to the original text of the bill backed by the citizens' initiative, as it established the possibility of proposing to the people a second immediate reelection, rather than mediate as had originally been established and also the plenary of the House of Representatives met to discuss the bill even though it was not authorized to meet in special session and had not been published in the Official Journal.

Finally, the Constitutional Court reiterated the proposition that incurs a defect in competence, that is pending when the power of constitutional amendment known as "structuring principles or defining elements" of the Constitution. In the particular case, the Court concluded that the third presidential term replaces the Constitution and, therefore, is vitiated by competition. That is, it was estimated that when the People and / or Congress, act as components and non-originating products, have limited its power of constitutional reform preventing it to replace the essential elements of the Constitution, which can only be altered by primary constituent. Therefore, *grosso modo*, first, the proposed constitutional reform does not recognize the change of exercise of political power, to the extent that the third term "would be preserved for a long period of time for the ideological tendencies advocated by the government, as well as the team in charge to develop policies and would facilitate the continuation of the dominant majority." Second, the Court considered that the possibility of a third consecutive re-election violates

the principle of separation of powers, since it blurs the system of checks and balances and promotes a presidential system "that, precisely, is characterized by [the exaggerated dominance of the executive] and the tendency to exceed the maximum exercise period of the presidential mandate of the *caudillo* effect and his political project." Third, the law that calls for the reelection referendum denies the right to equality because it affects "the chances of minorities and opponents to take power [to defeat] the opportunities for those who legitimately belong to the dominant trends contrary to and advocate different ideas about corporate governance." Finally, the Court concluded that the law is unconstitutional because it undermines the republican model adopted by the 1991 Constitution, which implies the temporality of the President and the succession secured through periodic elections.

Therefore, using the aforementioned ruling, the Constitutional Court ruled that neither Congress nor the people can change the Constitution in part if the change involves the replacement of its structuring principles or defining elements.

C) Case C-156 and C-216 2011, on the declaration of economic, social and environmental emergency

Every year in Colombia presents a natural phenomenon called "La Nina" causing an increase in rainfall from mid-year and that primarily affects the Caribbean and Andean regions.

In the middle of last year, La Nina manifested with an increase in rainfall above the historical average, causing serious flooding along the Pacific regions, the Caribbean and Andean, thus, causing loss of life, considerable destruction of buildings and roads, interruptions in the delivery of essential public services and seriously harm the economy and social life throughout the country.

In this context, by Decree 4580 of January 7, 2010, the President declared a state of economic, social and ecological emergency for thirty days, throughout the national territory, in order to avert the grave public calamity created by La Niña and prevent the spread of its effects.

In exercising the power of automatic control of the decrees to declare states of emergency, the Constitutional Court issued the ruling C-156, 2011, by which it declared the constitutionality of the decree insofar as it held that, one hand, it met all formal requirements necessary to issue and, on the other hand, "met the factual budget, the budget of values and decisions regarding the inadequacies of the ordinary means required by the Constitution and the Statute Law 137 of 1994 to declare a state of emergency."

Indeed, the Constitutional Court concluded that the existence of rainfall above the historic range, the specificity of the facts that gave rise to the decree and the greater intensity with the submission of the La Nina phenomenon, comparing with the facts of the previous years are reasons to follow the implementation of the budget. Likewise, the Court said that the assessments made by the Government in relation to the severity of the crisis, there were

neither arbitrary nor clearly wrong, because the evidence in the process, it was found that the effects of La Niña were devastating. Similarly, the decree passed the "trial of necessity" as it was demonstrated that the mechanisms provided for in the ordinary legal system to deal with natural disasters, were not sufficient to address the catastrophe, given its size.

Based on the declaration of this state of emergency, the government issued a series of decrees by which it adopted the organizational measures, budgetary and administrative provisions necessary to avert the serious state of public calamity, decrees that, in turn, were subjected automatic control of constitutionality.

Once expired the term of the previous decree, the Government issued Decree 020 of January 7, 2011, by which is again declared a state of economic, social and ecological emergency nationwide until 28 January 2011, to the extent that "after the declaration of a state of economic, social and ecological emergency, new facts were presented on the La Nina phenomenon, which were subsequent to the issuance of Decree 4580 of 2010 and make necessary measures to adopt to counter this crisis and its effects."

In exercise of the automatic control of constitutionality, the Constitutional Court ruled, by Sentence C-216, 2011, declaring the unconstitutionality of Decree 020 of 2011, after failing trials of necessity and lack of ordinary means. Thus, taking into account that since the declaration of the first state of emergency the government was aware that La Niña could worsen over time until mid-2011, the Government did not meet its burden of justifying for the need of sufficient extraordinary measures sufficient, following the first declaration of a state of emergency, which were insufficient to overcome the crisis and avoid aggravating their effects. In this sense, the facts stated in Decree 020 of 2011, they did not present new facts, unthinkable and unusual, and therefore the adoption of a new declaration of emergency was not justified, a power that since the Constitution 1991, can only be used on a exceptional nature by the executive. Finally, it is not understood that ordinary mechanisms available to the legislative and executive powers were not sufficient to cope with the crisis. In fact, the Court held that many of the measures taken to Decree 020 of 2011 "could be processed quickly with a message of urgency in the ordinary way before the Congress."

Therefore, through the sentences of C-156 C-216, 2011 and 2011, the Constitutional Court reiterated that with the promulgation of the Constitution of 1991, surpassed "the routine use of states of emergency which had fallen under the force of the [previous constitution], since it represented a sample of presidential exacerbation to dismantle the separation of powers and denied the importance that should be Congress."

D) Judgment T-629, 2010, by recognizing the existence of a contract between an institution and a sex worker

In exercise of the guardianship, a woman who was fired because of her pregnancy without the permission of the labor inspector sued the establishment in which she provided sexual services, on the ground that her fundamental rights were violated.

Firstly, the judge denied the protection of the rights claimed considering that the contract concerns of sexual activities is illicit, given that prostitution is contrary to good morals. However, due to the lack of protection of the plaintiff, the judge ordered local authorities to provide care to her and her child as well as legal counsel to determine whether she could present her case to ordinary courts.

The court of second instance upheld the entirety of the lower court's decision for the reasons outlined above. Because during the process it was not able to show the existence of an employment relationship, it was not apparent subordination.

Once the file was sent to the Constitutional Court, it was selected for review. Hence, the Institution has handed down the sentence T-629, 2010, by which it decided to revoke the sentences of the request and instead "grant the protection of fundamental rights to equal treatment before the law, non-discrimination, employment, social security, dignity, and protection of women during pregnancy, the right of the unborn, the maternal immunity and the vital minimum ". Additionally, the owner of the establishment was ordered to compensate the plaintiff for having unfairly dismissed and pay maternity leave she is entitled, such as paid leave by the fact of having to give birth, based on the minimum wage in effect at the time of dismissal.

Indeed, the Court considered that, in the context of human dignity and freedom, the exercise of prostitution is legal provided that it is by free will and by reason by the person selling sex, respecting the limits imposed by the Criminal Code and the existing rules, under which impose some regulations related to land use, sanitation and social behavior.

In this regard, the sentence also studies that prostitution in the terms explained above, is an economic activity governed by common law, it is subject to commercial law, taxation and compensation.

For these reasons, the Court held that it is not legitimate for the trial courts to appeal for decency to declare prostitution as illegal, because "the law recognizes the activity as economic because it has records, it gravel, imposes duties and confers rights to the actors." In this sense, morality is a concept that acts as a parallel source to positive law but according to it, and therefore can not compete with it. It started from the axiom that "what is not forbidden is permitted."

As for the existence of an employment relationship, the statement stated that when there is a real concrete and paid services in conditions of subordination, there is actually a contract even if it is sex. Indeed, the

constitutional law there is no rule on negative discrimination for people doing prostitution and, therefore, under the principle of equality it must recognize the existence of an employment relationship when checking the compliance essential elements of the contract.

Hence also the sex workers are entitled to be linked to universal social security system in health and pensions. However, the reimbursement is not appropriate because "the specificity of the provision," which rubs against human dignity, there is a precarious subordination against the employer and in this extent, "is predicated precarious worker's right to stability work and be restored to their work in case of unfair dismissal."

From the above we can conclude that since the promulgation of the Constitution of 1991, Colombia has produced a constitution for all branches of law because the consecration of the fundamental rights and the creation of the Constitutional Court. To this extent, due to the existence of mechanisms such as the application for protection and public action of unconstitutionality, which can be put in place without being represented by a lawyer, citizens have exercised power over the legislative apparatus and were able to demand fulfillment of their fundamental rights effectively. This has also enabled the Constitutional Court to rule daily on various subjects, creating a jurisprudence that has a binding effect and, consequently, has modified the system of sources of law in the country. Likewise, legal cases shown as examples in this article show how the legal cases law of the Institution has determined, in many cases, the fate of the country in political, economic and social development.

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

THE ROLE OF CONSTITUTIONAL COURT AND EQUIVALENT INSTITUTION IN STRENGTHENING THE PRINCIPLES OF DEMOCRACY

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I. Democracy – Its Significance and Essential Characteristics

The Federal Republic of Germany is a democratic and social federal state. The principle of democracy is one of the essential constitutional principles. In Germany, it may not be abolished even by means of an amendment of the Constitution. The principle of democracy is lent more concrete shape in Article 20 subsection 2, first sentence, of the Basic Law (*Grundgesetz* – GG, the German Constitution), which says that all state authority is derived from the people. Every organ of state authority and every act of exercise of state authority must find its basis in a decision by the people.[1]

In principle, the ongoing legitimisation of the organisation of state rule and state authority by the will of the people can take place in forms of direct or of representative democracy. Demands for grassroots democracy seek to overcome state rule by the immediate participation of the citizens in state decisions; they regard any form of representative democracy as deficient. However, as a model of democracy as such, identitary direct democracy is unsuitable and unrealistic. Instead, representative democracy is the necessary basic form of democracy as the rule of the people. As a matter of course, representative democracy can be strengthened by elements of direct democracy. However, representative democracy, in which elected members of Parliament represent the people, proves to be the necessary basic form of democracy.

1 Badura, in: Isensee/Kirchhof, Handbuch des Staatsrechts, vol. II, 3rd ed. 2004, § 27, marginal no. 27.

II. The Strengthening of Democracy by the Federal Constitutional Court

The Federal Constitutional Court strengthens democracy in a variety of ways. I would like to show this by presenting examples from selected areas. First of all, the Federal Constitutional Court sees to it that political opinions can form freely and that the foundation of democratic decisions is laid in this way. Furthermore, it is essential for the principle of democracy that the transfer of sovereign power to the state bodies, which in a representative democracy is performed through elections, takes place in a constitutional manner. In its function as the court with jurisdiction for cases involving the scrutiny of elections, the Federal Constitutional Court ensures that these standards are adhered to. Finally, the principle of democracy also requires the ability to function of the parliament elected in this manner. I will therefore make reference to decisions of the Federal Constitutional Court which strengthen Parliament's democratic function. At the end of my presentation, I will make some observations about the special challenges with regard to democratic legitimisation which arise where the Federal Republic of Germany transfers competences to supranational institutions or to the European Union.

1. The freedom of expression of opinion and the freedom of assembly as preconditions of a functioning democracy

A democracy needs the exchange of opinions and thus relies on the diversity of contributions. Without the legally secured political freedom of the individual, the process of free formation of opinion and intent is not guaranteed.[2] Someone who does not dare to voice his or her political convictions in public for fear of state repression cannot influence the polity and the direction in which it is intended to move. In the system of parliamentary democracy, statements and replies as an expression of agreement or disapproval ultimately result in a decision which is taken according to the majority principle. However, majorities are not traced out right from the start. They develop in a dynamical manner and can become a minority at a later point in time.[3]

The freedom of expression is complemented by the freedom of assembly as the freedom to collectively express one's opinion. In its established case-law, the Federal Constitutional Court emphasises the importance of the freedom of assembly for democracy. The special protection of the freedom of assembly in the German Constitution is due to its importance for the process of public formation of opinion in the free democratic order of the Basic Law. Majorities as well as minorities benefit from this fundamental right, which is geared towards the collective expression of opinions, and this fundamental right provides also those who do not have direct access to the media with the possibility of communicating their opinions to a broader public.[4]

2 Badura, in: Isensee/Kirchhof, *Handbuch des Staatsrechts*, vol. II, 3rd ed. 2004, *§ 27*, marginal no. 32.

3 On this, see also Sommermann, in: v. Mangoldt/Klein/Starck, *Kommentar zum Grundgesetz* vol. 2, 5th ed. 2005, *§ 20*, marginal no. 86.

4 See Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE) 104, 92 (104).

In many decisions, the Federal Constitutional Court has strengthened the freedom of expression of opinion and the freedom of assembly as the foundation of democratic decision-making. The principle of free political activity is derived from the fundamental right of free expression of opinion. The principle of free political activity encompasses the right to freely express one's political opinion in the process of preparing general political elections; this includes advertisement for voting and expressions of opinion by wearing a badge with political messages. In principle, harsh and exaggerated statements as well as disparaging statements on political parties are covered by the area of protection of the freedom of expression of opinions. Laws which restrict the freedom of expression of opinion and which from the outset are only directed against certain convictions, attitudes or ideologies are unconstitutional.

In certain cases, however, the freedom of expression of opinion and the freedom of assembly may be restricted as well. For instance, a provision in the German Criminal Code provides that a person who, publicly or in an assembly, disturbs the public peace by approving, glorifying or justifying the National Socialist rule of violence and arbitrariness in a manner violating the dignity of the victims may be punished. By way of exception, the Federal Constitutional Court approves of this restriction of the freedom of assembly. In view of the injustice and the terror that National Socialist rule brought to Europe and large tracts of the world, and which elude general categories, it is constitutional to set limits to the propagandistic approval of the National Socialist rule of arbitrary force.[5]

2. Elections as essential precondition of a parliamentary democracy

Because in a representative democracy the people exercises state authority through state bodies, the transfer of sovereign power to these state bodies is of fundamental importance. On principle, the transfer of sovereign power takes place through elections. The parliamentary election is the act in which the people bindingly expresses its will concerning the composition of the representative body of the people. The election is often the only action in which the people can decide in a legally binding manner. With its implementation of the political will into positions of state power, the election at the same time provides the state bodies with the necessary democratic legitimisation; without such legitimisation, the state would not be able to act in a legally binding manner. Thus, elections are the foundation of every democracy under the rule of law. Through the elections, the people determines the persons which the state bodies are composed of, and it determines who will exercise the power in the state.

In Germany, the scrutiny of election is primarily incumbent on the *Bundestag* (the German parliament). Recourse against the decisions of the *Bundestag* is only possible by lodging a complaint with the Federal Constitutional Court. Thus, the Federal Constitutional Court, as the court that is entrusted with decisions in cases involving the scrutiny of elections, secures the essential preconditions of

5 BVerfGE 124, 300.

democracy. It watches over the correct organisation of elections as the foundation of the democratic state under the rule of law.

With regard to equal suffrage, the Federal Constitutional Court has had to deal, among other things, with restrictions of the right to nominate candidates for election, the permissibility of combinations of party lists, the permissibility of barrier clauses, and issues relating to the delimitation of constituency boundaries. The Federal Constitutional Court for instance regards barrier clauses as permissible only under strict prerequisites. In proportional representation barrier clauses result in only those parties taking part in the allocation of seats in Parliament which have received more votes than provided in the barrier clause. Only where an impairment of a parliament's ability to function can be expected with a certain degree of probability can a barrier clause in electoral law be justified.

Apart from this, the Federal Constitutional Court demands that it must be possible for elections to take place in a transparent manner and under public scrutiny. From this it follows, among other things, that voting computers may only be used under narrow preconditions. In Germany, voting computers may only be used if the if the essential steps of the voting and of the ascertainment of the result can be examined by the citizen in a reliable manner and without any specialist knowledge of the subject. The voters themselves must be able to understand whether their votes cast are recorded in an unadulterated manner as the basis of vote counting, or at any rate as the basis of a later recount.

The principle of the equality of opportunities of political parties is very closely connected to the principle of general and equal elections. In this context, many decisions of the Federal Constitutional Court relate to party financing. For instance, it contradicts the Basic Law if tax-law provisions enable citizens with a high income to make far higher donations to political parties in a tax effective manner than citizens with a lower income. Nor may party financing by the state differentiate according to the political orientation of parties; even the argument of combating radical parties cannot justify differences in party financing.[6] The equality of opportunities for parties must also taken into account with regard to allotting broadcasting time for election campaign advertisements in radio and television programmes.

Due to the vital importance of political parties for a parliamentary democracy, the jurisdiction of the Federal Constitutional Court can be invoked to challenge the impermissible influence of state bodies to the disadvantage or in favour of a political party.[7] As the only barrier to the freedom of political parties, the Basic Law makes it possible to ban parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany (Article 21 subsection 2 of the Basic Law). However, the Federal Constitutional Court is the only court which may render judgment on the ban of a political party.

6 BVerfGE 111, 382 (410).
7 See BVerfGE 44, 125 (146).

3. The role of Parliament in a living democracy

In a representative democracy, the people is represented by the members of Parliament. Therefore decisions which affect Parliament have an effect on the democratic organisation of a state. The Federal Constitutional Court strengthens the principle of democracy by assigning important competences to Parliament. Furthermore, the Federal Constitutional Court watches over Parliament's ability to function.

a) Parliament's competence according to the essential questions doctrine (Wesentlichkeitstheorie)

The Federal Republic of Germany is a representative democracy in which Parliament is the only state body that is directly elected by the people. Admittedly, this direct personal democratic legitimisation does not result in an all-embracing requirement of parliamentary approval or in an exclusive reservation of decisions to Parliament. Instead, far-reaching decisions, and especially political ones, are reserved to other state bodies, for instance to the government.

As a matter of principle, however, law-making is reserved to Parliament in a parliamentary democracy. Parliament would only insufficiently be able to exercise its function as the people's representative body if important areas which are relevant to the citizens with regard to fundamental rights were transferred to the executive power without the citizens' participation. The Federal Constitutional Court has therefore ruled that all decisions which are essential to the realisation of fundamental rights are reserved to Parliament. The principle that all essential decisions must be taken by Parliament not only concerns the question of whether the parliamentary legislature must become active but also the question of how far the legislation must go in an individual case. Furthermore, according to the Federal Constitutional Court, it follows from the principle of democracy that the legislature is obliged to take all decisions itself which attain particular importance for the polity. One of the consequences is that questions such as the introduction of sex education in schools[8], peaceful applications of nuclear energy[9] or regulations about wearing a headscarf in class[10] are reserved to Parliament.

b) Protection of minorities and rights to be informed by the government

All members of the German Parliament have the same rights and obligations. This follows above all from the fact that the representation of the people is realised in Parliament, and that it is therefore not brought about by individual members of Parliament or by members of Parliament as a group or by the parliamentary majority but by Parliament as a whole.

It is true that in a democracy, the majority may prevail over the minority. On the other hand, the principle of democracy is strengthened if the minority in

8 See BVerfGE 47, 46.
9 See BVerfGE 49, 89.
10 See BVerfGE 108, 282.

Parliament can act appropriately. As a general rule, the Federal Constitutional Court therefore strengthens the rights of the parliamentary majority and of the individual member of Parliament.

As representatives of the whole people who are not bound by orders or instructions, and who are responsible only to their conscience, the members of Parliament are entitled to rights also vis-à-vis Parliament in order to effectively represent the interests of the voters represented by them. In particular, the members of Parliament have the right to deliberate. Public debates on arguments and counter-arguments as well as public discussion are essential elements of democratic parliamentarism. In particular public debate and the public search for decisions open up the possibility of balancing conflicting interests.[11] However, a public deliberation and debate fails to achieve its objective if in the run-up to it, no information or insufficient information about the subject of the deliberation is available. The members of Parliament are entitled to receiving all information that is necessary for an informed assessment.[12] Furthermore, each member of Parliament has the right to ask the government questions, a right which also includes the obligation on the part of the members of the Federal Government "to give a full explanation in reply to questions".[13]

Freedom of speech in Parliament is constitutionally protected as well[14] because the free speech of an elected representative directly serves to fulfil the tasks of the state laid down in the Constitution.[15] Freedom of speech in Parliament opens up the members of Parliament the possibility of making themselves heard and to accompany a legislative procedure in a constructive manner. The right to speak in Parliament is closely connected with the right of the members of Parliament to move procedural motions or to move amendments in the legislative procedure.[16]

4. The role of Parliament with regard to the transfer of sovereign powers to supranational institutions

The question of democratic legitimisation also arises with regard to supranational organisations to which the Federal Republic of Germany has acceded. As a Member State of the European Union, Germany has transferred sovereign powers to the European Union and participates in the development of the European Union in order to realise a united Europe. However, the precondition of this is that the European Union for its part guarantees the democratic, social, and federal principles and the principles of the rule of law.

As the European Union and its institutions exercise state authority which is derived from the Federal Republic of Germany as a Member State, the chain

11 See BVerfGE 40, 237 (249); 70, 324 (355).
12 See BVerfGE 70, 324 (355); Achterberg/Schulte, in: v. Mangoldt/Klein/Starck, *GG*, vol. 2, 5th ed. 2005, *Art. 38*, marginal no. 90.
13 See BVerfGE 13, 123 (125).
14 See BVerfGE 10, 4 (12); 80,188 (218); 96, 264 (284).
15 See BVerfGE 60, 374 (380).
16 See on this Achterberg/Schulte, in: v. Mangoldt/Klein/Starck, *GG*, vol. 2, 5th ed. 2005, *Art. 38*, marginal no. 90; H. H. Klein, in: Maunz/Dürig, *GG*, *Art. 38*, marginal no. 233.

of legitimisation must reach from the citizen in the domestic territory to the institutions of the European Union. In its decision on the Treaty of Lisbon[17], the Federal Constitutional Court extensively dealt with the democratic legitimisation in the realisation of the European Union.

Among other things, it held as follows:

The elaboration of the principle of democracy by the Basic Law is open to the objective of integrating Germany into an international and European peaceful order. The German Constitution is oriented towards opening the state system of rule to the peaceful cooperation of the nations and towards European integration.

The authorisation to transfer sovereign powers to the European Union pursuant to Article 23 subsection 1 of the Basic Law is, however, granted under the condition that the sovereign statehood of a constitutional state is maintained on the basis of a responsible integration programme according to the principle of conferral and respecting the Member States' constitutional identity, and that at the same time the Federal Republic of Germany does not lose its ability to politically and socially shape the living conditions on its own responsibility.

The Basic Law grants powers to participate and develop a European Union which is designed as an association of sovereign national states (*Staatenverbund*). The concept of *Verbund* covers a close long-term association of states which remain sovereign, an association which exercises public authority on the basis of a treaty, whose fundamental order is, however, subject to the disposal of the Member States alone and in which the citizens of the Member States remain the subjects of democratic legitimisation. The European Union must therefore comply with democratic principles as regards its nature and extent and also as regards its own organisational and procedural elaboration. This means firstly that European integration may not result in the system of democratic rule in Germany being undermined. This does not mean that a number of sovereign powers which can be determined from the outset or specific types of sovereign powers must remain in the hands of the state. European unification on the basis of a union of sovereign states under the Treaties may, however, not be realised in such a way that the Member States do not retain sufficient room for the political formation of the economic, cultural and social circumstances of life. This applies in particular to areas which shape the citizens' circumstances of life, in particular the private space of their own responsibility and of political and social security, which is protected by the fundamental rights, and to political decisions that particularly depend on previous understanding as regards culture, history and language.

As under constitutional law only acts for which Parliament can take responsibility are democratically legitimised, the European Union may not be granted a blanket empowerment for the exercise of public authority which has a direct binding effect on the national legal system.[18] The Basic Law does not grant

17 See BVerfGE 123, 267 et seq.
18 See BVerfGE 58, 1 (37); 89, 155 (183-184, 187); 123, 267 (351).

the German state bodies powers to transfer sovereign powers in such a way that their exercise can independently establish other competences for the European Union. It prohibits the transfer of competence to decide on its own competence (*Kompetenz-Kompetenz*).

III. Summary

Democracy requires the free self-determination of citizens which have equal rights. As a general rule, this requires free elections in which the citizens as members of the people can participate with equal rights. Furthermore, however, a free formation of opinions must be possible, which is the essential precondition of the political process. Apart from this, it must be ensured in a parliamentary democracy that Parliament as the representative body of the people can effectively exercise its functions in its interaction with the other constitutional bodies. The Federal Constitutional Court therefore develops the principle of democracy not only in its decisions concerning electoral law, but also in its rulings with regard to the fundamental rights relating to communication and with regard to parliamentary law. In this context, the transfer of sovereign powers to supranational organisations poses particular challenges.

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

THE ROLE OF CONSTITUTIONAL COURT IN STRENGTHENING THE PRINCIPLES OF DEMOCRACY IN INDONESIA

Hon. Maria Farida Indrati
Justice of Constitutional Court of Indonesia

A. The establishment of the Constitutional Court in Indonesia

The Birth of the Constitutional Court (MK) in Indonesia happened because of the 1945 Constitutions changes made by the People's Consultative Assembly (MPR) in 1999-2002. A process of constitutional changes intended to improve the basic rules of civic life that can reduce the potential for abuse of power in the past.

The changes are conducted over a period of four years. In 1999, the Assembly changed nine chapters. The things that changed the principle of term limits is the president, limits the power of the President in the field of legislation, and efforts to build a mechanism of checks and balances. In 2000, the Assembly managed to convert 25 chapters with six main topics which involve local government or decentralization, the position of citizens and residents, human rights, national defense and security, and concerning the flag, language and symbols of state and national anthem.

In 2001, the Assembly did a fundamental changes to the 1945 Constitution relating to sovereignty, the reform of parliament, direct presidential elections, forming a new organization called the Constitutional Court and set the procedure changes to the Constitution. In 2002, the Assembly made changes by focusing on issues of MPR composition, method of Presidential election, the settlement should the president die, resign, retire or cannot fulfill his obligations, granting the President to establish a Presidential Advisory Council, the abolition of the Supreme Advisory Council, as well as provisions on the independence of Bank

Indonesia. It also sets a minimum limit of the budget for education costs as much as 20% of the state budget, and prohibits any changes in the shape of the Unitary Republic of Indonesia.

With these changes, the manuscript of the 1945 Constitutions have been changed 300 percent. Before the changes, the 1945 Constitutions consist of only 16 chapters, 37 articles and 47 paragraphs plus 4 supplementary Transitional articles and 2 supplementary paragraphs. After 4 times of change, the 1945 Constitutions have become 20 chapters, 73 articles, 171 paragraphs plus 3 articles of the Transitional rules and 2 articles of Supplementary Rules.

Through the addition of Article 24C of the 1945 Constitutions, the Constitutional Court is present in the state system of Indonesia. The establishment of this state institution is intended to strengthen the principle of checks and balances between state institutions by providing primary authority that is testing the law against the 1945 Constitution which previously couldn't be done.

Thus, the formation of the Constitutional Court cannot be separated from the development of thoughts and ideas of the importance of judicial review in a democratic legal state. It is based on the premise that the law as a political product always has a character which is largely determined by the political constellation that gave its birth and the possibility of laws reflect the interests of the dominant political force that may be inappropriate or even in conflict with higher regulations. Therefore, there should be a mechanism to anticipate or cope with it through the mechanism of judicial review.

Moreover, in practice the government in the past turned out to have a tremendous opportunity to make a variety of laws and regulations as further constitution implementation. It opens up the possibility of the establishment of regulations that do not fit, even contrary to the Act that became the basis of its own formation.

In the 1945 Constitution Amendment, the idea of judicial review is given to the Constitutional Court for judicial review of Laws against Constitutions and for judicial review under the laws and regulations is given to the Supreme Court. At first there were three alternative institutions which were given the authority of judicial review against the Constitutions, namely the People's Consultative Assembly, the Supreme Court or Constitutional Court.

The idea of giving those powers to the People's Constitutional Assembly (MPR) finally ruled out because of inexistence of being the highest state institutions anymore, the MPR is not a group of legal and constitutional experts, but mainly representatives of political organizations and interest groups. The idea of reviewing the legal constitutions by the Supreme Court was also ultimately unacceptable because the Supreme Court itself has too many duties in the care of the case load as their competence. Therefore, the laws review against the Constitution authority finally was granted to its own institutions, namely the Constitutional Court.

B. Constitutional Court and Democracy

Article 24C of the 1945 Constitution asserts that the Constitutional Court is one of the judicial power perpetrators that held four authorities and one obligation. Constitutional Court authority is to hear at the first and last final decision for: (1) review on the Laws against the Constitution, (2) settle dispute of state institutions whose authorities are granted by the Constitution, (3) decide upon the dissolution of political parties, and (4) decide dispute of the election results. In addition to its authority, the obligation of the Constitutional Court is to give decision on the opinion of the Parliament regarding the alleged violations by the President and / or Vice President under the 1945 Constitution.

In carrying out the functions and its authority, the Constitutional Court must work independently and impartially. Thus in each of the handling, its investigation and verdict will be free from intervention and influence except of what is proven in the court. Only by this way that the decisions resulting in the strengthening of democracy can be accepted by the broad public in Indonesia. Since its establishment in 2003 until today, the Constitutional Court has received some 840 case requests consist of the 372 petitions for judicial laws review against the 1945 Constitution, 15 requests authority dispute between state institutions, 116 petition disputes against the results of national elections, and 337 petition disputes against the results of elections of regional heads. As of the cases examined by the Constitutional Court, 781 requests had been settled until early July 2011.

1. Judicial Review against 1945 Constitution

Cases of Judicial Review against the Constitution is the most widely requested to the Constitutional Court. The decision of the review can tell whether any provisions of law being petitioned is accepted or not opposed to the 1945 Constitution. Constitutional Court's decision which grants a petition for judicial review automatically will change the provisions of a Law which is declared contradictory to the 1945 Constitution and therefore has no binding legal force.

Since its creation on August 13, 2003 until early July 2011, the Court has made decision on 321 judicial reviews. Of these, 85 cases granted (26.5%), 106 cases rejected (33%), 94 cases are not acceptable (29.3%), and 36 cases withdrawn (11.2%).

Constitutional Court decisions are final interpretation of the 1945 Constitution materials and are named as the final interpreter of the constitution. Therefore, the Constitutional Court's decision is always associated with the substance of the 1945 Constitution that do not only embrace political democracy, but also economic and socio-cultural democracy.

Constitutional Court decisions in the case of reviewing the law, in principle, aims to protect citizens' constitutional rights and human rights which are fundamental to the establishment of democracy. In addition, there are also

decisions of the Constitutional Court related to the mechanisms of democracy, namely elections, both at national and local level.

Here are some examples of Court decisions which are closely associated with the development of democracy in Indonesia.

a. Voting Rights for Former Members of the Forbidden Organization

Article 60 Sub-Article g of Law Number 12 Year 2003 concerning General Elections for the DPR, DPD and DPRD specify the requirement to be candidates for the DPR, DPD, Provincial /Regency / City DPRD, which is not a former member of the banned Indonesian Communist Party (PKI), including its organization mass, nor the people involved directly or indirectly in G30S/PKI, or other illegal organizations. Constitutional Court declared that the 1945 Constitution prohibits discrimination as stated in Article 27 paragraph (1), Article 28D paragraph (1), Article 28I paragraph (2), of the 1945 Constitutions. However, Article 60 Sub-Article g of Law Number 12 of 2003 mentioned above prohibits a group of Indonesian Citizen (WNI) to be nominated and use their rights to be elected based on their previous political beliefs. So, the article is declared unconstitutional by the Constitutional Court.

b. Terms of Contempt against President and Vice President

The Decision Number 013-022/PUU-IV/2006 declares that Article 134, Article 136 up to Article 137 of the Criminal Code on defamation offenses against the President and Vice President against the 1945 Constitution and has no binding legal force. Constitutional Court found the articles governing criminal defamation against the President and Vice President could create legal uncertainty *(rechtsonzekerheid)* as very susceptible to interpretation whether or not a protest, a statement of opinion or thought is a critique or insult against the President and / or Vice President.

According to the Court, it is contradictory to Article 28D Paragraph (1) of the 1945 Constitution and can hamper the efforts of communication and information acquisition, which is guaranteed by Article 28F of the 1945 Constitution. The articles of the Criminal Code are also likely to hamper the right to freedom of states of mind with oral, written, and expression of an attitude because they always use the legal apparatus of the rallies. Therefore, it is declared contrary to Article 28, Article 28E Paragraph (2), and Paragraph (3) of the 1945 Constitution.

c. Offense Hostilities may Cause Offense Abuse of Power

In Decision Number 6/PUU-V/2007 Constitutional Court states that the substance of Articles 154 and 155 of the Criminal Code does not guarantee legal certainty so contradictory to Article 28D Paragraph (1) of the 1945 Constitution. Article 154 of the Penal Code reads “Whoever publicly stated feelings of hostility, hatred or contempt against the Government of the Republic of Indonesia, shall be imprisoned for ever seven years or a fine of five hundred Rupiahs.”

Article 155 of the Criminal Code reads "(1) Anyone broadcast, perform or paste to be known by the public, writings or images which express feelings of enmity, hatred or contempt against the Government of the Republic of Indonesia, or to make them more commonly known, shall be punished with imprisonment for four years and six months or a fine of four thousand five hundred Rupiahs, (2) If you are guilty of the crime on the job and at the time of committing the crime is still within the five years after the first convict punishment of such crimes be fixed, then it can revoke his/her right to do the job. "

Both formulation of the Articles according to the Constitutional Court could lead to a tendency of abuse of power because they can easily be interpreted according to the ruling taste. Consequently, these articles assessed by the Constitutional Court may obstruct the freedom to express thoughts and attitudes as well as freedom of expression that is contradictory to Article 28 and 28E Paragraph (2) and Paragraph (3) of the 1945 Constitution. Therefore, on July 17, 2007 the Court decided that the provisions of Article 154 and Article 155 of the Criminal Code against the 1945 Constitution and have no legal force.

d. Individual candidates in the Regional Head Election

Constitutional Court Decision under No. 5/PUU-V/2007 grant judicial review of Article 56 paragraph (2), Article 59 paragraph (1), (2), and (3) of Law Number 32 Year 2004 regarding Regional Government. These articles provide that candidates for regional head and deputy head of the region can only be submitted by political parties and coalitions of political parties. However, after the Constitutional Court Review decision, now candidates can also follow the general elections of regional heads of political parties without going through the political party proposal as long as they meet all minimum requirements which have been stipulated in the legislation.

e. Changing Desirability Election System based on the Most Voted Ballots

In this case, the Court affirmed that Article 55 paragraph (2) of Law 10/2008, which define each of the three candidates have at least one female candidate is a policy in order to meet affirmative action for women in politics as a follow-up of Women of the World Convention of 1995 in Beijing and various international conventions which have been ratified. According to the Court, affirmative action will provide opportunities to women for the formation of gender equality having the same role between women and men.

The Court confirmed its interpretation that the provision of a quota of 30% (thirty percent) and having a female candidate out of every three candidates is a positive discrimination in order to balance the representation of women and men to become legislators in the DPR, DPD and DPRD. However, the Court also emphasized that to improve the position of women in politics is not solely dependent on legal factors, but also cultural factors, capabilities, proximity to the people, religion, and the degree of community trust in female legislative candidates, as well as the increasing awareness on the role of women in politics.

Meanwhile, Constitutional Court judged that Article 214 letters a, b, c, d, and e of Law 10/2008 are unconstitutional. Those articles determine that the selected candidate is a candidate who gets above 30% (thirty percent) of the voter divisor number (BPP), or occupy a smaller sequence number if no one is getting 30% (thirty percent) of the voter divisor number, or who occupies a smaller sequence number if a gain of 30% (thirty percent) of the voter divisor number is more than proportionate number of seats obtained by a political parties participating in the election.

The above provision according to the Constitutional Court is contrary to the substantive meaning of popular sovereignty and qualified to be on the contrary to the principles of justice as set forth in Article 28D Paragraph (1) of the 1945 Constitution. It is also stressed that it is a violation of the sovereignty of the people if the will of the people which is reflected in their choice is being ignored in the determination of legislators, then it would actually violate the sovereignty of the people and justice. According to the Court, if there are two candidates who get extremely different votes between them then the candidate who received the most votes was defeated by the one who has less vote, because the one with less votes gets smaller rank number. Based on this decision the desirability of legislative candidates is determined directly based on the rank of votes they get.

f. Eliminating Releases Sanctions and Prohibition of the Quick Count and Survey

The provisions concerning the imposition of sanctions for the press declared unconstitutional by the Constitutional Court through Decision Number 32/ PUU-VII/2009 dated February 24, 2009. The reason is because such provision causes legal uncertainty, injustice, and contrary to the principle of freedom of expression guaranteed by the 1945 Constitution.

Three main considerations underlying the decision of the Constitutional Court, namely: *First*, these articles can lead to interpretations that the institution which can give sanction could be an alternative institution, namely the Indonesian Broadcasting Commission (KPI) or the Press Council which allows the type of sanction imposed is also different; *Second* , the formulation of these provisions also mix the position and authority of the *Indonesian Broadcasting Commission* and the Press Council against the authority of the general election Committee to impose sanctions on the Commission who implement election campaign, and *Third*, the imposition of sanctions for broadcasters should not be done by the IBC (KPI), but rather by the Government (Minister of Communication) after fulfilling the due process of law, while toward the print media it is not possible to do revocation sanctions because the Law 40/1999 no longer use the licensing agency issuing the print media, so it is a norm that no longer needed because the loss of legal force and *raison d'être* of this.

Meanwhile, the ban on poll (survey) and counting fast (quick count) of the Act of legislative and the President / Vice President elections also expressed

against the 1945 Constitutions by the Constitutional Court Decision Number 9/PUU-VII/2009 dated March 30 2009 and successively Decision Number 98/ PUU-VII/2009 dated July 3, 2009. According to the Court, although they are not conducted by academicians or scholars, the survey or quick count about the election result is a scientifically-based activities which must also be protected by the spirit and principles of academic freedom and freedom of the pulpit-scientific-academic because it is guaranteed not only by Article 31 Paragraph (1), Paragraph (3), and Paragraph (5) of the 1945 Constitution but also by the provisions of Article 28F of the 1945 Constitution which includes freedom to explore, process and release information, including scientific information.

Further consider that the opinion polls, surveys, or the quick count results of voting by using the scientific method is a form of education, supervision, and a counterweight in the process of organizing the state, including the general election. Another consideration is public, from the beginning, has known *(notoir feiten)* that the quick count is not the official results and therefore cannot be treated as official results, but public has the right to know it. The quick count was not going to affect voters' freedom to impose their choice. This was because, according to the Court, the voting is over and a quick count is not possible to be done before the completion of voting.

g. Terms Endorse Presidential Election Voters ID Cards or Passports

One of the landmark decision of the Constitutional Court in the context of escorting democracy is the decision number 102/PUU-VII/2009 dated July 6, 2009 which broke the deadlock Presidential Election Law relating to legal issues about unregistered voters in the voters list (DPT). With reference to Decision Number 011-017/PUU-I/2003 dated February 24, 2004, the Court affirmed that the constitutional rights of citizens to elect and be elected (rights to vote and right to be candidates) is a right guaranteed by the Constitution, laws, and international conventions, so the restriction, distortion, elimination, and removal of rights is a violation of the rights of citizens.

It is explicitly guaranteed in the Constitutional Court according to Article 27 Paragraph (1), Article 28C Paragraph (2), Article 28D Paragraph (1), Article 28D Paragraph (3), and Article 28I Paragraph (2) of the 1945 Constitution. In addition, also in line with Article 21 of the Universal Declaration of Human Rights, Article 25 of International Covenant on Civil and Political Rights, and Article 43 of Law Number 39 Year 1999 on Human Rights.

Therefore, the Court gave legal considerations by stating that the rights of citizens to vote should not be hampered or hindered citizens to use their voting rights by various regulations and any administrative procedures. Thus, the provision requiring a citizen registered as voters in the voters list (DPT) is more of an administrative procedure and should not negate the things that are substantially the citizen's right to choose (right to vote) in the general election.

The Court considers that the best solution to overcome the problems of voters who are not listed in the voters list is to allow the use of ID cards or valid

passports in the Presidential Election. However, in order not to cause the loss of citizens' constitutional rights and not violate the provisions of the legislation in force, the Court also ordered the Election Commission (KPU) to further regulate the technical implementation of the use of voting rights for Indonesian Citizen not registered in the voters list.

Based on those considerations, the Court decided that Article 28 and Article 111 Election Law are constitutional insofar they are interpreted as to include citizens who are not enrolled in the DPT and fulfilled the election terms and procedures, (conditionally constitutional).

2. Dispute about Election Results

The next authority which is quite important in strengthening democratic principles is to decide disputes about election results. Case of election disputes is the case brought under the argument that there has been a mistake resulted from vote count conducted by the Election Commission (KPU) and /or there is a structured, systematic and massive violation. Election disputes cover the whole series of elections, both for the presidential and legislative elections. The authority of the Constitutional Court in judging disputed elections contributed to the strengthening of the principles and pillars of democracy in Indonesia, because this is the downstream of the process of election of the President and Vice-President and the representatives of the people who will sit in the Parliement.

There were 45 cases concerning the handling of Disputes in the Election Results (PHPU) Legislature in the 2004 elections with the following details: 15 cases granted (33.33%), 15 cases rejected (33.33%), and 15 cases were considered not acceptable (33.33%). As for handling 2009 PHPU Legislature, there were 71 cases with the following details: 25 cases granted (35.21%), 38 cases rejected (53.52%), and 8 cases were not acceptable (11.72%). There were 71 cases put to court in 2009. The cases were divided into 42 cases filed by political parties contesting in the 2009 elections, 27 cases filed by Candidate of Regional Representative Council and two cases filed by Candidates for President and Vice President. Against the 71 cases, 25 cases granted (35.21%), 38 cases rejected (53.52%), and 8 cases considered not acceptable (11.27%).

After the transfer of authority to handle disputes concerning the Regional Head Election (Election) from the Supreme Court (MA) to the Constitutional Court (MK) on October 29, 2008 under Section 236C of Law Number 12 Year 2008 Second Amendment to Law Number 32 Year 2004 regarding Regional Government, the Court has effectively carried out the task of examining, hearing and deciding cases since the beginning of November 2008 General Election. The number of cases that have been settled until the General Election date of early July 2011 were 331 cases with the following details: 36 cases granted (10.8%), 224 cases rejected (67.7%), 67 cases considered not acceptable (20.2%), and 4 cases withdrawn (1.2%).

With regard to the details of the cases above, the jurisprudence of the Constitutional Court that was used in every decision related to the competence of the Court in dealing with the Constitutional Court as the guardian of election results, the Court adjudicated constitutional disputes not only to dissect Election petition to see the results of the vote as such, but also to examine in depth the existence of violations that have structured, systematic, and massive influence towards the outcome of the vote. This is very much in line with the provision requiring the Court rule on the dispute based on the truth of the legal substance as defined in Article 45 paragraph (1) of the Constitutional Court Law that states, *"The Constitutional Court decided the case based on the 1945 Constitution in accordance with evidence and convictions of the judge."*

The various decisions of the Constitutional Court have evidently provided the legal meaning and justice in the handling of election petition dispute. In the practice that has become accepted as a solution to jurisprudence and law, the Court can assess structured, systematic, and massive violations as a determining factor of the verdict by reason of breach with three properties that can significantly influence the outcome of ranking of the vote in the election or General Election.

Based on the views and paradigms that are then adopted, the Court confirms that the cancellation of election results due to structured, systematic, and massive violations is in no way intended by the Court to take over the authority of other judicial bodies. The Court did not want to prosecute criminal or administrative violations in the election, but only took the violations proven in the field that affect the election results as a basis for the verdict but did not impose criminal sanctions and administrative sanctions against the perpetrators. Therefore, a violation that has been legally proven according to the Constitutional Court and has been used as the bases of the decision of cancellation by the Constitutional Court can still be legally processed further to general courts or the State Administrative Court because the Court never makes decisions in the context of criminal or administrative. Constitutional Court may even provide an opportunity for prospective candidates thwarted by the Election Commission to lodge a partition before the Court.

The above mentioned Constitutional Court's jurisprudence is always taken into consideration and guidance in making decisions in elections in dispute. In casting its decision, the Court faces the decision either to grant or deny the true count according to the Petitioners, but the Court can also order to re-counting or re-voting. Counting or a re-vote can be ordered to be implemented in all areas or some areas of law depending on the facts revealed in the process of evidence at the trial.

3. Dispute of Constitutional Authority among State Institutions

The case on constitutional disputes between state institutions is a matter in which the petitioner is a state agency whose authority is granted by the 1945 Constitution. The state agency has a direct interest in the disputed authority.

In the state system in Indonesia, the relationship between a state agency with another is bound by the check and balance principle. Under this principle, state institutions are considered equal and mutually compensate each other. As the implications of these mechanisms, and the fact that state agencies are considered equal in position, there is the possibility that the implementation of the authority of each state institution can have different interpretation of the 1945 Constitution. If different interpretation arises, the perpetrators of the amendment of 1945 find it necessary to establish a special agency entrusted with the task to decide upon the solution to these problems. In a state system outlined in the 1945 Constitution, the mechanism for the resolution of the dispute in authority is conducted through the state judicial process—the case is submitted to the Constitutional Court of Indonesia.

Until early July 2011 Constitutional Court has registered as many as 15 cases with the following details: two cases rejected (13.33%), seven cases not acceptable (46.67%), 3 cases withdrawn (20%), and the remaining three cases had not been decided upon (20%). Thus, there has been no single request granted yet by the Court.

4. Dissolution of Political Parties and Impeachment

As previously mentioned above, it seems clear that from various powers and duties specified by the 1945 Constitution and other legislation, the Court has been very productive in examining and deciding upon judicial review, election results disputes, and State Institution's authority disputes.

The authority that has never been used is to examine and decide upon the dissolution of political parties requested by the Government. Up until now there has never been any request from the government to dissolve a political party, therefore it can be concluded that no political party at the moment is indicated violating the constitution and laws that can be used as a base to dissolve it.

The obligation of the Constitutional Court upon deciding on the opinion of the House of Representative that the President and / or Vice President has violated a specific law or no longer qualifies as President and / or Vice President under the has never been addressed by the Constutional Court since up until now the House has never filed such a case. More precisely, since the Court established up to the moment, President and / or Vice President has never been considered by the House of Representative to violated a specific law or ineligible as President and / or Vice President under the 1945 Constitution.

C. Concluding Remarks

Up to this moment, the presence of Constitutional Court in the Indonesian state system is considered by many has given contributions to the growth of democratic principles and law enforcement in Indonesia. Since the establishment of the Constitutional Court, making the laws can not be based only on majority consensus of the current interests, but also needed to be considered whether the regulation is contradicted with the constitution or not. If later it is proven that

the law making process and its content is contradictive with the Constitution, the Constitutional Court could annul.

In addition the Court also has a role in upholding democracy in the process of legislative elections, the President and Vice President, as well as regional head/ vice regional head. In examining and resolving an election dispute, the Court did not merely count the votes, but also substantively judge whether election process is legally valid. If proven there's a structured, systematic, and massive infringement in the performed election then the Constitutional Court can order for a recount or re-vote of the vote.

The role of establish checks and balances is also performed by the Court during the impeachment process of President. Since the Constitutional Court existed, the President can not be interupted with impeachment treat by the House of Representative only because of his political policy. The President can only be threatened with impeachment by the House of representative if he violates certain major things or have a certain conditions that do not qualify as President and / or Vice President under the 1945 Constitution in its implementation which should be tested prior through previlegiatum forum on the Constitutional Court. Yet the President and / or Vice President also can not be arbitrary because he still can be under strict supervision by the Parliament in which the ordinance was controlled by the Court based on its control frame of the relationship between state institutions which regulated by the constitution.

Although sometimes there are some obstacles during the implementation of the Constitutional Court's decision, but in general the rulings of the Constitutional Court can be implemented by all parties, including the President and the House of Representative.

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

SESSION ONE

The Role of Constitutional Court and Equivalent Institution in Strengthening the Principles of Democracy

PANEL II

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

THE ROLE OF THE CONSTITUTIONAL COURT IN STRENGTHENING THE PRINCIPLES OF DEMOCRACY

Hon. Min Hyeong-Ki

Justice of the Constitutional Court of Korea

I. Foundation of the Constitutional Court of Korea

Since its launch on September 1, 1988, the Constitutional Court of Korea (the "Court" or the "Constitutional Court") continued to demonstrate the ideals and values of the Constitution of Korea. The Court also made persistent efforts to bridge the gap between the constitutional norm and its reality by reinforcing the state's duty to safeguard the fundamental rights of individuals. As such efforts gradually gained the confidence of the people who pursued the rule of law and guarantee of fundamental rights, the Court was able to secure the status and influence as an independent institution adjudicating constitutional cases.

The Constitution is no longer a simple ornament in the code of laws. Instead, it has become a living norm in our day-to-day lives and the standard for all state actions. The Court has become a trustworthy guardian of the Constitution.

As a result, the Constitutional Court has continuously been voted as the most trusted and influential state agency in the recent opinion polls. The Court is also being noted and recognized not only in Asia but throughout the world for having successfully established the constitutional adjudication system within such a short period of time.

II. Constitutional Status and Competence of the Constitutional Court of Korea

Article 111, Section 1 of the Constitution provides for five areas of jurisdiction: the constitutionality of a law upon the request of the ordinary courts; impeachment; dissolution of a political party; competence disputes between

state agencies, between state agencies and local governments and between local governments; and constitutional complaints as prescribed by Act.

First, in adjudication on constitutionality of statutes, only the concrete norm control is adopted, as the constitutional review of statutes is exercised upon the request of an ordinary court when the constitutionality of laws is at issue in a pending case.

In the case of adjudication on competence disputes, the Korean Constitutional Court differs from those of other countries where constitutional competence disputes between state agencies are the principal subject matter of review. The Korean Constitutional Court is vested with more comprehensive powers to adjudicate on constitutional or legal competence disputes between all government institutions established on the basis of the Constitution, as well as disputes between the state agencies.

Last but not least, there are two types of constitutional complaints: one filed by individuals who have had their constitutional fundamental rights violated by exercise or non-exercise of governmental power (Article 68, Section 1, Constitutional Court Act) and the other directly filed by an individual who had his or her motion to request for constitutional review denied at an ordinary court (Article 68, Section 2, Constitutional Court Act). The second type of constitutional complaints exists to prevent the Constitutional Court's norm control power from becoming insignificant and merely symbolic when the ordinary courts are reluctant to request the constitutional review of laws. This kind of a constitutional complaint system is unique to Korea, and it is widely accepted as a prudent method to make the Constitutional Court's norm control more effective. Over the past three years, such types of constitutional complaints filed by individuals have amounted to some 30 percent of the total constitutional complaint cases, and their acceptance rate is even as high as that of cases filed by the ordinary courts requesting constitutional review. This, in fact, demonstrates that the current system turned out to be effective.

III. Political Independence

Since its inception, the Constitutional Court has been exercising its power of constitutional adjudication as an institution independent from all political powers, acting as a guardian of the constitutional order and guarantor of individuals' fundamental rights. Among the most high-profile cases that demonstrate its independence are the impeachment case of the former President Roh in 2004 (2004Hun-Na1, decided on May 14, 2004) and the constitutional complaint case opposing the relocation of Korea's capital city Seoul (2004Hun-Ma554, etc., decided on October 21, 2004).

The impeachment case was about a charge against the former President brought by the National Assembly, which argued that he violated an election law. The Constitutional Court rejected the case after a number of oral pleadings.

In the constitutional complaint case, the Court declared unconstitutional the Special Act for relocation of the nation's capital and nullified the Act. The

relocation of the nation's capital was one of the most important projects which had been promoted by the President.

The political circle was sharply divided over the decisions of the Constitutional Court: then President and the ruling party that had welcomed the Court's decision in the impeachment strongly condemned the Court in the capital relocation case, while the opposition party took a completely contrasting position. These cases clearly show that the Constitutional Court has maintained its independence and executed its adjudicative power solely based on the Constitution.

IV. Implementation of the Rule of Law

The Constitutional Court of Korea, to date, has reiterated that all state powers, namely the legislative, executive and judiciary, should be exercised in conformity with the Constitution.

Even in the case of highly-politicized state actions that were exempt from judicial review under the pretext of governance, the Constitutional Court ruled that such state actions should rightfully be bound by the Constitution and therefore should be subjected to the Court's constitutional review (KCCR 93Hun-Ma186, Feb. 29, 1996). In particular, the Court also held that the power of the President, even when exercising national emergency power, could not exceed the limits defined by the Constitution (KCCR 92Hun-Ka18, June 30, 1994).

Although the National Assembly has autonomy in its legislative process, the Court can exercise constitutional review over the legislative process if it is in violation of the procedures as specified in the Constitution and laws. In this regard, in a case where the Speaker of the National Assembly notified the time of the meeting only to the majority party members, preventing minority party members from attending the process of legislation review and voting, and passed a bill, the Court ruled that the Speaker's act violated the right to review and vote of the minority party members (KCCR 96Hun-Ra2, July 16, 1997).

The Court ruled that the prosecutor's refusal to grant the defense attorney the right to inspect and copy criminal investigation records infringed upon the defendant's right to assistance of counsel and to a speedy and fair trial, and that the prosecutor's refusal was unconstitutional (KCCR 94 Hun-Ma 60, Nov. 27, 1997). The Court, on the basis of due process of law, also struck down the "Act against Anti-State Activities," which provided that if the accused did not attend a trial for no good cause, the trial should be held in his absence and a final judgment should be held on the very first trial date (KCCR 95 Hun-Ka 5, Jan. 25, 1996).

As such, the Constitutional Court helped all state powers conform to the Constitution by declaring those violating the Constitution unconstitutional. By doing so, the Court has worked hard to strengthen the rule of law based on the Constitution.

V. Conclusion

As the Korean Constitutional Court has come of age with 22 years of history, we will continue to focus on further strengthening the Court's political independence and impartiality. We will continue to do our best in achieving full-blown democracy and implementing the rule of law, so that the people of Korea can have their dignity and value more respected and pursue happiness in a more just and affluent society.

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

THE DOCTRINE OF THE CONSTITUTIONAL COURT OF LITHUANIA AS AN INSTRUMENT IN SHAPING DEMOCRATIC INSTITUTIONS

Hon. Toma Birmontien
Justice of the Constitutional Court of Lithuania

1. Introduction

The present system of constitutional control reflects the legal ideas of several centuries. During the last decades *a* particularly big role has been played by the constitutional control institutions while restoring democratic institutes in most states of the Eastern and Central Europe. Constitutional control influences, and sometimes also determines, the content of some areas of law as well as formation of new institutes of law. In the modern world constitutional review, carried out by various forms and methods, exists not as an idea of perfection of law, but as one of the essential features of a democratic state, and this is especially evident from the development of statehood in the Central and Eastern Europe at the end of the 20th century. The constitutional review performs a significant role in the transformation of the legal systems of the states of the Eastern and Central Europe. The jurisprudence of the Constitutional Court of Lithuania has accumulated sufficient practice of assessment of the jurisprudence of other European constitutional courts.

The principles of democracy, which must be followed by a state striving for the welfare of its citizens, are universal; they have been fostered for centuries and are reflected not only in the constitutions of the states, but also in the documents adopted by the international community, *inter alia* the Organisation of the United Nations. While restoring democratic institutes in the Eastern and Central Europe, an important role was played by international human rights instruments and, particularly, the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights). The important features of the constitutional doctrine of human rights developed by

the Constitutional Court of Lithuania have been influenced by the jurisprudence of the European Court of Human Rights.

The tradition of constitutional control in European states has spanned many decades and, although at its source some competences and activities of these institutions seemed to be not so important, the formation of the constitutional doctrine as well as the development of the competencies of institutions of constitutional control determined a wider concept of responsibility of legislature and the executive before the Constitution. Such concept conditioned the right of institutions of constitutional control to recognize action and inaction of state institutions, especially when it concerns issues of human rights or fundamental principles of law, as being in conflict with the Constitution.

The Constitution – the supreme law of a country – means limitation of the state power. The latter's decisions should comply with the requirements established in the Constitution. Constitutional control institutions normally investigate whether the established limits have been violated. The Constitutional Court provides interpretation of the Constitution and laws, however, will other branches of government will always follow it? It is a universal truth that Constitutional Courts, when they carry out constitutional control, are quite often criticized and reproached that they "destroy", by their decisions recognizing legal acts as conflicting with the Constitution, the work of legislature or the executive. Therefore, it might appear that the activities of these courts could sometimes be a reason for a constitutional conflict, as it is not easy for other branches of government to accept that the Constitutional Court's decision is really the "last instance" in the dispute. The public confidence is one of the main strength of the Constitutional Courts that enables them to carry out their duties.

The issue of competences of judicial review is a complex and multifaceted problem; and in the legal doctrine and in the case-law of constitutional control institutions this issue is solved in many ways. The purpose of this presentation is to disclose some tendencies in the activities of the Constitutional Court of Lithuania and to analyze some cases which led to the recognition of this institution as being an instrument in shaping democratic institutions as well as a guardian of the Constitution.

2. The acts of the Constitutional Court and legal power thereof

The purpose of the Constitutional Courts is to guarantee the constitutionality of the legal system. This function is exercised through the control of the constitutionality of laws and other legal acts and through the implementation of other powers entrusted to the Constitutional Courts. The obligatory character of Constitutional Court decisions is, perhaps, one of the axioms of modern constitutionalism.

In Lithuania, the Constitutional Court was established in 1993, while implementing the provisions of the 1992 Constitution of the Republic of Lithuania. Under the Constitution, the Constitutional Court *inter alia* decides whether the laws are not in conflict with the Constitution and whether other

legal acts are not in conflict with the Constitution and laws[1]. The Constitutional Court implements *a posteriori* [2] abstract control, even though in cases when the courts apply to the Constitutional Court, such control also includes the elements of concrete control. The Constitutional Court decisions operate *erga omnes.* If the Constitutional Court recognizes a legal act as being in conflict with the Constitution (or law), such an act cannot be applied[3], thus, it is removed from the legal system. While deciding whether the law or other legal act is not in conflict with the Constitution, the Constitutional Court construes the Constitution, as such construction is compulsory. Thus, the official doctrine formulated by the Constitutional Court significantly influences the Lithuanian legal system.

The Constitution does not explicitly consolidate the power of the Constitutional Court to construe the Constitution officially; however, the Constitutional Court has noted more than once that such powers thereof stem from its constitutional purpose. The official constitutional doctrine reveals the interrelations of various constitutional provisions, the relation of their content, the balance of the constitutional values, and the essence of the constitutional legal regulation as a single whole. The recognition of the evolution of the official constitutional doctrine is one of the essential features of the constitutional jurisprudence

The Lithuanian Constitutional Court is attributed to active courts. In Lithuania, the concept of the Constitution (jurisprudential constitution) includes not only the pure text of the Constitution, but also the constitutional doctrine formulated in the constitutional jurisprudence. The use of the broad concept of the constitution, which includes not only text, but also the constitutional doctrine formulated, has increased in Lithuania as well as in other countries.

1 **Article 105 of the Constitution provides:**
The Constitutional Court shall consider and adopt a decision whether the laws of the Republic of Lithuania and other acts adopted by the Seimas are not in conflict with the Constitution of the Republic of Lithuania.
The Constitutional Court shall also consider if the following are not in conflict with the Constitution and laws:
1) acts of the President of the Republic;
2) acts of the Government of the Republic.
The Constitutional Court shall present conclusions:
1) whether there were violations of election laws during elections of the President of the Republic or elections of members of the Seimas;
2) whether the state of health of the President of the Republic allows him to continue to hold office;
3) whether international treaties of the Republic of Lithuania are not in conflict with the Constitution;
4) whether concrete actions of members of the Seimas and State officials against whom an impeachment case has been instituted are in conflict with the Constitution.

2 In certain cases the Constitutional Court of the Republic of Lithuania may also implement *a priori* control, for example, when the President of the Republic applies to the Constitutional Court regarding international treaties.

3 **Article 107 of the Constitution provides**:
A law (or Paragraph thereof) of the Republic of Lithuania or other act (or Paragraph thereof) of the Seimas, act of the President of the Republic, act (or Paragraph thereof) of the Government may not be applied from the day of official promulgation of the decision of the Constitutional Court that the act in question (or Paragraph thereof) is in conflict with the Constitution of the Republic of Lithuania.
The decisions of the Constitutional Court on issues ascribed to its competence by the Constitution shall be final and not subject to appeal.
On the basis of the conclusions of the Constitutional Court, the Seimas shall take a final decision on the issues set forth in the Third Paragraph of Article 105 of the Constitution.

3. Some features of the doctrine of human rights formulated by the Constitutional Court

The human rights are recognized as one of the most important institutes of constitutional law. The present system of human rights reflects the philosophical and legal ideas of several centuries. The doctrine of the human rights which is based on the priority of a person and his rights in relation with the state became not only the integral component of the constitutional systems, but it became an international system of protection of human rights.

The institutions of constitutional control—constitutional courts—continually construe the rights and freedoms of a person which are enshrined in the Constitution and in such way the final limits of law are drawn by the constitutional jurisprudence. The recognition of the evolution of the official constitutional doctrine, i.e. recognition that the process of creation of the constitutional doctrine is continuous and may not be finite is an important feature of formation of the jurisprudential constitution which influences the concept of constitutional freedoms of a person as it broadens not only the concept of constitutional rights but also expands the possibilities to recognize human rights as constitutional rights.

The Constitutional Court consolidates the concept of human rights as innate rights which are based on the democratic values. In the jurisprudence of the Constitutional Court, the European Convention on Human Rights and the doctrine of human rights and freedoms which is formulated in the jurisprudence of the European Court of Human Rights take a particular place. The Constitutional Court interprets the jurisprudence of the European Court of Human Rights as a particularly important source for interpretation of law.

In the jurisprudence of the Constitutional Court, we could single out the following tendencies of the development of the doctrine of human rights, formation of the doctrine of the derived (explicitly and implicitly consolidated) constitutional rights; recognition of the status of absolute rights for certain rights, recognition of the principle of integrity and indivisibility of human rights; recognition of social rights as individual rights, for which judicial defence must be guaranteed; grounding of the doctrine of limitation of application of rights on the principles of the European Convention on Human Rights; and direct defence of the human rights which are entrenched in the international documents.

So far the Constitutional Court has been formulating the doctrine of the derived (implicitly consolidated) constitutional rights very carefully. The Constitutional Court "finds" such rights while interpreting any right which is directly enshrined in the Constitution or a constitutional principle. To such implicitly enshrined rights for which the Court recognizes constitutional protection we could also attribute *inter alia* such rights as the right to a fair legal process, the right of a journalist to preserve the secret of the source of information, the right to paying of a pension granted by a law which is not in conflict with the Constitution.

Even though the Constitutional Court does not directly define any right as a derived constitutional right, however, while having assessed its arguments set forth in the ruling of 23 October 2002, [4] we may draw a conclusion that freedom of the media is considered to be such right, the right of a journalist, as a special subject, not to disclose the source of information which may be restricted only by a court and only when it is necessary to disclose the source of information due to the greater interest protected by the Constitution and other constitutionally defended value. In the said ruling the Constitutional Court noted that from Article 25 of the Constitution[5] as well as the other provisions of the Constitution consolidating and guaranteeing the freedom of an individual to seek, obtain and impart information stems the freedom of the media. Under the Constitution, the legislator has a duty to establish the guarantees of the freedom of the media by law. The Constitutional Court recognized the right of the journalist to preserve the secret of the source of information as one of such guarantees. The Constitutional Court noted an important role of the press in a democratic society, also the interest of a democratic society to guarantee and protect press freedom.[6]

The Constitutional Court, while interpreting the constitutional principle of a state under the rule of law and other provisions of the Constitution, *inter alia* the provisions of Paragraph 1 of Article 30[7] of the Constitution, has also formulated the principle of the right of a person to apply to court for protection of his violated rights as an absolute right of the person. The formation of this doctrine was begun as far back as in the ruling of 30 June 2000[8] and its development is being continued. In its ruling of 29 December 2004[9], the Constitutional Court has also noted that this right implies the right of the person to proper legal process and that this right is a necessary condition for implementation of justice. The

4 Constitutional Court ruling of 23 October 2002 „ On the Protection of the Private Life of a Public Person and the Right of the Journalist not to Disclose the Source of Informatikon".
Full texts of all final acts adopted by the Constitutional Court of the Republic of Lithuania can be found at www.lrkt.lt/index_e.html.

5 Article 25 of the Constitution provides:
The human being shall have the right to have his own convictions and freely express them.
The human being must not be hindered from seeking, obtaining, and imparting information as well as ideas.
Freedom to express convictions, as well as to obtain and impart information, may not be restricted other than by law, if it is necessary to protect the health, honour and dignity, private life, and morals of a human being, or to defend constitutional order.
Freedom to express convictions and impart information shall be incompatible with criminal actions—the instigation of national, racial, religious, or social hatred, violence and discrimination, slander and disinformation.
The citizen shall have the right to obtain any available information which concerns him from State institutions in the manner established by law.

6 The jurisprudence of the European Court of Human Rights was influential in giving the status of constitutional rights for the right of the journalist to preserve the secret of the source of information. The interpretation of Article 8 of the European Convention on Human Rights which enshrines freedom of self-expression has a special meaning on the development of the doctrine of constitutional rights.

7 Article 30 of the Constitution provides:
The person whose constitutional rights or freedoms are violated shall have the right to apply to court.
The law shall establish the compensation for material and moral damage inflicted on a person.

8 Constitutional Court ruling of 30June 2000 „On the right to compensation for damage inflicted by unlawful actions of interrogatory and investigatory bodies, the prosecutor's office and court"

9 Constitutional Court ruling of 29 December 2004 „On the restraint of organised crime"

constitutional right of a person to apply to court may not be artificially restricted and its implementation may not be burdened, either.

The right of the person, whose constitutional rights and freedoms have been violated to apply to court for protection of such rights is indivisibly related to the right to a fair legal process. The latter right could also be attributed to the sphere of implicitly consolidated constitutional rights. In the jurisprudence of the Constitutional Court this right is assessed as the one that may not be limited.

The Constitutional Court has interpreted a great many other constitutional rights of a person, and, generally speaking, in the constitutional doctrine much attention is paid to construction of equality of rights of persons, as one of the most important constitutional principles.

It would be a difficult task to distinguish a single ruling of the Constitutional Court, reflecting the ample jurisprudence of this area, however, while assessing the role of the Constitutional Court in strengthening democracy we could single out the afore-mentioned Constitutional Court ruling of 23 October 2002, which was designated *inter alia* for freedom of mass media; in addition, the Constitutional Court ruling of 9 December 1998[10] is worth mentioning, which stirred much reaction from the public as well. In the latter ruling, in which the Constitutional Court, while resolving a constitutional justice case subsequent to the petition of a group of Members of the Seimas (Parliament), recognized the provisions of the Criminal Code providing for the death penalty as unconstitutional. In this ruling, the Constitutional Court also invoked documents of international law, *inter alia* the Universal Declaration of Human Rights which was adopted on 10 December 1948 at the General Assembly of the United Nations, the Second Optional Protocol to the International Covenant on Civil and Political Rights adopted at the UN General Assembly in 1989, etc.

The Constitutional Court has also formed the doctrine of limitation of social rights during an economic crisis. In its decision of 20 April 2010,[11] the Constitutional Court, while providing construction of provisions of its previous rulings, emphasised the importance of adherence to constitutional requirements during an economic crisis, when various issues of social guarantees are being decided, and reiterated some of the principles formulated previously, whereby in exceptional situations, when, due to a grave economic and financial situation that has occurred in the state the servants' salaries financed from state and municipal budgets, as well as awarded pensions that are paid from *inter alia* social insurance funds, may be reduced, however, it can be done only by law, when there is no other economic and financial alternative, and while following the constitutional principle of proportionality and other constitutional principles. Such reduction of the remuneration for work (and pensions[12]) must be temporary

10 Constitutional Court ruling of 9 December 1998 „ On the death penalty provided for by the sanction of Article 105 of the Criminal Code".

11 Constitutional Court decision of20 April 2010 „ On the construction of the provisions of acts of the Constitutional Court related to reduction of pensions and remunerations during an economic crisis".

12 The Constitutional Court in the same decision also formulated a duty to the legislator, whereby, the legislator, upon occurrence of an extreme situation, when *inter alia* due to an economic crisis it is impossible to accumulate the amount of the funds necessary to pay old age pensions must, while reducing old age

and grounded upon the circumstances of the extremely difficult economic and financial situation in the state.

In addition, the rulings of the Constitutional Court, in which various aspects of the electoral right were considered, also deserve special attention. One of the most recent rulings of the Constitutional Court, that of 11 May 2011,[13] also dealt with issues of the electoral right, providing an interpretation of some provisions of the law on election to municipal councils, in particular. In this ruling, the Constitutional Court considered the problems of nomination of candidates, certain issues of establishing the results of election, *inter alia* election thresholds.

4. The constitutional doctrine relating to powers of state institutions

A democratic state is based on respect for human rights and strict observance of the constitutional powers by state institutions. It is not sufficient solely to regulate these issues in a proper manner in the text of the Constitution; it is important that in the course of implementation of the empowerments of state institutions one would not distort the essence of these powers and would properly perceive the content thereof as well as the limits of the powers of the said state institutions. While exercising the constitutional review over legal acts, one is faced with a difficult and important task of not only declaring the legal acts, which are inconsistent with the Constitution, null and void, but also with that of forming the constitutional doctrine relating to state institutions and construing the constitutional powers thereof.

In the jurisprudence of the Constitutional Court various issues relating to powers of state authorities have been disclosed. The Constitutional Court has been consistently building its doctrine upon the constitutional principles of *inter alia* a state under the rule of law, separation of powers, as well as other principles. The Constitutional Court has construed the issues relating to the exercise of the constitutional powers of the Seimas (Parliament), the President of the Republic, and the Government, and has formulated a vast doctrine dedicated to the independence of courts as well as to the function of administering justice, which is performed by courts.

4.1. The Constitutional Court doctrine relating to the form of the State of Lithuania

The Constitutional Court has no direct power to decide disputes between state institutions. Nevertheless, questions of the intersection between competences are, at times, robed in a legal outfit and decided under the form of control over legal norms. Even though the petitions filed to the Constitutional Court by the Government of the Republic of Lithuania are especially rare, yet one of such

pensions, provide for a mechanism of just compensation of incurred losses to the persons to whom such pensions were awarded and paid, whereby, after the said extreme situation is over, the state would undertake an obligation before such persons to compensate them, in a fair manner and within a reasonable time, the losses incurred by them due to the reduction of the old age pension.

13 Constitutional Court ruling of 11 May 2011 „ On elections to municipal councils".

cases could be successfully dealt with only after the Constitutional Court has spoken on the form of governance of the State of Lithuania, which determines the nature of the relations of the President of the Republic and the Government, as well. In its Ruling "On the compliance of the 10 December 1996 Seimas Resolution 'On the Programme of the Government of the Republic of Lithuania' with the Constitution of the Republic of Lithuania" of 10 January 1998,[14] the Constitutional Court emphasised that, under the competence of state institutions as established by the Constitution of the Republic of Lithuania, the governance model of the State of Lithuania is to be attributed to the parliamentary republic governance form; alongside, it has noted that the governance form of the State of Lithuania is also characterised by certain peculiarities of the so-called mixed (half-presidential) form of governance; this is reflected in the powers of the Seimas, those of the head of the state—the President of the Republic, and those of the Government, as well as in the legal arrangement of their reciprocal interaction. The Lithuanian constitutional system has consolidated the principle of the responsibility of the Government to the Seimas, which determines a respective way of Government formation. When assessing the powers of the President of the Republic in appointing the Prime Minister and confirming the Government, the Constitutional Court has stressed that the President of the Republic has to appoint the Prime Minister who is supported by the Seimas majority and to confirm such a Government the programme of which can be approved by the Seimas by the majority of votes of its members taking part in the sittings, since, otherwise, the institution of the executive power ensuring functioning of the state would never be formed. Attempting to gain the confidence of the Seimas, in foreseeing the trends of its activity for a certain time period, the Government is obliged to take into consideration a possible approval or non-approval of the Seimas. By expressing its confidence in the programme of the Government, the Seimas takes an obligation to supervise as to how the Government will be acting in implementing its programme. The programme of the Government is the basis of political-legal responsibility of the Government to the Seimas, as they are jointly responsible to the Seimas for their common activities.

After the said Constitutional Court ruling was promulgated, there were many discussions—this ruling received sharp criticism not only from among political scientists, but also lawyers. In the opinion of some authors, while interpreting the Constitution, the Constitutional Court "reduced" the powers of the President of the Republic *vis-à-vis* the Government. However, after some time has passed, this ruling no longer stirs any big discussions. Several Presidents of the Republic were changed after elections, while the formation of the Government takes place according to the procedure, as it was construed by the Constitutional Court in the course of interpretation of the Constitution. Thus, in certain cases, while executing the function of review of legal norms and deciding the issues of competence of branches of state power, the Constitutional Court becomes a certain arbiter and, in the course of interpretation of the Constitution, responsibility falls upon it also to construe the issues of the form of the State of Lithuania itself.

14 Constitutional Court ruling of 10 January 1998 „On the Programme of the Government of the Republic of Lithuania".

4.2. The features of the constitutional doctrine of the Parliament and a Member of the Parliament

In its jurisprudence the Constitutional Court has analysed various aspects of the legislative power, *inter alia* the functions and powers of the Seimas (Parliament), the powers of structural sub-units of the Seimas, the elements of the legal status of a Member of the Seimas, *inter alia* the principle of a free mandate and the content thereof, etc.

The constitutional nature of the Seimas, as representation of the Nation, determines its special place in the system of state institutions, as well as its functions and powers. While implementing its constitutional powers, the Seimas executes classical functions of the parliament.

The Constitutional Court has also held that every decision of the Seimas, no matter what its expression (legal form) might be, can be disputed at the Constitutional Court with regard to the compliance of this decision (act of the Seimas) with legal acts of higher power, *inter alia* (and, first of all) the Constitution. Under the Constitution, the subjects specified in Paragraph 1 of Article 106 of the Constitution can do so, *inter alia* not less than 1/5 of all Members of the Seimas, i.e. a group of not less than 29 Members of the Seimas. These are very important powers of the Constitutional Court, which were formulated by the Constitutional Court when it was interpreting some aspects of parliamentary control—a refusal of the Seimas to form a special investigation commission.[15] It is noteworthy that, as a rule, at the Constitutional Court laws adopted by the Seimas are most often challenged, whereas other resolutions or decisions passed by the Seimas have been the object of constitutional review only in rare cases.

4.2.1. Parliamentary control—important function of the Parliament

Parliamentary control, one of the classical functions of the Parliament, is an important instrument to ensure separation and balance of the State powers. It is one of the essential elements of the parliamentary democracy, one of the instruments of the parliament to influence the activities of the executive power and it could also be considered as an effective guarantee of human rights.

The constitutional concept of separation of powers and their inter-functional cooperation has been consecutively developed in the jurisprudence of the Constitutional Court for many years. Even though without *expressis verbis* formulating the notion of the constitutional institute of parliamentary control, the Constitutional Court revealed its certain essential elements: the Constitutional Court names the parliamentary control as an important sphere of constitutional competence of the Seimas, whose implementation must meet the constitutional principles and be in harmony with the constitutional doctrine of the separation and balance of the state powers; the Constitutional Court has also revealed certain forms of control and drafted its limits. The purpose of the parliamentary control—to ensure proper implementation of constitutional

15 Constitutional Court ruling of 4 April 2006. „On the formation of Seimas provisional commissions of investigation and control".

functions of the state powers—is to be treated as an effective guarantee of human rights, as the purpose of all state powers and their institutions is to serve the people and to protect them from abuses.

The forms of parliamentary control provided for in the Constitution may not be assessed as final; the Constitution does not establish any *final* list of the forms of parliamentary control. Under the Constitution, the powers of the Seimas may be established and are established not only in the Constitution, but also in laws; certain powers of the Seimas which are enshrined in the Constitution may be concretized by laws. The Constitutional Court has more than once noted that the Seimas, as the representation of the Nation, has the right to establish by means of laws also such powers for itself which are not *expressis verbis* specified in the Constitution, however, which are designed for the implementation of the constitutional functions of the Seimas.

The form of parliamentary control not entrenched *expressis verbis* in the Constitution is provisional investigation commissions, whose formation and competence are regulated by the Statute of the Seimas and a special law. The activity of the provisional investigation commissions instituted by the Seimas is also to be distinguished as independent form of parliamentary control; such conclusion could be drawn when assessing Constitutional Court rulings of 13 May 2004,[16] 4 April 2006 and decision of 21 November 2006.[17]

The parliamentary control, even though being a very important task of the Seimas, may not be construed as one without having constitutional limits of its implementation; the implementation of such function may not change into arbitrariness.

While interpreting the content of parliamentary control, one is to note that it is first of all related to the activities of the Government that is a collegial body of the executive power, but not only the activity of the Government, as a collegial body, but also the activity of the ministries and other institutions established by laws could be subject to parliamentary control.

The provisions of the doctrine of the parliamentary control encompasses that the courts cannot be subject thereto. This idea is consecutively followed by the Constitutional Court in its subsequent jurisprudence as well. In its ruling of 4 April 2006, the Constitutional Court noted that a parliamentary provisional investigation commission cannot take over the constitutional powers of courts or otherwise interfere with the implementation of the constitutional competence of courts, nor violate the independence of the judge and courts in the course of administration of justice, let alone administer justice by itself.

When developing the doctrine of parliamentary control, in its decision of 21 November 2006, the Constitutional Court noted that parliamentary democracy is not such system, where the parliament, when there is even the lightest pretext, may exert control even over any decisions of such institutions (their officials),

16 The Constitutional Court Ruling "On the powers of Seimas provisional investigation commissions" of 13 May 2004.

17 Constitutional Court Decision "On the formation of Seimas provisional investigation commissions" of 21 November 2006.

initiate application of sanctions against corresponding persons, let alone adopt decision by itself for the state or municipal institutions (their officials) which enjoy corresponding competence, i.e. adopt such decisions which can be adopted only by the state institutions (their officials) which have corresponding competence, for example, courts, prosecutors, the State Control, institutions of pre-trial investigation, and entities of the operational activity provided for in laws.

Thus, the Constitutional Court gradually corrected the doctrine of the parliamentary control of subjects in the aspect that the list of the subjects of parliamentary control is actually not identical to the institutions which meet the features specified in Paragraph 1 of Article 61 of the Constitution (the Seimas forms or elects such institutions), the parliamentary control cannot be formally identified with the competence of the parliament to participate in the formation of certain institutions; the Constitutional Court also pointed out other institutions in whose respect such control is impossible.

The fact that certain institutions may not be subject to parliamentary control does not mean that the Seimas cannot initiate the parliamentary investigation linked to the activity of such institutions if it is related to the discovered information about the circumstances of the events which are significant to the society and to receiving of the necessary information.[18] In the decision of 21 November 2006, the control function of the Seimas (parliamentary control) is construed as deciding that there are no spheres in the life of the state in which the Seimas, the representation of the Nation, could not (in case there is a special matter (of state importance)), by heeding the Constitution, exercise parliamentary control. It is also important that the Constitutional Court does not think that one may *ex ante* draw any final list of spheres of parliamentary control; the impossibility of such final list of questions is determined by the constitutional competence of the Seimas.

Even though it is not possible to draw any final list of the spheres of parliamentary control, in its decision of 21 November 2006, the Constitutional Court still formulated what may not be subject to investigation of parliamentary control, the Constitutional Court particularly emphasized that one cannot, by means of legal regulation of the activities of Seimas provisional investigation commissions, create preconditions where the Seimas provisional investigation commission or the entire Seimas directly organises the work of other state or municipal institutions or interferes with the activity of any state or municipal institutions (their officials) which implement public power, or adopts such decisions which can be adopted only by the state institutions (their officials) which have corresponding competence.

18 In its rulings of 13 May 2004 and 4 April 2006, the Constitutional Court noted: "In order that it might properly discharge its parliamentary functions and implement its constitutional powers, the Seimas, the representation of the Nation, has to possess exhaustive, objective information about the processes taking place in the state and society, about the situation in various sectors of life of the state and society and the arising problems. The possession of such information is a necessary precondition for the fact that the Seimas might be able to effectively act in the interests of the Nation and the State of Lithuania, that it would properly execute its constitutional duty."

When assessing the arguments set forth in the aforementioned jurisprudence of the Constitutional Court, we could point out certain spheres whose parliamentary control is impossible in general, and, first of all, it is the private life of a person.

Thus, the doctrine formulated by the Constitutional Court not only created pre-conditions for the parliament to discharge its important function of parliamentary control, but also established certain limits which cannot be overstepped by the legislator so that the constitutional balance of powers would not be disturbed and human rights would not be violated.

4.2.2. Some peculiarities of the constitutional doctrine relating to the constitutional status of the Member of the Parliament

The Seimas (Parliament) of the Republic of Lithuania consists of 141 Members of the Seimas. In the course of deciding constitutional justice cases, the Constitutional Court has interpreted various aspects of the constitutional status of the Member of the Seimas. In the jurisprudence of the Constitutional Court a considerable amount of attention is given *inter alia* to interpretation of the principle of the free mandate of the Member of the Seimas. Other elements of the constitutional status of the Member of the Seimas, which are also important, have been construed in the Constitutional Court doctrine too, *inter alia* issues of constitutional liability of a Member of the Seimas, as well as certain aspects of some social guarantees of Members of the Seimas, *inter alia* the questions of the possibility of reducing remuneration of Members of the Seimas under the circumstances of an economic crisis[19] and those of the content of the expenses relating to parliamentary activities, as well as the limitations concerning their working activity.

The Constitutional Court treats the Member of the Seimas as a professional politician, i.e. the one whose work at the Seimas is his professional activity, and in regard to whom certain limitations of working and other type activities are applied, some of which were interpreted *inter alia* in the Constitutional Court decision of 23 February 2011.[20]

The Constitutional Court has noted more than once that the constitutional status of the Member of the Seimas integrates the duties, rights and guarantees of activity of the Member of the Seimas as a representative of the Nation, and it is based upon the constitutional principle of the free mandate of the Member of the Seimas; the essence of the free mandate of the Member of the Seimas is

19 In its 15 January 2009 decision, while construing the provision "when due to particular circumstances (economic crisis, natural disasters, etc.), an extremely difficult economic and financial situation has occurred in the state <...> the legislator may change the legal regulation which establishes the salaries to various persons, and to consolidate the legal regulation on the salaries which would be less favourable to these persons, if it is necessary in order to ensure the vital interests of society and the state and to protect other constitutional values" of its decision of 28 March 2006, the Constitutional Court emphasised that the said provision *inter alia* means that after an extremely difficult economic and financial situation has occurred in the state the legislator is allowed to temporarily establish a smaller salary of a Member of the Seimas from that established at the beginning of Seimas' term of office.

20 Constitutional Court decision of 23 February 2011. 2011 „On the construction of the provisions of a ruling of the Constitutional Court, which are dealing with the activities incompatible with the status of a Member of the Seimas".

that a representative of the Nation is free to implement the rights and duties vested in him without restricting this freedom by mandates of the electorate, political requirements of the parties or organisations that have promoted him, also not recognising the imperative mandate and the right of pre-term recall of the Member of the Seimas; the free mandate of the Member of the Seimas, which is entrenched in the Constitution, is one of the guarantees of independency of activities and equality of Members of the Seimas.

In its ruling of 1 July 2004, the Constitutional Court emphasised the constitutional duty of the Seimas to set by legal acts the legal regulation that would provide no preconditions for using the free mandate of a Member of the Seimas in the interests other than the interests of the Nation and the State of Lithuania, i.e. for the private benefit of a Member of the Seimas, his close relatives or other persons, for their personal interests or the interests of a group, in the interests of the political parties or political organisations, public or other organisations, and other persons, which nominated or supported the candidate to the office of the Member of the Seimas, in the interests of territorial communities, electors of the electoral district of elections of a Member of the Seimas. The activity of a Member of the Seimas should be legally regulated in the manner so that it would be possible to efficiently control whether such confrontation does not exist, whether a Member of the Seimas does not use his free mandate in the interests other than the interests of the Nation and the State of Lithuania; and in case a Member of the Seimas disregards the aforementioned requirements of the Constitution, he must be held liable pursuant to the Constitution and laws.

The constitutional doctrine relating to the principle of the free mandate of the Member of the Seimas, the interpretation of which has found its place in the Constitutional Court rulings, remains to be an important issue of the constitutional doctrine even today, as new aspects of this constitutional institute are constantly emerging. One of the latest acts of the Constitutional Court devoted to interpretation of the principle of the free mandate of the Member of the Seimas is the decision of 15 May 2009,[21] wherein, on the request of the President of the Republic, the Constitutional Court interpreted the provisions of one of its previous rulings—the Constitutional Court ruling of 9 May 2006.[22] In the said ruling the Constitutional Court has interpreted the principle of the free mandate of the Member of the Seimas as a duty of the Member of the Seimas to vote in the manner that the Seimas would be able to adopt a resolution complying with the imperatives of the Constitution.

In its decision of 15 May 2009, the Constitutional Court emphasised that one of the democratic principles of adopting decisions in the Seimas is the majority principle, and that the political will of the majority of Members of the Seimas is reflected in Seimas resolutions. Under the Constitution, the will of the Seimas regarding adoption of corresponding resolutions may not be expressed otherwise

21 The reason why the President of the Republic applied to the Constitutional Court was the refusal of the Seimas for a proposal of the President of the Republic to dismiss the President of the Supreme Court upon the expiry of the term of office of the latter (the President of the Republic decided not to propose that the Seimas appoint him for another term of office).

22 Constitutional Court ruling of 9 May 2006 „On the constitutional system of the judiciary and its self-government, on appointment, promotion, transfer of judges and their dismissal from Office".

than by voting by Members of the Seimas at a Seimas sitting and adopting a corresponding legal act. The activity of the Member of the Seimas, which is based upon the constitutional principle of the free mandate of the Member of the Seimas, may not be opposed to the powers of the Seimas as representation of the Nation. While implementing the constitutional powers, the Seimas has a duty to adopt corresponding decisions provided for in the Constitution; under the Constitution, the Member of the Seimas, as a representative of the Nation, not only acquires corresponding rights, but also must discharge certain duties arising from the Constitution and laws which are not in conflict with it. A different construction of the constitutional principle of the free mandate of the Member of the Seimas—purportedly, that this mandate could be understood as absolute freedom of the Member of the Seimas to act at a Seimas sitting in such manner so that the Seimas would not execute the requirements arising from the Constitution to adopt corresponding decisions—would mean that conditions to adopt decisions incompatible with the Constitution are created.[23] The Constitution implies only such concept of the discretion of the Member of the Seimas, and only such concept of the conscience of the Member of the Seimas, according to which there is no gap or contradictions between the discretion of the Member of the Seimas and the conscience of the Member of the Seimas on the one hand, and the requirements of the Constitution and the values protected and defended in it, on the other hand. When in office, and while implementing their rights, Members of the Seimas shall follow the Constitution, the interests of the State, as well as their own consciences, and may not be restricted by any mandates.

The duty of the Member of the Seimas to act in the manner obligated by the oath taken by the Member of the Seimas, while heeding the requirements arising from the Constitution and the laws which are not in conflict with it, may not be interpreted as meaning the restriction of the constitutional principle of the free mandate of the Member of the Seimas. The construction of this principle that, purportedly, the Member of the Seimas, while discharging his constitutional obligation, would be allowed in certain cases to disregard the Constitution and laws which are not in conflict with it, is incompatible with the constitutional concept of the principle of the free mandate of the Member of the Seimas.

In the aforesaid decision the Constitutional Court *inter alia* reiterated the provisions of the Constitutional Court rulings of 1 July 2004 and 4 April 2006 that the free mandate of the Member of the Seimas is not a privilege of a representative of the Nation, it is rather one of the legal measures ensuring that the Nation

23 In the Constitutional Court decision of 15 May 2009 it was *inter alia* emphasised that, under the Constitution the Republic of Lithuania, when the Seimas implements the constitutional powers (constitutional duty) related with dismissal of the President of the Supreme Court (or the chairman of a division of this court) from office upon expiry of the term of his powers (term of office), and when the corresponding individual act of application of law regarding this issue is adopted at the sitting of the Seimas, the Members of the Seimas are under obligation to, first of all, ascertain whether there exists the fact of an objective character, i.e. whether the term of powers of the President of the Supreme Court (or the chairman of a division of this court), which is provided for in the law, has expired, and if the said fact of an objective character is ascertained, to act in the manner that the Seimas would be able to implement the requirement arising from the Constitution to dismiss the President of the Supreme Court (or of the chairman of a division of the same court) upon expiry of their term of powers.

will be properly represented in its democratically elected representation, the Seimas, and that the representation of the Nation, the Seimas, will act only in the interests of the Nation and the State of Lithuania; due to this, the free mandate of the Member of the Seimas may not be used in the interests other than those of the Nation and the State of Lithuania.

In its conclusion of 27 October 2010[24], while deciding whether a Member of the Seimas can vote for another Member of the Seimas during sittings of the Seimas, the Constitutional Court also substantiated its arguments by the principle of the free mandate of a Member of the Seimas, and noted that the right of the Member of the Seimas to vote at his own discretion in the course of adoption of any decision of the Seimas, which stems from the principle of the free mandate of the Seimas Member, *inter alia* the requirement of the individuality of the mandate of the Seimas Member, which is entrenched in the Constitution, may be realised only by the expression of the will of the Member of the Seimas in person in the course of voting at a sitting of the Seimas; in cases where the requirement of voting by the Member of the Seimas in person at a sitting of the Seimas is not observed, *inter alia* where in the course of voting one Member of the Seimas votes instead of another Member of the Seimas and thereby expresses the will of not that Member of the Seimas instead of whom a vote is cast, but his own, one disregards the requirements for the procedure of adoption of laws, which stem from the Constitution, *inter alia* Article 69 thereof, distorts the results of the voting, as well as creates preconditions for violation of the principle of the free mandate of the Seimas Member, entrenched in the Constitution; the individuality of the mandate of the Seimas Member also implies that no person, *inter alia* a Member of the Seimas, may take over the rights and duties of another Member of the Seimas, a representative of the Nation, *inter alia* the right to vote.

Thus, in the Constitutional Court jurisprudence one has also disclosed somewhat new aspects of the principle of the free mandate of the Member of Parliament—a constitutional law institute that has become a classical one—which, at times, come into view at the intersection of powers of state authorities or they become disclosed when the Constitutional Court deals with cases of disregard of the duties of a Member of Seimas.

In the jurisprudence of the Constitutional Court issues of constitutional liability of Members of the Seimas were also decided. The Constitutional Court even had to decide on impeachment of members of parliament.[25] In its conclusion

24 Constitutional Court conclusion of 27 October 2010 „On the actions of Linas Karalius and Aleksandr Sacharuk, Members of the Seimas".

25 Under the Article 74 of the Lithuanian Constitution, for gross violation of the Constitution, breach of oath, or upon disclosure of the commission of a crime, the Seimas may, by a 3/5 majority vote of all the members of the Seimas, remove from office the President of the Republic, the President and justices of the Constitutional Court, the President and justices of the Supreme Court, the President and judges of the Court of Appeal, as well as members of the Seimas, or may revoke the mandate of a member of the Seimas. This shall be performed in accordance with the procedure for impeachment proceedings which shall be established by the Statute of the Seimas.
Article 105 of the Constitution inter alia provides that the Constitutional Court shall present conclusions whether concrete actions of members of the Seimas and State officials against whom an impeachment case has been instituted are in conflict with the Constitution.
Under the provisions of the Statute of the Seimas, the parliament has the right of initiative to institute impeachment proceedings.

of 27 October 2010, the Constitutional Court, subsequent to an inquiry of the Seimas, the petitioner,[26] had to decide on the constitutional liability of a member of parliament due to his failure to participate, without a valid reason (and without the knowledge of the Seimas), in plenary sittings of the parliament and those of a committee thereof, because he had left on a private foreign tour (and, because that member of parliament had told lies about his trip), as well as on the constitutional liability of another member of parliament, who voted in plenary sittings of the parliament for the absent member of parliament when corresponding decisions were being adopted. In its conclusion, the Constitutional Court held that these two Members of the Seimas had breached the oath and grossly violated the Constitution.[27]

In this conclusion the Constitutional Court emphasised not only the significance of the free mandate of members of parliament, but also that of the oath of a Member of the Seimas, and noted that, under the Constitution, after the elected Member of the Seimas takes the oath and gains all the rights of a representative of the Nation, a constitutional duty arises to that Member of the Seimas to unreservedly be faithful to the Republic of Lithuania, respect and obey the Constitution and laws; in discharging their functions and implementing state power; from the oath of the Member of the Seimas and the constitutional status of the Member of the Seimas there arises the requirement that the Member of the Seimas act conscientiously, while communicating with the electorate and representatives of the public, give true facts regarding the discharge of his duties, and avoid the behaviour which would degrade the reputation and authority of the Seimas, the representation of the Nation.

In this conclusion the Constitutional Court also stated that breach of the oath and gross violation of the Constitution may incur the revocation of the mandate of the Seimas Member.

26 By means of Article 2 of its resolution No. XI-838 of 25 May 2010, the Seimas, the petitioner, applied to the Constitutional Court for a conclusion on whether the concrete actions of the Member of the Seimas L. K, which had been indicated in the Conclusion of the Special Investigation Commission for Impeachment Against the Member of the Seimas L. K., were in conflict with the Constitution, and by means of Article 2 of its resolution No. XI-837 of 25 May 2010, the Seimas applied to the Constitutional Court for a conclusion on whether the concrete actions of the Member of the Seimas A. S., which had been indicated in the Conclusion of the Special Investigation Commission for Impeachment Against the Member of the Seimas A. S., were in conflict with the Constitution.

27 The Constitutional Court came to a conclusion that the actions of A. S., a Member of the Seimas of the Republic of Lithuania—the use of the certificate of a Member of the Seimas of L. K., a Member of the Seimas of the Republic of Lithuania, at the plenary sittings of the Seimas of the Republic of Lithuania and *deliberate voting instead of the latter 8 times—were in conflict with the Constitution* of the Republic of Lithuania. By these actions, A. S., a Member of the Seimas of the Republic of Lithuania, had grossly violated the Constitution of the Republic of Lithuania and breached the oath.
The actions of L. K., a Member of the Seimas of the Republic of Lithuania—going on a foreign tour of Asian states and, due to this, failing to attend, without important and justifying reasons, the plenary sittings of the Seimas of the Republic of Lithuania, which took place on 13, 14, 19, 20 and 21 January 2010, and the sittings of the Committee on Health Affairs of the Seimas of the Republic of Lithuania, which took place on 15 and 20 January 2010—were in conflict with the Constitution of the Republic of Lithuania. By these actions, L. K., a Member of the Seimas of the Republic of Lithuania, had breached the oath and grossly violated the Constitution of the Republic of Lithuania.
It is noteworthy that the Seimas, having received the conclusion of the Constitutional Court, voted on impeachment against the said Members of the Seimas. The result was that only the Member of the Seimas L. K. lost his mandate of a Member of the Seimas, whereas the other Member of the Seimas, due to the failure to achieve the qualified majority of votes, was not removed from the Seimas by impeachment proceedings and he continues to be a Member of the Seimas.

Thus, the jurisprudence of the Constitutional Court reflects various elements of the constitutional status of a Member of the Seimas, which are related with the rights and duties of a Member of the Seimas, which are determined by a special constitutional situation of a Member of the Seimas, since, under the Constitution, he is a representative of the Nation.

4.3. Peculiarities of the constitutional doctrine relating to the President of the Republic

In the analysis of the questions relating to competences of state authorities those rulings of the Constitutional Court are important wherein the powers of the President of the Republic have been interpreted. When construing the dualistic nature of the executive power, the Constitutional Court has construed the relationship of the powers of the President of the Republic and the Government and has emphasised that the latter two are the state institutions with independent powers. The dualistic concept of the executive power is formulated by the Constitutional Court in its ruling of 13 December 2004,[28] by indicating *inter alia* that the constitutional arrangement of the State of Lithuania has a specific feature of the model of dualistic (double) executive power: the executive power is exercised by the President of the Republic—the Head of State, and the Government.

The Constitutional Court has been consistent in its position that institutions of state authority may not take over the powers of each other; in its ruling of 15 March 2011[29], the Constitutional Court assessed the powers of the President of the Republic, which are established in Paragraph 2 of Article 140 of the Constitution, as the ones related to his constitutional powers as the Commander-in-Chief of the Armed Forces of the state and noted that, under the Constitution, *inter alia* the provision of Paragraph 2 of Article 5 thereof, whereby the scope of power shall be limited by the Constitution, these specific constitutional powers of the President of the Republic, as the Commander-in-Chief of the Armed Forces of the State, may not be granted to any other subject by law or other legal act.

Legal acts of the President of the Republic are substatutory acts; thus, they are subject to the doctrine of the constitutional review of substatutory legal acts that has been formulated by the Constitutional Court.

The Constitutional Court has formulated a constitutional doctrinal provision that particular decrees passed by the President of the Republic may not be, on certain grounds, disputed in the Constitutional Court. In its ruling of 22 February 2008[30], while construing the elements of the content of decrees of the President of the Republic whereby he implements the right of delayed veto, the Constitutional Court noted that the mere fact that the reasons of the President of the Republic, on the grounds of which the law adopted by the Seimas is referred back to it for repeated consideration, may be assessed by someone (*inter alia* the Members of

28 The Constitutional Court ruling of 13 December 2004. Official Gazette *Valstybs inios,* 2004, No.181-6708; No.186.

29 The Constitutional Court ruling of 15 March 2011. Official Gazette *Valstybs inios*, 2011, No. 32-1503.

30 Constitutional Court ruling of 22 February 2008 „On the powers of the President of the Republic in implementing the right of delayed (relative) veto".

the Seimas) as unfair, may not be a pretext for questioning the compliance of a corresponding decree of the President of the Republic with the Constitution (as well as initiating the constitutional justice case at the Constitutional Court).

It needs to be mentioned that decrees of the President of the Republic were not an object of constitutional control for a considerable period of time. The first petition regarding the constitutionality of the decree of the President of the Republic was received at the Constitutional Court only in 2003.

Recognition of a decree of the President of the Republic as being in conflict with the Constitution, when there exist different grounds, is assessed in the doctrine of the Constitutional Court as providing the possibility of the appearance of different legal consequences. A decree that has been passed by the President of the Republic with conscious disregard for the Constitution, by acting not in the interests of the State of Lithuania and the Nation, but his personal interests (seeking financial and other notably solid support), would constitute a ground to initiate impeachment proceedings in the Seimas (Parliament).

4.4. Features of the Judiciary

The Constitutional Court has decided cases related to various aspects of the judiciary more than once. There is abundant jurisprudence of the Constitutional Court designated for securing the constitutional independence of courts and for guarantees of activities of judges.

The Constitutional Court even had to solve the question whether the Constitutional Court is a court—a group of Members of the Seimas (Parliament) applied to the Constitutional Court with such a doubt. In its ruling of 6 June 2006[31], the Constitutional Court emphasized that, under the Constitution, the Constitutional Court is an institution of constitutional justice executing constitutional judicial review, within its competence deciding on the compliance of legal acts (parts thereof) of lower power with legal acts of higher power, *inter alia* (and, first of all) with the Constitution, and executing its other constitutional powers, as well as guaranteeing the supremacy of the Constitution in the legal system and securing constitutional justice. The Constitutional Court as a state institution, which is named as a court in the Constitution itself, in its constitutional nature may not be considered as not a court, i.e. as not a judicial institution, and the mere fact that there are separate Chapters “The Court” and “The Constitutional Court” in the Constitution, is not and may not be a basis to construe that, allegedly, as it seemed to the petitioner, the Constitutional Court is not a court—part of the judicial power and is somewhere out of the limits of the judiciary system. On the contrary, the fact that there are two separate Chapters “The Court” and “The Constitutional Court” in the Constitution does not deny the fact that the Constitutional Court which, under the Constitution, executes constitutional judicial control, is a part of the system of courts, but it emphasizes its particular status in the system of judicial power as well as in the system of all the state institutions executing state power; in this way, the

31 Constitutional Court ruling of 6 June 2006 „On the status of the Constitutional Court“.

peculiarities of the constitutional purpose and competence of the Constitutional Court are emphasized. The fact that, under the Constitution, the Constitutional Court has the powers to recognise legal acts of other institutions implementing state power—the Seimas, the President of the Republic, and the Government—as being in conflict with legal acts of higher power, first of all, with the Constitution, and, thus, to abolish the legal power of these acts and to remove these legal acts from the Lithuanian legal system, as well as the fact that only the Constitutional Court has the constitutional powers to officially construe the Constitution—to provide the concept of the provisions of the Constitution, which is binding on all the law-making and law-applying institutions as well as on the Seimas, the representation of the Nation, obviously testify that the Constitutional Court may not be an institution not implementing state power.

The Constitutional Court rulings of 21 December 1999 and[32] 9 May 2006[33], as well as *inter alia* its decision of 15 May 2009 are of special importance. In these acts the Constitutional Court was deciding on the procedure for appointment, promotion, transfer and dismissal of judges from office.

The Constitutional Court has held in its acts more than once that the function of administration of justice determines the independence of the judge and courts, which is one of the essential principles of a democratic state under the rule of law: while administering justice, courts must ensure the implementation of the rights established in the Constitution, the laws and other legal acts, to guarantee the supremacy of law, and to protect human rights and freedoms. The independence of judges and courts is not an end in itself: this is a necessary condition of protection of human rights and freedoms, not a privilege but one of the main duties of a judge and courts arising from the right of every person who thinks that his rights or freedoms are violated to an independent and impartial arbiter of the dispute, which, under the Constitution and laws, would in essence solve the dispute at law.

In its ruling of 9 May 2006, the Constitutional Court has formed important principles of self-government of courts, *inter alia* the constitutional concept of institution of judges. One of self-government institutions of courts, as an independent State power, is the special institution of judges provided for in Paragraph 5 of Article 112 of the Constitution. This institution is an important element of self-government of the judiciary which is an independent State power; it participates in the formation of the corps of judges, it serves as a balance to the President of the Republic as a subject of the executive, who enjoys exceptional powers in forming the corps of judges.

The full-fledged character of the judiciary, its autonomy, independence and the constitutional principle of separation of powers do not allow to construe the constitutional purpose and functions of the said special institution of judges in

32 Constitutional Court ruling of 21 December 1999 „ On the procedure of appointing judges and other norms of the Law on Courts“.

33 Constitutional Court ruling of 9 May 2006 „ On the constitutional system of the judiciary and its self-government, on appointment, promotion, transfer of judges and their dismissal from Office“.

such a way so that its role of a balance to the President of the Republic in the area of the formation of the corps of judges would be denied or ignored. On the other hand, the checks and balances which the judiciary (institutions thereof) and other state powers (institutions thereof) have with respect to each other may not be treated as opposition mechanisms of corresponding powers, thus, it would be unfair to construe that the constitutional purpose of the said special institution of judges is only to be a balance to the President of the Republic in the area of the formation of the corps of judges because also partnership and cooperation between the President of the Republic and this special institution of judges is necessary while forming it.

The Constitutional Court interpreted that the formula "institution of judges" of Paragraph 5 of Article 112 of the Constitution[34] implies that this institution has to be collegial; such special institution of judges may not be not formed; the procedure and basis of its formation must be established by the law; it may not function so that the requirements of the proper legal process would not be followed (in this special institution of judges itself and in relations with other state institutions, *inter alia* in the relations with the President of the Republic). Its decisions give rise to legal effects.

In the same ruling the Constitutional Court emphasized that the activity of this special institution of judges must be transparent, so that neither the President of the Republic, nor the society would have reasoned doubts regarding the formed corps of judges, as then people's trust in law and the legal system of the state would in general decrease; thus, the advice of the said special institution of judges to the President of the Republic must be rationally argued and the reasons due to which it is advised to appoint a certain person as a judge, promote, transfer a judge or dismiss him from office or not to appoint a person as a judge, not to promote, not to transfer a judge and not to dismiss a judge from office (and if a justice of the Supreme Court or a judge of the Court of Appeal is appointed, promoted, transferred or dismissed from office—to advise to submit his candidature for the Seimas or not to submit) must be set forth clearly. No advice (or other decisions) of the said special institution of judges may be based on assumptions, subjective prejudice or opinions of members of the said special institution of judges—it is necessary to ground such advice.

The Constitutional Court construed the formula "a special institution of judges shall advise" of Paragraph 5 of Article 112 of the Constitution as meaning that the said state institution must be formed only from judges, since it is only

34 **Article 112of the Constitution** provides:
n Lithuania, only citizens of the Republic of Lithuania may be judges.
Justices of the Supreme Court, as well as the President of the Supreme Court, who shall be chosen from among them, shall be appointed and dismissed by the Seimas upon the presentation by the President of the Republic.
Judges of the Court of Appeal, as well as the President of the Court of Appeal, who shall be chosen from among them, shall be appointed by the President of the Republic upon the approval of the Seimas.
Judges and presidents of regional, local, and specialized courts shall be appointed and transferred to other places of work, by the President of the Republic.
A special institution of judges provided for by law shall advise the President of the Republic concerning the appointment of judges, as well as their promotion, transference, or dismissal from office.
A person appointed as judge shall take an oath, in accordance with the procedure established by law, to be faithful to the Republic of Lithuania and to administer justice in accordance only with the law.

an institution formed on professional basis, i.e. a special institution of judges", may serve as a balance to the President of the Republic, both as a subject of the executive and as an institution of political nature, in the course of formation of the corps of judges. Only such institution may ensure the independence of judges and courts *inter alia* in the aspect that the judges of all courts with no exception would be protected from the interference of the state power and government institutions, Members of the Seimas and other officials, political parties, political and public organisations in the activity of a judge or court (such interference is *expressis verbis* prohibited by Paragraph 1 of Article 114 of the Constitution[35]).

In this survey of the jurisprudence of the Constitutional Court of Lithuania an attempt was made to disclose only some of important aspects of the constitutional doctrine, but these aspects could be regarded as being influential in various spheres of life of the state and consolidating the respect for the Constitution and universal democratic values.

35 Article 114 of the Constitution provide:
Interference by institutions of State power and administration, members of the Seimas and other officials, political parties, political and public organisations, or citizens with the activities of a judge or the court shall be prohibited and incur liability as provided for by law.
The judge may not be held criminally liable, arrested, or otherwise restricted of his freedom without the consent of the Seimas, or between sessions of the Seimas, of the President of the Republic.

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

CONSTITUTIONAL JUSTICE, FUNDAMENTAL RIGHTS AND DEMOCRACY IN CHILE

Hon. Christian Suárez Crothers
Justice of the Constitutional Court of Chile

Mr. Chief Justice of Constitutional Court of Indonesia Excellences
Participants in this Symposium
Ladies and Gentlemen:

I would like to start my presentation by thanking the Constitutional Court of Indonesia for his kind invitation to participate in the celebration of its eighth anniversary. I want to convey to you the cordial greetings of the Constitutional Court of Chile and its members.

The subject I have chosen is "Constitutional Justice, Democracy and Human Rights." In the time available I would like to explain how the combination of constitutional justice and democracy has occurred in the Chilean constitutional system, especially after the 2005 constitutional amendment.

The first Chilean Constitutional Court was created, in 1970, under the Constitution of 1925. The initial purpose of was to create a court of law, with full power to resolve conflicts between the higher state organs.

Chilean democracy, however, collapsed in 1973. under the military government ruled in Chile for 17 years.

The Constitution of 1980, now enforce, was enacted under the military government and established a Constitutional Court, initially composed of members related to the military government.

If the first Constitutional Court was created under the fear of the arrival to power of President Salvador Allende, the new Court was created as a new institutional guardian suspicious of political parties and of the Parliament. It

was a way of preserving the heritage of the Armed Forces Government, in the global context of the cold war.

However, that situation changed at the onset of the transition to democracy following the democratic election of the President Patricio Aylwin in 1989 who governed with the Coalition of Parties for Democracy.

After a plebiscite that ended the government of General Pinochet, a very important amendment to the Constitution was submitted to a referendum which meant an agreement between the military government and its opponents.

In 2005, there was a new amendment to the Constitution, this time led by President Ricardo Lagos, which ended with the existence of non-elected senators and restricted the powers of the National Security Council, which was an organ composed of a large number of military officials, to appoint senators and two members of the Constitutional Court.

This amendment was also important in other respects, but with regard to the Court there was a change in its composition and its powers.

Today, the Court is composed of ten members. Three appointed by the President, three by the Supreme Court and four by the Senate (with two with approval of the House of Representatives). The modification of the organic law of the Court also provide for the existence of two alternate members, nominated by the President of the Republic from a shortlist by the Constitutional Court and by two thirds of the Senate approved.

Thus, the 2005 constitutional amendment gave Congress a bigger say in the composition of the Constitutional Court.

As for the powers of the Constitutional Court, the amendment had the virtue of introducing two legal instruments which are playing an important role from the point of view of the protection of rights.

First, an action for the declaration of inapplicability of the statutes.

This legislation exists in Chile since 1925 and allows the parties to a dispute (now also any judge) to ask the Supreme Court then, and the Constitutional Court now to declare that a statute is not to be applied to the particular dispute.

Although it has a resemblance to the recent French institution of the *"question prioritaire de constitutionnalité",* this action differs from the Chile an action because the issue can be more easily raised, without prior involvement of other courts. In the French case it is essential that grants its prior authorization the *Cour de Cassation* or the *Conseil d'État*. The result has been an intense activity of the Chilean Court on the weighting of rights; it now performs a specific control of constitutionality, in which it weighs up and the rights allegedly affected.

This has given rise to a very extensive case law, ranging from the right to life, due process and personal liberty, to property rights, education and health care. The Constitutional Court has been active in declaring admissible the issues presented; each time receiving more complaints of inapplicability.

The second instrument is the power to strike down a statute by reason of its unconstitutionality effects. I will this with this function of the court later.

I want to talk then, and in honor of the time, specifically about these two legal institutions, bearing in mind their impact on the quality of our democracy and the protection of fundamental rights.

The Writ of Inapplicability

The writ for the inapplicability of a statute in a particular dispute pending, allows the parties or the judge to ask to the Constitutional Court to declare that a statute is unenforceable in that particular case.

Unlike what usually happens in comparative law, in Germany or Colombia, the declaration of inapplicability is not a direct action for the protection of fundamental rights before the Constitutional Court, but it is a declaration the purpose of which to obtain that a particular legislation is not the applicable law to the case.

We noted earlier that this action of inapplicability has generated an increasing case law on rights. The Court is forced to examine whether or not a statute conform to the Constitution.

The Court needs to weigh, in a specific case, the rights that may be affected and it has been forced to do that job in resolving conflicts of rights.

Petitions to declare the inapplicability of a statute were less frequent before when this function was performed by the Supreme Court and the Constitutional Court stood its old role of exercising *ex ante* control of the constitutionally of parliamentary bills.

Now it is time to move to the second instrument that I have mentioned before: the *erga omnes* declaration of unconstitutionality.

The declaration of unconstitutionality

The most radical decision that a Constitutional Court might take is to strike down with *erga omnes* effects a law declared to be incompatible with the Constitution.

I will describe the five occasions in which the Court has declared the unconstitutionally of a law, under their new powers conferred by the 2005 amendment to the Constitution.

In the first case (judgment of 26 March 2007)[1], the Court reaffirmed the principle of due process and declared unconstitutional the rule stating that the Regional Director of the IRS could authorize officials of that service to hear and decide claims and complaints, acting on behalf of the director.

The second decision of April 18, 2008[2], declared the unconstitutionally of the use of the "morning-after pill", because it declared that the pill affects the right to life of the fetus.

1 Decision No. 681 of 26 March 2007, strike down the article 116 of the Tax Code.
2 Decision Nº740, as of April 18, 2008,

The third ruling as of May 25, 2009[3], declared unconstitutionality the *solve et repete* doctrine[4]. Acording this doctrine an administrative decision that imposed a fine can only be challenged after the fine or a part of it has been paid. In that case the Court held[5] that this practice was against due process and the right of access to justice.

The fourth ruling[6], issued on July 29, 2009, stated that the requirement of lawyers should provide free legal aid, was contrary to the Constitution and particularly against the right to an equal distribution of public burdens.

Finally, the fifth case opened up space in Chile to social rights. This decision dealt with the right to health.

According to the Court, the rules concerning private health insurance in Chile are contrary to the Constitution, "as they impede the guarantee to free and equal access to health care and the right to choose the health care system they wish to use, whether public or private. In addition, the excessive increase in the price of health care plans, forces people, especially in the higher age strata, to emigrate to a system that they do not want to belong to, which directly goes against the Constitution."

In this ruling the Court based its decision on the legal equality between men and women, the nature of the right to health and the importance of social rights in the Constitution concerning the right to social security, its substance and the implementation of the Convention 102 of the International Labour Organization; among other aspects of interest such as the principle of proportionality to resolve conflicts of rights set out in the field of abstract control of constitutionality.

These decisions, no doubt had an impact in the Chilean legal system, which recently introduced this power of "repealing" democratically enacted legislation.

After examining these two institutions, and in honor the time, I must say that the pending question is whether or not the Court contributes to enhance the democratic nature of Chilean institutions.

As it has recently happened in Spain and Greece, Chilean citizens are also restless.

They demand better education, social protection and participation in the political process. All these aspects influence and demand the Constitutional Court to update the Constitution, but the democratization of Chilean society and its transformation will be more the result of politics than the dictates of the judiciary, without prejudice of the contribution that the Constitutional Court will can provide.

Thank you.

3 Decision Nºs 1.254 and 1.345 as of May 25 , 2009, that handed down certain expressions of Article 171 of the Health Code.

4 Article Nº 171 of the Health Code.

5 Recital 17.

6 Judgment Role Nº 1254-08, as of 29 of July, 2009, said that the expression "free" is contained in the first paragraph of Article 595 of the Organic Code of Courts.

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

CONSTITUTIONAL COURT'S ROLE IN STRENGTHENING DEMOCRACY IN SPAIN

Hon. Francisco Perez de Los Cobos

Justice of the Constitutional Court of Spain

Democracy has been, since its origins in ancient Greece, the rule of the majority: decisions on public matters are made by vote of the citizens, all votes are equal, and the option prevails with the greater number of votes. When direct democracy gave way to representative, the one who gets to get the most number of votes in favor of his candidacy assumes the government. That is the classic formulation coined by Lincoln, that democracy is "government of the people, by the people and for the people."

The Enlightenment period in the eighteenth century, added three key notes:

First, that power comes from the people's consent, which results in a written document which outlines, in a rational way, the foundation of the government and reservation of the rights of citizens;

Second, that the state structure should be based on the principle of separation of powers, to avoid an absolute government;

Third, that the rights of citizens must be guaranteed against all and especially against its own ruler.

Finally, the trauma suffered by humanity during the Second World War has led to emphasize two things: the preservation of peace, thus avoiding war; and respect for human rights. These two points form the foundation of the United Nations, to which our two countries are its full members. They also form the core of the Universal Declaration of Human Rights, proclaimed on December 10, 1948, to which our two countries adopt and respect. Furthermore, in the case of Spain, there is a legal mandate to interpret our Constitution in light of that Universal Declaration (art. 10.2 CE).

These various strands that intertwine to form the concept of democracy are excelled in the constitutions of Europe; in this complex century of the 21st, the European countries are united by democracy, and to uphold it, it must include the rule law and respect for human rights (Statute of the Council of Europe, Treaty on European Union).

This set of basic principles has been embraced by the Spanish Constitution of 1978. Spain has suffered the intense ravages caused by the resistance of the old regime to accept the liberal revolutions and later social, economic and political revolutions enlighten by the twentieth century. We have suffered the failure of several subsequent constitutions with civil wars and military regimes. We paid a high price in lives, welfare and freedoms. That historical experience has been that the current Constitution was drafted by consensus of all political forces that have entered into a "framework of coincidences sufficiently broad to fit into it all kind of political options" (STC 11 / 1981, April 8, fj 7).

The constituent agreement is not exempt from ambiguities in some spots. It is precisely the desire to preserve the basic rules of coexistence, rules that were agreed upon in 1978 by all political forces, that the Constitution established a Constitutional Court. An independent, distinct and separate from other state institutions and does not represent any political force or defend any interests other than the law. Their only activity is the jurisdictional defense of the Constitution. Its only strength, the legal grounds.

The Court has done its work. In the thirty years of its existence since 1980, it has proven itself to strengthen and promote democracy as declared by the Constitution. A democracy where, essentially is governed according to the rule of the majority applies, the rule of law and respect for human rights, simultaneously.

The rule of the majority has been protected by the Spanish Constitutional Court in its various forms: in parliament, in elections and when the people call for a referendum. As noted in one of the most relevant sentences, "Our constitutional democracy ensures a very broad participation of citizens in public life and collective destiny, deciding them periodically through the election of representatives in the Parliament ... in the autonomous parliaments and local councils ... on the political fate of the national community in all areas, general, regional and local levels. Moreover, the Constitution even says that it is only citizens, acting through the process of reform, have the supreme power, that is, the power to amend the Constitution" (STC 103/2008, of September 11 , fj 2.7).

Numerous rulings by the Constitutional Court have affirmed the constitutional mandates that put to Parliament, representing the people, in the center of the political system: both the national parliament (Parliament, formed by the Congress of Deputies and Senate) and the Legislative Assemblies of the 17 Autonomous Communities which comprise the Kingdom of Spain.

Various rulings have highlighted the rule of law should not be eroded by governments regulations. Some rulings have protected the essential functions of the legislative to control the government or to approve the budgets. In all, the Court has served to strengthen the free debate in the parliament, where the forces of the majority and the opposition deliberate publicly about the actions

of the Government and the various alternatives that exist in matters of public interest.

Second, constitutional jurisprudence has ensured that the elections, which make possible the peaceful change of governments and nurturing of political majorities, either for the central government, the autonomous communities and the local councils, are free and fair.

Several rulings of the Court have ensured the respect for the minorities, even when their programs are contrary to the constitutional system. The Spanish Constitution does not establish a militant democracy: any political project is considered compatible with the Constitution provided that it does not resort to any activities that violate the democratic principles or fundamental rights of citizens. Debates and discussions between different political parties should be promoted through peaceful means: violence and intimidation can be prosecuted by law, including the dissolution of political parties which advocate or justify violence.

The Constitutional jurisprudence has underpinned in decisive terms, the essential features of the rule of law: the supremacy of law and independence of the courts.

It is the law, passed by Parliament, which should regulate the basic aspects of living: it is only the law that can regulate the exercise of fundamental rights, the basic institutions of the state or the system of Autonomous Communities.

This assumes special importance regarding the principle of legality in criminal matters: no authority can punish a citizen outside the law. You can not impose sanctions, whether criminal (including imprisonment), and purely administrative, for performing behaviors that have not been banned by a previous law, and can only impose the sanctions permitted by law. A wide range of sentences have been issued to a null administrative penalties or fines as well as regulations and sanctions which have no clear legal foundation.

On other aspect of the rule of law, the Spanish Constitution takes special care the jurisdiction and independence of the courts. In this regard, the Constitutional Court has carried out an essential work to implement this constitutional privilege. Since its first ruling, it has addressed issues of the relationship between state courts and the Catholic Church in sensitive areas such as marriage and family. Other sentences are on ensuring the principles of unity and exclusivity of the judicial power, solving major problems related to military jurisdiction, or on other matter, on the jurisdictional dimension (immunity from jurisdiction, universal jurisdiction, enforceability, etc.).

In terms of judicial independence, the Court has outlined the powers of the Supreme Judicial Council, the giving the highest guarantee of independence from the government; or the inherent requirements of the ordinary judge predetermined by law. In most cases, the sentences were pronounced on the judicial impartiality, which is an essential ingredient of the rule of law.

Constitutional jurisprudence has firmly faced the resistance of some administrative authorities to cooperate with the courts and, in particular, to execute the decisions that had been nullified by administrative acts or protected in any way the rights of citizens (eg, delays in delivery of the administrative record incidents of unenforceability, default due to lack of budget).

The Constitutional Court has always underlined the supremacy of fundamental rights: they are a beacon of all judicial proceedings and at the same time, its hard limit. This concern for the fundamental rights involved in judicial proceedings has led to profound changes in all jurisdictional areas within the Courts in Spain.

The clearest example is provided by the criminal courts. Since the seminal Judgment 31/1981, of July 28, the application of constitutional rights has fundamentally altered the criminal justice system, upgrading the trial, the requirement of full guarantee of proving charges and discharges, and full exercise of the rights to defend, grinding the effectiveness of resources, especially withy regard to the right of every defendant to have his conviction reviewed by a higher court, and in all matters relating to the investigation of criminal acts in its many manifestations . The effective prosecution of crime should not violate the rights of citizens: personal freedom, privacy of communications, privacy of home and many others.

The constitutional jurisprudence has also impacted other jurisdictions. Such as the successive legal reforms and limitations which that have modernized civil court order (Act 2000), social (Laws 1980, 1990 and 1995) and administrative-law (Law 1998), were largely done by incorporating the solutions and criteria deduced from the constitutional jurisprudence.

Naturally, human rights are not confined to the guarantees of due process *(fair trial).* The Spanish Constitution, in line with the constitutions of many countries adopted after the Universal Declaration of Human Rights of 1948, includes a broad statement of rights that all public authorities have a duty to respect. This includes nouns, such as the rights to life, to freedom of religion and expression, or to personal and family privacy. Others are structural in nature among which stands out the right to equality before the law and the prohibition of discrimination on grounds of birth, race or ethnicity, gender or other criteria forbidden by law.

In all these areas, the Constitutional Court has displayed a constant activity that allows the rights declared by the Constitution are not "merely theoretical or illusory, but real and effective" (STC 12/1994, of January 17, fj 6). Thus, to name a few of the strong stream of jurisprudence, it has analyzed the limits within which the legislature may partially legalize consented abortion (STC 53/1985) or the prison authorities may by force feed prisoners who are on hunger strike (STC 120/1990 of 27 June). It has vigorously protected the freedom of expression and information, which will give strong power to the media, an essential element of democracy (JCC 12/1982 of 31 March, 199/1999, 8 November), but also making sure that that the media (press, radio, television or, more recently, internet) do not infringe the rights of citizens for his honor, privacy or his or her own image (SSTC 105/1990, of June 6, 176/1995, 11 December). And it has vigorously defended the rights of citizens to demonstrate, to associate, or in the labor context, to organize or to exercise the right to strike and other collective action (respectively, JCC 36/1982 of 16 June 57/1990 of 29 March; 136/1999 of July 20 and 219/2001 of 31 October, 11/1981, 8 April and 183/2007 of 10 September), provided that they are not engage in coercive or violent behavior, or other rights

abuses that harm the rights of other citizens (SSTC 2 / 1982 of January 29, 37/1998, 17 February).

The Constitutional Court also deserves a chapter for championing in the rights of all citizens to equality before the law (JCC 49/1982, of July 14, 45/1989 of 20 February; 181/2000 of 29 June). This give a special relevance of equality between women and men, preventing the discrimination against women based on historical origin, and can be fought vigorously by the legislator through the programs on equality (SSTC 128/1987, of July 16, 12 / 2008 of January 29, 92/2008 of July 21).

In all those fields, and many others which due to time constraints cannot be mention here, the Constitutional Court has acted as a defender of the Constitution. And, therefore, has performed itself to the service for the establishment of an "advanced democratic society" that the Spanish Constitution of 1978 would like establish in Spain.

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

THE ROLE OF CONSTITUTIONAL COURT IN STRENGTHENING THE PRINCIPLES OF DEMOCRACY IN INDONESIA

Hon. Anwar Usman
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A. The Establishment of the Constitutional Court in Indonesia

The Birth of the Constitutional Court (MK) in Indonesia happened because of the 1945 Constitutions changes made by the People's Consultative Assembly (MPR) in 1999-2002. A process of constitutional changes intended to improve the basic rules of civic life that can reduce the potential for abuse of power in the past.

The changes are conducted over a period of four years. In 1999, the Assembly changed nine chapters. The things that changed the principle of term limits is the president, limits the power of the President in the field of legislation, and efforts to build a mechanism of checks and balances. In 2000, the Assembly managed to convert 25 chapters with six main topics which involve local government or decentralization, the position of citizens and residents, human rights, national defense and security, and concerning the flag, language and symbols of state and national anthem.

In 2001, the Assembly did a fundamental changes to the 1945 Constitution relating to sovereignty, the reform of parliament, direct presidential elections, forming a new organization called the Constitutional Court and set the procedure changes to the Constitution. In 2002, the Assembly made changes by focusing on issues of MPR composition, method of Presidential election, the settlement should the president die, resign, retire or cannot fulfill his obligations, granting the President to establish a Presidential Advisory Council, the abolition of the

Supreme Advisory Council, as well as provisions on the independence of Bank Indonesia. It also sets a minimum limit of the budget for education costs as much as 20% of the state budget, and prohibits any changes in the shape of the Unitary Republic of Indonesia.

With these changes, the manuscript of the 1945 Constitutions have been changed 300 percent. Before the changes, the 1945 Constitutions consist of only 16 chapters, 37 articles and 47 paragraphs plus 4 supplementary Transitional articles and 2 supplementary paragraphs. After 4 times of change, the 1945 Constitutions have become 20 chapters, 73 articles, 171 paragraphs plus 3 articles of the Transitional rules and 2 articles of Supplementary Rules.

Through the addition of Article 24C of the 1945 Constitutions, the Constitutional Court is present in the state system of Indonesia. The establishment of this state institution is intended to strengthen the principle of checks and balances between state institutions by providing primary authority that is testing the law against the 1945 Constitution which previously couldn't be done.

Thus, the formation of the Constitutional Court cannot be separated from the development of thoughts and ideas of the importance of judicial review in a democratic legal state. It is based on the premise that the law as a political product always has a character which is largely determined by the political constellation that gave its birth and the possibility of laws reflect the interests of the dominant political force that may be inappropriate or even in conflict with higher regulations. Therefore, there should be a mechanism to anticipate or cope with it through the mechanism of judicial review.

Moreover, in practice the government in the past turned out to have a tremendous opportunity to make a variety of laws and regulations as further constitution implementation. It opens up the possibility of the establishment of regulations that do not fit, even contrary to the Act that became the basis of its own formation.

In the 1945 Constitution Amendment, the idea of judicial review is given to the Constitutional Court for judicial review of Laws against Constitutions and for judicial review under the laws and regulations is given to the Supreme Court. At first there were three alternative institutions which were given the authority of judicial review against the Constitutions, namely the People's Consultative Assembly, the Supreme Court or Constitutional Court.

The idea of giving those powers to the People's Constitutional Assembly (MPR) finally ruled out because of inexistence of being the highest state institutions anymore, the MPR is not a group of legal and constitutional experts, but mainly representatives of political organizations and interest groups. The idea of reviewing the legal constitutions by the Supreme Court was also ultimately unacceptable because the Supreme Court itself has too many duties in the care of the case load as their competence. Therefore, the laws review against the Constitution authority finally was granted to its own institutions, namely the Constitutional Court.

B. Constitutional Court and Democracy

Article 24C of the 1945 Constitution asserts that the Constitutional Court is one of the judicial power perpetrators that held four authorities and one obligation. Constitutional Court authority is to hear at the first and last final decision for: (1) review on the Laws against the Constitution, (2) settle dispute of state institutions whose authorities are granted by the Constitution, (3) decide upon the dissolution of political parties, and (4) decide dispute of the election results. In addition to its authority, the obligation of the Constitutional Court is to give decision on the opinion of the Parliament regarding the alleged violations by the President and / or Vice President under the 1945 Constitution.

In carrying out the functions and its authority, the Constitutional Court must work independently and impartially. Thus in each of the handling, its investigation and verdict will be free from intervention and influence except of what is proven in the court. Only by this way that the decisions resulting in the strengthening of democracy can be accepted by the broad public in Indonesia. Since its establishment in 2003 until today, the Constitutional Court has received some 840 case requests consist of the 372 petitions for judicial laws review against the 1945 Constitution, 15 requests authority dispute between state institutions, 116 petition disputes against the results of national elections, and 337 petition disputes against the results of elections of regional heads. As of the cases examined by the Constitutional Court, 781 requests had been settled until early July 2011.

1. Judicial Review against 1945 Constitution

Cases of Judicial Review against the Constitution is the most widely requested to the Constitutional Court. The decision of the review can tell whether any provisions of law being petitioned is accepted or not opposed to the 1945 Constitution. Constitutional Court's decision which grants a petition for judicial review automatically will change the provisions of a Law which is declared contradictory to the 1945 Constitution and therefore has no binding legal force.

Since its creation on August 13, 2003 until early July 2011, the Court has made decision on 321 judicial reviews. Of these, 85 cases granted (26.5%), 106 cases rejected (33%), 94 cases are not acceptable (29.3%), and 36 cases withdrawn (11.2%).

Constitutional Court decisions are final interpretation of the 1945 Constitution materials and are named as the final interpreter of the constitution. Therefore, the Constitutional Court's decision is always associated with the substance of the 1945 Constitution that do not only embrace political democracy, but also economic and socio-cultural democracy.

Constitutional Court decisions in the case of reviewing the law, in principle, aims to protect citizens' constitutional rights and human rights which are fundamental to the establishment of democracy. In addition, there are also

decisions of the Constitutional Court related to the mechanisms of democracy, namely elections, both at national and local level.

Here are some examples of Court decisions which are closely associated with the development of democracy in Indonesia.

a. Voting Rights for Former Members of the Forbidden Organization

Article 60 Sub-Article g of Law Number 12 Year 2003 concerning General Elections for the DPR, DPD and DPRD specify the requirement to be candidates for the DPR, DPD, Provincial /Regency / City DPRD, which is not a former member of the banned Indonesian Communist Party (PKI), including its organization mass, nor the people involved directly or indirectly in G30S/PKI, or other illegal organizations. Constitutional Court declared that the 1945 Constitution prohibits discrimination as stated in Article 27 paragraph (1), Article 28D paragraph (1), Article 28I paragraph (2), of the 1945 Constitutions. However, Article 60 Sub-Article g of Law Number 12 of 2003 mentioned above prohibits a group of Indonesian Citizen (WNI) to be nominated and use their rights to be elected based on their previous political beliefs. So, the article is declared unconstitutional by the Constitutional Court.

b. Terms of Contempt against President and Vice President

The Decision Number 013-022/PUU-IV/2006 declares that Article 134, Article 136 up to Article 137 of the Criminal Code on defamation offenses against the President and Vice President against the 1945 Constitution and has no binding legal force. Constitutional Court found the articles governing criminal defamation against the President and Vice President could create legal uncertainty *(rechtsonzekerheid)* as very susceptible to interpretation whether or not a protest, a statement of opinion or thought is a critique or insult against the President and / or Vice President.

According to the Court, it is contradictory to Article 28D Paragraph (1) of the 1945 Constitution and can hamper the efforts of communication and information acquisition, which is guaranteed by Article 28F of the 1945 Constitution. The articles of the Criminal Code are also likely to hamper the right to freedom of states of mind with oral, written, and expression of an attitude because they always use the legal apparatus of the rallies. Therefore, it is declared contrary to Article 28, Article 28E Paragraph (2), and Paragraph (3) of the 1945 Constitution.

c. Offense Hostilities may Cause Offense Abuse of Power

In Decision Number 6/PUU-V/2007 Constitutional Court states that the substance of Articles 154 and 155 of the Criminal Code does not guarantee legal certainty so contradictory to Article 28D Paragraph (1) of the 1945 Constitution. Article 154 of the Penal Code reads “Whoever publicly stated feelings of hostility,

hatred or contempt against the Government of the Republic of Indonesia, shall be imprisoned for ever seven years or a fine of five hundred Rupiahs."

Article 155 of the Criminal Code reads "(1) Anyone broadcast, perform or paste to be known by the public, writings or images which express feelings of enmity, hatred or contempt against the Government of the Republic of Indonesia, or to make them more commonly known, shall be punished with imprisonment for four years and six months or a fine of four thousand five hundred Rupiahs, (2) If you are guilty of the crime on the job and at the time of committing the crime is still within the five years after the first convict punishment of such crimes be fixed, then it can revoke his/her right to do the job."

Both formulation of the Articles according to the Constitutional Court could lead to a tendency of abuse of power because they can easily be interpreted according to the ruling taste. Consequently, these articles assessed by the Constitutional Court may obstruct the freedom to express thoughts and attitudes as well as freedom of expression that is contradictory to Article 28 and 28E Paragraph (2) and Paragraph (3) of the 1945 Constitution. Therefore, on July 17, 2007 the Court decided that the provisions of Article 154 and Article 155 of the Criminal Code against the 1945 Constitution and have no legal force.

d. Individual candidates in the Regional Head Election

Constitutional Court Decision under No. 5/PUU-V/2007 grant judicial review of Article 56 paragraph (2), Article 59 paragraph (1), (2), and (3) of Law Number 32 Year 2004 regarding Regional Government. These articles provide that candidates for regional head and deputy head of the region can only be submitted by political parties and coalitions of political parties. However, after the Constitutional Court Review decision, now candidates can also follow the general elections of regional heads of political parties without going through the political party proposal as long as they meet all minimum requirements which have been stipulated in the legislation.

e. Changing Desirability Election System based on the Most Voted Ballots

In this case, the Court affirmed that Article 55 paragraph (2) of Law 10/2008, which define each of the three candidates have at least one female candidate is a policy in order to meet affirmative action for women in politics as a follow-up of Women of the World Convention of 1995 in Beijing and various international conventions which have been ratified. According to the Court, affirmative action will provide opportunities to women for the formation of gender equality having the same role between women and men.

The Court confirmed its interpretation that the provision of a quota of 30% (thirty percent) and having a female candidate out of every three candidates is a positive discrimination in order to balance the representation of women and men to become legislators in the DPR, DPD and DPRD. However, the Court also emphasized that to improve the position of women in politics is not solely

dependent on legal factors, but also cultural factors, capabilities, proximity to the people, religion, and the degree of community trust in female legislative candidates, as well as the increasing awareness on the role of women in politics.

Meanwhile, Constitutional Court judged that Article 214 letters a, b, c, d, and e of Law 10/2008 are unconstitutional. Those articles determine that the selected candidate is a candidate who gets above 30% (thirty percent) of the voter divisor number (BPP), or occupy a smaller sequence number if no one is getting 30% (thirty percent) of the voter divisor number, or who occupies a smaller sequence number if a gain of 30% (thirty percent) of the voter divisor number is more than proportionate number of seats obtained by a political parties participating in the election.

The above provision according to the Constitutional Court is contrary to the substantive meaning of popular sovereignty and qualified to be on the contrary to the principles of justice as set forth in Article 28D Paragraph (1) of the 1945 Constitution. It is also stressed that it is a violation of the sovereignty of the people if the will of the people which is reflected in their choice is being ignored in the determination of legislators, then it would actually violate the sovereignty of the people and justice. According to the Court, if there are two candidates who get extremely different votes between them then the candidate who received the most votes was defeated by the one who has less vote, because the one with less votes gets smaller rank number. Based on this decision the desirability of legislative candidates is determined directly based on the rank of votes they get.

f. Eliminating Releases Sanctions and Prohibition of the Quick Count and Survey

The provisions concerning the imposition of sanctions for the press declared unconstitutional by the Constitutional Court through Decision Number 32/PUU-VII/2009 dated February 24, 2009. The reason is because such provision causes legal uncertainty, injustice, and contrary to the principle of freedom of expression guaranteed by the 1945 Constitution.

Three main considerations underlying the decision of the Constitutional Court, namely: *First*, these articles can lead to interpretations that the institution which can give sanction could be an alternative institution, namely the Indonesian Broadcasting Commission (KPI) or the Press Council which allows the type of sanction imposed is also different; *Second* , the formulation of these provisions also mix the position and authority of the *Indonesian Broadcasting Commission* and the Press Council against the authority of the general election Committee to impose sanctions on the Commission who implement election campaign, and *Third*, the imposition of sanctions for broadcasters should not be done by the IBC (KPI), but rather by the Government (Minister of Communication) after fulfilling the due process of law, while toward the print media it is not possible to do revocation sanctions because the Law 40/1999 no longer use the licensing

agency issuing the print media, so it is a norm that no longer needed because the loss of legal force and *raison d'être* of this.

Meanwhile, the ban on poll (survey) and counting fast (quick count) of the Act of legislative and the President / Vice President elections also expressed against the 1945 Constitutions by the Constitutional Court Decision Number 9/PUU-VII/2009 dated March 30 2009 and successively Decision Number 98/ PUU-VII/2009 dated July 3, 2009. According to the Court, although they are not conducted by academicians or scholars, the survey or quick count about the election result is a scientifically-based activities which must also be protected by the spirit and principles of academic freedom and freedom of the pulpit-scientific-academic because it is guaranteed not only by Article 31 Paragraph (1), Paragraph (3), and Paragraph (5) of the 1945 Constitution but also by the provisions of Article 28F of the 1945 Constitution which includes freedom to explore, process and release information, including scientific information.

Further consider that the opinion polls, surveys, or the quick count results of voting by using the scientific method is a form of education, supervision, and a counterweight in the process of organizing the state, including the general election. Another consideration is public, from the beginning, has known *(notoir feiten)* that the quick count is not the official results and therefore cannot be treated as official results, but public has the right to know it. The quick count was not going to affect voters' freedom to impose their choice. This was because, according to the Court, the voting is over and a quick count is not possible to be done before the completion of voting.

g. Terms Endorse Presidential Election Voters ID Cards or Passports

One of the landmark decision of the Constitutional Court in the context of escorting democracy is the decision number 102/PUU-VII/2009 dated July 6, 2009 which broke the deadlock Presidential Election Law relating to legal issues about unregistered voters in the voters list (DPT). With reference to Decision Number 011-017/PUU-I/2003 dated February 24, 2004, the Court affirmed that the constitutional rights of citizens to elect and be elected (rights to vote and right to be candidates) is a right guaranteed by the Constitution, laws, and international conventions, so the restriction, distortion, elimination, and removal of rights is a violation of the rights of citizens.

It is explicitly guaranteed in the Constitutional Court according to Article 27 Paragraph (1), Article 28C Paragraph (2), Article 28D Paragraph (1), Article 28D Paragraph (3), and Article 28I Paragraph (2) of the 1945 Constitution. In addition, also in line with Article 21 of the Universal Declaration of Human Rights, Article 25 of International Covenant on Civil and Political Rights, and Article 43 of Law Number 39 Year 1999 on Human Rights.

Therefore, the Court gave legal considerations by stating that the rights of citizens to vote should not be hampered or hindered citizens to use their voting rights by various regulations and any administrative procedures. Thus, the provision requiring a citizen registered as voters in the voters list (DPT) is

more of an administrative procedure and should not negate the things that are substantially the citizen's right to choose (right to vote) in the general election.

The Court considers that the best solution to overcome the problems of voters who are not listed in the voters list is to allow the use of ID cards or valid passports in the Presidential Election. However, in order not to cause the loss of citizens' constitutional rights and not violate the provisions of the legislation in force, the Court also ordered the Election Commission (KPU) to further regulate the technical implementation of the use of voting rights for Indonesian Citizen not registered in the voters list.

Based on those considerations, the Court decided that Article 28 and Article 111 Election Law are constitutional insofar they are interpreted as to include citizens who are not enrolled in the DPT and fulfilled the election terms and procedures, (conditionally constitutional).

2. Dispute about Election Results

The next authority which is quite important in strengthening democratic principles is to decide disputes about election results. Case of election disputes is the case brought under the argument that there has been a mistake resulted from vote count conducted by the Election Commission (KPU) and /or there is a structured, systematic and massive violation. Election disputes cover the whole series of elections, both for the presidential and legislative elections. The authority of the Constitutional Court in judging disputed elections contributed to the strengthening of the principles and pillars of democracy in Indonesia, because this is the downstream of the process of election of the President and Vice-President and the representatives of the people who will sit in the Parliement.

There were 45 cases concerning the handling of Disputes in the Election Results (PHPU) Legislature in the 2004 elections with the following details: 15 cases granted (33.33%), 15 cases rejected (33.33%), and 15 cases were considered not acceptable (33.33%). As for handling 2009 PHPU Legislature, there were 71 cases with the following details: 25 cases granted (35.21%), 38 cases rejected (53.52%), and 8 cases were not acceptable (11.72%). There were 71 cases put to court in 2009. The cases were divided into 42 cases filed by political parties contesting in the 2009 elections, 27 cases filed by Candidate of Regional Representative Council and two cases filed by Candidates for President and Vice President. Against the 71 cases, 25 cases granted (35.21%), 38 cases rejected (53.52%), and 8 cases considered not acceptable (11.27%).

After the transfer of authority to handle disputes concerning the Regional Head Election (Election) from the Supreme Court (MA) to the Constitutional Court (MK) on October 29, 2008 under Section 236C of Law Number 12 Year 2008 Second Amendment to Law Number 32 Year 2004 regarding Regional Government, the Court has effectively carried out the task of examining, hearing and deciding cases since the beginning of November 2008 General Election. The

number of cases that have been settled until the General Election date of early July 2011 were 331 cases with the following details: 36 cases granted (10.8%), 224 cases rejected (67.7%), 67 cases considered not acceptable (20.2%), and 4 cases withdrawn (1.2%).

With regard to the details of the cases above, the jurisprudence of the Constitutional Court that was used in every decision related to the competence of the Court in dealing with the Constitutional Court as the guardian of election results, the Court adjudicated constitutional disputes not only to dissect Election petition to see the results of the vote as such, but also to examine in depth the existence of violations that have structured, systematic, and massive influence towards the outcome of the vote. This is very much in line with the provision requiring the Court rule on the dispute based on the truth of the legal substance as defined in Article 45 paragraph (1) of the Constitutional Court Law that states, *"The Constitutional Court decided the case based on the 1945 Constitution in accordance with evidence and convictions of the judge."*

The various decisions of the Constitutional Court have evidently provided the legal meaning and justice in the handling of election petition dispute. In the practice that has become accepted as a solution to jurisprudence and law, the Court can assess structured, systematic, and massive violations as a determining factor of the verdict by reason of breach with three properties that can significantly influence the outcome of ranking of the vote in the election or General Election.

Based on the views and paradigms that are then adopted, the Court confirms that the cancellation of election results due to structured, systematic, and massive violations is in no way intended by the Court to take over the authority of other judicial bodies. The Court did not want to prosecute criminal or administrative violations in the election, but only took the violations proven in the field that affect the election results as a basis for the verdict but did not impose criminal sanctions and administrative sanctions against the perpetrators. Therefore, a violation that has been legally proven according to the Constitutional Court and has been used as the bases of the decision of cancellation by the Constitutional Court can still be legally processed further to general courts or the State Administrative Court because the Court never makes decisions in the context of criminal or administrative. Constitutional Court may even provide an opportunity for prospective candidates thwarted by the Election Commission to lodge a partition before the Court.

The above mentioned Constitutional Court's jurisprudence is always taken into consideration and guidance in making decisions in elections in dispute. In casting its decision, the Court faces the decision either to grant or deny the true count according to the Petitioners, but the Court can also order to re-counting or re-voting. Counting or a re-vote can be ordered to be implemented in all areas or some areas of law depending on the facts revealed in the process of evidence at the trial.

3. Dispute of Constitutional Authority among State Institutions

The case on constitutional disputes between state institutions is a matter in which the petitioner is a state agency whose authority is granted by the 1945 Constitution. The state agency has a direct interest in the disputed authority. In the state system in Indonesia, the relationship between a state agency with another is bound by the check and balance principle. Under this principle, state institutions are considered equal and mutually compensate each other. As the implications of these mechanisms, and the fact that state agencies are considered equal in position, there is the possibility that the implementation of the authority of each state institution can have different interpretation of the 1945 Constitution. If different interpretation arises, the perpetrators of the amendment of 1945 find it necessary to establish a special agency entrusted with the task to decide upon the solution to these problems. In a state system outlined in the 1945 Constitution, the mechanism for the resolution of the dispute in authority is conducted through the state judicial process—the case is submitted to the Constitutional Court of Indonesia.

Until early July 2011 Constitutional Court has registered as many as 15 cases with the following details: two cases rejected (13.33%), seven cases not acceptable (46.67%), 3 cases withdrawn (20%), and the remaining three cases had not been decided upon (20%). Thus, there has been no single request granted yet by the Court.

4. Dissolution of Political Parties and Impeachment

As previously mentioned above, it seems clear that from various powers and duties specified by the 1945 Constitution and other legislation, the Court has been very productive in examining and deciding upon judicial review, election results disputes, and State Institution's authority disputes.

The authority that has never been used is to examine and decide upon the dissolution of political parties requested by the Government. Up until now there has never been any request from the government to dissolve a political party, therefore it can be concluded that no political party at the moment is indicated violating the constitution and laws that can be used as a base to dissolve it.

The obligation of the Constitutional Court upon deciding on the opinion of the House of Representative that the President and / or Vice President has violated a specific law or no longer qualifies as President and / or Vice President under the has never been addressed by the Constutional Court since up until now the House has never filed such a case. More precisely, since the Court established up to the moment, President and / or Vice President has never been considered by the House of Representative to violated a specific law or ineligible as President and / or Vice President under the 1945 Constitution.

C. Concluding Remarks

Up to this moment, the presence of Constitutional Court in the Indonesian state system is considered by many has given contributions to the growth of democratic principles and law enforcement in Indonesia. Since the establishment of the Constitutional Court, making the laws can not be based only on majority consensus of the current interests, but also needed to be considered whether the regulation is contradicted with the constitution or not. If later it is proven that the law making process and its content is contradictive with the Constitution, the Constitutional Court could annul.

In addition the Court also has a role in upholding democracy in the process of legislative elections, the President and Vice President, as well as regional head/ vice regional head. In examining and resolving an election dispute, the Court did not merely count the votes, but also substantively judge whether election process is legally valid. If proven there's a structured, systematic, and massive infringement in the performed election then the Constitutional Court can order for a recount or re-vote of the vote.

The role of establish checks and balances is also performed by the Court during the impeachment process of President. Since the Constitutional Court existed, the President can not be interupted with impeachment treat by the House of Representative only because of his political policy. The President can only be threatened with impeachment by the House of representative if he violates certain major things or have a certain conditions that do not qualify as President and / or Vice President under the 1945 Constitution in its implementation which should be tested prior through previlegiatum forum on the Constitutional Court. Yet the President and / or Vice President also can not be arbitrary because he still can be under strict supervision by the Parliament in which the ordinance was controlled by the Court based on its control frame of the relationship between state institutions which regulated by the constitution.

Although sometimes there are some obstacles during the implementation of the Constitutional Court's decision, but in general the rulings of the Constitutional Court can be implemented by all parties, including the President and the House of Representative.

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THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

SESSION ONE

The Role of Constitutional Court and Equivalent Institution in Strengthening the Principles of Democracy

PANEL III

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

CONCEPTION OF FURTHER DEEPENING DEMOCRATIC REFORMS AND DEVELOPMENT OF CIVIL SOCIETY IF THE REPUBLIC OF UZBEKISTAN AND DEMOCRATIZATION OF THE STATE POWER AND GOVERNANCE

Hon. Uzak Bazarov

Justice of the Constitutional Court of Uzbekistan

First of all, let me express my gratitude to the Constitutional Court of the Republic of Indonesia for the opportunity to participate in this international symposium such a high level, and also congratulate on its eighth anniversary and wish success in efforts to strengthen democracy and protect human rights.

Since gaining independence Uzbekistan has set the goal of creating a humane and democratic state of law, which was proclaimed in the Constitution of the Republic of Uzbekistan.

The Constitution stipulates that Uzbekistan is the sovereign democratic republic, that democracy in the Republic of Uzbekistan is based on panhuman principles according to which the highest value is the man, his life, freedom, honor, dignity and other birthrights, that the system of state power in Uzbekistan is based on the principle of separation of powers into legislative, executive and judicial branches.

Based on this principle parliament of the country - the Oliy Majlis was elected, an effective system and structure of executive power was created, a complete system of judicial power - the Constitutional Court, courts of general jurisdiction and commercial courts was established.

Alongside with that during the past period of independence wide-ranging reforms in the sphere of state power and administration were carried out in order to realize progressively the constitutional principle of separation of powers, to

create between them an effective system of checks and balances, to strengthen the role of authority and control functions of the legislative and representative powers in central and local levels, to implement the measures of liberalization, autonomy and independence of the judicial system.

Based on the decision of the referendum held on January 27, 2002 a bicameral national parliament - Oliy Majlis was established.

The main objectives pursued in this case - were to form a system of checks and balances in the exercise of powers by Parliament, substantially improve the quality of legislative work, to achieve a balance of national and regional interests, bearing in mind that the upper house - the Senate, representing mainly local councils, represents the regions and the lower Legislative Chamber - operates on a permanent professional basis.

In the development of the national parliament particular importance had the adoption in 2003 of the Constitutional Law "On Legislative Chamber of Oliy Majlis of Uzbekistan", "On the Senate of Oliy Majlis of the Republic of Uzbekistan", which clearly defined the status, powers and mechanisms of each chamber and the new parliament as a whole.

One of the politico-legal acts of the enormous importance of this period was an exclustion from the Constitution of the Republic of Uzbekistan in 2007, the rules stipulating that the president is the chief executive power. Now Article 89 of the Constitution specifies that "the President of the Republic of Uzbekistan is the head of the state and ensures the coordinated functioning and interaction of bodies of state power."

An important step towards liberalization was the abolition of the post of Chairman of the Cabinet of Ministers, which previously was held by the President of the Republic of Uzbekistan. In accordance with the adopted laws the Prime Minister now, not only organizes, but also manages the activities of the Cabinet of Ministers, is personally responsible for effectiveness of its activity, presides at meetings of the Cabinet of Ministers, signs its documents, makes decisions on state and economic management.

However, the growing level of political culture and social consciousness of the population and the dynamic processes of democratization and liberalization of society, strengthening the multiparty system create the necessary prerequisites to ensure a more balanced distribution of powers among the three subjects of state: President - Head of State, the legislative and executive powers. In this regard the President of the Republic of Uzbekistan Islam Karimov on November 12, 2010 at the joint session of the chambers of the Oliy Majlis of Uzbekistan presented "The Concept of the further deepening of democratic reforms and the formation of civil society in the country", which provided the legislative initiative for democratization of state power and control. Based on these initiatives the Law "On Amendments to Certain Articles of the Constitution of the Republic of Uzbekistan (articles 78, 80, 93, 96 and 98)" was adopted.

Thus, the law established a new mechanism for the appointment of the Prime Minister. Now candidature of the Prime Minister proposed by a political

party with has the most numbers of parliamentary seats in elections for the Legislative Chamber of Oliy Majlis, or more political parties which have obtained the equal most numbers of seats in parliament.

The President of the Republic of Uzbekistan, after considering the nominated candidature for the post of Prime Minister within ten days offers him for consideration and approval by the chambers of the Oliy Majlis of the Republic of Uzbekistan.

An important novelty is the introduction of the institution of non-confidence vote in the system of government which is based on the principle of separation of powers. It represents itself as a mechanism in accordance with which in case there arise stable contradictions between the Prime Minister and the Legislative House of the Oliy Majlis on the suggestion, officially made for the name of the President of the country by deputies of the Legislative House in the size not less than third of their total number, the question on expressing the veto to the Prime Minister will be introduced for discussion in the joint session of the Houses of the Oliy Majlis. The Veto to the Prime Minister will be considered accepted if not less than two thirds of the total number of deputies of the Legislative House and members of Senate of the Oliy Majlis vote for him. In this case the President of the country makes a decision on dismissing the Prime Minister from the position. And all members of the government will leave their positions together with the Prime Minister.

This institute was introduced for the purpose of expanding the authority of the parliament in realization of the control over execution of laws by the executive power and is challenged to promote raising the role of the Legislative power in the political system of the country as well as the responsibility of the parliament for provision of consistent and qualitative execution of adopted laws.

Another principle provision of the above said law is granting the houses of the Oliy Majlis the right to hear and discuss the reports of the Prime Minister on urgent questions of social-economic development of the country. This norm completing the above said mechanisms for interaction of the parliament with the government emphasizes the accountability of the government before the parliament, raises the Prime Minister's responsibility, and finally, will promote to the establishment of a constructive dialogue between the legislative and executive branches of the government.

Thus, in the Republic of Uzbekistan the principle of creating an effective system of checks and balances designed to ensure balance, operates not only between branches of government, but also between the subjects of power - the head of state, and branches of government. Thus, the President has the right of legislative initiative, legislation passed by Parliament shall come into force upon signature by the President, the President has the right to veto that is to return the law to parliament for revision, the Constitutional Court determines the constitutionality of laws, decrees of the chambers of the Oliy Majlis, the decrees of the President, government regulations, the President represents in the Senate for election nominations of judges of the Constitutional, Supreme and Economic

courts. All this and the others are part of a comprehensive mechanism to ensure the principle of checks and balances.

In the system of ensuring the principle of checks and balances an important place occupies the Constitutional court of the Republic of Uzbekistan. The Constitutional court is the judicial body operating on a permanent basis. It is elected for five years by the Senate of the Oliy Majlis of the Republic of Uzbekistan upon representation of the President of the Republic of Uzbekistan consiting of in a Chairman, Deputy Chairman and five members of the Constitutional Court, including a judge from the Republic of Karakalpakstan. The Constitutional Court and its judges in their work, are independent and obey only to the Constitution of the Republic of Uzbekistan. Decisions of the Constitutional Court are binding for all bodies of state authority and administration, as well as enterprises, institutions, organizations and public associations, officials and citizens.

Basic principles of operation of the court are dedication to the Constitution, independence, collegiality, transparency and equality rights of the judges.

The Constitutional court tries cases on the constitutionality of the acts of legislative and executive power, that is, determines the compliance of the laws of the Republic of Uzbekistan Republic of Uzbekistan, decisions of Oliy Majlis, presidential decrees, regulations of the government and local authorities, international treaties and other obligations of the Republic of Uzbekistan . Consequently, it protects individuals from violations of their rights and freedoms from unconstitutional legal acts, including the laws.

Jurisdiction of the Constitutional Court applies to the regulations which have formally adopted and entered into legal force. The Constitutional Court has no control over the constitutionality of draft legal acts, ie, carries out the subsequent control and not the preliminary.

Decisions adopted by the Constitutional Court on normative-legal acts found as not conforming the relevant norms of the Constitution come into effect upon publication in the press. Decisions of the Constitutional Court are final and could not be appealed.

In protecting the rights and freedoms of great importance has an authoritative interpretation of the Constitution and laws. Interpretation is a form of the activity of the Constitutional Court, which ensures the implementation of constitutional norms, principles and guidelines, promotes the authority of the Constitution, prevents the violation of the Constitution and laws, and, ultimately, protects human rights and freedoms. The aim of interpretation is to eliminate uncertainties in understanding the provisions of the Constitution and laws, provide their observance. By interpretation the Constitutional Court explains the real meaning of constitutional norms and laws, warning their different understanding. Thus, it serves as the main tool for ensuring the stability of the Constitution, the protection of its norms. Thus, the Constitutional Court reviewed the case on the interpretation of paragraph five of the first part of Article 6 of the Law "On Advocacy," due to the fact that the Republican research forensic center refused a request of advocates to issue the written expert opinions on matters necessary

for the provision of legal assistance to clients. The Center cited to the absence of the norm entitling this right to advocate in procedural code. And yet, this norm of the Law "On Advocacy" says that while exercising the professional activity advocate has the right "to seek with the consent of the client and to obtain the written expert opinions on matters necessary for the provision of legal aid." According to the adopted in this case the decision of the Constitutional Court "expert agencies or experts at the request of a advocate with the consent of his client should give him a written expert opinion on the matters necessary for the provision of legal aid."

In accordance with the Constitution, the Constitutional Court has the right of legislative initiative. This right of the Constitutional court is realized by introducing the bill to the Legislative Chamber of the Oliy Majlis. In this case the Constitutional Court bases on the priority of human rights and freedoms. For example, the first part of Section 536 of the Criminal Procedural Code of the Republic of Uzbekistan stipulated that parole from the penalty and replacement of the unserved part of punishment with more lenient penalties is applied by a judge upon presentation of the administration of penal institutions. In other words, this rule did not provide for direct appeal to the court of the convicted person or his counsel with a request for parole from the sentence, or replacement of the unserved part of punishment with more lenient punishment. Meanwhile, article 44 of the Constitution of the Republic of Uzbekistan stipulates that "Everyone is guaranteed judicial protection of his rights and freedoms." Following the adoption of the Constitutional Court's decision on this issue all rules of law were amended by Parliament in accordance with the requirements of the Constitution.

Thus, in the Republic of Uzbekistan it is created an effective system of checks and balances on the basis of the constitutional principle of separation of powers, which ensures the implementation of democratic principles in the exercise of state power and governance and in this important role also belongs to the Constitutional Court of the Republic of Uzbekistan.

Thank you for your attention.

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

THE ROLE OF CONSTITUTIONAL COURTS OR EQUIVALENT INSTITUTIONS IN STRENGTHENING THE PRINCIPLES OF DEMOCRACY : THE CASE OF THAILAND

Hon. Chalermpon Ake-uru
Justice of the Constitutional Court of Thailand

Thailand is a constitutional democracy with The King as Head of State. It is a democracy governed by a constitution. The current Constitution is the Constitution of the Kingdom of Thailand B.E 2550 (2007). Sovereign powers, belonging to the Thai people, which are separated into legislative, executive and judicial powers are exercised through the National Assembly, the Council of Ministers and the Courts respectively in accordance with the provisions of the Constitution. The performance of duties of the National Assembly, the Council of Ministers, the Courts, Constitutional Organs and State agencies must be in accordance with the rule of law.

The Constitution it self prescribes the purposes, powers and limits of a government and sets forth how a country is administered. It contains the provisions on the structure of state powers and the relations among these powers as well as provides guarantees of basic rights and liberties of the people. In constitutional democracy, the constitution is regarded as supreme. Thus, it is provided in the Constitution that the Constitution is supreme law of the state. The provisions of any law, rule and regulation, which are contrary to or inconsistent with the Constitution will be unenforceable.

In this connection, the Constitutional Court performs the important function of safeguarding this supremacy of the Constitution. It also serves as a judicial body which recognizes and protects the rights and liberties of the people and

translates into reality the protection of rights and liberties by the exercise of adjudicative power.

The Constitutional Court was established by virtue of the Constitution. It consists of the President and eight judges to be appointed by the King upon advice of the Senate. Judges of the Constitutional Court are styled "Justices of the Constitutional Court" .

The Constitution provides for the Constitutional Court to have powers and duties in adjudicating and ruling constitutional cases. These powers and duties may be divided into the following nine categories :

(1) constitutional review of bills and draft rules of procedure of the legislative branch prior to their promulgation to ensure that they are not inconsistent with or contrary to the Constitution;

(2) constitutional review of a promulgated law to ensure that it is not inconsistent with or contrary to the Constitution;

(3) constitutional review of the prerequisites for the enactment of an Emergency Decree to ensure that it is not inconsistent with or contrary to the Constitution;

(4) ruling on whether or not members of the House of Representatives, senators or members of the committee are involved directly or indirectly in the use of the appropriations;

(5) ruling on disputes regarding the powers and duties among the National Assembly, the Council of Ministers or the Constitutional organs other than the Courts which arise between two or more of such organs;

(6) review resolutions or regulations of political parties, consideration of appeals of members of the House of Representatives and ruling on cases concerning the constitutional exercise of political rights and liberties by a person or a political party;

(7) ruling on the membership or qualification of a member of the National Assembly, Ministers and Election Commissioners;

(8) ruling on whether or not a treaty requires prior approval of the National Assembly;

(9) powers and duties prescribed under the Organic Act on Political Parties, B.E. 2550 (2007).

Rulings by the Constitutional Court in the nine categories of constitutional cases help promote and strengthen the principles of democracy in accordance with the Constitution.

Since its establishment in 1998, the Constitutional Court has rendered several important decisions or rulings. Due to limited time available, in this presentation I will mention only some of these decisions or rulings.

1. Ruling No. 21/2546 In this case, the Constitutional Court held that the Names of Persons Act B.E. 2505 (1962), was contrary to or inconsistent

with the Constitution because it contained mandatory provisions requiring married women to use their husbands' surnames only would be an inequality in rights due to differences in sexes and therefore contravened the principle of equality. This ruling sets a precedent on the equality between men and women in society.

2. Ruling No. 18/2551 (Ruling on the dissolution of Machima Thipathai Party), No. 19/2551 (Ruling on the dissolution of Chart Thai Party), and Ruling No. 20/2551 (Ruling on the dissolution of People Power Party) These three parties were the ruling political parties at that time. In these three cases the Constitutional Court stated that the Election Commission or the Supreme Court of Justice, as the case may be, considered that there were reasonable grounds to believe that members of the executive committees of the three political parties did violate the Election Law resulting in the election of members of the House of Representatives not proceeding in an honest and fair manner in order to acquire the power to rule the country by a means which is not in accordance with the modes provided in the Constitution. The Constitutional Court therefore decided to dissolve these three political parties. The effect of the ruling is thus laid down as a principle that a democratic regime of government must always go through an honest and fair election in accordance with the Constitution.

3. Ruling No. 12-13/2551 This is a case of conflict of interests. In this case, the Constitutional Court held that section 267 of the Constitution prohibits the Prime Minister and Ministers from being employees of any person to prevent conflict of interests. The fact that Mr. Samak Sundaravej, Prime Minister at that time, continued to act as a host for the TV cooking shows and accepted remuneration even after assuming the position of the Prime Minister, showed that he was employed as stipulated in section 267 of the Constitution. He therefore committed an act prohibited by or incompatible with section 267 of the Constitution, resulting in the termination of his premiership.

4. Ruling No. 12/2552 This is a case concerning a Military Government Order issued in 1972 which prohibited owners or possessors of shops from operating food and beverage businesses between 1 a.m. to 5 a.m. without authorization. The Constitutional Court ruled that the Military Government Order issued in 1972 limited the liberties to run a business and to undertake a fair and free competition and held that that Military Government Order was against the provision on restriction of the rights and liberties of people as well as the right of engagement in a business or an occupation as provided by the Constitution. This decision therefore sets a standard on the protection of rights and liberties of individuals.

Regarding compliance with decisions or rulings of the Constitutional Court, it could be said that all constitutional organs and state agencies are enjoined by the Constitution to comply with such decisions. The Constitution stipulated that the decision of the Constitutional Court will be deemed final and binding on the National Assembly, the Council of Ministers, the Courts and other state

organs. It is final in the sense that the parties may not file an appeal to any court or body. It is binding in the sense that the decisions of the Constitutional Court will be binding not only to the parties but also to third parties. Thus, once the Constitutional Court passes a ruling, that ruling will be directly binding on the National Assembly, the Council of Ministers, the Courts as well as constitutional organs and state agencies in the enactment, application and interpretation of laws.

In practice, so far, there has never been a case of non-compliance with the decision of the Constitutional Court once the decision has been rendered.

However, during the process of the Court's deliberation of a case, there may be criticisms, diverse challenges or any form of political pressure from some quarters. Take for example, on the day that the Constitutional Court would read its ruling on the case of dissolution of the three political parties, there were a blockade of the courthouse of the Constitutional Court by a mob who supported the three political parties to prevent the Justices of the Constitutional Court and officials of the Office of the Constitutional Court from entering the courthouse to perform their duties. The venue for hearing and decision on these three political parties' dissolution cases had finally been shifted to the courthouse of the Administrative Court.

In facing these challenges and obstacles, the "state of mind" of the Justices of the Constitutional Court becomes all the more important. The Justices of the Constitutional Court must stand firm, face the difficulties with great fortitude, and also maintain the high level of resilience in the discharge of their judicial duties with impartiality.

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

THE BASIC AUTHORITY OF THE CONSTITUTIONAL COURT IS THE RESPECT TO THE CONSTITUTION

Hon. Johannes Schnizer
Justice of the Constitutional Court of Austria

My duty is to speak about the challenges and obstacles in enforcing authority in the constitutional court, in order to strengthen the democratic principles. The Austrian constitutional court is the world's oldest specialized constitutional court, structured with the federal constitution in 1920.

Now, I would like to illustrate our theme and offer you an example of our history.

In 1933, it came to the abolishment of democracy and the establishment of a dictatorship. The background of what has occurred in the past becomes a lesson for today. It was the measures taken as containment of the budget deficit following the economic crisis of 1929 and the crash of the banking industry that happened in1931. The federal administration drew a law to cut down on salaries of the railroad men. The government's proposal was accepted with only one vote-passing majority in parliament. The speaker of the national council, who belonged to the opposition, determined that one of the parliament members had delivered two ballots and therefore the vote was not valid. After tough discussions he then laid down his position to be able to cast his own vote. Responding to the situation, both of his deputies also laid down their positions, in order to be able to secure the majority of votes for the government. The chancellor at that time described that the parliament had failed because of lack of incompetency of the chair to act and deliberate the administration unconstitutionally with an emergency decree.

The connection to the constitutional court: the Austrian constitutional court assembled to discuss about the constitutionality of the decision made by the chancellor - the proceeding was an evident of unconstitutionality, and the

constitutional court had received calls from all sides. The chancellor ordered the police and paramilitary forces, which were apparatus of the government to the constitutional courts assembly to prevent the adoption of resolution. Historians say that it was the crucial point of violation of the constitution: It is possible that a State institution offended the constitution. Only if the constitutional court gets obstructed in their effort to prove the constitutional offence, then it would eventually come to a violation of constitution and a switch-off of the constitution.

It is not a coincident that in those years, in the late twenties and early thirties of the previous century, a controversy occurred in our scope of scientific based discussion of who should be appointed to protect the constitution. Standing side beside, as leading counterparties were two most influential German and Austrian guru of constitutional law during that era.

Carl Schmitt stated that the "guardian of the constitution" should be the President, because he inherit the power to dismiss the government, and because of his highest command of the federal military. Hans Kelsen the most important author of the Austrian federal constitution and the founder of the constitutional authority countered the issue saying that the guardian of the constitution should be the constitutional court: An independent Institution should exist to decide over a constitutional dispute. The constitution forms and limits the authorization of the government institutions, only an independent i nstitution could decide when a government Institution outstrips its authorities or in other terms offends the constitution. As paradox it may sound: Out of the reason because the constitutional court possesses no other authorities, it is in shape to make decisions over other institutions, which forms and limits the constitution. Furthermore the incident in year 1933 in Germany had shown that the President was not in the position nor has the will, to prevent the act of offence toward the constitutions that led to Hitler's dictatorship.

Hence in our present fact: the basis of authority of a constitutional court is placed within respect of the constitution. Offence against the constitution may occur. Eventually, according to its nature, constitutional regulations are often indefinite, and require interpretation.

Like every judicial interpretation's request, it could lead to various results. It is legitimate and is unavoidable in particular. Moreover if it comes to the question of the governmental powers, every institution wants to extend their influence as far as possible. That is why an independent institution is very much needed. Respect towards the constitution exists, because of respect toward the constitutional courts decisions.

According to the Austrian constitution the president has the endorsement, to implement the decisions of the constitutional court, whereby every state institution including the military are comprised under his authority (Art.146 B-VG). Except for the execution of financial payments, where the proper court is in charge, it has never come to such execution. Although it has never occurred, it surely does not mean that every decision of the constitutional court would immediately be implemented. A prominent example would be the dispute

over locations of signboards. In a region south of Austria, in Kaernten, where minorities of Slovenian descendants reside, according to the constitution, (precisely adopted after the 1955 Treaty of Austria which brought freedom) these minorities have the right of bilingualism including for the placement of bilingual signboards, if it exceeds a certain figure of the minority. The constitutional court then decided for the placement of the bilingual signboards in certain areas. The governor of Kaernten at the time refused to fulfill the decision for years, because he politically succeeded by standing on the side of the majority.

The media exposed a big discussion over this matter. They threw questions of why such decisions could not be implemented; indeed it came to difficult legal issues but the actual question is: Should the President order the military to march to Kaernten, to place the signboards, and guard them so it would not be able to be removed? That would ruin the rights of freedom and could heat up and arise conflict between the minorities and parts of the majorities.

On the other hand – and this is very decisive– the media showed that they completely couldn't understand how one could disobey the realization of the decision made by the constitutional court.

All state institutions – at least those outside of Kaernten – emphasized, that the decision made by the constitutional court must be implemented, even if it does not meet our interest. This also represented the opinion of the majority of the people.

There was a strong public pressure to the state of Kaernten to respect the decision of the constitutional court.

While the bilingual signboards have been put up, and the decision of the constitutional court is implemented, the new governor of Kaernten acknowledged a push of popularity. This shows that the authority of the constitutional court requires respect of the people toward the decision made by the constitutional court itself. In this matter the role of the mass media comes in play, - as well as the readiness of other state institutions to publically take side of the constitutional court - the substantial role. A substantial prerequisite, for the function of the Constitutional Court's jurisdiction, is hereby the independency of the mass media. They must be able to cover and bring up constitutional offence so that the principles of democracy can be protected, and at the same time to guarantee these principles of democracy and Institutions which are in conjunction with the measures constructed by the constitutional court.

Finally, I would like to deliberate the substantial obligation of the constitutional court in its direct responsibility in protecting the fundamentals of democracy. I mean the responsibility of the constitutional court to determine over the legal standard of election.

The constitutional court takes its obligation as the election court seriously, in correctly regulating the law of the election proceeding in its jurisdiction, to be able to inspect the representatives of political parties, in detail according the elections law.

Obviously it is recurring to the exclusion or dividing of election. In all these cases an immediate action is required to conduct new election, the decision of the constitutional court will always be respected. The reason is because it would be inconceivable for the people, a decision of the constitutional court concerns the rectitude of the election, which is not changeable, and it concerns the important democratic right of the people. Eventually the people embraced the reconstruction of democracy after the end of Hitler's dictatorship in 1945 through the allied forces, and wont let their rights be taken away anymore.

I'm coming to my last point, which I think would be the most substantial issue: the basis of authority of the constitutional court is the people's trust to the institution itself. According to opinion polls, the Austrian constitutional court belongs to the most respected instrument not only within the Republic, but also through out the entire Austrian society. The constitutional court should obtain this form of trust on its own: through comprehensive decisions, through constant decision practices and followed by foreseeable decisions, an alert decision, which would respond on substantial questions and through the irreproachable livelihood of the members of the constitutional court. This is a personal contribution of which every constitutional judge would contribute to the authority of a constitutional court.

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

THE ROLE OF CONSTITUTIONAL COURT AND EQUIVALENT BODIES IN STRENGTHENING THE PRINCIPLES OF DEMOCRACY

Hon. Mykhailo Zaporozhets

Justice of the Constitutional Court of Ukraine

1. Democracy is one of the most important social values, which provides individual involvement in shaping the authority and therefore it is a necessary prerequisite for personal freedom and relative independence from the authority. Thus, the structure and the activities of a democratic state is consistent with the essence of universally recognized human and citizens` rights and freedoms.

   The principles of democracy are unconditional requirements arising from the very essence of democracy imposed on all its subjects and institutions. Basic and fundamental principles of democracy include, in particular, the principles of pluralism, the involvement of citizens in resolution of matters of national importance, people's sovereignty, publicity, division of powers, unity, equality, and guarantee of rights and responsibilities. The principles of judicial independence, responsibility and accountability of officials to the representative bodies and the people, collegiality, combination of representative and direct forms of democracy, decentralization of power, free media, freedom of speech, freedom of political organizations and others specify and meaningfully develop basic principles.

2. Despite the declaration of democratic principles at the constitutional level, the process of their adoption in modern states is rather complicated and contradictory. Bodies of the constitutional control are designed to carry out an important role in this process; the European Commission "For

Democracy through Law" (Venice Commission) has repeatedly pointed out their key role in the implementation of democratic principles.

It is easy to see by shooting the fleetest glance at the powers of bodies of the constitutional justice regarding the functioning of mechanisms of direct democracy. For example, in Romania and France, they control the conduct of presidential elections and referenda; in Kazakhstan and Moldova – presidential and parliamentary elections; in the Republic of Lithuania the Constitutional Court provides an opinion on violation of legality at presidential and parliamentary elections. In Greece, the Supreme Special Court examines the legality of the referendum results; in Slovakia, Greece, France and the Czech Republic bodies of the constitutional control consider issues related to election of members of parliament; in Bulgaria – issues related to election of the president; in Croatia – members of parliament and the president; in Greece, the Czech Republic, Austria they are entitled to consider the issue of deprivation of deputies` mandates. Bodies of the constitutional justice are entitled to consider issues of the distribution of competence among the highest state bodies and bodies of autonomy, as well as among the autonomous regions (Spain, Italy); similar powers are entrusted to bodies of the constitutional justice in some federal states as well.

3. Article 1 of the Constitution of Ukraine proclaimed Ukraine a democratic state, other articles stipulate basic principles of democracy, in particular: the priority of human rights and freedoms (Article 3), people's sovereignty (Article 5), division of powers (Article 6), diversity (Article 15), equality and equity (Article 24, 26), publicity (Article 34).

The role of the Constitutional Court of Ukraine, which is the peer of the Ukrainian Constitution, in strengthening and realization of these principles is key and undisputed. Let us dwell upon those principles of democracy, which are directly reflected in its jurisprudence and received the appropriate development and conceptual definition.

4. *The principle of people's sovereignty* is primary in the development of society, formation of democratic principles of political life. Article 5 of the Constitution of Ukraine stipulates that the people are the bearers of sovereignty and the only source of power, who exercise power directly and through bodies of state power and bodies of local self-government. This constitutional provision has been developed in the decisions of the Constitutional Court of Ukraine, which is reflected in the following conceptual positions:

- the power of the people is primary, unique and inalienable; it is exercised by the people through free will and elections, referendum and other forms of direct democracy in the manner specified by the Constitution and laws of Ukraine, through state bodies and bodies of local self-government which are formed in accordance with the Constitution and laws of Ukraine[1];

1 See Decision of the Constitutional Court of Ukraine in the case concerning execution of power by the

- results of the people's will obtained by way of election or referendum are binding[2];
- the exclusive right of the people to determine and to change the constitutional order in Ukraine shall not be usurped by the state, its bodies or officials[3];
- seizure of state power by force or other unconstitutional or illegal means by state bodies and bodies of local self-government, their officials, citizens or their associations is prohibited[4];
- in all-Ukrainian referendum upon people's initiative, the people as the bearers of sovereignty and the only source of power in Ukraine may exercise their exclusive right to determine and to change the constitutional order in Ukraine by means of adoption of the Constitution of Ukraine in the manner envisaged by the Constitution and laws of Ukraine; the people of Ukraine may also pass laws (introduce amendments to them) in the manner envisaged by the Constitution and laws of Ukraine, except those laws which cannot be passed at referendum according to the Constitution of Ukraine[5].
- decisions of the all-Ukrainian referendum concerning adoption of laws is final and does not require any approval, including the Verkhovna Rada of Ukraine[6].

These and other legal positions of the Constitutional Court of Ukraine stated in the decisions concerning the official interpretation of the Constitution and laws of Ukraine promote a clear and consistent understanding by all subjects of the constitutional legal relationship of the crucial issues of state building which are resolved on the basis of the principle of the people's sovereignty or those related to it.

The Constitutional Court also approves and implements the principle of people's sovereignty by declaring certain provisions of laws which violate the electoral rights of citizens of Ukraine unconstitutional [7]. Fundamental principles of universal, equal and direct suffrage, free and secret ballot of the citizens of Ukraine in elections are the constitutional framework of the electoral process.

5. The most important principle of democracy is the *principle of division of powers*, drawn up by the international community within the process of development of democratic states. Its basic idea is that the democratic political regime may be established in a state only if the division of authority

people dated October 5, 2005 No. 6-rp/2005.

2 Ibid.

3 Ibid.

4 Ibid.

5 See Decision of the Constitutional Court of Ukraine in the case concerning adoption of the Constitution and laws of Ukraine at referendum dated April 16, 2008 No. 6-rp/2008.

6 Ibid.

7 See, for example the Decision of the Constitutional Court of Ukraine in the case concerning elections of the People's Deputies of Ukraine dated February 26, 1998 No. 1-rp/1998, in the case concerning application of the Law of Ukraine "On Election of the President of Ukraine" dated December 24, 2004 No. 22-rp/2004.

functions among independent state bodies is provided. Three fundamental functions of state authority – legislative, executive and judicial – shall be implemented by the respective state bodies.

In the Constitution of Ukraine, as well as in the constitutions of other states, the principle of division of powers is not realized in its pure (classical, according to Montesquieu) form. Today the current issue is not the separation of one power from the other, but their balanced, mutual control where one power does not have an excessive superiority over the others. This principle is stipulated in Article 6 of the Fundamental Law of Ukraine, according to which state power in Ukraine is exercised on the principles of its division into legislative, executive and judicial power; bodies of legislative, executive and judicial power exercise their authority within the limits established by the Constitution and in accordance with the laws of Ukraine.

The Constitutional Court of Ukraine is based on the principle of the division of powers when resolving competence disputes between the constitutional bodies of state power, bodies of the Autonomous Republic of Crimea, bodies of local self-government. By motivating its decisions on these issues, the Constitutional Court of Ukraine pointed out a set of important legal positions, for example:

- even if the bodies of legislative, executive and judicial power are independent in their activity within the authorities given by law, the stability of the constitutional order is achieved through a clear system of check and balances among the abovementioned authorities. The division of power into legislative, executive and judicial assumes their close cooperation, the final result of which is the achievement of the constitutional goals and objectives (in particular, ensuring human and citizens' rights and freedoms, their security, the stability of the constitutional order)[8];
- division of the state power is stipulated by the structural differentiation of the three equal fundamental functions of the State: legislative, executive, judicial. It reflects the functional certainty of each body of state power, and assumes not only the separation of their authorities, but their cooperation, mutual check and balances system, which aim is to provide their cooperation as a single state power[9];
- the principle of division of the state power gains its sense provided that all bodies of power act only within the single legal framework[10];
- steady observance and compliance of the Constitution of Ukraine and laws of Ukraine by bodies of legislative, executive and judicial power provides the implementation of the principle of the division of the state power and is the prerequisite of its unity, stability, civil peace and harmony in the State[11];

8 See item 4 of the motivation part of the Decision of the Constitutional Court of Ukraine on temporary execution of authorities by officials dated April 27, 2000 No.7-rp/2000.

9 See item 4.1 of the motivation part of the Decision of the Constitutional Court of Ukraine dated April 1, 2008 No. 4-rp/2008 (case on the Rules of Procedure of the Verkhovna Rada of Ukraine).

10 Ibid.

11 Ibid.

- only the Verkhovna Rada of Ukraine has the unique right to adopt laws and amend them (except this right is executed by the people directly); this right may not be passed to other bodies of power or state officials[12];
- independence of judges, first of all, means their independence, they are not bound by any circumstances or other will, except the law, while execution of justice[13].

One may state that the application of the principle of the division of state power in the constitutional justice during adjudication on the competence of state bodies assists not only in balancing the execution of power in the State, but in controlling the legitimacy of the activity of state bodies at different levels. In the latter case the principle of the division of power is closely connected with the principle of legality.

6. *Principle of legality* is stipulated in Article 19.2 of the Constitution of Ukraine, according to which state bodies and bodies of local self-government and their officials are obliged to act only on the grounds, within the limits of authority, and in the manner envisaged by the Constitution and the laws of Ukraine.

   It follows from the practice of the application of the abovementioned principle by the Constitutional of Court of Ukraine that:

   - the state bodies should act not only within the limits of their constitutional authorities but in the manner defined by the Constitution of Ukraine (for example, the Verkhovna Rada of Ukraine by defining the procedure on appointment and discharge of judges to and from administrative offices by adopting a Resolution and not a Law, was acting within the limits of its authorities but in a manner that differed from that prescribed by the Constitution of Ukraine)[14];
   - the authorities of the Verkhovna Rada of Ukraine, the President of Ukraine are exhaustively stipulated by the Constitution of Ukraine[15];
   - the right to delegate the legislative function from the Verkhovna Rada to any other state body is not envisaged by the Constitution of Ukraine[16].

On the one hand, the principle of legality is used by the Constitutional Court of Ukraine for determination of the conformity of legal acts with the Constitution

12 See item 3 of the motivation part of the Decision of the Constitutional Court of Ukraine dated December 14, 2000 No. 15-rp/2000 concerning the procedure of execution of the decisions of the Constitutional Court of Ukraine.

13 See item 4.1 of the Decision of the Constitutional Court of Ukraine in the case on independence of judges as a component of their status dated December 1, 2004 No.19-rp/2004.

14 See item 2 of the motivation part of the Decision of the Constitutional Court of Ukraine dated March 25, 2010 No. 9-p/2010.

15 See, for example, the Decisions of the Constitutional Court of Ukraine dated April 10, 2003 No. 7-rp/2003 (case on guarantees of activities of People's Deputies of Ukraine), dated April 7, 2004 No. 9-rp/2004 (case on the Coordination committee), dated May 27, 2009 No. 12-rp/2009, dated June 10, 2010 No. 16-rp/2010.

16 See item 3.3 of the Decision of the Constitutional Court of Ukraine dated October 9, 2008 No. 22-rp/2008.

of Ukraine; on the other hand – for protection of human and citizens' rights and freedoms stipulated in the Constitution of Ukraine and further developed in the laws of Ukraine.

7. The fundamental principle of democracy – *the priority of human rights and freedoms* – is recognised and stipulated by the Constitution of Ukraine as a fundamental principle of public policy. The human being, his or her life and health, honour and dignity, inviolability and security are recognised in Ukraine as the highest social value. Human rights and freedoms and their guarantees determine the essence and orientation of the activity of the State. The State is answerable to the individual for its activity. To affirm and ensure human rights and freedoms is the main duty of the State (Article 3 of the Constitution of Ukraine).

The Fundamental Law of Ukraine secures the security of human rights and freedoms by ensuring the system of important guarantees, in particular inalienability and inviolability of human rights and freedoms (Article 21); the recognition of the fact that these rights and freedoms affirmed by this Constitution are not exhaustive; the content and scope of existing rights and freedoms shall not be diminished in the adoption of new laws or in the amendment of laws that are in force (Article 22); human and citizens' rights and freedoms shall not be restricted, except in cases envisaged by the Constitution of Ukraine (Article 64).

The Constitutional Court of Ukraine plays an important role in affirming and protecting human rights and freedoms. It not only interprets the content of those rights and freedoms but also protects them from any illegal restrictions. An essential guarantee is that the Constitution of Ukraine does not allow amendments to its norms, in case the Opinion of the Constitutional Court of Ukraine proves that the proposed amendments violate or restrict human and citizens' rights and freedoms.

Significant in the jurisprudence of the constitutional justice is the protection of basic rights (to life, freedom, personal immunity etc.), as exemplified by the decisions on the proportionality of legal responsibility[17] and the impossibility of retroactive force of legal norms, except in cases, when they mitigate or annul the legal responsibility[18].

Quite often social issues (in particular, benefits for socially vulnerable categories of people) became the subject of constitutional review [19]; the priority in this cases would be given to the constitutional right to social protection.

Also, the Constitutional Court of Ukraine often protected the constitutional human right to judicial protection and fair trial[20].

17 See for example the Decisions of the Constitutional Court of Ukraine dated November 2, 2004 No. 15-rp/2004 (case on more lenient punishments sentenced by court) and dated January 26, 2011 No. 1-rp/2011 (case on replacement of the death penalty by life imprisonment).

18 See for example the Decisions of the Constitutional Court of Ukraine dated April 19, 2000 No. 6-rp/2000 (on retroactive effect of the Criminal Law), dated April 5, 2001 (No. 3-rp/2001 case on taxes).

19 See, for example, the Decisions of the Constitutional Court of Ukraine dated July 6, 1999 No. 8-rp/1999 (case on the right to benefits), dated March 20, 2002 No. 5-rp/2002 (case on the right to benefits, compensations and guarantees), dated March 17, 2004 No. 7-rp/2004 (the case on social protection of servicemen and employees of law enforcement bodies).

20 See, for example, the Decisions of the Constitutional Court of Ukraine dated July 9, 2002 No. 15-rp/2002

When motivating its decisions, the Constitutional Court of Ukraine primarily acts on the premise of the norms of the Constitution of Ukraine, the provisions of basic international legal instruments on human rights, fundamental principles of law that guide the contemporary European judicial and legal practice, and to a large extent takes account of the legal positions of the European Court of Human Rights.

8. In addition to the above mentioned, a lot of other principles have been also developed in the juris prudence of the Constitutional Court of Ukraine: ensuring the right to freedom of association in political parties and civil organisations, freedom of thought, that of speech, freedom to express one's views and beliefs, freedom citizens to appeal to state bodies etc.

But it eloquently testifies to fact that the Constitutional Court of Ukraine is as a reliable guarantor of the realisation of the principles of democracy in the Ukrainian society.

in the case on pre-trial settlement of disputes; dated January 30, 2003 No. 3-rp/2003 in the case on the court's consideration of specific resolutions of the investigator and prosecutor.

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

THE ROLE OF CONSTITUTIONAL COURT IN STRENGTHENING THE PRINCIPLES OF DEMOCRACY IN INDONESIA

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A. The Establishment of the Constitutional Court in Indonesia

The Birth of the Constitutional Court (MK) in Indonesia happened because of the 1945 Constitutions changes made by the People's Consultative Assembly (MPR) in 1999-2002. A process of constitutional changes intended to improve the basic rules of civic life that can reduce the potential for abuse of power in the past.

The changes are conducted over a period of four years. In 1999, the Assembly changed nine chapters. The things that changed the principle of term limits is the president, limits the power of the President in the field of legislation, and efforts to build a mechanism of checks and balances. In 2000, the Assembly managed to convert 25 chapters with six main topics which involve local government or decentralization, the position of citizens and residents, human rights, national defense and security, and concerning the flag, language and symbols of state and national anthem.

In 2001, the Assembly did a fundamental changes to the 1945 Constitution relating to sovereignty, the reform of parliament, direct presidential elections, forming a new organization called the Constitutional Court and set the procedure changes to the Constitution. In 2002, the Assembly made changes by focusing on issues of MPR composition, method of Presidential election, the settlement should the president die, resign, retire or cannot fulfill his obligations, granting the President to establish a Presidential Advisory Council, the abolition of the Supreme Advisory Council, as well as provisions on the independence of Bank

Indonesia. It also sets a minimum limit of the budget for education costs as much as 20% of the state budget, and prohibits any changes in the shape of the Unitary Republic of Indonesia.

With these changes, the manuscript of the 1945 Constitutions have been changed 300 percent. Before the changes, the 1945 Constitutions consist of only 16 chapters, 37 articles and 47 paragraphs plus 4 supplementary Transitional articles and 2 supplementary paragraphs. After 4 times of change, the 1945 Constitutions have become 20 chapters, 73 articles, 171 paragraphs plus 3 articles of the Transitional rules and 2 articles of Supplementary Rules.

Through the addition of Article 24C of the 1945 Constitutions, the Constitutional Court is present in the state system of Indonesia. The establishment of this state institution is intended to strengthen the principle of checks and balances between state institutions by providing primary authority that is testing the law against the 1945 Constitution which previously couldn't be done.

Thus, the formation of the Constitutional Court cannot be separated from the development of thoughts and ideas of the importance of judicial review in a democratic legal state. It is based on the premise that the law as a political product always has a character which is largely determined by the political constellation that gave its birth and the possibility of laws reflect the interests of the dominant political force that may be inappropriate or even in conflict with higher regulations. Therefore, there should be a mechanism to anticipate or cope with it through the mechanism of judicial review.

Moreover, in practice the government in the past turned out to have a tremendous opportunity to make a variety of laws and regulations as further constitution implementation. It opens up the possibility of the establishment of regulations that do not fit, even contrary to the Act that became the basis of its own formation.

In the 1945 Constitution Amendment, the idea of judicial review is given to the Constitutional Court for judicial review of Laws against Constitutions and for judicial review under the laws and regulations is given to the Supreme Court. At first there were three alternative institutions which were given the authority of judicial review against the Constitutions, namely the People's Consultative Assembly, the Supreme Court or Constitutional Court.

The idea of giving those powers to the People's Constitutional Assembly (MPR) finally ruled out because of inexistence of being the highest state institutions anymore, the MPR is not a group of legal and constitutional experts, but mainly representatives of political organizations and interest groups. The idea of reviewing the legal constitutions by the Supreme Court was also ultimately unacceptable because the Supreme Court itself has too many duties in the care of the case load as their competence. Therefore, the laws review against the Constitution authority finally was granted to its own institutions, namely the Constitutional Court.

B. Constitutional Court and Democracy

Article 24C of the 1945 Constitution asserts that the Constitutional Court is one of the judicial power perpetrators that held four authorities and one obligation. Constitutional Court authority is to hear at the first and last final decision for: (1) review on the Laws against the Constitution, (2) settle dispute of state institutions whose authorities are granted by the Constitution, (3) decide upon the dissolution of political parties, and (4) decide dispute of the election results. In addition to its authority, the obligation of the Constitutional Court is to give decision on the opinion of the Parliament regarding the alleged violations by the President and / or Vice President under the 1945 Constitution.

In carrying out the functions and its authority, the Constitutional Court must work independently and impartially. Thus in each of the handling, its investigation and verdict will be free from intervention and influence except of what is proven in the court. Only by this way that the decisions resulting in the strengthening of democracy can be accepted by the broad public in Indonesia. Since its establishment in 2003 until today, the Constitutional Court has received some 840 case requests consist of the 372 petitions for judicial laws review against the 1945 Constitution, 15 requests authority dispute between state institutions, 116 petition disputes against the results of national elections, and 337 petition disputes against the results of elections of regional heads. As of the cases examined by the Constitutional Court, 781 requests had been settled until early July 2011.

1. Judicial Review against 1945 Constitution

Cases of Judicial Review against the Constitution is the most widely requested to the Constitutional Court. The decision of the review can tell whether any provisions of law being petitioned is accepted or not opposed to the 1945 Constitution. Constitutional Court's decision which grants a petition for judicial review automatically will change the provisions of a Law which is declared contradictory to the 1945 Constitution and therefore has no binding legal force.

Since its creation on August 13, 2003 until early July 2011, the Court has made decision on 321 judicial reviews. Of these, 85 cases granted (26.5%), 106 cases rejected (33%), 94 cases are not acceptable (29.3%), and 36 cases withdrawn (11.2%).

Constitutional Court decisions are final interpretation of the 1945 Constitution materials and are named as the final interpreter of the constitution. Therefore, the Constitutional Court's decision is always associated with the substance of the 1945 Constitution that do not only embrace political democracy, but also economic and socio-cultural democracy.

Constitutional Court decisions in the case of reviewing the law, in principle, aims to protect citizens' constitutional rights and human rights which are fundamental to the establishment of democracy. In addition, there are also

decisions of the Constitutional Court related to the mechanisms of democracy, namely elections, both at national and local level.

Here are some examples of Court decisions which are closely associated with the development of democracy in Indonesia.

a. Voting Rights for Former Members of the Forbidden Organization

Article 60 Sub-Article g of Law Number 12 Year 2003 concerning General Elections for the DPR, DPD and DPRD specify the requirement to be candidates for the DPR, DPD, Provincial /Regency / City DPRD, which is not a former member of the banned Indonesian Communist Party (PKI), including its organization mass, nor the people involved directly or indirectly in G30S/PKI, or other illegal organizations. Constitutional Court declared that the 1945 Constitution prohibits discrimination as stated in Article 27 paragraph (1), Article 28D paragraph (1), Article 28I paragraph (2), of the 1945 Constitutions. However, Article 60 Sub-Article g of Law Number 12 of 2003 mentioned above prohibits a group of Indonesian Citizen (WNI) to be nominated and use their rights to be elected based on their previous political beliefs. So, the article is declared unconstitutional by the Constitutional Court.

b. Terms of Contempt against President and Vice President

The Decision Number 013-022/PUU-IV/2006 declares that Article 134, Article 136 up to Article 137 of the Criminal Code on defamation offenses against the President and Vice President against the 1945 Constitution and has no binding legal force. Constitutional Court found the articles governing criminal defamation against the President and Vice President could create legal uncertainty *(rechtsonzekerheid)* as very susceptible to interpretation whether or not a protest, a statement of opinion or thought is a critique or insult against the President and / or Vice President.

According to the Court, it is contradictory to Article 28D Paragraph (1) of the 1945 Constitution and can hamper the efforts of communication and information acquisition, which is guaranteed by Article 28F of the 1945 Constitution. The articles of the Criminal Code are also likely to hamper the right to freedom of states of mind with oral, written, and expression of an attitude because they always use the legal apparatus of the rallies. Therefore, it is declared contrary to Article 28, Article 28E Paragraph (2), and Paragraph (3) of the 1945 Constitution.

c. Offense Hostilities may Cause Offense Abuse of Power

In Decision Number 6/PUU-V/2007 Constitutional Court states that the substance of Articles 154 and 155 of the Criminal Code does not guarantee legal certainty so contradictory to Article 28D Paragraph (1) of the 1945 Constitution. Article 154 of the Penal Code reads “Whoever publicly stated feelings of hostility, hatred or contempt against the Government of the Republic of Indonesia, shall be imprisoned for ever seven years or a fine of five hundred Rupiahs.”

Article 155 of the Criminal Code reads "(1) Anyone broadcast, perform or paste to be known by the public, writings or images which express feelings of enmity, hatred or contempt against the Government of the Republic of Indonesia, or to make them more commonly known, shall be punished with imprisonment for four years and six months or a fine of four thousand five hundred Rupiahs, (2) If you are guilty of the crime on the job and at the time of committing the crime is still within the five years after the first convict punishment of such crimes be fixed, then it can revoke his/her right to do the job. "

Both formulation of the Articles according to the Constitutional Court could lead to a tendency of abuse of power because they can easily be interpreted according to the ruling taste. Consequently, these articles assessed by the Constitutional Court may obstruct the freedom to express thoughts and attitudes as well as freedom of expression that is contradictory to Article 28 and 28E Paragraph (2) and Paragraph (3) of the 1945 Constitution. Therefore, on July 17, 2007 the Court decided that the provisions of Article 154 and Article 155 of the Criminal Code against the 1945 Constitution and have no legal force.

d. Individual candidates in the Regional Head Election

Constitutional Court Decision under No. 5/PUU-V/2007 grant judicial review of Article 56 paragraph (2), Article 59 paragraph (1), (2), and (3) of Law Number 32 Year 2004 regarding Regional Government. These articles provide that candidates for regional head and deputy head of the region can only be submitted by political parties and coalitions of political parties. However, after the Constitutional Court Review decision, now candidates can also follow the general elections of regional heads of political parties without going through the political party proposal as long as they meet all minimum requirements which have been stipulated in the legislation.

e. Changing Desirability Election System based on the Most Voted Ballots

In this case, the Court affirmed that Article 55 paragraph (2) of Law 10/2008, which define each of the three candidates have at least one female candidate is a policy in order to meet affirmative action for women in politics as a follow-up of Women of the World Convention of 1995 in Beijing and various international conventions which have been ratified. According to the Court, affirmative action will provide opportunities to women for the formation of gender equality having the same role between women and men.

The Court confirmed its interpretation that the provision of a quota of 30% (thirty percent) and having a female candidate out of every three candidates is a positive discrimination in order to balance the representation of women and men to become legislators in the DPR, DPD and DPRD. However, the Court also emphasized that to improve the position of women in politics is not solely dependent on legal factors, but also cultural factors, capabilities, proximity to the people, religion, and the degree of community trust in female legislative candidates, as well as the increasing awareness on the role of women in politics.

Meanwhile, Constitutional Court judged that Article 214 letters a, b, c, d, and e of Law 10/2008 are unconstitutional. Those articles determine that the selected candidate is a candidate who gets above 30% (thirty percent) of the voter divisor number (BPP), or occupy a smaller sequence number if no one is getting 30% (thirty percent) of the voter divisor number, or who occupies a smaller sequence number if a gain of 30% (thirty percent) of the voter divisor number is more than proportionate number of seats obtained by a political parties participating in the election.

The above provision according to the Constitutional Court is contrary to the substantive meaning of popular sovereignty and qualified to be on the contrary to the principles of justice as set forth in Article 28D Paragraph (1) of the 1945 Constitution. It is also stressed that it is a violation of the sovereignty of the people if the will of the people which is reflected in their choice is being ignored in the determination of legislators, then it would actually violate the sovereignty of the people and justice. According to the Court, if there are two candidates who get extremely different votes between them then the candidate who received the most votes was defeated by the one who has less vote, because the one with less votes gets smaller rank number. Based on this decision the desirability of legislative candidates is determined directly based on the rank of votes they get.

f. Eliminating Releases Sanctions and Prohibition of the Quick Count and Survey

The provisions concerning the imposition of sanctions for the press declared unconstitutional by the Constitutional Court through Decision Number 32/ PUU-VII/2009 dated February 24, 2009. The reason is because such provision causes legal uncertainty, injustice, and contrary to the principle of freedom of expression guaranteed by the 1945 Constitution.

Three main considerations underlying the decision of the Constitutional Court, namely: *First*, these articles can lead to interpretations that the institution which can give sanction could be an alternative institution, namely the Indonesian Broadcasting Commission (KPI) or the Press Council which allows the type of sanction imposed is also different; *Second* , the formulation of these provisions also mix the position and authority of the *Indonesian Broadcasting Commission* and the Press Council against the authority of the general election Committee to impose sanctions on the Commission who implement election campaign, and *Third*, the imposition of sanctions for broadcasters should not be done by the IBC (KPI), but rather by the Government (Minister of Communication) after fulfilling the due process of law, while toward the print media it is not possible to do revocation sanctions because the Law 40/1999 no longer use the licensing agency issuing the print media, so it is a norm that no longer needed because the loss of legal force and *raison d'être* of this.

Meanwhile, the ban on poll (survey) and counting fast (quick count) of the Act of legislative and the President / Vice President elections also expressed

against the 1945 Constitutions by the Constitutional Court Decision Number 9/PUU-VII/2009 dated March 30 2009 and successively Decision Number 98/ PUU-VII/2009 dated July 3, 2009. According to the Court, although they are not conducted by academicians or scholars, the survey or quick count about the election result is a scientifically-based activities which must also be protected by the spirit and principles of academic freedom and freedom of the pulpit-scientific-academic because it is guaranteed not only by Article 31 Paragraph (1), Paragraph (3), and Paragraph (5) of the 1945 Constitution but also by the provisions of Article 28F of the 1945 Constitution which includes freedom to explore, process and release information, including scientific information.

Further consider that the opinion polls, surveys, or the quick count results of voting by using the scientific method is a form of education, supervision, and a counterweight in the process of organizing the state, including the general election. Another consideration is public, from the beginning, has known *(notoir feiten)* that the quick count is not the official results and therefore cannot be treated as official results, but public has the right to know it. The quick count was not going to affect voters' freedom to impose their choice. This was because, according to the Court, the voting is over and a quick count is not possible to be done before the completion of voting.

g. Terms Endorse Presidential Election Voters ID Cards or Passports

One of the landmark decision of the Constitutional Court in the context of escorting democracy is the decision number 102/PUU-VII/2009 dated July 6, 2009 which broke the deadlock Presidential Election Law relating to legal issues about unregistered voters in the voters list (DPT). With reference to Decision Number 011-017/PUU-I/2003 dated February 24, 2004, the Court affirmed that the constitutional rights of citizens to elect and be elected (rights to vote and right to be candidates) is a right guaranteed by the Constitution, laws, and international conventions, so the restriction, distortion, elimination, and removal of rights is a violation of the rights of citizens.

It is explicitly guaranteed in the Constitutional Court according to Article 27 Paragraph (1), Article 28C Paragraph (2), Article 28D Paragraph (1), Article 28D Paragraph (3), and Article 28I Paragraph (2) of the 1945 Constitution. In addition, also in line with Article 21 of the Universal Declaration of Human Rights, Article 25 of International Covenant on Civil and Political Rights, and Article 43 of Law Number 39 Year 1999 on Human Rights.

Therefore, the Court gave legal considerations by stating that the rights of citizens to vote should not be hampered or hindered citizens to use their voting rights by various regulations and any administrative procedures. Thus, the provision requiring a citizen registered as voters in the voters list (DPT) is more of an administrative procedure and should not negate the things that are substantially the citizen's right to choose (right to vote) in the general election.

The Court considers that the best solution to overcome the problems of voters who are not listed in the voters list is to allow the use of ID cards or valid

passports in the Presidential Election. However, in order not to cause the loss of citizens' constitutional rights and not violate the provisions of the legislation in force, the Court also ordered the Election Commission (KPU) to further regulate the technical implementation of the use of voting rights for Indonesian Citizen not registered in the voters list.

Based on those considerations, the Court decided that Article 28 and Article 111 Election Law are constitutional insofar they are interpreted as to include citizens who are not enrolled in the DPT and fulfilled the election terms and procedures, (conditionally constitutional).

2. Dispute about Election Results

The next authority which is quite important in strengthening democratic principles is to decide disputes about election results. Case of election disputes is the case brought under the argument that there has been a mistake resulted from vote count conducted by the Election Commission (KPU) and /or there is a structured, systematic and massive violation. Election disputes cover the whole series of elections, both for the presidential and legislative elections. The authority of the Constitutional Court in judging disputed elections contributed to the strengthening of the principles and pillars of democracy in Indonesia, because this is the downstream of the process of election of the President and Vice-President and the representatives of the people who will sit in the Parliement.

There were 45 cases concerning the handling of Disputes in the Election Results (PHPU) Legislature in the 2004 elections with the following details: 15 cases granted (33.33%), 15 cases rejected (33.33%), and 15 cases were considered not acceptable (33.33%). As for handling 2009 PHPU Legislature, there were 71 cases with the following details: 25 cases granted (35.21%), 38 cases rejected (53.52%), and 8 cases were not acceptable (11.72%). There were 71 cases put to court in 2009. The cases were divided into 42 cases filed by political parties contesting in the 2009 elections, 27 cases filed by Candidate of Regional Representative Council and two cases filed by Candidates for President and Vice President. Against the 71 cases, 25 cases granted (35.21%), 38 cases rejected (53.52%), and 8 cases considered not acceptable (11.27%).

After the transfer of authority to handle disputes concerning the Regional Head Election (Election) from the Supreme Court (MA) to the Constitutional Court (MK) on October 29, 2008 under Section 236C of Law Number 12 Year 2008 Second Amendment to Law Number 32 Year 2004 regarding Regional Government, the Court has effectively carried out the task of examining, hearing and deciding cases since the beginning of November 2008 General Election. The number of cases that have been settled until the General Election date of early July 2011 were 331 cases with the following details: 36 cases granted (10.8%), 224 cases rejected (67.7%), 67 cases considered not acceptable (20.2%), and 4 cases withdrawn (1.2%).

With regard to the details of the cases above, the jurisprudence of the Constitutional Court that was used in every decision related to the competence of the Court in dealing with the Constitutional Court as the guardian of election results, the Court adjudicated constitutional disputes not only to dissect Election petition to see the results of the vote as such, but also to examine in depth the existence of violations that have structured, systematic, and massive influence towards the outcome of the vote. This is very much in line with the provision requiring the Court rule on the dispute based on the truth of the legal substance as defined in Article 45 paragraph (1) of the Constitutional Court Law that states, *"The Constitutional Court decided the case based on the 1945 Constitution in accordance with evidence and convictions of the judge."*

The various decisions of the Constitutional Court have evidently provided the legal meaning and justice in the handling of election petition dispute. In the practice that has become accepted as a solution to jurisprudence and law, the Court can assess structured, systematic, and massive violations as a determining factor of the verdict by reason of breach with three properties that can significantly influence the outcome of ranking of the vote in the election or General Election.

Based on the views and paradigms that are then adopted, the Court confirms that the cancellation of election results due to structured, systematic, and massive violations is in no way intended by the Court to take over the authority of other judicial bodies. The Court did not want to prosecute criminal or administrative violations in the election, but only took the violations proven in the field that affect the election results as a basis for the verdict but did not impose criminal sanctions and administrative sanctions against the perpetrators. Therefore, a violation that has been legally proven according to the Constitutional Court and has been used as the bases of the decision of cancellation by the Constitutional Court can still be legally processed further to general courts or the State Administrative Court because the Court never makes decisions in the context of criminal or administrative. Constitutional Court may even provide an opportunity for prospective candidates thwarted by the Election Commission to lodge a partition before the Court.

The above mentioned Constitutional Court's jurisprudence is always taken into consideration and guidance in making decisions in elections in dispute. In casting its decision, the Court faces the decision either to grant or deny the true count according to the Petitioners, but the Court can also order to re-counting or re-voting. Counting or a re-vote can be ordered to be implemented in all areas or some areas of law depending on the facts revealed in the process of evidence at the trial.

3. Dispute of Constitutional Authority among State Institutions

The case on constitutional disputes between state institutions is a matter in which the petitioner is a state agency whose authority is granted by the 1945 Constitution. The state agency has a direct interest in the disputed authority. In the state system in Indonesia, the relationship between a state agency with

another is bound by the check and balance principle. Under this principle, state institutions are considered equal and mutually compensate each other. As the implications of these mechanisms, and the fact that state agencies are considered equal in position, there is the possibility that the implementation of the authority of each state institution can have different interpretation of the 1945 Constitution. If different interpretation arises, the perpetrators of the amendment of 1945 find it necessary to establish a special agency entrusted with the task to decide upon the solution to these problems. In a state system outlined in the 1945 Constitution, the mechanism for the resolution of the dispute in authority is conducted through the state judicial process—the case is submitted to the Constitutional Court of Indonesia.

Until early July 2011 Constitutional Court has registered as many as 15 cases with the following details: two cases rejected (13.33%), seven cases not acceptable (46.67%), 3 cases withdrawn (20%), and the remaining three cases had not been decided upon (20%). Thus, there has been no single request granted yet by the Court.

4. Dissolution of Political Parties and Impeachment

As previously mentioned above, it seems clear that from various powers and duties specified by the 1945 Constitution and other legislation, the Court has been very productive in examining and deciding upon judicial review, election results disputes, and State Institution's authority disputes.

The authority that has never been used is to examine and decide upon the dissolution of political parties requested by the Government. Up until now there has never been any request from the government to dissolve a political party, therefore it can be concluded that no political party at the moment is indicated violating the constitution and laws that can be used as a base to dissolve it.

The obligation of the Constitutional Court upon deciding on the opinion of the House of Representative that the President and / or Vice President has violated a specific law or no longer qualifies as President and / or Vice President under the has never been addressed by the Constutional Court since up until now the House has never filed such a case. More precisely, since the Court established up to the moment, President and / or Vice President has never been considered by the House of Representative to violated a specific law or ineligible as President and / or Vice President under the 1945 Constitution.

C. Closing

Up to this moment, the presence of Constitutional Court in the Indonesian state system is considered by many has given contributions to the growth of democratic principles and law enforcement in Indonesia. Since the establishment of the Constitutional Court, making the laws can not be based only on majority consensus of the current interests, but also needed to be considered whether the regulation is contradicted with the constitution or not. If later it is proven that

the law making process and its content is contradictive with the Constitution, the Constitutional Court could annul.

In addition the Court also has a role in upholding democracy in the process of legislative elections, the President and Vice President, as well as regional head/ vice regional head. In examining and resolving an election dispute, the Court did not merely count the votes, but also substantively judge whether election process is legally valid. If proven there's a structured, systematic, and massive infringement in the performed election then the Constitutional Court can order for a recount or re-vote of the vote.

The role of establish checks and balances is also performed by the Court during the impeachment process of President. Since the Constitutional Court existed, the President can not be interupted with impeachment treat by the House of Representative only because of his political policy. The President can only be threatened with impeachment by the House of representative if he violates certain major things or have a certain conditions that do not qualify as President and / or Vice President under the 1945 Constitution in its implementation which should be tested prior through previlegiatum forum on the Constitutional Court. Yet the President and / or Vice President also can not be arbitrary because he still can be under strict supervision by the Parliament in which the ordinance was controlled by the Court based on its control frame of the relationship between state institutions which regulated by the constitution.

Although sometimes there are some obstacles during the implementation of the Constitutional Court's decision, but in general the rulings of the Constitutional Court can be implemented by all parties, including the President and the House of Representative.

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THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

THE ROLES OF CONSTITUTIONAL COUNCIL OF MOROCCO IN UPHOLDING THE PRINCIPLES OF DEMOCRACY

Hon. Mohammed Achargui
President of the Constitutional Council of Morocco

Introduction

Based on the 1996 Consitution of Kingdom of Morocco, the Constitutional Council is responsible for jurisdiction delegated to it persuant to Constitutional provisions or based on basic laws and regulations generated from the Constitution and it is complementary.

Such jurisdiction can be clasified into three main groups, namely, as follows:

Firstly, the jurisdication in performing control over constitutional degree of basic laws, ordinary laws, and internal laws applicable to the two parliamnetary councils.

Secondly, jurisdiction in controling the division between legistalative powers and executive powers.

Thirdly, jurisdiction in cotroling the validility of selection of parliament members and referrandum process.

In impelementing the above jurisdictions and other jurisdictions, the Constitutional Council, since its establishment in 1994 up to now, has passed 814 decrees which affirmed a number of regulalions and principles which enbaled to uphold legal power and protection of Human Rights.

With respect to the above matters, it is necessary to mention that basic decrees passed by the Constitutional Council were mainly related to the respect for Constitution and its high position, and related to the protection of rights and

freedom that are badly needed, particularly through the control over the validity of election of parliament members.

Through those decrees, the Constitutional Council highly considers the respect for a number of basic principles which constitute the pillars of a democratic and modern state such as the seperation of powers and indepency of judiciary institutions.

With relation to the theme of present Symposium, "Constitutional Democratic State", **firstly**, I would like to present some examples of experince of Constitutional Council of Morocco in upholding the principles of democracy through a number of important decress or decisions; and **secondly**, to look into open prospects or opportunities for the Constitutionla Council to make some constitutional reforms in larger scales which are currently underway in Morocco.

Firstly, is the most prominent example of Constitutional Council's experience in upholding the principles of democracy. This example can be seen from the explanations of a number decrees or decisions made by the Consitutional Council in relation to:

1) Protection of the position and authorities or powers of constitutional institutions;
2) Protection of mechanism of the life of democracy;
3) Protection of the rights and freedom of the public.

1) Protection of the position and authorities or powers of constitutional institutions:

In order to ensure the high position of Constitution and respect the division of jurisdictions among constitutional institutions stipulated by the Constitution, with all available time and opportunities, the Constitutional Council pays considerable attention to the protection of the position and authorities of consitutional institutions. These all are refected in some examples related to Parliament, Council of Ministers and Judicial Authorities.

1- Parliament

The Constitutional Coucil makes serious efforts to protect parliamentary legislative competency, as well as the rights and fredom of parliament members.

(1) Protection of Parliamentary legislative competence

Besides giving considerable attention to legal protection by emphazing that cetain topics are among solely legislators' competence (such as Decree Number: 386/2000), the Consitutional Council pay considerable attention to the necessity for the parliamnet to perform legislative authorties in full, without any shortcomings or negligence whatsoever. These all are reflected in the Decree Number 382/2000 dated 15th March 2000. The Decree was

issued in regarding the examination of the constitutional degree of Articles 15 – 97 of Constitution concerning the records of collection of public debts which have been due, which says as follows:

"It is clear from the analysis of the provison contained in Article 142 … that when legislators enforce some conditions due to some mismatches between an individual status who has not settled paybale public debt and the performance of official or representative tasks, then the legislators provide some justification over the matter with the reason that it is necessary to create and keep the harmony of public life, and in that way such legal practice does not guarantee procedural rules which should be made by legislators by considering the character of the Article and the nature of competence given by the Consititution to them.

This is because the legislators have not passed any procedural rules which can be use as a reference when any incompatility happens. Besides that there are no other suitable and neutral parties or agencies appointed to settle such matter, neither having an integraity to avoid themselves from arbitrariness or depotism; nor being able to guarantee independence of legislative body in its relation to the seperation of various authorties or powers, by respecting the authorities delegated to constitutional institutions.

In addition to the problem of legislative negligence, the Constitutional Council gives considerable respect for the seperation of legislative competence within the Parliament, among others, which are categorized into complementary Laws, Financial Laws, or ordinary Laws.

With respect to the above matter, the Constitutional Council regards that, after reminding that finanical regulation No. 98/7 stipulates that annual financial regulation cannot be modified during the life of fiscal year, except through a regulation called 'amendment of financial regulation', that the amendement of annual financial regulation can be made in accordance with the guidelines of ordinary regulation, which is regarded being in contradictory with Constitution (Decree No. 2000/386).

In a similar context, but in a differebt case, the Constitutional Council regards that the annual financial regulation may not contain any conditions which are outside the scope of such regulation.

In the decision issued after some complaints made by parliament members over the constitutional degree of financial regulation year 2009, the Constitutional Council stated that financial regulation containing provisions related to stipulation on the fine imposed on each traffic violation proved by static radar and CCTV Camera, such regulation appears to be a a new tool for legal evidence. Such stipulation cannot be added into financial regulation because of its nature. Because of that the regulation is condered against the Constitution (Decree No. 2008/728). This means that such stipulation must be included into a ordinary regulation.

In onother Decree, the Constitutional Council regards that some stipulations of Law No. 78-7 on financial regulation, which states that "each legal

stipulation contained in a regulation, which obliges new charges or fees or obliges to cut off the revenue that may reduce financial balance of the existing financial regulation – cannot be included into the stage of financial execution (for the said legal stipulation), except after the said financial regulation states that there has been an evaluation over the new charges or the decrease in the revenue dan after there has been a permit on the matter" …. causing legal texts that have been approved by the Parliament do not function and they are confirmed by a Decree of the Kingdom through an Official Gazzette. This case is against the stipuation contained in Chapter 4 of the Constitution which states that a Regulation is the highest expression of the will of nation and that everybody has to comply with it (Decree No. 98/250).

B. Protection of the rights and freedom of members of parliament

Among the important decisions made by the Constitutional Council in this regard, is a decision that emphasized the rights of parliament members in the formation of parliamentary groups and affiliations to the groups according to their choice and will. In this sense, it is understood that the provisions of Codes of the House of Representatives stating that the formation of parliamentary groups on the basis of representation of parties in Parliament are not in accordance with the Constitution, because the members of parliament who received a mandate from the people as provided for in Chapter 36 the Constitution, they have full independence and freedom of choice, including the right to form groups among themselves, both those affiliated to certain political parties or non-political groups (Decision No. 213/1998).

It is necessary to remember keep that the Decision No. 52 dated January 3rd, 1995, in which the Constitutional Council stressed the right of members of parliament to participate in all activities of the parliament, even those who are not members of particular groups in parliament should do the same. In this way the Constitutional Council has recognized their rights to explain the reasons for voting at the time of filing an objection or related records in the minutes of the meeting or during the intruption of discussion following the government responses to oral questions.

In addition to these decisions, it should also be remembered that decision the Constitutional Council stated that "Requiring the Parliamentary Observers to make a statement before the court, under any circumstances, be considered injuring their freedom, and it is against one of the fundamental rights guaranteed by the Constitution. As a matter of fact, such an observation should take place, the observers still have the freedom not to make any statement, in accordance with the principle of presumption of innocence" (Decree No. 2004/586).

2 - **Council of Ministers:**

Among the powers or authorities the Constitution delegated to the Council of Ministers, led by King is to consider the issues of concern to the general policy of the state, which means that the national or sectoral policies can not be made outside the Council of Ministers. It is as stated by the Council of Ministers in the case of the determination of monetary policy. In its ruling on the consideration of (policy) the Governor of Bank of Morocco (Central Bank) by the Parliament, the Council states as follows: "Given the provisions of Article 58 of the Constitution of the Bank of Morocco, which states in this case that the consideration of (the policy) the Governor of Bank of Morocco is only valid in issues of monetary policy, the activity of credit institutions and institutions the decision of which is considered. And that the definition of 'consideration' of (policy) of the Governor of the Bank of Morocco as stated in the article referred to, refer to "matters relating to monetary policy," - the definition is unclear. From the said decision it can also be understood that the theme is also related to the determination of monetary policy that is included into the authority of the Bank of Morocco, but it is one of the tasks the Council of ministers headed by His Majesty the King, on the basis of stipulation set forth in Chapter 66 of the Constitution.

Therefore, stipulated in Article 58 that the "consideration" of (the policy) the Governor of Bank of Morocco by the Standing Committee of Parliament responsible for financial matters, on issues related to monetary policy, it is not in accordance with the Constitution" (Decree No. 2005 / 606).

3- **Respect the principle of separation of powers and independence of the judiciary:**

The principle of separation of powers, including a structural principle and fundamental to a democratic state. This principle has been incorporated into the system through the Moroccan Constitution through Constitution of 1962, which later re-enforced in the wordings the following texts of the Constitution, and in the jurisprudence of the Constitutional Court. Here is the wording of the first decisions issued based on the Constitution on December 31st, 1963 stating that "the formation of search committee or oversight body within the House of Representatives, violated the Constitution." This is because, "the establishment of a examination committee will in turn violate the principle of separation of powers which is the basis of the Constitution."

"The Constitutional Council, in turn, have the opportunity to underline this principle in its Decision No. 2000/382 dated March 15th, 2000 which was previously mentioned as the principle of independence of the Legislative Body in the context of separation of powers by respecting the power in the hands of constitutional institutions."

With respect to the independence of the judiciary, Chapter 82 of Constitution states that, "The judiciary is independent of the Legislative Authority and Executive Authority." Constitutional Council as a judicial institution that

specifically has the exclusive jurisdiction and it is independent of the Executive Authority, Legislature and Judiciary, are in a position which makes it able to guarantee the independence of the judiciary. In this sense, every time there is an opportunity, the Council did not hesitate to remind the independence of the judiciary and the emphasis is given the respect for these principles as stated in the decree issued on November 10th, 1995 on the Constitution No. 95-5 that specifically mention the existence of Fact Finding Commission, which reads as follows:

"Given that the mission of Fact Finding Commission will end when the facts its handles is the object of legal proceedings, which is not only related to the implementation of the legal process after the formation of the Committee, but also when the process is carried out prior to its formation, and not the object of attention when it is underway, in order to maintain the principle of judicial independence and, therefore, it is necessary to understand stipulation provided for in Article 40 of the Constitution." (Resolution No: 95 / 92)

In another Decree, dated August 11th, 2004 Rules of the Supreme Court, the Council considers that the exclusion of chief of Supreme Court and chairman of the Commission of Inquiry from prosecution, even when compared with their peers, it must comply with its provisions – in running the same judicial function the two even have more widespread authority in the judicial activity and bear the responsibilities that could be decisive in the decision. Moreover, this exception does not depend on the legal justification, then the exemption violates the constitutional principle which bears constitutional value, namely, judicial independence (Decision No: 2004/583).

II- Maintenance of mechanism of democracy

Democracy stands on a number of values and it is run through the constitutional institutions and through other substantial mechanisms, particularly, among others, general election. Therefore, there is no democracy without any efforts to protect general election and the validity of its implementation.

Within this scope, supervision carried out by the Constitutional Council on the validity of parliamentary elections produce quite rich interpretations that have been touched various stages of the electoral process, both associated with early stages of the electoral process, election campaigns or related to the voting process itself.

In the first stage, the nomination of candidates (as we shall see) is the most important component. Furthermore, the preparation of lists of voters which is one component of the early stages of the selection process, enabling the Council to declare, for example, that the lack of an agenda for change in the annual audit of electoral lists have been depriving the rights of number of citizens which are guaranteed by the Constitution, and also canceling the elections in the constituency who do not respect this procedure (Decree No. 2000/404).

With regard to the election campaign and voting process, it is for the Council an opportunity to display a set of rules and principles through the issuance of a decision in this regard. To that end the Council seeks to protect and guarantee the validity of the election competition through the use of facilities in accordance with the provisions of the Constitution. The Council then control the possibility of irregularities and fraud when the impact is clear on the voting results. The Council also monitors the accuracy of the establishment of polling stations, conduct the voting and announce the results.

The respect for the validity of the voting, the freedom to choose and the respect for the various rules and regulations of the elections, given the importance of these regulations for the democratic system as a whole, all these help the Constitutional Council to improve the quality of its decision such as in the final decision - to the level of 'General Rule' so it must be 'clear, accurate and complete' according to Council decisions (Decree no. 2011/811).

In addition to ensuring the validity of the election, the Council also stresses the importance of the principles of pluralism and freedom of competition between political parties.

Thus, the Board stated in Decision no. 630 dated January 23rd, 2007 as follows: "Given that the provisions of Chapter 3 of the Constitution, in addition to establishing the functions of political parties, it is also mentioned perceptions of a legal framework which is used as a reference for every political party. The function of political parties, among others, are to contribute to the establishment of representative institutions, to nominate the party's cadres and sympathizers, as well as to propose options and programs for residents as well as to participate in the 'framing' of the electoral process. Political will parties carry out their functions through a multi-party-system that rejects a single party, based on the principles of constitution, including political pluralism and freedom of competition among the parties. Regulation of the Constitution about political parties in this case also always emphasizes the need for independence of political parties in handling their internal problems, while equalizing the positions of the parties before the law

III- Maintenance of rights and public freedoms:

The essence of democracy lies in the extent to which citizens have rights, public freedoms and guarantees for them to be able to run a democracy either in the economic, social or in the field of civil and political rights. In this case, in which we are more concerned about is the spirit of the Constitutional Council in a number of decisions related to the maintenance of the political rights of citizens, particularly with respect to the rights of self-nomination and election.

So, for example, the Council state that the requirements specified in the Election Regulations, which include descriptions of political affiliation of

candidates to be elected, is unconstitutional, the reason is of which as follows: "Given that the terms of the candidate's political affiliation ..., contrary to the provisions of Chapter 9 of Constitution which guarantee freedom of citizens to engage in union organizations or political organizations of their choice, and with reference to the provisions of Chapter 12, which state that all citizens can hold any duty and public position" (Decree No. 2002/475).

Monitoring the validity of parliamentary elections, for the Constitutional Council, is a fertile ground to display rules and principles designed to protect the rights and political freedoms. In this context it is necessary to mention the important position of self-nomination rights and freedom of voting provided for in the decisions of the Council. The lack of respect for the rights and freedoms will not make the Council hesitate to revoke illegal decisions issued by the competent administrative authority, since it may hold up the rights of some citizens to become candidates in the election.

Thus, the Board considers that the rejection of the competent administrative authorities over self-nomination of voters because of an issue that is not a final decision or in absentia, when they go ahead and nominate themselves, is a form of holdup of the rights to proclaim themselves to be candidates. This is supported for the following reasons: "It is clear from what has been stated above that the voters did not acquire their rights for self-nomination while it violates the Constitutional provisions that have been established, so it is not impossible if it results in negative impact on the voting results, so that it is abolished" (Decree No. 2001/449).

In another case, the Constitutional Council considered that a Regional Head (a Governor) who did not implement a judicial court which revoked a decree or decision on the rejection of self-nomination to be candidates in election, could be the reason to annul the results of election.

This is because such a negligence is associated with the violation of fundamental rights o people that are guaranteed by Constitution and other complementary Regulations. In the Decree related to this case, it was mentioned as follows: "In connection with the Regional Head (the Governor) who insisted rejecting to record self-nomination of the Defendant although there has been a notice of the issuance of a court ruling stating that the rejection of self-nomination was a violation of the stipulation provided for in the fourth paragraph of Article 81 of Constitution associated with the House of Representatives." Such a case is also included into violation of people's fundamental rights which are guaranteed by Constitution and other complementary Regulations related to all citizens" (Decrees No. 2000/401 and 1998/185).

In this context, it is necessary to note that the Constitutional Council always opposes any action which is against the authenticity of a court ruling or restricting the rights of self-nomination of candidates and freedom of voting of the voters (Decrees No, 795, 796 and 800/2010).

In relation to the protection of political freedoms, the Constitutional Council strongly rejects any kind of action that could undermine the freedom of voting, or restricting the freedom of voting the voters. Here are some examples:

Some actions that can contaminate the freedom of voting, including fraudulent maneuvers that cause uncertainty in terms of freedom of voters to express their will, make the Constitutional Council to cancel the results of the ballot "(Decrees No. 2000/393 and 2008/704 and 2007/646).

It is clear from the dossier that came with the file, as well as from existing conditions that do not give the electoral process which does not give the voters who want to use their voting rights for their interests. In this context, it is necessary for the Council to cancel of the voting process (Decrees No. 2000 / 363 and 2000/399).

Freedom of rights to vote and equality among voters is among the principles underlying the Constitutional Council in any decision. In this context, the Council stipulates that the provisions which are contrary to freedom of rights of voting and the principle of equality among voter, will be regarded as the unconstitutional provisions (Decree No. 2002/475). In a larger number of decisions issued, the Council pays a great respect for the the above principle as we will mention some of them below:

> "If Chapter 31 of Constitution concerning the House of Representatives, as described in the second paragraph allows a Regional Head to extend the duration voting until 8:00 o'clock at night, then the report on the extension of time in some polling stations, in the same constituency, could result in violation of the principle of equality among voters as well as violations of the principle of equality of opportunity among the candidates. (Decree no. 95/70)

Secondly, Challenges and Prospects Ahead

The primary challenge faced by any institution of constitutional justice is in terms of the extent to which the success of these institutions, through various constitutional facilities – in defending the high position of Constitution, in providing a balanced and prudent maintenance of democratic values, which are the pillars of enforcement of Constitution itself.

This noble goal cannot be realized in a democratic state, except in the presence of a judicial institution that is capable of protecting the constitutional foundations, values, and principles of democracy.

Through stages of its development, constitutional judiciary in Morocco has contributed to performing these functions and duties. Currently the said institution also has been ready to move in the same direction, to move to a more advanced and broader scope, in the scope of dynamic constitutional reform launched by His Majesty King Mohammed VI after his speech on March 9th, 2011 that called for a deeper and comprehensive reform constitutional reform.

With regard to the ongoing constitutional dynamics in the Kingdom of Morocco, I want to conclude my discussion on two main issues:

The first problem is related to the innovative methodology used to approve the said constitutional reforms prior to submission in the form of a referendum.

For the implementation of the participation of all parties in the development of future scenarios around the new constitutional system, two institutions have been established, namely, **firstly**, an instititution of legal nature, which is reflected in "Constitutional Review Advisory Committee" composed of 19 members chosen from a number of prominent legal experts and chaired by a former member of the Constitutional Council. **Secondly**, is the political institution composed of all political party leaders, including the parties thatare not represented in parliament and leaders of the main union organizations. The institutions will be chaired by adviser to His Majesty the King.

It is necessary to note that the legal entity is not working behind closed doors, but for a few weeks, it will make considerable efforts to listen to all political parties and union organizations and associations of civil society such as Human Rights Association, young women, and Religious Associations.

The said agency or council will also accept any advice or suggestion. The two institutions mentioned above are obliged to consider all options proposed and give their opinions about the substance of the reforms proposed by the Law Committee.

The second problem concerns the level and characteristics of these reform as described in a speech dated March 9th , His Majesty the King expressed his firm commitment to create an in-depth reform "which is essentially a system of constitutional democracy" through the seven fundamental pillars that are briefly embodied in the strengthening of constitutional Moroccan-style-pluralistic identity; upholding human rights system, strengthening the principle of separation of authorities or powers, especially by expanding legislative-parliamentary-jurisdiction, which is inspective in nature, strengthening the government's jurisdiction, the first minister, strengthening the role of political parties, strengthening the status of the parliamentary opposition and civil society; strengthening mechanisms for the creation of public life and well managed institutions, in addition to increasing the judiciary system into an independent authority, and strengthening the authority or power of the Constitutional Council. And we should pay special attention to this matter.

The questions now are, among others, (1) what kinds of prospects does the Constitutional Council have in the scope of comprehensive reforms? (2) To what direction the Council will move to strengthen its authority?

As mentioned above, political institutions, unions and organizations have expressly described the whole picture to the Advisory Committee to review the Constitution. It has been clear to us via search for proposals put forward by those agencies regarding the Constitutional Council, that these institutions have been focused on the following three approaches, namely:

1 – To provide a minority parliament with broader rights to sue the constitutionality of ordinary legislation before the Constitutional Council.

Because, if the legislation is complementary to Constitution within the Constitutional Council, it shall be delegated to the Constitutional Council, and the right to sue the constitutionality of the regulation of normal (prior to its publication), and limited, according to the Constitution of 1996, and only to the King, Prime Minister and Speaker of the House, the President of Advisory Board and one-fourth of members of one of Parliamentary Council.

Many political actors who assume that an increase in the number to one-fourth of parliament members assess that it is necessary for the entire constitution tailored to the Constitutional Council. This indicates that there is little change that allows one of the two Parliament Councils to exercise their rights to sue over the constitutionality of the ordinary law before the Constitutional Council since 1996, and so far not more than four cases.

Therefore, to strengthen the democratic system which reflects respect for the high position of the Constitution of the fundamental provisions, many union organizations, political parties and the rights that proposed reduction of this figure, making it impossible for minorities in parliament to refer to the Constitutional Council (some agencies proposed a reduction in the figure to be ten members of each Parliament Council).

2 – To allow a person (an individual or a legal entity) to contest the constitutionality of the ordinary law before the Constitutional Council.

3 – To control of the constitutionality of agreement:

This is done by providing the Constitutional Council with an authority to monitor the constitutionality of international treaties and conventions that may be incompatible with the Constitution, before it is approved.

In fact, strengthening the authority of the Constitutional Council in this direction will enable it to come up to uphold its fundamental mission. A mission must be carried out by all the Constitutional Courts as reflected in the efforts in maintaining the high position of Constitution, the rules of law, the principle of equality of position of each person, the protection of the rights and fundamental freedoms for the maintenance of the basics of legal and democratic state, which will enable the Constitutional Court to compete with the democratic choice of the state and society in our country.

These all are the biggest challenges which may lead us to a success!

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

SESSION TWO

Democratization of Lawmaking Process

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ON CONSTITUTIONAL DEMOCRATIC STATE

SESSION TWO

Democratization of Lawmaking Process

PANEL I

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

DEMOCRATIZATION OF LAWMAKING PROCESS

Hon. Claudio Ximenes
President of the Tribunal de Recurso of Timor Leste

The Constitution defines Timor-Leste as a democratic State based on the rule of law, the will of the people and the respect for the dignity of the human person.

Materializing this definition the Constitution says that: the people shall exercise the political power through universal, free, equal, direct, secret and periodic suffrage and through other forms laid down in the Constitution (s. 7, nr. 1); the political power lies with the people and is exercised in accordance with the Constitution (s. 62); elected organs of sovereignty, including the President of the Republic, and of local government shall be chosen by universal, free, direct, secret, personal and regular suffrage (s. 65, nr. 1, and 76, nr. 1); the Prime Minister shall be designated by the political party or alliance of political parties with parliamentary majority and shall be appointed by the President of the Republic, after consultation with the political parties sitting in the Parliament (s. 106, nr. 1). Although the Courts are not a political body, the President of the Supreme Court is appointed by the President of the Republic and this appointment should be ratified by the National Parliament (s.124), and out of the 4 members seating with the President of the Supreme Court of Justice in the Superior Council for the Judiciary, witch is the organ of management and discipline of the judges and it is incumbent upon it to appoint, assign, transfer and promote the judges, one is designated by the President of the Republic, one is elected by the Parliament, and one is designated by the Government (s. 128, nr. 1 and 2).

On law-making process the Constitution and the bylaws of the Parliament assigns the legislative initiative to members of the Parliament, the parliamentary groups and the Government. But Parliament is undoubtedly the State body which by nature has the legislative power.

Section 95 establishes that it is incumbent upon the Parliament to make laws on basic issues of the country's domestic and foreign policy (nr. 1) and presents a long list of matters over which Parliament has exclusive power to make laws - such as (a) the borders of Timor-Leste, (b) the limits of the territorial waters, of the exclusive economic area and of the rights of Timor-Leste to the adjacent area and the continental shelf, (c) national symbols, (d) citizenship, (e) rights, freedoms and guarantees, (f) the status and capacity of the person, family law and inheritance law, (g) territorial division, (h) the electoral law and the referendum system, (i) political parties and associations, (j) The status of Members of the National Parliament, (k) the status of office holders in the organs of State, (l) the bases for the education system, (m) the bases for the health and social security system, (n) the suspension of constitutional guarantees and the declaration of the state of siege and the state of emergency, (o) The Defence and Security policy, (p) the tax policy, and (q) the budget system (nr. 2).

Section 96 establishes that the Parliament may authorize the Government to make laws on a list of matters over which Parliament has exclusive jurisdiction - such as (a) definition of crimes, sentences, security measures and their respective prerequisites, (b) definition of civil and criminal procedure, (c) organization of the Judiciary and status of magistrates, (d) General rules and regulations for the public service, the status of the civil servants and the responsibility of the State, (e) general bases for the organization of public administration, (f) monetary system, (g) banking and financial system, (h) Definition of the bases for a policy on environment protection and sustainable development, (i) General rules and regulations for radio and television broadcasting and other mass media, (j) civic or military service, (k) general rules and regulations for requisition and expropriation for public purposes, (l) means and ways of intervention, expropriation, nationalization and privatization of means of production and land on grounds of public interest, as well as criteria for the establishment of compensations in such cases (nr. 1). Laws authorizing legislation shall define the subject, sense, scope and duration of the authorization, which may be renewed (nr. 2). Laws on legislative authorization shall not be used more than once and shall lapse with the dismissal of the Government, with the end of the legislative term or with the dissolution of the National Parliament (nr. 3).

Section 97 establishes that the power to initiate laws lies with the Members of Parliament, the parliamentary groups and the Government (nr.1). Although, for the sake of the principle of separation of powers and institutional cooperation, there shall be no submission of bills, draft legislation or amendments involving, in any given fiscal year, any increase in State expenditure or any reduction in State revenues provided for in the Budget or Rectifying Budgets. (nr. 2)

As confirmation of the broad legislative powers of Parliament, section 98 establishes that statutes other than those approved under the exclusive legislative

powers of the Government may be submitted to the Parliament for appraisal, for purposes of terminating their validity or for amendment, following a petition of one-fifth of the Members of Parliament and within thirty days following their publication (nr. 1); the National Parliament may suspend, in part or in full, the force of a statute until it is appraised (nr. 2); where termination of validity is approved, the statute shall cease to be in force from the date of the publication of the resolution in the Official Gazette, and it shall not be published again in the same legislative session (nr. 4).

The legislative process is a complex process involving a series of acts carried out by deferent State bodies: parliament or government, the President and, eventually, the Supreme Court.

This process involves several stages:

(a) The phase of legislative initiative - presentation of a text of normative precepts, a bill (called "projecto de lei" when presented by a member the Parliament or a parliamentary group, and "proposta de lei" when presented by the Government).

(b) The phase of hearings – to collect data in order to analyze the content of the legislative process and whether the legislative procedure is appropriate.

(c) The phase of decision - to decide whether or not to approve the bill or proposed law. Voting in general, and voting in detail and final overall voting should take place in this phase.

(d) The phase of control - the control is done by the President of the Republic and eventually by the Supreme Court. It is the responsibility of the President to sign the bill passed by Parliament. The President may decide to promulgate or veto the bill pass by the Parliament and sent for enactment. But before deciding whether to enact the bill or not the President may request the Supreme Court to decide whether the bill passed by the Parliament violates the Constitution (section 149)[1]. When the Supreme Court decides that the bill sent to the President for enactment violates the Constitution the President may ask the Parliament to redraft the bill in accordance with the decision of the Supreme Court. When the President of the Republic does not promulgate the bill, on the basis that the Supreme Court have decided that the bill violates the Constitution or by exercising the political veto, if the Parliament confirms it's vote by an absolute majority of its members in full exercise of their functions, the President of the Republic shall promulgate the bill (section 88 and 149, n. 4).

By the enactment of the bill by the President of the Republic the legislative process is complete. But in a democratic State based on the rule of law the citizens are entitled to know that a law exists. Publication of the law in the official gazette is a prerequisite of its effectiveness (section 5, n. 1 and 2 – a), c) and d), of Law 1/2002, June 29).

1 The Court of Appeal, which shall exercise the powers of the Supreme Court, has been called several times to do the preventive control of the constitutionality of the draft law sent for promulgation.

Timor-Leste is a 9 year young Republic that holds many challenges for the Government. The rate of illiteracy is high; so is the rate of ignorance about the state institutions and their functioning. The heads of the State institutions have no long experience. It is urgent to pass the laws required for the functioning of various institutions and the regulation of various activities in the country.

But, in practise, both the Government and the Parliament have involved through public consultations and hearings the institutions and other stakeholders in preparing the draft legislation relating matters that have to do directly with them.

I would say that the lawmaking process in Timor-Leste has a high rate of democracy either by the legislative and constitutional framework, either by operation of the system and either by external transparency.

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

DEMOCRATIZATION OF LAW MAKING PROCESS

Hon. Ignatius Mulyono
Chairman of Legislation Board of the House of Representatives of Indonesia

There is no doubt about the knowledge and understanding of our founding fathers concerning the concept of democracy from the scholars in any parts of the world. However, the term of democracy will never be found in Pancasila, the basic national policy of the Republic of Indonesia. This does not mean that the Indonesian people do not recognize democracy. The concept of democracy in Indonesia did not take the full thoughts from other countries. The concept of democracy is obtained from the concepts that were explored by their own culture.

One of the founders of this nation once said that "the ability and skills of the Indonesian people in managing the country has been existing since thousands of years ago as reflected in the reign of great kingdoms of the archipelago at the time. Seeing the 21,000 villages in Java, 700 Nagari in Minangkabau, the arrangement of the nine states in Malaya, so was in Borneo, the Bugis, Ambon, Darwin, and elsewhere. This federal arrangement is not influenced by Hinduism, Buddhism, and feudalism and colonialism. Rural countryside is still the same, although the order varies according to changing times and the village is one of the pillars of the federal customs which has more similarities than differences in Indonesia. In this structure, some people are selected to hold power and be delegates to the higher order. This representation discusses big matters. Delegates do not only strengthen the federal common law in the state code below, but also act as a guide in people's desire in organizing the country. These delegates would be the soul connections of the people and the representatives based on the Indonesian culture.

Republic of Indonesia was not established by and for certain people, not by and for one group, but by all for all. There are at least three keywords in Pancasila, wisdom, consultation and representation. Two keywords are enough to explain how the House of Representatives work as a board representative, that is the representative board that consult various national problems in a spirit of wisdom for the benefit of the people, not the individual, groups and certain groups.

Those concepts relate to the democratization process of law making. This display will picture how the progress of legislation, which like it or not will be reflected on how the success and difficulties experienced by the House of Representatives related to law making and the development of democracy in Indonesia.

Democratization of Law Making

a. The developments occurred

Sociological conditions and political dynamics influence a substantial and significant impact on the formation process of law in Indonesia. Before the reform era, the House of Representatives has a negative stigma as a 'craftsman chop' or just as a formality legitimacy providers for every law proposed by the Government. Filing a initiative bill was a tough thing to do at that time. It cannot be discharged from the social political conditions in which the process of filling the members of the board representation which is not done in democratic elections, non functioned political parties, very limited freedom to submit their opinions, and limited releases.

Era of change known as reform era was marked by the change of written law, namely the 1945 Constitution 4 (four) times from 1999 until 2002. The change of Constitution has become the basis and starting point in the process of democratization of law making process.

The Amandemen of 1945 Constitution, Article 20 paragraph 1 explicitly state that the House of Representatives has the authority to make laws. This policy change the construction of 1945 Constitution, Article 5. It previously said that the President holds the authority to make law with the consent of the House of Representatives. President has the right to submit the bill to the House of Representatives.

The Amandemen of 1945 Constitution, has swung the pendulum of law making power from the President (executive) to the House of Representatives (the legislature). Besides the changes of the power of law making, democratization of law making is accompanied by other democratic instruments, namely the clean general election, freedom to express their opinions, and freedom of the press. The process of election that aims to elect representatives who will sit on the board of representatives has been improved. The improvement includes the participants who are only constrained by the two political parties and a group;

no appointed members of the board of representation, and the organizers of a national election which is fixed and independent.

Institutional construction in law making also changed after the amandement of 1945 Constitution, with the formation of a new board, the Regional Representative Council and the Constitutional Court. According to 1945 Constitution, Article 22D Paragraph 1 and 2, the Regional Representative Council may propose to the House of Representatives the bill relating to regional autonomy, central and local relations, the establishment , consolidation and development of districts, natural resources management and other economic resources, and related to the balance of central and local finance. The Regional Representatives Council also discusses the draft relating to the district autonomy; central and regional relations; establishment , development and consolidation of district; management of natural resources and other economic resources, as well as central and local financial balance; and give consideration to House of Representatives on the bill estimating the income and expenses and bill related to taxes, education, and religion. While based on 1945 Constitution, Article 24C Paragraph 1, one of the Constitutional Court authority is to adjudicate on the first and final floor to review the law to the Constitution.

Based on the institutional construction, the law making does not only involve the House of Representatives and the President, but also involves a new board that is the Regional Representative Council, particularly when those laws related to matters as outlined in the constitution. There is a democratization of the legislation because the district interests which are represented by the Regional Representative Council have opportunities in the legislation. While the Constitutional Court having authority to review the laws to the constitution, is the democratization concerning the interpretation whether there is conflict between the laws and 1945 Constitution.

b. Public Participation and Transparency

The formation of a democratic law generally links to problems of transparency and public participation. On Juridical normative, the underlying conditions have been quite organized in the regulation legislation.

Act Number 10/2004 on Formation Legislation organized the participation of society in Chapter X of Article 53 which states that society has the right to make suggestions verbally or in writing in order to discuss the draft.

Next, in Article 153 of Act Number 27/2009 stated that the completion and discussion of the bill, including a discussion of the state budget, the public community has the right to make suggestions verbally and/or in writing to the House of Representatives. Members of the House of Representatives or other organs of House of Representatives that equip or discuss the bill can get input from the public community. Further conditions about the procedure of input acceptance and absorption in the preparation and discussion of the bill are ruled by the House of Representatives.

House of Representatives' rules of code organizes the public participation in Article 208 up to Article 211. Based on the Community Code, public community may give feedback orally and / or in writing to the House of Representatives in the process:

a. restructuring and setting national Legislation Program;

b. Bill preparation and discussion;

c. discussion of the bill on the state budget;

d. monitoring the implementation of the law and

e. monitoring the implementation of government policy.

In the case of written input in the process, the input is delivered to members or Head of House of Representatives. Inputs are given by stating a clear identity addressed to chairmen of the House, the committee leaders, a commission led coalition, leader of a special committee, the leader of Legislative Body, or the leader of the Agency Budget preparing the discussion of the bill and surveillance of the law, or government policy. In the case of the input presented to the chairmen of the House, the input is forwarded to the leadership committee, a commission led coalition, led a special committee, the leadership of Legislative Body, or the leadership of the Agency estimates, the complete draft bill.

In the case of the oral input, leader of a commission, leader of commission coalition, leader of a special committee, leader of Legislative Body, or the leader of the Budget Agency, determining the time and the number of inviting people.

The leader of committee, leader of coalition commission, leader of a special committee, the leader of Legislative Body, or the leader of the Budget Agency sent invitations to the invited person. The meetings could be done in the form of a hearing to public opinion, the meeting with the leaders of a commission, a leaders of coalition commission, leader of a special committee, leader of Legislative Body, or the leader of the Budget Agency, or meeting with the leaders of a commission, leader of coalition commission, leader of a special committee, leader of Legislative Body, or leader of Budget Agency accompanied by several members involving in the preparation of the law. The results of the meeting serve as input to the proposed law which is being prepared. Leaders of parliament bodies who accept suggestions inform the follow-ups to the community by mail or electronic media.

Related to the transparency, Article 200 of Law Number 27 Year 2009 on the People's Consultative Assembly, the House of Representative, Regional Representative Council, Regional House of Representative states that all meetings in the House of Representatives are actually open, unless the meeting stated closed.

In implementation, the House has done activities to absorb the aspirations of society at all stages of legislation, ranging from planning, preparation and discussion. The absorption of the community's aspirations, among others made by Hearing Public Meetings, work visits, and received written input either via mail or electronically, and receive delegation coming directly to the House of

Representatives to deliver the aspirations associated with the legislation. While the transparency of the process is done with state open meetings, except for certain cases specified closed, the distribution of the development of the bill through the print and electronic media, as well as through press conferences to explain the development debate of the bill.

Aspiration of the absorption is still more optimized through the mechanism and increase system capacity to be able to collect and process inputs and be presented to the House members as a topic to determine the attitudes and decisions. Transparency process can be optimized by increasing the role and cooperation with mass media both print and electronic publications to inform the development of discussion of the bill, and do not select only certain legal plan which is attractive, because all of the bills have equally important meaning.

c. Obstacles

Democratization in the legislation can be mentioned on the right track, but undeniably, there are problems and difficulties. Problems associated with the process of legislation, covering the two principal cases, the process and substance.

Concerning the process, the process of developing the bill in the House of Representatives, from the planning, organization, and discussion, take a relatively long time. With the member composition in the House of Representatives consisting of 9 (nine) fractions, the discussion to reach a consensus is more difficult and takes time. In addition, much discussion of the bill done in parallel and parliament bodies give implications on the legislation.

Associated with the substance, the freedom of opinion and obligations of the House to absorb as much as the aspirations of the community, the House gets more inputs. But the community's aspirations are not always the same, they are often found in conflict. Thus, the House often faces a dilemma, that is differences of interests. Policy formulation is always be associated with different interests to consider. Employment Management Policy has aspects of the interests of employers and workers. There are aspects of trade policy interests of producers and consumers. Policy on management of natural resources associates with aspects of economic importance and sustainability of the environment, and so forth. That requires wisdom and statesmanship of the nature of House members in a discussion of the bill to make the law acceptable to all parties or at least has the smallest negative impact. For that is the spirit of the founder countries need to sound in this opportunity that our nation is not for one person, one group or one group, but for all the Indonesian people.

Associated with it, the presence and existence of the Constitutional Court as constitutional guard of one of its duties to test the laws of the constitution has very important meanings. Testing the law against the constitution is one reflection of democracy. Testing the law against the constitution should be seen not to place the House of Representatives and the President (as the law maker) as a defendant and the applicant as a prosecutor. Constitutional court to review

whether there is any contradiction between the law with the constitution. In this case, the capacity of forming the law is to give evidence or explanation of the background associated with the formulation of the verse or article in the law. Articles or paragraphs in the law are based on political considerations that may have different interpretation. Thus, the legal test of constitutional law at the Constitutional Court is not sitting lawsuit that decides who wins or who loses, but it is the council to interpret whether there is any conflict between the law and the constitution. If the Constitutional Court states that there are conflicts, then the task of constitutional court to cancel and state that it does not work and it has no binding force. The task of House of Representatives and the President as a law maker is to complete the law through legislation by taking into consideration of law and Constitutional Court decisions. Thus the checks and balances mechanism runs.

Concluding Remarks

In closing, democratization in the process of legislation at this time is on the right track. However, completion still needs to be done, both regarding the process and substance in terms of legislation. Democracy in the legislation in Indonesia should be undertaken in the context of Indonesia, which is not a democracy for individuals or groups, unless democracy for all. In other words, the law is not formed for the benefit of individuals and groups, but to the interests of all the Indonesian people. Constitutional court, according to the task and its authority, has a very important role, namely to keep laws which are made by the Parliament and President constitutionally.

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

LEGISLATIVE PROCEDURE IN THE REPUBLIC OF LITHUANIA

Hon. Stasys SEDBARAS
Chairman of the Committee on Legal Affairs
Parliament of the Republic of Lithuania

1. General provisions

The legislative procedure is regulated by the Constitution and the Statute of the Seimas (the Parliament) in the Republic of Lithuania.

The Statute of the Lithuanian Parliament is a specific legal act reflecting certain sovereignty of the Parliament which is one of the branches of State power. The Constitution prescribes that the Statute of the Seimas has the power of law. This means that the procedure of its enactment slightly differs from the procedures of adoption of other laws; however, it does have the power of law.

The Statute of the Seimas (the Parliament) is specific, first and foremost, because its individual articles or the whole content may be eliminated, supplemented or changed by more than half of all the Seimas Members voting in favour thereof. A different majority is required in case of a regular legal act.

On the other hand, the laws adopted by the Seimas come into force only after they are signed and officially announced (promulgated) by the President of the Republic.

A different procedure is applied for the Statute of the Seimas: it is signed and announced by the Speaker of the Seimas. This means that the President of the Republic may not impact (to put a veto, like it is in case of other laws) the final content of the Statute of the Seimas.

2. Types of legal acts adopted by the Seimas

1. Laws:
   - 1.1. Regular laws. Laws are deemed to have been passed if more than a half of the Seimas Members present at the plenary sitting votes in favour thereof;
   - 1.2. The State Budget. The procedure of consideration of the State Budget differs from that of regular laws just as the procedure of its adoption differs from the one in the case of proposals rejected by the Government;
   - 1.3. Laws concerning ratification and denunciation of international treaties. A law concerning the ratification of an international treaty is adopted by a majority vote of the Seimas Members present at the sitting, but no less than 2/5 of all of the Seimas Members.
   - 1.4. Constitutional laws are deemed to have been passed if more than a half of the Seimas Members vote in favour thereof. Amendments to constitutional laws must be passed by a 3/5 majority vote of all the Seimas Members. The List of Constitutional Laws is established by the Seimas by a 3/5 majority vote of the Seimas Members;
   - 1.5. Laws on constitutional amendments are considered and voting in the Seimas thereon is held twice, with an adjournment of at least three months between voting. A law on amendment of the Constitution is deemed to have been passed by the Seimas provided at least 2/3 of all the Seimas Members voted in favour thereof during each voting (141 : 3 x 2 = 94 MPs).
   - 1.6. (Laws adopted by way of referendum).
2. Decisions of the Seimas.
3. Resolutions. A resolution is a non-standard act of the Seimas, adopted to confirm in writing the opinion of the Seimas on any issue of national importance.
4. Other non-standard acts (appeals, declarations, non-standard decisions, etc.).

The President of the Republic, the Government, Members of the Seimas, committees and political groups have the right of resolution initiative.

A decision of the Seimas, resolution or other non-standard legal acts of the Seimas is adopted at the plenary sitting by a majority vote.

3. Stages of the legislative process

The following stages of the legislative process are stipulated in the Constitution and the Statute of the Seimas:

1) Implementation of the right of legislative initiative;
2) Registration of a draft of law with the Secretariat of the Seimas;
3) Presentation of a draft law at the Seimas plenary sitting;
4) Consideration of draft laws in the principle committees;

5) Consideration of draft laws at the Seimas plenary sitting;
6) Adoption of a law at the Seimas plenary sitting.

3.1. Implementation of the right of legislative initiative

Under the Constitution the right of legislative initiative in the Seimas belongs to the members of the Seimas, the President of the Republic, and the Government. Citizens of the Republic of Lithuania also have the right of legislative initiative. 50.000 citizens of the Republic of Lithuania who have the electoral right may submit a draft law to the Seimas and the Seimas must consider it.

The right of legislative initiative is most often realised through the Government. The ministers set up working groups to cover the areas delegated to them and authorise the ministry staff to draft legislative proposals.

It is quite common that draft laws, notably those amending or supplementing the laws currently in force are submitted by Members of the Seimas or their groups.

The number of groups formed by the Board of the Seimas under Committees' proposals has recently increased. This contributes to broader representation of various society groups in drafting laws as compared to draft laws initiated in the framework of a single ministry.

Draft laws are also prepared by working groups set up by the President of the Republic; these draft laws are subsequently submitted to the Seimas for consideration by the Head of the State.

An explanatory note to be attached to the draft law is a very important requirement for the draft initiator; the detailed requirements thereof are described in the Statute of the Seimas.

3.2. Registration of draft laws with the Secretariat of the Seimas

All draft laws and proposals submitted to the Seimas are registered with the Secretariat of the Seimas. With respect to the registered draft law the Legal Department of the Office of the Seimas, within seven working days of the date of receipt thereof, draws up conclusions on whether or not the draft is in conformity with the Constitution, laws, principles of legislation and technical rules of law-making.

If a draft law is submitted by the Seimas Members, the President of the Republic, or citizens, it is transferred to the European Law Department under the Ministry of Justice which, within 10 working days of receipt thereof, works out conclusions whether or not this draft is in conformity with the European Union Law.

Publications *Seimo kronika* and *Valstybes Zinios (Official Gazette)* also announce about a draft law.

If the Legal Department concludes that a draft is not in compliance with the Constitution of the Republic of Lithuania, the Committee on Legal Affairs must preliminarily consider this draft.

If the Committee on Legal Affairs decides that the draft is in compliance with the Constitution, its consideration proceeds in accordance with the established procedure.

If the Committee on Legal Affairs comes to the conclusion that the law is not in conformity with the Constitution, the draft may be presented for consideration at the plenary sitting of the Seimas only in case the majority of the Seimas Members comprising more than a half of all MPs (71) decide otherwise or if an amendment to the Constitution is submitted by the draft initiators together with the draft.

As necessary, the Speaker of the Seimas and the Board of the Seimas may, on their own initiative or on the recommendation of the respective committee, request that the Government (when the draft is not submitted by it) and other institutions present to the Seimas their conclusions concerning the draft under consideration.

The initiators of a draft law have the right to recall the said draft before it is considered at a sitting of the Seimas.

3.3. Submission of a draft law at the plenary sitting of the Seimas

A draft of a law or any other Seimas act is presented at the Seimas sitting by the initiator of the draft or his representative (a representative of the President of the Republic, the Prime Minister, a Minister or Vice Minister authorised by the Government, or a representative of citizens), who gives a brief (maximum of 10 minutes) characterisation of the draft and answers questions of the Seimas Members (up to 10 minutes).

The Seimas adopts one of the following decisions concerning the submitted draft of a law or any other standard act:

1) to commence the procedure of consideration of the draft;
2) to postpone the procedure of submitting the draft and to specify the actions to be taken by the initiators prior to repeatedly submitting the draft to the Seimas; and
3) to reject the draft specifying the motives of rejection.

All decisions on the presentation and consideration of a draft law at the sitting of the Seimas are adopted by a simple majority vote of those present and voting, with the exception of decisions to reject a draft, or to publish a draft for public consideration, which are adopted provided that the majority voting in favour thereof comprises at least 1/4 of all the Seimas Members (36).

In the event that funding related to the adjustment of the State Budget is required for the implementation of the law, the proposals of the initiators of the draft and the conclusions of the Committee on Budget and Finance and the Government concerning possible sources of funding must be presented during

further consideration of the draft and the draft law on the amendment to the State Budget which is being considered.

Upon deciding to commence the procedure of consideration of a draft law, the Seimas must at the same sitting set an approximate date of its consideration at the sitting of the Seimas, and appoint the principal committee and additional committees for further consideration or improvement of the draft. The proposal concerning the date of the preliminary consideration, the principal committee and additional committees is deliberated and submitted to the Seimas by the Assembly of Elders.

3.4. Consideration of draft laws in committees

The principal committee must discuss at its sitting the readiness of the committee to examine the draft law. For the above purpose, the committee assigns responsible committee members – persons in charge of drafting committee conclusions (as a rule, one from the Seimas majority and one from the Seimas minority), stipulates which experts' opinions need to be heard, may request additional conclusions from other committees or State institutions, may specify up to when other interested persons may submit remarks, proposals and amendments to the committee, when conclusion drafters must submit the first draft of the conclusions to the committee, and make other preliminary decisions.

The principal committee must publish in the press the information about the deadline for proposals and remarks of interested persons to be submitted and how public representatives can acquaint themselves with the text of the draft law.

The principal committee must send the draft law to all interested State institutions and, as necessary, to public organisations, local governments, political parties, and organisations so that the said institutions and organisations can send their assessments thereof.

All of the material received concerning the draft law is assessed and summarised by the principal committee.

Following the expiration of the time for submitting remarks and proposals on the draft law, all of the remarks obtained from the interested persons and experts may be deliberated at the principal committee hearings, where all remark and proposal presenters are invited.

In case additional Seimas committees have been designated, the principal committee must receive conclusions of these committees regarding the draft law and evaluate them at its sitting as well.

During deliberations in the principal committee one of the following decisions to be presented for the consideration of the draft at the Seimas sitting must be adopted:

1) to approve the draft law, submitted by the initiators, or the draft law, revised by the committee, and the committee conclusions;
2) to approve or not to approve the amendments of the draft law received from persons enjoying the right of legislative initiative (amendments which have been approved are included in the draft law, revised by the committee; all of the amendments received from these persons are included in the conclusions of the committee);
3) to call a recess of deliberations in the committee and to return the draft law and conclusions for revision by the authors of the conclusions who must implement the actions indicated by the committee;
4) to announce the draft to the public for consideration;
5) to return the draft to its initiators for revision; or
6) to reject the draft.

3.5. Consideration of draft laws at the Seimas plenary sitting

The draft law and conclusions of the committee are distributed among Seimas Members no later than 72 hours before the commencement of the Seimas sitting during which this draft is deliberated.

During consideration of a draft law at a sitting of the Seimas, amendments received at least 48 hours prior to the sitting submitted by the President of Republic, Government, or a Member of the Seimas may still be presented. During deliberation of a draft law at the Seimas sitting, the Seimas decision is adopted with respect to the amendments and supplements by the Seimas.

The procedure of deliberating a draft law at the sitting of the Seimas is as follows:

1) a report of the principal committee which is examining the draft law is heard;
2) a vote is taken in case the principal committee proposes to return the draft to its initiators or to reject it. If the Seimas does not approve the principal committee's proposal, the Seimas may appoint another principal committee or set up a special Seimas commission to revise the draft law;
3) reports by representatives of initiators of alternative drafts, if there happen to be such, are presented;
4) additional reports by other committees are heard;
5) a general discussion is held on the basic provisions of the draft law: statements of the Government, other committees, political group members, and individual Seimas Members;
6) a recess is called in the Seimas sitting, should the Seimas fail to approve the draft submitted by the principal committee or should the Seimas decide to approve an alternate draft, which has not been approved by the principal committee, and the draft is either returned to the same principal committee for revision, or the Seimas may appoint another principal committee or set up a special Seimas commission to edit the draft;

7) decisions are deliberated and adopted with respect to the amendments and supplements of the draft law, which have been presented during deliberation in the principal committee by persons having the right of legislative initiative and those which have not been approved by the principal committee;
8) decisions are deliberated and adopted with respect to the amendments and supplements of the draft law, which have been presented by the President of the Republic, the Government or a Seimas Member, if the amendment or supplement submitted by him/her is supported by at least ten Seimas Members, at least 48 hours prior to the deliberation of the draft at the Seimas sitting.

After consideration the Seimas decides:

1) whether or not to approve the draft law approved by the committee with the amendments adopted during the Seimas sitting and to appoint the date of passage of the law;
2) whether or not to announce the draft for public consideration. In such a case the procedure is repeated starting from the consideration in the principal committee;
3) whether or not to return the draft for revision to the principal committee. If such a decision is adopted, a routine decision by the Seimas with the principal provisions indicating what needs to be corrected by the principal committee must be adopted concurrently;
4) whether or not to adjourn the consideration of the draft, if the consideration is not completed at the same sitting or if it becomes clear that the Seimas Members require additional information necessary for the consideration of the draft;
5) whether to return the draft to the initiators for fundamental revision. In this event, the procedure of deliberation of the draft is repeated from the moment of its presentation at the Seimas sitting;
6) whether or not to reject the draft and, if necessary, to authorise the preparation of a new draft.

Decisions of the Seimas at the stage of deliberation are taken by a majority vote.

3.6. Adoption of a draft law at the Seimas plenary sitting

The principal committee must submit to the Seimas for adoption a draft law newly edited by the Documentation Department of the Office of the Seimas. The Legal Department of the Office of the Seimas also submits conclusions with respect to this draft.

At the time of passing only the amendments, supplements and deletions which are supported by at least one fifth of the Seimas Members at the sitting are considered following the presiding officer's announcement thereof. All proposed amendments, supplements and deletions of the draft law must be submitted by the persons having the right of legislative initiative to the Secretariat of the Sitting at least 48 hours before the time indicated in the time schedule of commencement of the procedure of passing the law.

The principal committee must assess the received amendments, supplements and deletions as well as the conclusions of the Legal Department prior to the passing of a draft law.

During a regular session draft laws are usually passed at morning sittings on Thursdays.

During the passage of the law, the rapporteur appointed by the principal committee, makes a brief overview of the additional proposals and amendments received, indicating their presenters.

Subsequently, individual sections of the draft law are put to the vote. Decisions on individual articles are adopted by a majority of the Seimas Members present at the sitting.

After all the articles of the law have been considered, the entire draft law is put to the vote. When voting for the entire draft law takes place, the presence of no less than a half of all Seimas Members (at least 71 MPs) is required.

If the draft law is rejected at any stage of consideration, it may be submitted again, but no sooner than 6 months thereafter.

4. Final provisions

In an effort to further democratise the legislative process in the Republic of Lithuania, the Law on the Fundamentals of the Legislative Process is being drafted. Alongside a number of procedural provisions there are several principal proposals to make law-making accessible to the public, create conditions for general public representatives to observe the process of improvement of a legal act from its original draft to its adoption at the parliament or another competent institution (the Government, a ministry, municipal institution, etc.). In other words, the initiator of any legal act will have to post his draft on a special parliamentary website to provide a possibility for the public to follow the procedure of the preparation of the legal act.

On the other hand, the public will not only be able to follow the development of the legal act; society representatives will also have a possibility to present their own proposals that will be considered by the drafting team, which is called the procedure of *Consulting with the public*.

After a legal act is adopted, or, in case of a law – after it is signed by the Head of State, the act will be posted on the abovementioned special parliamentary website. Lithuania is essentially moving from a paper to digital format; with the only exception of periodical print outs of sets of legal acts to be sent to certain public institutions, possibly, to public libraries.

Another new idea proposed in the draft Law is the monitoring of the performance of a legal act to be carried out at certain intervals of time. This measure will help to identify the existing loopholes and regulatory problems and to improve the situation effectively. Monitoring results will be posted on the internet website mentioned above to enable society representatives' engagement in the process.

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

SESSION TWO

Democratization of Lawmaking Process

PANEL II

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

THE PHILIPPINE SUPREME COURT'S ROLE IN ENSURING CHECKS AND BALANCES

Hon. Renato C. Corona
Chief Justice of the Supreme Court of the Philippines

The Honorable Chief Justice Mohammad Mahfud of the Constitutional Court of the Republic of Indonesia, fellow Chief Justices, distinguished participants, delegates, distinguished guests, ladies and gentlemen, a pleasant good morning to you all.

I am glad to be here in Indonesia, our neighbor to the south. The Philippines and Indonesia have a long history of friendship, goodwill and affinity. Our people trace our ancestry to sea-faring Malays (from what is Indonesia today) who settled in our shores during the New Stone Age 5,000 BC to 3,000 BC.[1]

Filipinos and Indonesians are not only brothers but are also dependable allies and friendly neighbors committed to protect their common borders from terrorism and illegal fishing. It is therefore not surprising that this nation-archipelago is now home to some 100,000 Filipino workers, largely skilled professionals in banking, finance and advertising.

Today's Indonesia is an emerging model of democratic polity[2] metamorphosing from "the rule of an iron fist" to what United States President Barrack Obama calls "the rule of the people."[3] It is thus fitting that Indonesia should host this year's international symposium on the constitutional democratic state. As *The New York Times* prints out, "For all the country's troubles, Indonesia's transition to democracy after decades of autocratic rule may offer the best model."[4]

1 http://philippines-timeline.com.
2 http://www.theaustralian.com.au
3 http://www.npr.org/2011.
4 www.thejakartapost.com/new/2009/Prof. Thitinan Pongsudhirak of Chulalongkorn University authored this op-ed piece in *The New York Times.*

On this note, let me express my sincerest gratitude to Chief Justice Mohammad Mahfud for his kind invitation for me to be part of the celebration of the 8th Anniversary of the Constitutional Court of the Republic of Indonesia.

Indonesia's transition to democracy is somewhat akin to the path taken by the Philippines. Like Indonesia which has been under three Constitutions since its independence,[5] we have had three Constitutions in our relatively short history as a 20th century democracy.

Our first constitution in the post-1900 era was the 1935 Philippine Constitution. It came into being when our country was still a colony of the United States. (American control of our islands spanned 48 years from 1898 to 1946.) The governmental structure therefore practically mirrored that of the U.S. government. One notable change, however, was in the composition of the Supreme Court. Beginning 1935, the Court came to be an all-Filipino court.

Our colonial-era 1935 Constitution was replaced by the 1973 Constitution which changed the form of government from presidential to parliamentary. It resulted in the abolition of the Philippine Senate and the creation of the Office of the Prime Minister, with an authoritarian President retaining his executive control and exercising legislative powers.

Following the political demise of former President Ferdinand Marcos in 1986, the nation witnessed the birth of a new constitution, commonly referred to as the 1987 Philippine Constitution. It is the fundamental law of the land today.

The 1987 Constitution saw a return to the democratic, republican presidential form of government; the abolition of the unicameral assembly and reversion to a bicameral Congress and significantly, the expansion of the powers of the Supreme Court, among other amendments.

The 1987 Philippine Constitution states that

> the Philippines is a democratic and republican state. Sovereignty resides in the people, and all government authority emanates from them.[6]

This statement is the most important of our constitutional principles and it sets the stage for other principles to follow. These principles, taken altogether, form "the basic political creed of the nation."[7]

Our sovereign state is characterized as the "repository of legitimated authority"[8] and is described as democratic and republican. The characterization, however, is by no means coincidental.

Democracy, in its direct or pure form, is one in which "the will of the state is expressed directly and immediately through the people in a mass meeting or primary assembly."[9] Stated simply, this means the direct rule of the state

5 Constitution 1945, Federal Republic of Indonesia Constitution, and Temporary Constitution of 1950. www.ccourt.go.kr/Dr.Harjono/The Indonesian Constitutional Court.
6 Section 1, Article II, 1987 Philippine Constitution.
7 Sinco, Philippine Political Law, p. 116 (1962).
8 Friedman, The Changing Structure of International Law, pp. 213-214, (1987).
9 De Leon, Philippine Constitutional Law: Principles and Cases, p. 63, (1999).

by the people, a virtual improbability[10] in today's modern democracies because of population growth, expansions of territory and complexities of modern-day problems,[11] although vestiges of direct democracy in the form of people's initiatives and referenda still exist at present.

Republicanism, on the other hand, refers to the formulation and expression of the will of the state "through the agency of a relatively small and select body of persons chosen by the people to act as their representatives."[12] A republican form of democratic government thus espouses an indirect exercise of political power by the majority of the people through their duly chosen representatives. The possibility of breeding political extremism in any form is therefore considerably minimized.

A bedrock constitutional principle upon which the Philippine government is founded, and certainly one of the undisputable hallmarks of a democratic and republican state, is the "Separation of Powers" of the three great branches of government (the Executive, the Legislative and the Judicial) and its built-in system of "Checks and Balances."

Separation of Powers is clearly provided for in the Philippine Constitution, which in turn is the "written instrument by which the fundamental powers of government are established, limited and defined and by which these powers are distributed among the several departments or branches for their safe and useful exercise for the benefit of the people."[13] The philosophy behind the separation of powers was explained by James Madison:

> The great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachment of the others...It may be a reflection on human nature that such devices should be necessary to control the abuses of government.[14]

On the same vein, John Adams expounded on the rationale of this principle:

> A legislative, executive and judicial power comprehend the whole of what is meant and understood by government. It is by balancing each of these powers against the other two, that the efforts in human nature towards tyranny can alone be checked and restrained, and any freedom preserved in the constitution.[15]

But separation of powers is in no way absolute and is purposely described in an abstract and general form, rather than a rigid one, in our Constitution because it is "intended for practical purposes and adopted to common sense."[16]

10 De Leon, Philippine Constitutional Law: Principles and Cases, p. 118, (1999).
11 De Leon, Philippine Constitutional Law: Principles and Cases, p. 63, (1999).
12 De Leon, Philippine Constitutional Law: Principles and Cases, p. 63, (1999).
13 Malcolm and Laurel, Philippine Constitutional Law, p. 6 (1936), as cited in De Leon, Philippine Constitutional Law: Principles and Cases, p. 1, (1999).
14 The Federalist, No. 51, as cited in De Leon, Philippine Constitutional Law: Principles and Cases, p. 8, (1999).
15 The Life and Work of John Adams, Vol. 4, p. 186, (1851), as cited in De Leon, Philippine Constitutional Law: Principles and Cases, p. 8, (1999).
16 De Leon, Philippine Constitutional Law: Principles and Cases, p. 10, (1999).

Delineating governmental power between and among the three great branches guarantees their independence and vests them with the cloak of co-equality and co-ordination in the constitutional scheme of government. But the fundamental law, in order to safeguard against possible encroachment and abuse by one or two among the three, not only grants each branch powers "to secure coordination in the workings of the various departments"[17] but more importantly provides each one certain powers "to effectively check or restrain the others from encroaching upon its domain."[18]

Presupposing the possibility of error and/or abuse by any one of the three branches, the accompanying precepts of separation, independence and equality enable each one to check on the acts of the other two, thus maintaining the extremely important balance among them. This will fundamentally ensure that constitutional democracy will work for the good of the governed and the existence of a government truly "of the people, by the people and for the people."[19]

Specific mechanisms of checks and balances among the three branches of government are provided for in the Constitution itself.

On the part of the Executive Department, the President, in the exercise of his veto power, may disapprove bills enacted by Congress.[20] And with respect to his pardoning power, he may modify or set aside judgments of the courts.[21]

On the part of the Legislature, Congress (consisting of the Senate and the House of Representatives) may override the veto of the President by a vote of two-thirds of the House where the bill originated, and another vote of two-thirds by the other House.[22] It may also reject appointments by the President,[23] either

17 *Angara vs. Electoral Commission*, 63 Phil. 139 (1936), as cited in De Leon, Philippine Constitutional Law: Principles and Cases, p. 11, (1999).

18 De Leon, Philippine Constitutional Law: Principles and Cases, p. 11, (1999).

19 U.S. President Abraham Lincoln, Gettysburg Address.

20 Section 27, Article VII, 1987 Philippine Constitution. "Section 27. (1) Every bill passed by the Congress shall, before it becomes a law, be presented to the President. If he approves the same he shall sign it; otherwise, he shall veto it and return the same with his objections to the House where it originated, which shall enter the objections at large in its Journal and proceed to reconsider it. If, after such reconsideration, two-thirds of all the Members of such House shall agree to pass the bill, it shall be sent, together with the objections, to the other House by which it shall likewise be reconsidered, and if approved by two-thirds of all the Members of that House, it shall become a law. In all such cases, the votes of each House shall be determined by yeas or nays, and the names of the Members voting for or against shall be entered in its Journal. The President shall communicate his veto of any bill to the House where it originated within thirty days after the date of receipt thereof, otherwise, it shall become a law as if he had signed it.
(2) The President shall have the power to veto any particular item or items in an appropriation, revenue, or tariff bill, but the veto shall not affect the item or items to which he does not object."

21 Section 19, Article VII, 1987 Philippine Constitution. "Except in cases of impeachment, or as otherwise provided in this Constitution, the President may grant reprieves, commutations, and pardons, and remit fines and forfeitures, after conviction by final judgment.
He shall also have the power to grant amnesty with the concurrence of a majority of all the Members of the Congress."

22 Section 27(1), Article VII, 1987 Philippine Constitution.

23 Section 18, Article VII, 1987 Philippine Constitution. "The President shall nominate and, with the consent of the Commission on Appointments, appoint the heads of the executive departments, ambassadors, other public ministers and consuls, or officers of the armed forces from the rank of colonel or naval captain, and other officers whose appointments are vested in him in this Constitution. He shall also appoint all other officers of the Government whose appointments are not otherwise provided for by law, and those whom he may be authorized by law to appoint. The Congress may, by law, vest the appointment of other

revoke or extend the period for the proclamation of martial law or the suspension of the privilege of the writ of habeas corpus by the President,[24] amend or revoke decisions of the courts by enactment of new laws or amendment of old ones, define, prescribe and apportion the jurisdiction of various courts,[25] prescribe the qualifications of judges of lower courts,[26] determine the salaries of the President and Vice-President,[27] the members of the Supreme Court and the judges of the lower courts,[28] and impeach the President, the members of the Supreme Court[29] or other impeachable officers.

The 1987 Constitution established a powerful Judiciary, in contrast to Montesquieu's "next-to-nothing" judiciary[30] and Hamilton's depiction of "the weakest of the three departments of power."[31] This was done through the enlargement of the jurisdiction of the Supreme Court, particularly in the redefinition of "judicial power" under Article VIII, Section 1. It has given the Supreme Court the power to ensure that the equilibrium among the three branches of government is always on an even keel.

But what precisely is the current role of the Philippine Judiciary in maintaining the harmonious and balanced performance of governmental functions within constitutional limitations? Under the 1987 Constitution, the Supreme Court plays a vital and primordial role in maintaining and strengthening constitutional or republican democracy. In the system of checks and balances, the Judiciary, with the Supreme Court at the helm as the final arbiter of conflicting interests, has the power to declare the acts of the Legislative or Executive branch invalid or unconstitutional.[32]

officers lower in rank in the President alone, in the courts, or in the heads of departments, agencies, commissions, or boards..."

24 Section 18, Article VII, 1987 Philippine Constitution. "...The Congress, voting jointly, by a vote of at least a majority of all its Members in regular or special session, may revoke such proclamation or suspension, which revocation shall not be set aside by the President. Upon the initiative of the President, the Congress may, in the same manner, extend such proclamation or suspension for a period to be determined by the Congress, if the invasion or rebellion shall persist and public safety requires it."

25 Section 2, Article VIII, 1987 Philippine Constitution. "The Congress shall have the power to define, prescribe, and apportion the jurisdiction of the various courts but may not deprive the Supreme Court of its jurisdiction over cases enumerated in Section 5 hereof..."

26 Section 7(2), Article VIII, 1987 Philippine Constitution. "...(2) The Congress shall prescribe the qualifications of judges of lower courts, but no person may be appointed judge thereof unless he is a citizen of the Philippines and a member of the Philippine Bar..."

27 Section 6, Article VII, 1987 Philippine Constitution. "...The salaries of the President and Vice-President shall be determined by law and shall not be decreased during their tenure...."

28 Section 10, Article VIII, 1987 Philippine Constitution. "The salary of the Chief Justice and of the Associate Justices of the Supreme Court, and of judges of lower courts, shall be fixed by law. During their continuance in office, their salary shall not be decreased."

29 Section 2, Article XI, 1987 Philippine Constitution. "The President, the Vice-President, the Members of the Supreme Court, the Members of the Constitutional Commissions, and the Ombudsman may be removed from office on impeachment for, and conviction of, culpable violation of the Constitution, treason, bribery, graft and corruption, other high crimes, or betrayal of public trust...."

30 Spirit of Laws, vol.I, p.186 – Publius.

31 The Federalist, No. 78.

32 Section 4(2), Article VIII, 1987 Philippine Constitution. "...All cases involving the constitutionality of a treaty, international or executive agreement, or law, which shall be heard by the Supreme Court *en banc*, and all other cases which under the Rules of Court are required to be heard *en banc*, including those involving the constitutionality, application, or operation of presidential decrees, proclamations, orders, instructions, ordinances, and other regulations, shall be decided with the concurrence of a majority of the Members who actually took part in the deliberations on the issues in the case and voted thereon..."

This judicial power, also referred to as the "power of judicial review," is not new to our Supreme Court. It first appeared in the text of Article VIII, Sec 2 (1) of the 1935 Constitution, which conferred upon Philippine courts jurisdiction over "all cases in which the constitutionality or validity of any treaty, ordinance, or executive order or regulation is in question."

Judicial review is the power of the courts (and ultimately of the Supreme Court)

> to interpret the Constitution and to declare any executive or legislative act invalid because it is in conflict with the fundamental law."[33]

This is the power by which the Supreme Court protects and preserves the supremacy of the Constitution.

Despite the provision's salutary intentions, historical events, particularly during the martial law period from 1972-1986, unmasked the gross inadequacy of the "power of judicial review" as it was understood under the 1935 Constitution. The Judiciary was powerless to stand its ground against the iron fist of the then martial law regime. Thus there was a need to give more teeth to the Judiciary, the Supreme Court in particular, after the dictatorship was dismantled in 1986.

When the new government took over in 1986, one of its very first acts was to form a Constitutional Commission to draft a new charter. To strengthen the courts in the future, the framers of the 1987 Philippine Constitution expanded the Court's judicial power by giving it the authority to inquire into political questions where grave abuse of discretion is alleged.

The late Chief Justice of the Philippines Roberto Concepcion, an eminent member of the Constitutional Commission of 1986, authored the expanded jurisdiction clause. He pointed out that the role of the judiciary during the deposed martial law regime from 1972 to 1986 was anomalously marred by the all too frequent invocation of the political question doctrine as a defense in challenges against the government's authoritarian acts. The government, which had no valid defense whatsoever, was thus able to skirt the issue of constitutionality or illegality by simply raising the "political question" argument. "And (it) got away with it… As a consequence, certain principles concerning particularly the writ of habeas corpus… and other matters related to the operation and effect of martial law failed because the government set up the defense of political question…"[34]

Thus, with its expanded judicial power under the 1987 Constitution, the Supreme Court can:

> determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.[35]

Although the meaning and complexion of the power of judicial review have

33 De Leon, Philippine Constitutional Law: Principles and Cases, p. 418, (1999).
34 Record of the Constitutional Commission: Proceedings and Debates, pp.434-436 (1986).
35 Section 1, Article VIII, 1987 Philippine Constitution.

undergone a reconfiguration under the 1987 Philippine Constitution, its essence as a U.S. constitutional law[36] concept continues to influence our legal system.

There are, however, limitations to our Court's power of judicial review and they are in the form of proscriptions against deciding questions pertaining to (1) legislative policy and (2) acts, though political in nature, are not alleged to have been exercised with grave abuse of discretion.

Needless to state, it is through the exercise of this power of judicial review that our citizens are assured that their chosen form of a democratic and republican government will always operate within constitutional bounds. According to premier Philippine constitutionalist and former Justice Isagani Cruz:

> No act shall be valid, however nobly intentioned, if it conflicts with the Constitution...Expediency must not be allowed to sap its strength nor greed for power debase its rectitude...[37]

The past year witnessed disagreements on certain constitutional issues between the Philippine Supreme Court and Congress, and later between the Supreme Court and the Executive Branch. In a democracy, such conflicts in fact can and do happen. But it is well to remember that when the Philippine Supreme Court invokes its power of judicial review, it neither asserts its moral ascendancy or dominance over, nor encroaches on nor interferes in the powers of a co-equal branch of government. In the words of the late Justice Jose P. Laurel:

> ...when the judiciary mediates to allocate constitutional boundaries, it does not assert any superiority over the other departments; it does not in reality nullify or invalidate any act of the legislature, but only asserts the solemn and sacred obligation assigned to it by the Constitution to determine conflicting claims of authority under the Constitution and to establish for the parties in an actual controversy the rights which that instrument secures and guarantees to them.[38]

At the end of the day, our Supreme Court's rationale for being is to ensure that, in accordance with the fundamental law's declaration of principles, sovereignty resides in the people and all governmental authority emanates from them.

Various issues affect the Philippines at present concerning delineations of power and check-and-balance mechanisms between and among with the three branches of government. These state institutions continue to be intentionally or unintentionally pitted against each another in a complex battle of wills. Taken positively, however, these are, to me, palpable and normal manifestations of a healthy democracy, where the Executive, the Legislative and the Judicial branches weave around and between the pillars of freedom, democracy and republicanism in the struggle to achieve a harmonious melange of debate, agreement and dissent. This can only work to the advantage and benefit of the sovereign people.

36 See *Marbury vs. Madison*, 1 Cranch 137, 1803.
37 Cruz, Philippine Political Law, p. 11, (1987).
38 *Angara vs. Electoral Commission*, 63 Phil. 139, p. 158 (1936).

2010 saw significant changes in the Philippines. A new President stands at the helm of the governmental machinery. A new Legislature has been elected to Congress. A new Chief Justice, yours truly, sits at the head of the High Court. The entire Philippine Government has been imbued with renewed vigor and strength, with fervent hopes for the future of the country. And as Chief Justice, it is my solemn oath and duty to see to it that under my watch, governmental action keeps within the bounds of the Constitution and the law, and that justice is served speedily, even-handedly and efficiently to all.

In the final analysis, only through proper respect and coordination among the three branches of government, vigilance in checking each other's possible constitutional transgressions and maintaining the desirable constitutional balance can we avoid the danger of a constitutional crisis and societal anarchy.

The separation of powers with an ingrained system of checks and balances was one of the underlying features of our government even before we placed ourselves under a constitutional democratic regime, a regime which at present has been in place in our country for 112 years. The Philippines has, for more than a century, kept the spirit of constitutional democracy alive and burning. Whenever our state institutions faithfully and assiduously keep the exercise of their duties and responsibilities strictly within the distinctly defined bounds of the Constitution, they cannot but tend to the bright flame of constitutional democracy and light the way for a truly democratic constitutional state.

Thank you and a good day to all of you.

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

DEMOCRATIZATION OF THE LAWMAKING PROCESS (LESSONS FROM INDONESIA)

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the House of Representatives of Indonesia

I. INTRODUCTION

Laws play an important role in any rule of law state or constitutional democracy, including the State of the Republic of Indonesia. First, it is the laws that provide the foundation for all activities conducted by administrators of state authority. Second, laws typically contain the vision, mission and goals to be achieved by the government in power. And third, laws reflect the wishes of the people, who are sovereign. Consequently, a rule of law state means not only that state administration must be based on the law, but also signifies that all State administration activities must be undertaken in accordance with the wishes of the people.

The question is, how does one guarantee that a particular law truly reflects the wishes of the people? In a direct democracy, where the people themselves participate in formulating a law, clearly the people's wishes are truly reflected in that law. The substance of the law will reflect the sovereignty of the people because it is the people who formulate their desires and then put them into a law. But it is different in an indirect or representative democracy, which is what modern states apply in this century.

In a representative democracy, the authority to make laws is not executed by the people themselves, but is done by the people's representatives, who are elected by the people through the mechanism of a General Election that is held periodically and is free, direct, fair and transparent. Through the General Election, the people's representatives obtain the authority and mandate from the people to pursue the people's aspirations and interests by making laws.

While the authority of the people's representatives to make laws is obtained directly from the people, all of this does not necessarily guarantee that the laws produced will reflect the people's desires or wishes. In state practices in a democracy, it is not uncommon for the people's representatives to abuse the powers they formally obtained from the people to pursue interests that are far from the people's aspirations and wishes. The opportunity for the people's representatives to abuse this power by formulating such laws arises when certain political forces dominate the institution of the people's representatives. The hegemony of certain political forces in the institution of the people's representatives tends to result in laws becoming instruments or facilities to achieve their goals and to protect the interests of their group.

Therefore, even a state that embraces a representative democracy system for making laws still needs to be controlled by the people so that the laws that result truly reflect the sovereign people's wishes and do not merely become a tool of the dominant political forces in the institution of the people's representatives. People's control of the law-making process can be applied at each stage, from the stage of preparing the academic paper to preparing the draft of the law, its deliberation, ratification, and implementation in the field.

This paper on the democratization of the law-making process refers to Indonesia's experience since the 1998 reforms. It is made up of five sections: I. Introduction; II. Law-making Power; III. Democratization of the Law-making Process; IV. Role of the Constitutional Court; V. Conclusions.

II. LAWMAKING POWER

The Unitary State of the Republic of Indonesia is a state that has adopted a constitutional democracy. This is affirmed by the 1945 Constitution of the Unitary State of the Republic of Indonesia (the 1945 Constitution) following recent reforms. Such affirmation means that since the 1998 reforms, the understanding of democracy embraced by the Constitution is not absolute, meaning that it is not unlimited. Rather, it is limited, and these limitations are grounded in the Constitution. Laws that reflect the people's wishes must comply with the provisions of the Constitution, meaning that laws made by the people's representatives can be revoked if they violate the Constitution. Therefore, post-reform Indonesia no longer embraces the supremacy of parliament, but the supremacy of the Constitution. Hierarchically, the Constitution stands as the highest law of the Unitary State of the Republic of Indonesia.

Matters concerning laws, from their position with respect to the Constitution through to the institution granted the authority to establish them, are expressly stated in the 1945 Constitution. Article 20 paragraph (1) of the 1945 Constitution of the Republic of Indonesia explains that "the House of Representatives (DPR) has the power to make laws." If we only read this provision in Article 20 paragraph (1), then everyone would agree that Indonesia's constitutional system only grants law-making power to the House of Representatives (DPR). But in fact that is not the case. Since aside from the DPR, the 1945 Constitution also grants

law-making power to the President. This is in accordance with the provision in Article 20 paragraph (2) of the 1945 Constitution, which states, "every draft law shall be deliberated by the House of Representatives (DPR) and the President in order for them to reach agreement."

When the provisions in Article 20 paragraph (1) and Article 20 paragraph (2) of the 1945 Constitution are taken together, one can conclude that: (i) law-making power under the 1945 Constitution system actually rests in the hands of the DPR and the President (two-in-one); and (ii) Indonesia's constitutional system does not recognize the separation of powers between the executive and legislative. There are two reasons for this: (i) draft laws (or bills) cannot be deliberated and approved by the DPR members among themselves, rather, they must be deliberated jointly by the DPR and President; (ii) in addition to the joint deliberations by the DPR and President, these bills must also be jointly approved by the DPR and President in order to be ratified into law.

So, mutual deliberations and joint approval between the DPR and President are mandatory for ratification of a bill into law. Thus, it would be unconstitutional for a bill to only be deliberated and approved by the DPR. Likewise, it would be unconstitutional if a law were only drawn up and signed by the President without the draft first being deliberated and jointly approved by the DPR and President. Thus, a bill ratified into law by the President without involving the DPR, or ratified by the DPR without involving the President in its deliberations would mean that the law would not have legally binding force (i.e., non-binding).

The constitutional system of the Republic of Indonesia, which does not embrace separation of powers between the authorities of the legislative and the executive because it hands over law-making power to two state institutions, namely the DPR and the President (two-in-one), is intended to ensure there are checks and balances between these two state authorities. But this system brings with it certain constitutional consequences and risks, especially in relation to implementation of a presidential democracy under a multi-party system. The constitutional consequences and risks being referred to here are as follows:

First, the position of the DPR and the President in terms of their law-making power is the same. Both the DPR and the President are elected directly by the people through a general election. Both have obtained legitimacy from the people. Therefore, the DPR cannot disregard the President, nor can the President disregard the DPR. Both the DPR and the President are given the power under the Constitution to propose bills for discussion in order to obtain their joint approval.

Second, in discussing a bill, the President has relatively little difficulty in the decision-making process since the President is only one person. It is different for the DPR, which consists of fractions and members in uncertain numbers. The DPR for the period 2009-2014, for instance, has nine fractions reflecting the nine political parties that hold seats in the DPR, and 560 members grouped into these nine fractions representing the nine political parties that are there. In discussing a particular bill, the DPR clearly faces difficulties reaching a compromise. The DPR also has the potential to split into various fractions that oppose each other.

The process of discussing a bill to obtain joint approval often also faces obstacles because of the cumbersome decision-making process at the DPR.

Third, a political system that surrenders law-making power to the DPR and the President brings with it two constitutional risks. The first risk is that the government will become ineffective. If the President comes from a political party that does not control the majority of seats in the DPR (i.e., is a minority government), there is a strong likelihood of compromise between the DPR and the President in deliberating a bill, otherwise it would be difficult to enact the bill into law. If this risk arises, then the President faces constraints in governing, such that the government is threatened with becoming weak and ineffective. Also, to ensure effective government, the President in efforts to obtain the support of the majority in parliament will tend to use transactional methods that have the potential to violate democratic values.

The second risk is that a government in power has the potential to become authoritarian. If the President comes from a political party that controls the majority of seats in the DPR, the President can easily obtain support from the DPR in deliberations on bills, since the aspirations of the government are in line with the aspirations of the majority of those seated in the DPR. But if this situation became complete, there would be a clear potential to threaten democracy. The opposition's power in parliament would be paralyzed. Because the President comes from a political party that controls the majority of the DPR seats, the interests of the DPR and the President (majority rule) would color the process of deliberating a bill. Apart from the hegemony of the President and DPR in law-making becoming dominant, this situation tends to make the DPR's legislative function ineffective, merely a rubber stamp, and its function of control would become very weak.

While a situation like this has never completely occurred in a government administration since the reform in 1998, in theory, a constitutional system that does not expressly separate legislative powers from executive powers, granting legislative powers to the President and the DPR gives the regime in power an opportunity to make laws that disregard and renege on democratic principles. In addition, a law-making system such as this also tends to disregard the basic principles set forth in the 1945 Constitution.

III. DEMOCRATIZATION IN THE LAWMAKING PROCESS

To prevent abuse of power in the making of laws, law-making by the DPR and President needs to be limited by developing democratization in the law-making process. Law No. 10 of 2004 on Procedures for Making Legislation actually generally adopts the principle of democratization of the law-making process, covering four basic principles: 1) principle of openness (transparency); 2) principle of public participation (inclusiveness); 3) access to legislation, including access to bills; and 4) rational-logical principle for legal certainty.

First, the principle of openness in deliberating bills means that the law-making process, from the planning stage to preparation, drafting and deliberation is

open and transparent. The principle of openness here must really be qualitative, meaning that the public must be informed clearly and completely about the bill being deliberated. And the background and purpose of this law making must be explained explicitly to the public. If the bill comes from the President, then the President or related minister must socialize the bill to the public. And if the bill comes from the DPR, then the DPR must socialize it to the public.

The principle of transparency in law-making necessitates a proactive attitude from the law-making institute to socialize among the public the bill that is to be discussed. This socialization may use the media of television, newspapers, internet, websites, radio, magazines and other media. In addition to being proactive, socialization of the bill can be specially designed for specific target groups that will feel the direct or indirect effects of the bill being discussed, such as NGOs concerned about related issues.

With this principle of openness, all layers and groups in society will have a broad opportunity to give their input, including critiquing the substance of the bill. In addition, the input and critique from the public should be considered seriously. Input and critique from the public must be responded to, whether it is accepted or rejected. If it is rejected, the people providing the input should be informed, giving the reasons why. This is done as part of law-making accountability to the people as electors.

If this principle of transparency in law-making were applied properly, this would assure the quality of the laws that are made. In other words, the laws that are made would be truly responsive to the legal needs of the broader public. In addition, this principle of openness also needs to be applied in order to prevent inflation of laws that are totally ineffective in their implementation.

Second, apart from the principle of openness, the principle of participation (inclusiveness) in the law-making process is also needed to ensure democratization in law making. Applying this principle indicates an acknowledgment of the rights of people as important elements in law making. The public is recognized as having the right to play an active role in providing input, whether or not put in writing, and whether given directly or indirectly, in the context of the preparation or deliberation of a bill.

The DPR and the President in deliberating a bill should routinely hold public hearings as a forum for various community groups, to listen to people's input and opinions relating to various important issues concerning the bill being discussed. In deliberating a bill, the DPR does not just passively wait for community groups to come and convey their input. Rather, the DPR can take proactive steps to invite or approach stakeholders related to the substance in the bill being discussed. It is important that this is done so that the law-making process is not alienated but actually touches on the real needs of the public. By proactively encouraging public participation, hidden weaknesses in the law-making process during deliberation of a bill can be quickly overcome before the bill is passed into law.

To stimulate public participation in the law-making process, it is best if

participation occurs at every stage of the law-making process; and it should be conducted transparently. It should be determined whether any input given by the public can be accommodated, and participants should be told the reasons why their input or proposal cannot be accepted. This needs to occur in conjunction with the principle of accountability, whereby the DPR and government are obliged to be accountable to their constituents on what they have done.

Third is the principle of access to legislation and access to bills. This principle is important for ensuring democratization in law making, since without an acknowledgment of the right to freely obtain information, implementation of the principle of participation and the principle of openness in the law-making process would become ineffective. The public will find it hard to obtain accurate information and play an active role in the law-making process unless their right to freedom of information is acknowledged, especially the right to obtain information relating to bills being prepared by the government or the DPR.

To ensure open access to information relating to legislation and bills, special legislation is needed to guarantee the public's right to freedom of information. This legislation should not only guarantee this right of the public to obtain information, it should also ensure that every government official must be open or provide information that is needed by the public to those that need it. Indonesia's current Law on Transparency of Public Information is not sufficiently effective in ensuring that the public can freely obtain the information that is needed.

Fourth is the principle of rationality in deliberation of a bill. This principle means that the formulations contained in each article of the resulting law must be capable of being explained rationally using language that is easy for the public to comprehend and understand. Provisions in laws that do not comply with rational and logical norms, and that are difficult to understand will make these laws ineffective when attempts are made to implement them. Commonly, as a result of political compromise, the formulation of an article of a law becomes unclear, ambiguous, irrational, inconsistent, and illogical. Provisions such as these will clearly result in a lack of legal certainty for the public.

IV. CONSTITUTIONAL DEMOCRACY AND THE ROLE OF THE CONSTITUTIONAL COURT

Even if the process of deliberating a bill between the DPR and the President accommodates the four principles of democracy outlined above, this cannot preclude the possibility of abuse of power by democratic institutions, in this case, the DPR and the President, in the law-making process.

Such abuses of power, apart from disregarding the people's aspirations (principle of democracy) as holders of the sovereignty of the people, also violate the provisions of the Constitution (constitutional principle). The principle of majority rule applied in the decision-making process relating to the deliberation of a bill can often be accepted as legitimate from the perspective of a democracy. However, applying this principle actually has the potential to violate democratic

principles themselves, in addition to violating the Constitution.

The existence of the Constitutional Court is important in ensuring a point of equilibrium between the principle of democracy on one hand, and the constitutional principle on the other. The role of the Constitutional Court in ensuring the constitutionality of laws is critical, especially for protecting democracy itself from potential abuses of power by democratic institutes.

There are two fundamental principles contained within the principle of democracy: (i) the principle of individual autonomy (liberal ideology), which basically means that no person has to submit to provisions made by another individual; and (ii) the principle of equal status, namely that every person has the same opportunity to influence decisions that affect all people in society. The Constitutional Court came into being to protect these two fundamental principles of democracy.

The Constitutional Court also exists in an effort to ensure that the legal products that result can create a sense of ownership among all citizens, and to be the umpire for law products that create distribution of consequences as a result of lawsuits by citizens who are convinced their constitutional rights have been violated by a law agreed between the DPR and the President.

Sense of ownership will arise if the resulting law product arises from initiatives and active participation by all citizens, such that their constitutional rights and obligations are reflected in the law product (i.e., democratic process). While distribution of consequences occurs if during the law-making process, citizens are not convinced that their constitutional rights and obligations are reflected in the law product resulting from their representatives and government (i.e., political process).

V. CONCLUSION

I would like to end this paper by presenting the following conclusions:

1) Laws play a strategic role in the Republic of Indonesia because laws are the foundation for all activities by state administrators to guarantee realization of a democratic rule of law state (constitutional democratic state);

2) Under Indonesia's constitutional system, laws are products of the DPR and the President, which together hold the authority and mandate directly from the people. In the law-making process, neither is mutually exclusive, rather, they must cooperate to achieve joint approval;

3) The principle of democracy is important to law making because if the principles contemplated in a democracy are applied consistently, this will result in a sense of ownership of the law among citizens;

4) The principle of democracy has been adopted in the law-making system prevailing in the Republic of Indonesia, covering all stages from planning to preparation, drafting, and deliberation. The principles of openness and public participation, being part of the people's control of law making, have

been implemented at each stage in the deliberation of a bill mentioned above.

5) As the makers of laws, the DPR and the President have a responsibility to uphold democratic principles in law making. Democratic law making requires an absolute guarantee from the makers of the Law on Human Rights, involving participation by the broader public, including civil society participation, and applying the principle of transparency at each stage of deliberation of a law;

6) The majority rules principle in law-making is incompatible with the principles of a constitutional democracy. Therefore, the principle of a majoritarian democracy must be replaced with an alternative principle such as the principle of a pluralist democracy.

7) The presence of the Constitutional Court in Indonesia's constitutional system is confirmation that the democratic system being embraced is a constitutional democracy with the characteristics of constitutional supremacy rather than parliamentary supremacy. The Constitutional Court is needed to protect and enhance a sense of ownership among all citizens regarding laws, and to be an umpire for law products that create distribution of consequences as a result of lawsuits by citizens who are convinced their constitutional rights have been violated by such a law.

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THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

DEMOCRATIZATION OF LAWMAKING PROCESS

Hon. Mr. Mohammed Abbou

First Vice President of the House of Representaives of Morocco

In the name of Allah, Most Gracious, Most Merciful salawat its greetings to His Messenger and his family and his companions,

Mr. Chairman of House of Representatives of Indonesia,

All Honorable Chairmen of Parliament, Distinguished Members of Parliament,

Mr. Chairman of Constitutional Court of Republic of Indonesia

All Distinguished Judges,

Our Distinguished Invited Guests,

Ladies and Gentlemen,

Assalamua'laikum Warahmatullahi Wabarakatuh

It is a great honor for me to meet you all here today. I am so happy that I can attend this important international symposium organized by the Constitutional Court of Indonesia in the celebration of the eighth anniversary of its establishment with the theme "Constitutional Democratic State."

It is an invaluable opportunity to exchange thoughts and views on the best ways and mechanisms to build and strengthen the country that sheltered by the truth and the law, standing firmly on a foundation of participation, pluralism, good governance and equality of opportunity. We hope we are able to take some lessons that will help us all in dedicating ourselves in state institutions, which can respond to community expectations and beloved our citizens.

In this occasion I would like to thank the Chairman of the Constitutional Court of Indonesia, who has kindly invited the House of Representatives of Morocco to attend this very important international symposium, given the circumstances of the world is filled with challenges like those we facing now.

Please allow me also to express my pride in the name of the Kingdom of Morocco that now we have profound ties of friendship and brotherhood that bind and unite the peoples of Morocco and Indonesia, as well as strong bilateral cooperative relationship between both countries and nations.

My dear brothers and sisters, Ladies and Gentlemen,

Our participation in current international symposium is very important, given the era of the transformations taking place in our world in recent decades that have made democratic values and principles of law as priority demands of humanity as well as 'common denominator' to all the struggle of the nations of the world.

If the principles of democracy and human rights are the principles of universality, then the experience of people in the world dedicated to these principles of course are related to the characteristics and internal political and social contexts which have accumulated in each country.

Since the early years of independence, the independence of the Kingdom of Morocco has chosen the approach of pluralism and freedom by devoting these principles as one important option to the first constitutional engineering in the Kingdom in 1962, while other important regions in the world at that time were still the object of the invasion of a 'single-party' system.

All these show that the Kingdom of Morocco believes the importance of citizen participation in the management of public affairs and decision-making, as well as the sanctity of democratic institutions.

Such practices in the institutions of national constitutions in the last few decades have developed qualitatively. This development has given siginificant impact on the performance of legislative institutions. Besides, it has also helped to create central institutions in a democratic structure and a space for freedom of opinion and expression. The Members of Parliament have played a crucial roles in the implementation of their constitutional duties as well as in controlling the performance of the government or in conducting diplomacy in parallel.

Members of Parliament have also contributed qualitatively in formulating legal texts for the state, either through in-depth discussion between opposition and majority in the Committee of Parliament, or through the necessary amendments, and approved a large number of laws and regulations related to the expansion of human rights guarantees and people's participation in managing their problems at national scale. Therefore, some added values have appeared before various components of Moroccan society generated from the contributions of parliament members to deepen parliamentary performance and realize the democratic dimension.

Ladies and Gentlemen,

For the last few days, Morocco has become a political station in our national history. This was reflected in a deep constitutional reforms aimed at strengthening the building of national democracy, and strengthening the principle of separation and balance of authority, dedicating the pluralistic nature of the united Moroccan identity.

Other goals of what have been going on in our country are to devote our steadfast diversity to the values of openness, the development of individual and collective freedoms, to strengthen human rights system, and devote the principles of 'good governance'.

The new constitution is a quantum leap which is simulatenously a prominent transformation in the course of our democratic constitutional state. With this in mind we continue to consider major developments it creates, as well as to respond to proposals put forward by national political parties and union organizations and human rights, scientific agencies and civil society.

Ladies and Gentlemen,

Of course, we do not have enough time to describe the most important implications of the new constitution, but we will underline and emphasize the following important elements:

- The sovereignty of the nation and the majesty of the Constitution;
- The recognition of the principle of separation of authority, selp-helpness and sustanability ;
- The affirmation of a real 'agreement' regarding the rights and obligations of citizens and freedom of association;
- Strengthening control mechanisms and good governance;
- Strengthening equality between women and men in terms of rights and freedoms;
- The acceptance of the option of democracy that cannot be pulled back;
- Expanding the spectrum of law to Parliament and upgrade it to the position of a single regulator;
- Using the democratic way of selecting the Prime Minister and strengthening its roles in the management of public affairs and public policy development;
- Improving the judiciary institutions as an independent authority;
- Strengthening and protecting human rights.

In addition to the above jurisdictions, the Constitutional Court occupies a special position in the process of engineering a new constitution, both in terms of shape, for which the Constitution has been specializing a separate chapter consisting of six chapters, or in appointing this the Chief of Constitutional Court, who will form its institutions consisting of twelve members with a term

of nine years and cannot be extended. Six members will be appointed by the King, including members proposed by the Secretary General of the Supreme Scientific Council. While half of the other members will be chosen through election by members of both Houses of Representatives with a majority of two third of the members. They will be formed from each council, according to certain professional and ethical criteria, including higher education in law and judicial competence, and managerial professionalism whose competence and integrity are well recognized.

Regarding jurisdiction, it has been expanded in such a way so that the parties concerned with the law can may bring any cases to the Constitutional Court regarding its present form. It was enacted to strengthen the sovereignty of the supreme law of the Constitution, as well as to strengthen the rules of law and control, both before and after the Constitutional Court, whose decisions do not accept all types of lawsuits, while they binding on all administrative and judicial authority in our country.

It is also necessary to note that the transition from the Constitutional Council into the new Constitution Court would provide tremendous positive impacts on moral values that are mandatory, in the minds of the plaintiffs before the Council and its decisions.

Ladies and gentlemen,

Finally, I wish to convey to you the sincere greetings and respect for Mr. Chairman and members of the Kingdom of Morocco's House of Representatives to all of you, and on behalf of them, we do not forget to express our admiration and pride in the building dan development of democracy in this country, for which all of you are celebrating the eighth anniversary of the establihment of the Constitutional Court.

We appreciate the efforts and achievements that you have recorded in a short time so as to strengthen the rules of law and the sovereignty of constitutional justice in a democratic society like the people of Indonesia.

We believe that the channels of communication and cooperation existing between the two institutions in our state constitution will become more solid and stronger with the birth of the Constitutional Court in Morocco and will work hard to connect the bridges of cooperation and communication in the service of democracy and human rights.

We hope that this symposium can be fruitful and satisfactory success, which also brings benefits to the bilateral relations between Indonesia and Morocco, giving additional progress, cooperation and prosperity in the future.

Wassalamualaikum wr.wb.

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

SESSION TWO

Democratization of Lawmaking Process

PANEL III

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

DEMOCRATIZATION OF LAWMAKING PROCESS IN THAILAND

Hon. Prajit Rojanaphruk
Member of the Senate of the National Assembly of Thailand

The present Constitution of the Kingdom of Thailand 2007 provides that the Thai National Assembly comprises the House of Representatives and the Senate which may hold joint or separate sittings in accordance with the Constitution.

One of the main duties of the National Assembly is to enact the laws of the land.

The process of lawmaking begins with the House of Representatives, i.e., a bill shall be first submitted to the House of Representatives. In general, a bill may be introduced by the Council of Ministers, Members of the House of Representatives of not less than twenty in number, the Courts or independent constitutional organizations whereby the Presidents of such Courts or of such organizations are in charge of the act; or by not less than ten thousand eligible voters. In introducing a bill, it shall be submitted together with an explanatory memorandum which shall be open for easy access to the public.

When the House of Representatives has considered a bill and passed a resolution of approval, the House of Representatives shall submit such bill to the Senate. The Senate must, in general, finish the consideration of such bill within sixty days otherwise it shall be taken that the Senate has approved it.

In case the Senate agrees with the House of Representatives, the Prime Minister shall present the bill approved by the National Assembly to the King for His signature within twenty days as from the date of receiving such bill from the National Assembly and the bill shall come into force as an Act upon its publication in the Government Gazette.

If the bill approved by the National Assembly has not received the royal assent and the King returns it to the National Assembly or does not return it within ninety days, the National Assembly must reconsider such bill. If the National Assembly resolves to reaffirm the bill with the votes of not less than two-thirds of the total number of existing members of both Houses, the Prime Minister shall present such bill to the King for signing once again. If the King does not sign and return the bill within thirty days, the Prime Minister shall cause the bill to be promulgated as an Act in the Government Gazette as if the King had signed it.

If the Senate disagrees with the House of Representatives, such bill shall be withheld and returned to the House of Representatives. If there is an amendment and the House of Representatives disagrees with it, each House shall appoint persons, being or not being its members, in such equal number as may be fixed by the House of Representatives to constitute a joint committee for considering the bill. If both Houses approve the bill considered by the joint Commission, the bill will be signed into law. If either House disapproves it, the bill shall be withheld.

In case of enactment of organic of fundamental. Acts as specified in Section 138 of the Constitution totaling nine Acts of this kind altogether, such organic law bills are to be introduced only by the Council of Ministers, members of the House of Representatives of not less than one tenth of total number of the existing members of the House of Representatives or members of the House of Representatives and Senators of not less than one tenth of members of both Houses; or by the Constitutional Court, the Supreme Court or other independent constitutional organizations whereby the President of such Court or of such organization is in charge of the organic act.

The consideration of an organic law bill in the House of Representatives and the Senate shall be done in here readings as follows:

Voting for adoption of the principle of a bill in the first reading and section by section scrutiny of a bill in the second reading shall be made by a majority of votes of each House.

Voting in the third reading shall require affirmative votes of more than one-half of the existing members of each House. Other provisions concerning the enactment of an Act shall apply mutatis mutandis to the consideration of an organic law bill.

With a view to enhancing the democratization of law making process, Section 165 of the Thai Constitution provides that a person having the right to vote in an election shall have the right to vote in a referendum which may be held on the following grounds:

The Council of Ministers is of the opinion that any issue may affect national or public interests, the Prime Minister, with the approval of the Council of Ministers may consult the President of the House of Representatives and the President of the Senate for the purpose of calling a referendum by publication in Government Gazette.

In case where a referendum is required by law.

Before the referendum, the State shall provide sufficient information for the public and provide equal opportunities for the people to make their own decisions

The rules and procedures for voting in a referendum shall be in accordance with the Organic Act on Referendum which was enacted in 2009 containing the details of procedures for voting, referendum period and the number of votes required for the final decision.

On the question of constitutionality control on the enactment of law, the present Thai Constitution delegates the authority in this respect to the Constitutional Court. Section 154 of the Constitution provides that after the approval of any bill by the National Assembly before the Prime Minister presents it to the King for His signature:

if members of the House of Representatives, senators or members of both Houses of not less than one-tenth of the total number of the existing members of both Houses are of the opinion that any provisions of the said bill are contrary to or inconsistent with this Constitution or such bill is enacted contrary to the provisions of this Constitution, they shall submit their opinion to the President of the National Assembly as the case may be, and the President of the House receiving such opinion shall then refer it to the Constitutional Court for decision and, without delay, inform the Prime Minister thereof.

If the Prime Minister is of the opinion that the provisions of the said bill are contrary to or inconsistent with this Constitution, the Prime Minister shall refer such opinion to the Constitutional Court for decision and, without delay, inform the President of the House of Representatives and President of the Senate thereof.

During consideration of the Constitutional Court, the Prime Minister shall suspend the proceedings in respect of the promulgation of the bill until the Constitutional Court gives a decision thereon.

If the Constitutional Court decides that the provisions of such bill are contrary to or inconsistent with this Constitution and that such provisions of the bill constitute the essential element thereof, such bill shall lapse.

If the Constitutional Court decides that the provisions of such bill are contrary to or inconsistent with this Constitution other than in the case specified in paragraph three, such conflicting or inconsistent provisions shall lapse.

The provisions of Section 154 shall apply mutatis mutandis to draft rules of procedure of the House of Representatives, draft rules of procedure of the Senate and draft rules of procedure of the National Assembly which have already been approved by the House of Representatives, the Senate or the National Assembly, as the case may be.

Furthermore, as far as the organic law bill is concerned, after its adoption by the House of Representatives and the Senate it has to be submitted to the Constitutional Court of review of its constitutionality.

In view of the above, there are instances in which the public has played a role in democratisation of lawmaking process either directly or indirectly through their representatives in the National Assembly. In case of the present Thai Constitution in particular, a referendum was held for its adoption. In conclusion, public awareness and participation in democratitsation of lawmaking process have been encouraged.

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

DEMOCRATIZATION OF LAWMAKING PROCESS

Hon. Hidayat Nur Wahid
Chairman of the Committee for Inter-Paliementary Cooperation
The House of Representative of Indonesia

About Indonesia

As the fourth-most populous country in the world, and is currently considered the world's third largest democratic country, Indonesia has been transformed in a relatively short time as the role model of democracy at the global level. This cannot be separated from the socio-political condition that developed in the transition period to the New Order Reform in 1997-1998 when Indonesia laid the foundation of the1945 Constitution which became part of the basic law of the country (droit constitutionnel) as the legal basis which could capture the mystical atmosphere of the community at that time. At that time, people from all walks of life had a mutual agreement about the importance of change of power and governance. At that time, the power was held by the President who held the mandate of the People's Consultative Assembly (MPR). Even though the government was formally selected through the election in the MPR, the method of governance did not change for about 32 years,. Amendments to the 1945 Constitution was then conducted from the first amendment to the fourth amendment which was performed to capture the true desire of the society at the time.

Democracy and the law in Indonesia

In the new era, the concept of democracy was carried out in a more organized way. The 1945 Constitution started limiting the power of the President who holds the power of the executive body (Article 7 of the 1945 Constitution's first amendment). The 1945 Constitution also explicitly outlines the separation of

power which comprises the executive, legislative and judicial bodies at the same time confirms the presence of high state institutions that support the separation of powers of the President, the House of Representatives (DPR), Regional Representatives Council (DPD), State Audit Board (BPK), the Supreme Court (MA), the Constitutional Court (MK), and the Judicial Commission (KY). Also, the 1945 openly began to ensure a variety of human rights that must be protected by the state. With such a form, it seems clear that Indonesia is also a state law (*rechstaat*) demonstrating the following characteristics:

1. The existence of the Constitution or the basic law which contains a written provision about the relationship between the rulers and the people;
2. The division of state power, which includes: Law making power held by the Parliament, an independent judicial authority which not only handles disputes between individual people but also between rulers and people, and the government which bases its actions on the legislation;
3. The rights of the people are recognized and protected.

The concept of legal-based state cannot be separated from the view of the people (democratic view). The laws that regulate and restrict the power are interpreted as the laws arising from the hands of the people's sovereignty as stated in Article 1 paragraph 2 of the 1945 Constitution. Some views even explicitly mention rechtsstaat as a democratic constitutional state (democratische rechtsstaat). In addition to being acknowledged as a democratic constitutional state, Indonesia is also clearly stated as a constitutional democratic country. To demonstrate the implementation of this concept, Indonesia holds on to the important principles of state law which is the principle of legality. This principle then ensures that every act of the state be based on law. The principle of legality can be obtained through the legislators, the law making body. Currently, the power to enact the law according to the 1945 Constitution is held by the House of Representatives. This is re-confirmed in Article 20 paragraph (1) of the 1945 Constitution where the Parliament holds the legislative, budgetary and controlling functions. With such features, the role of Parliament as the representation of people's representatives is now complete. This also well confirms democratic values owned by Indonesia through the House of Representatives.

Lawmaking Process in Indonesia

To organize the state activities as well as running the authority arising from the implementation of the Constitution, the state established legal norms set by legislators. However, these norms will not be complete to ensure the implementation of the overall function of the state, because there are many other bodies that are formed as support agencies or the high state the consequences of the 1945 Constitution. Therefore, it is necessary to have other regulations under the legislation which is specified in hierachy. This is also in line with the theories of Hans Kelsen on "The Hierarchy of Law" which reveals that the rule of law is a tiered structure where the laws are structured from a lower to a higher principle.

In the legal system in Indonesia, legislation is structured in hierarchy. The state then sets the ladder in the hierarchy of legislation. So far, Indonesia has experienced several changes in the order of legislation ranging from TAP MPRS No. XX/MPRS/1966 and also TAP MPR No. V/MPR/1973, TAP MPR No. III/MPR/2000 on Sources of Law and Sequence of legislation until later became Law Number 10 of year 2004 on the establishment of legislation.

In the law, the hierarchy of legislation in Indonesia is described as follows: the 1945 Constitution of the Republic of Indonesia (which became the legal basis for legislation); Law/Government Regulation in Lieu of Law: Government Regulation; Regulation issued by the President; Local Regulations that include Provincial / Regency / City and Village Regulations; and other types of legislation are recognized and have binding legal force as ordered by higher level of legislation.

Law No. 10/2004 also affirms the law making principle as well as the principles of the substance of the legislation. Article 5 of Law No. 10/2004 details the principle of the right way of establishing the egislation that includes: clarity of purpose; institutional or right-forming organs; correspondence between the type and material content; the applicability; versatility and benefits; clarity of the formulation; and, openness.

The products of legislation should apply the principles of the legal substance under Article 6 of Law No. 10/2004 namely: shelter; humanity; nationality; familial; country characteristics (*Kenusantaraan*); unity in diversity; justice; equality in law and government; order and legal certainty; and/or balance, harmony and alignment. Legal substance is also still open to other principles in accordance with the law throughout the legislation in question.

Law No. 10/2004 also outlines the need for direction in a planned, phased and integrated way in the establishing the Act by specifying the need for National Legislation Program (Prolegnas) and Regional Legislation Program (Prolegda).

The law governs the formation of legislation that started from the Planning Development Act; Establishment of legislation; up to the Discussion and Approval to Bill. The law reaffirms the role of House of Representatives (DPR) as the representation of an important political shift in 1997-1998 and the institutionalization of democracy which is manifested through a representative who has the power to shape the law. The House of Representatives was instrumental in the planning process where through Legislation (Baleg), legislators plan to coordinate all initiatives put forward between the House and the Government. The spirit of democracy is also transferred to the local legislators (DPRD) who receive similar authority to make legislation in the regional level.

Democracy in law making process

Indonesia as a democratic state institutionalizes democratic values in a variety of institutions, which includes in the institutionalization of the process law making (law making process). The principles of democratization appeared

in the normalized principles included in Law No. 10/2004, for example: the principle of openness, which became one of the principles in the formation of legislation. This is part of the institutionalization of the democratic values in regulating the prevailing norms in the country. The spirit of this principle is also in line with the common values of democracy that is about community participation and government accountability. Thus, as stated in the explanation to Law No. 10/2004, all layers of society have the widest possible opportunity to provide input in the process of making legislation.

Typical Indonesian democratic practices, such as deliberation, is also contained in the principles of the legal substance, for example principle of the kinship (asas kekeluargaan), as exposed in Article 6 of Law No. 10/2004.

To reach the public spaces in providing norms that provide justice for its people, the state opens the opportunity for its citizens to participate. In fact, the Law No. 10/2004 strictly regulates public participation (Article 53), which reads "People are entitled to provide input, either oral or written discussions in preparing draft laws and draft local regulations."

The public is explicitly given the opportunity to discuss the bill, and also the draft regulations in the regional level. However, can the people not participate outside it (Law and Regional Regulation)? Although not strictly regulated, the law guarantees the participation of the people through the implementation of the law making principle.

This legislation of the process of democracy can also be made through other channels such as freedom of the press via Act No. 40 of year 1999 on the Press which guarantees freedom of the media to convey information; to Law No. 14/2008 on Public Disclosure, which one of its aims is to encourage participation of the society in public policy-making process.

House of Representatives as the holder of public representation, who are directly elected by the people, realize the importance of community participation in determining the direction of the country. The House realizes characteristics of rechtsstaat state that guarantees and protects the rights of its people as important pivot in the life of the state. For that reason, democratization is vital in the policy-making process, especially when relating it to the Act. In Law No. 27 of year 2009 on the MPR, DPR, DPD and DPRD (MD3), the House realizes its task to capture, collect, hold and follow up on people's aspirations through the opening of public taps in the process of law making. Article 153 of Law on MD3 opens explicitly the right of people to provide input either orally or in writing to the House. The principles of democratic accountability in the administration are also confirmed by Article 200 of Law on MD3, explaining that every meeting in the Parliament is essentially open, except for certain meetings which are declared closed. Community participation can be done in the process of Public Hearings Meeting or other meetings, working visits, seminars, discussions or similar activities, until the review process or the follow up of a variety of reviews to prepare a bill.

Checks and balances in democracy

Although the process of establishing laws and regulations, both by the government and the Parliament, has given the juridical opportunity for the involvement of the community, supported by the principles of the formation of the legislation which has already been well stated, it cannot be denied that the products of these laws are also often born with the formal democratic principle. This arises not because the juridical opportunity is closed, but due to a lack of socialization and community participation in the establishment process. In addition, the conflict of interests makes the state bodies sometimes simply formalize the juridical opportunity, without regard to its substance. Indeed, in principle any legislation passed by Parliament and signed by the President reflects the will of the majority of the nation, considering that both parties receive both the mandate --directly--from the people. However, the law cannot be denied by any legal product produced politically because it is determined through the majority model. While the legal product reflecting the will of the people is the 1945 Constitution.

Concerning this issue, there is a mechanism that provides the right to review to the judicial actor to determine if the existing legislation is contrary to the higher level regulation or to examine whether the laws are contrary to the basic norms contained in the 1945 Constitution. This judicial review is conducted by two judicial institutions that exist in the 1945 Constitution which are the Supreme Court and Constitutional Court.

The concept of the Constitutional Court is relatively new for Indonesia. Prior to the Constitutional Court, judicial review is only in the hands of the Supreme Court, and it was only to review the laws and regulations under the Act. With the establishment of the Constitutional Court, then, judicial review can be made examining the Act which is considered contrary to the constitution (1945 Constitution). Through Act No. 24 of 2003 regarding the Constitutional Court and related laws on Amendment Act No. 24 of 2003 regarding the Constitutional Court, judicial review process can be done. This well describes the check and balance process which becomes the motor of democracy in a country.

The impact of judicial review carried out by the Constitutional Court gave a big change for the journey of making laws. That is, there is the possibility of an article in the law to be declared null and void because they conflict with the constitution or constitution by condition. The annulation of one article in a law-which may be interwoven with other chapters, can cause the entire chapter to be inapplicable. This mechanism can certainly give birth to self-criticism, both politically and legally against legislative institutions, considering that the Constitutional Court makes decisions at the first and last (final and binding) level of the legal hierarchy.

The check and balance mechanism after the amendment of the 1945 Constitution can be considered the softening process of the doctrine of separation

of powers or the division of state power by connecting the branches of power which are mutually exclusive. It is intended to prevent the birth of absolute and unsupervised power that runs independently, without being connected with each other in the achievement of objectives in a consistent and effective way.

The long road to democracy

Seeing the journey of Indonesia as a new country in democracy, there is no doubt that there have been many achievements made since the reforms were carried out. Democracy also touches the positive norms embodied by the provider and the owner of the authority, even up to the law process of making legislation. However, the implementation of democracy is still often done formally, so sometimes forget about the substance of democracy itself that is of, and for the people. Thus, it is appropriate to the spirit of check and balance in the constitution that gave birth to or shift the power in the high state agencies conducted in order to support democratization efforts lawmaking. However, efforts to create a democratic Indonesia are not as easy thing as turning the palm of the hand. The democratic substance is intended for people's welfare. Efforts to democratize legislation still need to be refined, because this is part of the long road towards democracy a better Indonesia.

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

SESSION THREE

The Mechanism of Checks and Balances among State Institutions

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PANEL I

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

THE MECHANISM OF CHECKS AND BALANCES AMONG THE MEXICAN STATE INSTITUTIONS

Hon. Margarita Beatriz Luna Ramos
Justice of the Federal Supreme Court of Justice of Mexico

It gives me great satisfaction to find myself as part of the International Symposium "Constitutional Democratic State", to celebrate the 8th Anniversary of the Constitutional Court of the Republic of Indonesia. The different experiences each one of our countries has experienced regarding the independence of the courts, the assurance of the separation of State Powers and the mechanisms of checks and balances among them, will give an enriched discussion for the purposes of the event.

The results of this International Symposium will become a rewarding exercise for all of the participants. I am sure that the experiences shared will enrich each country's effort to enforce democracy and equilibrium among the State Powers.

On this occasion, I will refer to the prominent role to be played by the Supreme Court of Justice of Mexico, as a constitutional court, and in general to the Mexican Federal Judicial Power, in the process of consolidating democracy.

Democracy is as a fundamental and essential value of the constitutional State, whose sovereignty lies in the will of the people. In this same path, democracy has as its objective the well-being of the governed, the unrestricted respect for their fundamental rights and the principles of constitutional supremacy, legality and Division of Powers.

Democracy requires adequate control of the constitutionality of the acts issued in the exercise of public powers. The Constitution and secondary legislation emanate from the bodies of representation and should be interpreted according to the benefit of the people that directly or indirectly has inspired them.

With this conviction, I wish to reiterate that the Supreme Court of Justice of the Nation, Mexican Constitutional Court, currently constitutes the balance in the settlement of many and varied conflicts subject to its jurisdiction. It is the guarantor of the preservation of conditions for a social, peaceful and harmonious coexistence. It is the safeguard of the fundamental rights of each person and their human dignity; and is in charge of strengthening the State Institutions.

A community is an historic creation and the social activity is inseparable from the continuity linking the present with the past and what it creates towards the future. In the Mexican constitutional evolution, historical reality, facts and human behavior, expressed through social, economic, political and legal relations favored the birth, formation and evolution of our institutions:

1. The judicial review.
2. The constitutional controversies, which can be considered the means to control general rules and to resolve conflicts arising from the division of powers and the federalism.
3. The actions of unconstitutionality, seeking to declare unconstitutional general rules from the claims brought mainly, by parliamentary minorities.
4. The control of the legality, through the exercise of the power of attraction on relevant issues, and through the analysis of conflicting criteria issued by the Collegial Courts of Circuit.

1. The Judicial Review

Among the institutions of constitutional control, is the judicial review, the first legal procedure of control that makes its appearance in the constitutional history of my country. It was born and became a purely Mexican institution, which aims to safeguard the constitutional and legal rights of the governed, and goes far beyond our borders as a magnificent contribution to the legal culture of other countries.

The work developed by the Federal Courts, through the Judicial Review, has shown that the vocation for this constitutional procedure and calling for freedom, more than related, are identical, because the conviction of the need for legal and peaceful means exists, and not from violent subversions, to obtain the rule of law and the respect for the property of the person. All of this crystallizes the dream of the founding fathers of the Independence, Reform and Revolution.

The Judicial Review is not an impediment to the exercise of legitimate powers of Government, but, on the contrary, it is the index and guide so that the exercise can have constitutional validity.

Of great importance for the Mexican Legal System was the 1988 Constitutional Reform. It was the beginning of the transformation of the Supreme Court of Justice towards a true constitutional court. This reform greatly reduced the power of the Supreme Court in matters of legality (it retained only the exercise of

the power of attraction on relevant issues and through the analysis of conflicting criteria issued by the Collegial Circuit Courts), allowing the High Court to devote itself to the study of the constitutional control.

2. The Constitutional Controversy

Since February 5, 1917, date when our Constitution was enacted, the constitutional controversy was established as a procedure for the protection of the powers that this document provides to each organ of the State derived from the federal system and the principle of separation of powers.[1]

Recognition of federalism and the safeguarding of the Division of Powers are the elements that determine the existence of this means of constitutional control. With the constitutional controversy an invasion of the competence areas set out in the Constitution may be resolved.

It constitutes a real trial between authorities, entities or bodies established in our Magna Carta, which can be promoted by the Federation, one of the powers, the Federal States, the Federal District and the municipalities; against general rules or acts involving the existence of a grievance to the detriment of the petitioner.

The constitutional reform of 1994 was decisive, extending the jurisdiction of the Supreme Court of Justice in the field of constitutional controversy, including, among other petitioners, the cell of the political and administrative organization of Mexico: the municipality.

The resolution of a Constitutional Controversy, in order to have universal effects, has to be approved by a majority of at least eight out of eleven Justices of the Supreme Court. These effects consist, in the case of general rules, to declare the invalidity of the law with universal effects, when such provisions of the Federal States or Municipalities were challenged by the Federation, and when the Municipalities are challenged by the States

3. The Action of Unconstitutionality

The action of unconstitutionality was also established in 1994. From then on, political minorities of the legislative bodies, both federal and local, as well as political parties and the General Procurator of the Republic, were able to present themselves to the Supreme Court, when they sustain, through the argumentation of legal reasons that the majority position is not in line with our Constitution

In contrast to what is happening with the constitutional controversies, in the actions of unconstitutionality it is not necessary to prove the existence of a tort or legal injury, nor the specific application of the rule, in order to grant legitimacy to the petitioner.

1 Supreme Court of Justice of Mexico, *The Division of Powers*, Supreme Court of Justice of Mexico (Series Great Topics of Mexican Constitutionalism #2), México, 2005, pp. 107.

The action of unconstitutionality guarantees constitutional order and the certainty of the Mexican legal system. It looks for the Supreme Court of Justice to analyze in the abstract the constitutionality of a rule.[2] This kind of constitutional control is a procedure, because it does not imply a dispute between parties; it is only applicable regarding general rules.

The resolution of an action of unconstitutionality, approved by at least eight of the eleven Justices may declare the invalidity of a general ruling and, just like the constitutional controversy, it will have general effects.

The action of unconstitutionality ensures the Federal Pact, because it protects the dogmatic and organic parts of the Constitution, and ensures that the legislature honors it. By declaring the general annulment of an unconstitutional rule, it is confirmed that the legislature must comply with the principle of constitutional supremacy before issuing any general rule.

The invalidity declaration of a rule requires a minimum of eight votes and the nullification effect is produced with the enforcement of the corresponding resolution.

After the relevant constitutional reform of 1996, the then Autonomous Federal Electoral Court, became part of the Federal Judicial Power and settled in favor of the Supreme Court of the country, the power to deal with the action of unconstitutionality on electoral laws.

4. The Control of Legality

Another means of constitutional control that the Supreme Court of Justice of Mexico has is the so-called power of attraction on relevant issues. It was established with the purpose of giving the High Court the faculty to resolve issues that by origin correspond to Collegial Courts. In order for the Supreme Court to study these cases, they must have the characteristics of legal importance and significance, and that the legal problem arises, given its significance, novelty or complexity, requires a statement from the highest court in the country.[3]

The Court has defined, for cases of this means of control, what must be considered of importance and significance. In determining the conditions just mentioned, the theory distinguishes the qualitative and quantitative elements that must be analyzed to determine the need or not for the Supreme Court to examine the case.

It is important to consider in this matter the terms "interest" and "importance" as relevant considerations of the intrinsic nature of the case, both legal and extralegal, to refer to the qualitative aspect. The term "significance", on the other hand, must be reserved for the quantitative aspect, thereby reflecting the

2 Thesis: P./J. 71/2000, Semanario Judicial de la Federación y su Gaceta , Novena Época, Pleno, Tomo: XII, Agosto de 2000, p. 965, "CONTROVERSIAS CONSTITUCIONALES Y ACCIONES DE INCONSTITUCIONALIDAD. DIFERENCIAS ENTRE AMBOS MEDIOS DE CONTROL CONSTITUCIONAL."

3 Articles 107-V of the Political Constitution of the United Mexican States (Constitución Política de los Estados Unidos Mexicanos); 182-III of the Judicial Review Law of Mexico (Ley de Amparo), and 21-III-b) of the de la Judicial Federal Branch Organization Law (Ley Orgánica del Poder Judicial de la Federación).

exceptional or novelty characteristic that will entail the establishment of legal criteria.

Through the resolution of contradictions of precedents upholded by the collegiate courts, the Supreme Court also exercises an important control of legality, and determines the criteria that should prevail and must be observed by the authorities.

Even though the competence to resolve constitutional controversies has been established in the Constitution since its enactment, the truth is that between 1917 and 1994 the Supreme Court resolved only 42 cases of this nature. This picture, which meant a minimal intervention of the Supreme Court of Justice on issues of such significance, changed radically.

The constitutional reforms of 1994, the enactment of a Regulatory Act of Article 105 of the Magna Carta and the growing political pluralism in our country, determined that from 1995 to date, 407 actions of unconstitutionality and 973 constitutional controversies were promoted. This increase corroborates the unquestionable need and importance of these procedures of constitutional control in a plural and democratic society.

It is necessary to emphasize that these new powers have enabled the Federal Supreme Court to assume its historical responsibility as a new and important legal and political actor which earlier stood outside the democratic processes. This is consistent with the role of a balancing factor in the political system.

It should be noted that at least in this aspect, we have coincided with the clock of history that marks the time in other countries. In due course we have joined the recognition and enrichment of the branch of government specialized law, known as Constitutional Procedural Law, whose essential components are the procedures arising from the new powers granted to the Supreme Court, in addition to the traditional view of the judicial review.

The evolution of the judicial system of control of the constitutionality, at present, has closed a formerly incomplete circle: by the judicial review, the civil liberties or fundamental rights are defended; through constitutional controversies, the separation of powers and the distribution of competence between the Federation, States and Municipalities is guaranteed; and through the action of unconstitutionality, it strengthens the pluralistic and democratic participation of members of legislative bodies. This circle has in addition the possibility of challenge granted to political parties in the field of electoral laws.

Over the past years, the Supreme Court of Justice has implemented a policy of transparency that has contributed to the strengthening of its legitimacy as a Constitutional Court. With very few exceptions, the Plenary Court performs its meetings publicly. Any interested party may personally attend the Chamber and witness the deliberations that Justices undertook to solve the matters within the competence of the Court.

In addition, these sessions are transmitted live through the Judicial TV Channel and on the internet webpage of the Supreme Court, where they are stored so that anyone anywhere in the world can see and hear any session they

need. Also, hours after the meeting concludes, the corresponding stenography version is published and stored. There is also a section in which all sentences issued by the Mexican Supreme Court are concentrated.

The divergent paths that followed the policy and law, in accordance with the previous State model , make it posible today for the Judicial Power to resolve issues directly related with politics and law. In this regard, the Supreme Court of Justice, Constitutional Court of Mexico, is a guarantor of effective separation of powers, of the validity of federalism and the defense of human dignity.

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

THE ROLE OF THE CONSTITUTIONAL COURT AND THE EQUIVALENT INSTITUTIONS TO STRENGTHEN DEMOCRACY

Hon. Gulzorova Muhabbat Mamadkarimovna
Justice of the Constitutional Court of Tajikistan

Dear Chairman,
Dear Colleagues,
Ladies and gentlemen,

Allow me on behalf of the Constitutional Court to congratulate the President and Judges of the Constitutional Court of the Republic of Indonesia with eighth anniversary of the founding of the Constitutional Court of the Republic of Indonesia and wish them all the best.

We welcome the initiative of the Constitutional Court and Parliament of the Republic of Indonesia at the holding of the International Symposium, which will surely become a new impetus to strengthen the system of constitutional justice in the world and significantly enhance the effectiveness of international relations of the Constitutional Court and the Constitutional Court of the Republic of Indonesia. Allow me to thank you for inviting me and giving us the opportunity to become better acquainted with the people of Indonesia, with its historical culture, achievements and activities of the Constitutional Court.

Dear Colleagues,

History shows that in many countries after the establishment of constitutional order, the stability of the Constitution and its ability to provide guarantees of the rights and freedoms of man and is the key to prosperity of the state. Although the state of Tajikistan is rich in ancient history, but with the proclamation of independence in 1991, the Declaration of Independence and the

State Constitution, November 6, 1994 were recognized as natural human rights and freedoms at the level of the Basic Law was proclaimed the supreme value of human rights and freedoms. Following the adoption of the new Constitution, which is fully consistent with the basic principles of democracy and the general world experience was 17 years old. The Constitution was not only a guarantee of transition of Tajikistan to the new democratic level, but also with the approval of the basic law of the country there were new conditions in the theory and method of establishing democracy and constitutionality in Tajikistan.

A special role in the establishment of constitutional democracy in the society is to have constitutional courts, which in fact, were the first so-called innovation in a transitional society. Constitutional courts have been hard to find a lasting place in transforming society, which are characteristic of uncertainty, legal nihilism, significant institutional and functional problems to ensure viability of the social system in a mode of legal restrictions and democratic freedoms. It is no accident that sometimes became an arena of constitutional courts, and sometimes the victim of the struggle of old and new thinking. Despite this, in a transitional society in many respects the constitutional courts assume greater responsibility in the establishment of constitutional democracy, the rule of fundamental constitutional values and principles.

President of the Republic of Tajikistan Rahmon in his speech on the occasion of the 15th anniversary of the Constitution of Tajikistan, said that: "... for the first time in the history of the state of Tajiks by referendum by the people directly, with the knowledge of high responsibility to the past, present and future generations, adopted in as the supreme law of the country's constitution of the independent state of Tajikistan.

This fateful document that reflected the will and resolve of the people, determined to progress and further improve our society.

Proclaiming people, their rights of freedom as the highest values of the Constitution of the Republic of Tajikistan has identified the objectives and content of the legislative, executive, local government and local authorities, meaning that laws should not impose such rules of conduct that do not comply with human rights and freedoms or violate them. In addition, all branches of government and public officials in their work, above all, must take into account human rights and freedoms, without committing acts that violate or restrict them. To preserve and protect the standards of the Constitution and the rights and freedoms of individuals with the adoption of the Constitution in the government while the people of Tajikistan contributed to the emergence of an independent institution, the Constitutional Review Body, that is, Constitutional Court. Its activity is regulated by the Constitution and Constitutional Law "On Constitutional Court of the Republic of Tajikistan". According to the Constitutional law principles protecting human rights and freedoms through constitutional jurisdiction are: independence, collegiality, openness, competition and equality of the parties. On the basis of such principles in their work today, The Constitutional Court shall adopt decisions which have their value in protecting the rights and freedoms of man and citizen.

Also under the new Constitution, the judicial system has been further developed (as a combination of courts established by the Basic Law and constitutional law), has established a new judicial body - the Supreme Economic Court. One important mechanism for protecting human rights and rule of law in the executive bodies is the ombudsman, who also successfully been active in Tajikistan, along with other institutions in the legal systems of civilized countries.

Deploying the full range of state institutions in a democratic society, eliminating the domination of political power, eliminates or severely restricts manifestation of its negative sides. Among the extensive set of institutions characteristic of a developed state in a democracy, you must specify, in particular, such as: people's right to exercise power, especially through the formation of representative bodies carrying out legislative and oversight functions, the existence of local government; subordination of all law authorities are independent and strong justice, education ombudsman. Thus, to the constitution could play as transformative and stabilizing role in society, social consciousness, in the activities of the state, its politics, in political regime must be certain conditions. There must be a regime of law in general and constitutional law in particular, the state should have the capacity to implement its decisions, and civil society - to have institutions that can provide a deterrent in today's society the constitution - a means of stimulating and stabilizing the democratic development. Given the complicated structure of modern society, consisting of thousands of associations, unions, associations with intersecting interests, their involvement in political life through a representative electoral system, to some extent, the mixing, synthesizing numerous group differences and contradictions, is largely an integrating and stabilizing system factor, diluting the interests of social cleavages front, reducing to a minimum level, including traditional class antagonisms. Membership of individuals in a large number of divergent groups and participation in mutually intersecting conflicts make society more odorodnym, harmonious socio-political relations. Public life in each country develops a legal basis. Rule of law is one of the fundamental principles of law. If a society is not dominated by law and legality, if the rights and freedoms are not respected, if not honored by the national customs and traditions, as well as universal values, such a state cannot be called democratic and legal. These thoughts were expressed in the speeches of leaders and judges of the constitutional supervision organs of Europe and Asia, held in 2010 in Dushanbe International Scientific and Practical Conference "The bodies of constitutional review in the context of integration of legal systems: international experience and practice of Tajikistan," dedicated to the 15th anniversary of the formation of the Constitutional Court. In the conference attended by representatives from over 15 countries and we very much hope that the past at such a high level, it will make a significant contribution to the further expansion of cooperation of the judiciary, the influential international and regional organizations to enhance their role in ensuring the rights and freedoms of individuals and strengthening human and civil liberties, strengthen the rule of law and justice, peace and stability in society.

If a society only written laws, but not satisfied, then in such a society is served justice. The law must be implemented in practice. Time the law was passed, all citizens are obliged to implement it. One of the main indicators of the democratic rule of law is equality before the law, the rule of law, that means: First, the rule of law in all spheres of public life. Nobody has the right to be released from liability under the law, and secondly, the major social, economic and political relations are regulated only by law, and their members, without exception whatsoever be liable for violation of the law. The need for democratic reforms must be recognized by society. Also, democratic institutions must reflect the mentality and cultural peculiarities of each nation. For example, the Western democracies are based on a philosophy of individualism. The East a democracy based on the idea of collectivism, the priority of public opinion and the process develops under the influence of such features of the eastern people as law-abiding, the priority of moral and spiritual principles in political relations. The pursuit of justice - another characteristic of the mentality of the people of the eastern states and the main task is to create a legal mechanism to ensure equal initial opportunity for all people to open, i.e. realize their potential, to meet their needs. The further a person's position in society should be determined by his desire and ability to work.

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

CHECKS AND BALANCES MECHANISM AMONG STATE INSTITUTIONS (EXPERIENCE AND PRACTICE IN INDONESIA)

Hon. M. Akil Mochtar
Justice of the Constitutional Court of Indonesia

Preliminary

The principle of separation of powers is one element of the enforcement of state law. The principle of separation of powers means that in performing the functions or authorities, state institutions in their respective branches of state power has the exclusivity that should not be touched or interfered by another branch of state power.

However, in practice, it's impossible to strictly separate the branches of state power. The most likely is to separate strictly the functions of each branch of state power rather than strictly separate them as having no relationship at all. Therefore, the principle of separation of powers then gave birth to variations in administrative practices, one of which is realized through the application of the principle of checks and balances.

Principle of checks and balances arose from the need to ensure that each power does not exceed his authority. On the other hand the principle of checks and balances are also to ensure the freedom of each branch of state power as well as to avoid excessive interference from the power of one over the other powers. In other words, this principle is aimed at creating a balance in the politics of social interaction without impairing the function and reducing the independence of the authority of other institutions.

As the country's laws, Indonesia continues to build a democratic order and apply the principles and mechanisms of checks and balances. The dynamics of state administration that occurred and accompanied by leaps in the democratization

of ideas also determine how the implementation of the mechanism of checks and balances. Based on the foregoing, this paper is an exposure of practical experience and implementation of mechanisms of checks and balances that have been executed. In this paper, the emphasis is more directed to the role and contribution of the Constitutional Court of the Republic of Indonesia, as a state institution in the judicial branch of power, in creating harmonious relations within the framework of the mechanism of checks and balances among state institutions in Indonesia.

Checks and Balances in the Formation of Law

The power of law making is held by the House of Representatives. However, every bill must be discussed and agreed upon by the House and the President (Article 20 paragraph 1and 2 1945 Constitution). In certain respects, the discussion of bill should involve the Regional Representatives Council, which is a draft relating to regional autonomy, relations between central and local government, the formation, expansion and merger of regions, management of natural resources and other economic resources, as well as relating to the financial balance between central and local government and draft relating to taxes, education, and religion (Article 22D Paragraph 2 1945 Constitution). Thus the form of power laws according to the constitution of Indonesia is not a monopoly of the Parliament as a legislature, but must be discussed and agreed upon with the President that theoretically holds the executive power. Therefore, the President has no veto after the bill was discussed and approved by Parliament, but a veto is implicitly held by the President at the time of discussion with the House when the President does not approve a bill.

Constitution of Indonesia does not recognize the parliamentary system of two chambers (bicameral system) in the formation of laws, although the parliamentary system of Indonesia recognizes the Regional Representative Council, a council whose members are representatives from the provinces in Indonesia who are elected through general elections (similar to the Senate in United States). Regional Representative Council's limited legislative authority is only entitled to submit a bill relating to regional autonomy, central and local relations, the establishment, expansion and merger of regional natural resource management and other economic resources, and relating to the financial balance between central and local to the Parliament and taxes, education and religion together with the Parliament (Article 22D paragraph 1 and paragraph 2 1945 Constitution). Thus, the position of the Regional Representative Council cannot balance the authority of the House of Representatives and the President in forming legislation. Regional Representative Council's 's involvement is limited to participation in the discussion. The position and authority of such Council still raises the academic debate in Indonesia and the Regional Representative Council are still fighting for the fifth change of the 1945 Constitution to strengthen the authority of the Regional Representative Council, but there is no agenda of the Assembly for that change.

Formation mechanism of such laws (joint discussion between the House and the President) is a legacy of constitutional practice since Indonesia independence

that continues to be maintained and strengthened in the 1945 Constitution Amendment (Third Amendment 2001), except for discussions with the new Regional Representative Council known since the third 1945 Constitution Amendment . The draft discussion and agreement model between the House and the President is a reflection of the principle of consultation in the administration of state based on Pancasila, the state philosophy of Indonesia.

Constitution of Indonesia knows another representative institution, namely the People's Consultative Assembly (MPR), which consists of all members of the House of Representatives and Regional Representative Council (Article 2 paragraph 1 1945 Constitution), that has the authority to change and establish the Constitution (Article 3, paragraph 1 1945 Constitution). The authorization is the exclusive authority possessed by the Assembly of which the decision cannot be canceled or tested by any state agency. Therefore, the Assembly power to change and set a law is the supreme power which is not limited unless the restrictions by the Constitution itself.

According to the Indonesian Constitution, the legislation produced by Parliament and the President can be tested and canceled by the Constitutional Court, both in the form of formal testing on legislation procedures, as well as testing of the material content of the legislation, partially or completely (Article 24C paragraph 1 1945 Constituion).

Checks and Balances in the Implementation of Executive Power

Executive power in the constitution of Indonesia known as the power of government held by the President (Article 4 paragraph 1 1945 Constitution), assisted by ministers of state (Article 17 1945 Constitution), as well as by some council considerations of the President (Article 16 1945 Constitution). In exercising his power, President is monitored continuously by the House of Representatives and Regional Representative Council in certain respects. Parliament oversight functions is guaranteed by the constitution to give constitutional rights to Parliament, among others, the right of interpellation, the right of inquiry, and the right of expression (Article 20A Paragraph (2) 1945 Constitution). Interpellation is the right of Parliament to request information from the Government about the government policy which is important, strategic and has far-reaching impact on the life of society, nation and the state. Right of inquiry is the right of Parliament to investigate the implementation of legislation and / or policy of the Government relating to important and strategic matters and having broad impact on the life of society, nation and the state and it is allegedly contrary to laws and regulations. The Parliament has rights to express an opinion on: a) Government policies or about the extraordinary events that occurred in the country or abroad; b) follow-up exercise of the right of interpellation as referred to in paragraph 2 and the right of inquiry referred to paragraph (3), or c) allegations that the President and / or Vice President violated the law either an act of treason, corruption, bribery, other felonies, or if it is proved no longer qualify as President and / or Vice President. In addition, each member of the House of Representatives has the right to ask questions, submit suggestions, opinion, and immunities.

In addition, the President in carrying out his authority, in a variety of things, has to go through the approval of Parliament. The Constitution decides that the president has to go through the approval of Parliament in declaring war, making peace and treaties with other countries (Article 11 paragraph (1) 1945 Constitutional) The President must also obtain the approval of Parliament if an international treaty will create an extensive and fundamental impact on the lives of the people relating to the financial burden of state and / or requiring changes or legislation (paragraph 2 Section 11 1945 Constitution). The constitution also requires the President to get the Parliament consideration in the appointment of ambassadors and consulates and in acceptance of other countries ambassadors (Article 13 paragraph 1 and 2 1945 Constitution), granting amnesty and abolition (Article 14 paragraph 2 1945 Constitution). As for granting clemency and rehabilitation, the President listens to the consideration of the Supreme Court (Article 14 paragraph 1 1945 Constitution).

If the House of Representatives found the President violate certain laws that's governed by the constitution, Parliament may propose impeachment of President (Article 7A 1945 Constitution). The House of Representatives begins the impeachment process, and judges whether the reasons for impeachment and procedures are in accordance with the constitution by the Constitutional Court, and the Assembly decides whether to dismiss or not dismiss the President (Article 7B 1945 Constitutions).

Regional Representative Council is only authorized to supervise the implementation of laws, especially laws relating to regional autonomy, establishment, expansion, and merger of regional, national and local relationships, management of natural resources and other economic resources, the implementation of the budget, taxes, education, and religion to present the results of such supervision to the House of Representatives. Regional Representative Council's supervision is very limited because the results are submitted for follow-up supervision by Parliament so that it can be said that the Council was not fully offset the Presidential body.

In the management and responsibility of state power, the President is inspected continuously by a state agency that regulates the constitution, namely the Supreme Audit Board (BPK). The Supreme Audit Board's results are submitted to the House of Representatives, Regional Representative Council and Local House of Representative, based on their authority (Article 22E Paragraph (1) 1945 Constitutions) The Supreme Audit Board's examination results is the subject of supervision of House of Representative, Regional representative Council and the law enforcement agency against the President and other executive powers.

Relating to government and local government power-sharing, the constitution does not explicitly divide. The Constitution only confirms that the provincial government and district / municipality government organize and manage their own affairs based on the autonomy principles and assistance duty (Article 18 1945 Constitution). The type and scope of authority held by local governments is determined by the laws. Therefore, within the framework of the constitution, there is no check and balance relationship

between central government and local government. That's because Indonesia adopts a unitary state, where local government is part of the state government by the President. The relationship between central and local government still becomes an academic debate until now. Local government continues to demand greater autonomy authority with the scope of greater authority.

Checks and Balances on the Judiciary Power

In the Constitution there is not an oversight mechanism among state institutions of judicial authority because the judicial power is the power held by the judiciary that are independent of the influence of other branches of power. Article 24 1945 Constitution states, "The judicial power is the power to conduct an independent judiciary to uphold the law and justice". 1945 Constitution decides that the Supreme Court and Constitutional Court holds the judicial power (Article 24 paragraph 2 1945 Constitution). In carrying out the functions and authority as the judiciary, there is no mechanism to cancel or examine the decisions of the judiciary by the state organs outside the judiciary.

Form of judicial power by offsetting other institutions found only in the mechanism of selection and appointment of Supreme Court justices as well as monitoring the behavior of justices. In the appointment of Supreme Court Justice, there are mechanisms that involve the institution of the Judicial Commission (KY), House of Representatives and the President. The Constitution decides that the Judicial Commission is authorized to propose candidates for Supreme Court to Parliament for approval and then assigned as the Supreme Court Justice by President (Article 24A and 24B 1945 Constitution). Also the process of selection and appointment of constitutional judges, the constitution determines that the nine constitutional judges, three judges are proposed by the Supreme Court, three by the Parliament, and three by the President to be appointed by the President. The President appoints the members of the Judicial Commission with the Parliament's approval.

While the Judicial Commission supervises the judges' conduct. It is ruled by the constitution as an independent institution in order to preserve and uphold the honor, dignity, and conduct of judges. Constitutional Court Decision No. 005/PUU-IV/2006 dated August 23, 2006 determined that Judicial Commision has the authority supervise the judges outside the Supreme Court and Constitutional Court.

Organs of Independent States

Indonesia Constitution also formed an independent organs that cannot be categorized on the legislative, executive and judicial branches of government, namely the central bank (Article 23D paragraph (1) 1945 Constitutions) and the electoral commission (Article 22E Paragraph (1) 1945 Constitutions). Both institutions are guaranteed by the constitution and laws to carry out its duties and functions independently. Judging from their function, the two institutions carry out the functions of state government, but because of their very strategic

position, they are placed as independent state institutions. It is a restrictions form on Presidential power.

Although the 1945 Constitution only recognizes the central bank and the electoral commission, but there many independent institutions established by the Act as independent supporting State institutions (supporting / auxiliary state organs), such as the National Commission on Human Rights (Komnas HAM), the Witness Protection Agency, the Corruption Eradication Commission, the Broadcasting Commission and others. The Independent institutions carry out the duties and functions independently and cannot be influenced by other state agencies. Therefore, the recruitment of members or officials who fill these institutions is done by a separate mechanism proposed by the President and selected and approved by Parliament. The establishment of independent institutions under the Act is a form of reductions and restrictions on executive power.

The Role of the Constitutional Court in Enforcing the Principle of Checks and Balances

Article 24C of the 1945 Constitution states, "The Constitutional Court authority to hear the first and last decision is final to review laws against the Constitution, rule on the dispute of the authority of state institutions whose authorities are granted by the Constitutions, decide upon the dissolution of political parties, and decide upon disputes on general election results ". With such authority, the Constitutional Court is expected to play a role in realizing the mechanism of checks and balances.

The principle of checks and balances on one hand makes each state agency equal, but on the other hand can open the possibility of disputes between agencies or state organs. It happens because the Constitution is not entirely explicit in formulating the authority of the institutions or state organs. So, there is possible difference of interpretation in understanding the authority of a state. As a consequence of the recognition function of this Court as a guardian of the Constitution as well as authoritative interpreters of the constitution, the constitution gives authority to the Constitutional Court to resolve authority disputes among states whose authorities are granted by the Constitution (Article 24C Paragraph (1) 1945 Constitution).

The subject of the authority dispute is the authority that comes from the constitution in order to ensure that the institutions of the country in performing their duties and functions do not overlap between state institutions to one another. Until now, of all authority disputes cases between state institutions examined at the Constitutional Court, no single case is granted, even most of them are not acceptable, either because of the problem of inappropriate legal status or because of misunderstanding of what which can be the object of dispute. This shows there is always potential conflict between state institutions or organs of government in a country, but not all conflicts can be categorized as constitutional issues. Only one case is a matter of dispute among state institutions whose authorities are granted the constitutional dispute between the Regional Representative Council with the President and Parliament on ignoring

the Regional Representative Council's consideration in appointing members of the Supreme Audit Board, i.e. in case Number 068/SKLN-II/2004.

The presence of Constitutional Court in the mechanism of checks and balances is also visible from one of authority delegated to the Constitutional Court to examine legislation against the Constitution. This test is formally testing the validity of forming institutions and procedures or procedures of legislation forming and material testing, which is to test the consistency and suitability of the material substance of the law, either article, paragraph or part of laws and legislation with the 1945 Constitution. With such authority, the Court plays roles to encourage institutions of state power institutions, especially the legislators not only act by consensus or majority agreement (democratic majoritarianism), but also must always pay attention and take into account the constitutional limits that have been agreed upon.

The mechanism of checks and balances in the process of legislation and laws of matter produced is a distinctive conception of Indonesia due to a presidential system, so although the authority of legislation in the hands of the House of Representatives, however, it requires the joint consideration and agreement between the House of the Representatives and the President (1945 Constitutions, Article 20 paragraph 1 and 2). Both institutions work together as a positive legislator. The cooperation is also underway with the Court that one of its authority to test laws against the Constitution. Constitutional Court's decision as an equilibrium (balance) is the result of oversight (checks) which are done through constitutional norm benchmarks written in the 1945 Constitution.

Within the framework of checks and balances, the developmental review of laws against the Constitution (constitutional review) is carried out by the Constitutional Court or a similar institution previously called negative legislation. It is in some ways expanded into positive legislation. At first, it just simply states a norm or law contrary to the Constitution then develops by giving the interpretation of a norm or law which is tested in order to qualify the constitutions so inevitably the constitutionality of the Constitutional Court makes a new norm. The shift is also performed by the Constitutional Court of the Republic of Indonesia. In several decisions, the Court has review laws in order to qualify so that the review norms or laws are constitutionally eligible. Constitutional Court's decision gives commentary (guidance, direction, and the guidelines and terms and even new norms) that can be classified as a conditionally constitutional decision (conditionally constitutional) and conditionally unconstitutional decisions (conditionally unconstitutional). If the interpretation determined in the decision of the Constitutional Court is met, a norm or law is retained constitutional legality. If the interpretation specified in the Constitutional Court's decision is not met, the law becomes unconstitutional so that it should be declared contrary to the Constitution and has no binding legal force.

Constitutional Court decisions that are qualified as conditionally constitutional include:

1. Constitutional Court Decision Number 058-059-060-063/PUU-II/2004 and Case Number 008/PUU-III/2005 dated July 19, 2005 concerning Water Resources;
2. Constitutional Court Decision No. 19/PUU-III/2005 dated March 28, 2006 concerning legal requirements for the deputy managing private placement of workers abroad;
3. Constitutional Court Decision No. 003/PUU-IV/2006 dated July 25, 2006 concerning action against the substantive law in corruption;
4. Constitutional Court Decision No. 14-17/PUU-V/2007 dated December 11, 2007 concerning the requirement for public office: never convicted;
5. Constitutional Court Decision No. 29/PUU-V/2007 dated 30 April 2008 concerning the movie censorship;
6. Constitutional Court Decision No. 10/PUU-VI/2008 dated July 1, 2008 concerning the domicile requirement for the candidates for Regional Representative Council;
7. Constitutional Court Decision No. 15/PUU-VI/2008 dated July 10, 2008 on terms 'never been sentenced' for candidates for the House of Representatives;
8. Constitutional Court Decision No. 102/PUU-VII/2009 dated July 6, 2009 regarding the use of ID cards and passports for Indonesian citizens in the Presidential and Vice-President, Election in 2009
9. Constitutional Court Decision No. 7/PUU-VII/2009 dated July 22, 2009 concerning the application of Article 160 of the Criminal Code as substantive offense;
10. Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009 dated August 7, 2009 concerning the calculation of the seat Parliament, Provincial and Regency / City in the second phase of the Political Parties Election Year 2009;
11. Constitutional Court Decision No. 49/PUU-VIII/2010 dated 22 September 2010 concerning the tenure of Attorney General.

The Constitutional Court decision that can be categorized as conditionally unconstitutional decisions (unconstitutional conditionally) are:

1. Constitutional Court Decision No. 54/PUU-VI/2008 dated 14 April 2009 concerning the division of the excise tax for tobacco-producing regions;
2. Constitutional Court Decision No. 4/PUU-VII/2009 dated March 24, 2009 concerning a selected public office-never sentenced;
3. Constitutional Court Decision No. 133/PUU-VII/2009 dated 25 November 2009 concerning the dismissal of Head of KPK on regular basis;
4. Constitutional Court Decision No. 5/PUU-IX/2011 dated June 20, 2011 concerning Head of KPK's length of service.

Constitutional Court shift that seems to be a positive legislator is due to the need to balance among the rule of law, justice and expediency proportionally. Such a move made by the Constitutional Court is to avoid a legal vacuum if the Constitutional Court annuls a norm of law.

Thus, through its decision to be positive legislators, the position of the Constitutional Court does not mean acquiring authority and control of other state Institution that violate the principles of checks and balances. The position cannot be removed from the Constitutional Court's role as a counterweight and control over the legislative and executive powers jointly as the legislators.

Relating to election the Constitution only mentions election organizers- a general election commission which is embodied in an institution called the Electoral Commission which carries out the elections. However, in the election, there are other agencies that come into play, namely the General Elections Supervisory Body (Bawaslu) which is not mentioned in the 1945 Constitution. In carrying out the duties, General Elections Supervisory Body essentially performs the function of checks and balances against the General Election Commission (KPU). In this same election, the Constitutional Court as a judicial authority which has the authority to resolve election disputes result also performs the function of checks and balances on the implementation functions of the Commission in carrying out elections.

During its development, the Constitutional Court which has the authority to resolve election disputes at the level of legislative elections (House of Representatives, Regional Representative Council and Local House of Representatives), Presidential and Local Elections Head may assess and determine the results of elections for these results as a case filed before the Constitutional Court. Even in substantive justice, the Court's role in carrying out this authority in addition to assessing the disputed vote count, also assess the violations committed by the officers for election organizers, both the General Election Commission and General Elections Supervisory Body which may affect the quality of elections and election outcomes. In this case, the Constitutional Court role is to conduct checks and balances on the functions of the Commission and General Elections Supervisory Body when doing their job.

Another important role of the Constitutional Court is in the process of dismissal of the president and / or vice president. Although this authority has not been carried out yet by the Constitutional Court, but in 1945 the Constitutions the position of Constitutional Court is very important in the mechanism of supervision of the President as the executive. Article 7B and Article 24C of the 1945 Constitution placed the Constitutional Court as an institution that has an obligation to assess and adjudicate the opinion of the House of Representatives regarding the alleged violations committed by the President and / or Vice President which will be used by the Assembly to dismiss the President and / or Vice President. In the process of presidential impeachment, the Constitutional Court acts as the Institution that is in charge of providing legal assessment of the overall process of presidential impeachment to be undertaken by Parliament so that the dismissal of the president as the implementation of checks and balances by the legislature against the executive power is not solely based on purely political reasons .

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

SESSION THREE

The Mechanism of Checks and Balances among State Institutions

PANEL II

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

THE MECHANISM OF CHECKS AND BALANCES AMONG STATE INSTITUTIONS

Hon. Carlos Hernandez Mogollon
Deputy Speaker of Parliament of Colombia

Colombia, since the constitution of 1991, according to its Article 1, is a democratic state, with a participatory and pluralistic character as such that any citizen of any party or movement political, are eligible to elect and be elected, which is the basis of pluralism. In fact, all the legal constitutional structure of the State guarantees that right of citizens to participate.

At the same time, the exercise of democracy, participation and pluralism should be reflected in the respect for human dignity, at work, because it attenuates the exclusiveness of the exercise of political power, by promoting the solidarity of the people within the democratic society and the prevalence of common interest on the subject.

In Colombia, voting is instrumental through which the people establish their governance, the accountability of public officials in the government, the changing of those in power, equality before the law and the division of power among the branches of the government. That is the democratic nature of our charter and it is one of the principles underlying our Constitution.

It is true that our contemporary constitutional development has not been peaceful, due to the existence of strong differences and oppositions, in term of organization, ideology, of professional practices; nevertheless, the progress made by the Court in its first years have provided the necessary flames for better future, where the rights enshrined in our Constitution, are not merely political ideals but are tangible realities and enforceable. Then one may ask: What has been the role of citizens within this model which seems traumatic for the judiciary and the national judiciary doctrine sector? To answer this question, one may take as an example of the ways in which the people ensures the integrity of the Constitution in politic, which is the Public Action against

Unconstitutionality, as provided in paragraph 6 of Article 40 of the Constitution, which build the casual links between public participation and the defense of constitutional rights.

The Public Action against Unconstitutionality in Colombia (API) without doubt is an effective tool for an effective democratic participation. Its effectiveness lies precisely in the considerable increase of their implementation by the public as well as the requirement on judges to imply such public participation. This change is evident when we contrast API with other formal controls.

The constitutional control in modern states is a basic guarantee in the rule of law aimed at implementing the principle of integrity and supremacy of the Constitution, a principle that is enshrined in Article 4 as follows: "The Constitution is the supreme law. In any case of incompatibility between the Constitution and law or other rule of law, the constitutional provisions shall be applied. " In this respect Judge Ciro Angarita Barón says in the decision of T-006 of 1992 that the supremacy position of the Constitution on the other rules that make up the legal system, is that it that determines the basic structure of the state, establishes the organs through which they exercises public authority, grants powers to make rules, to execute them and to make decisions according to these questions or disputes arising in society, and to make all this, is where the judicial order of the state is founded. The Constitution stands in the supreme and final framework in determining, both the legal order and the validity of any rule, regulation or decision, and issued by the organs of thereof. All acts issued by organs such as the Congress, the Executives and the judges are all identified with reference to the Constitution and shall not be recognized for the lack of it. The Constitution, as lex superior, decides and regulates the forms and methods in the production of norms that make up the system and is therefore it is "the source of all sources", the norma normarum. These features of supremacy and the maximum legal recognition which belong to the Constitution, are clearly stipulated in the Article 4. The Constitution establishes, expressly, the right of every citizen to bring public actions in defense of the Constitution and the law through the right to participate in the establishment, exercise and control of political power; likewise, the Constitution points out the different instruments or actions that can be exercised against the legal acts that violate their precepts and principles, namely the API, an action for annulment on grounds of unconstitutionality, the action of guardianship and, while not considered as an action but can also be included here that the exception for unconstitutionality as a corollary of the constitutional right to the supremacy of the Constitution.

The public action for unconstitutionality can be understood as the political rights which the Constitution, in paragraph 6, Article 40, grants to every citizen to present to the Constitutional Court of any violation of the constitutional provisions, laws, decrees and acts referred in Article 241 (No. 1, 4 and 5) of the Constitution, in order to obtain a ruling that is final with an erga omnes effects on the permanence or exclusion of the rule of law. Apart from the political right that where citizen can present its case to the Constitutional Court the constitution also provide to the citizen the right, in accordance with paragraph 1 of Article 242 of the Constitution, "To act as challenger or defender of the law

submitted by others", in which the participant may have a sense of belonging in its role within the hermetic process to ensure that the Constitution is not limited only to the plaintiff of the API. Such action, can only be presented against acts for amending the Constitution (procedural defects only), against laws (both substantive and procedural) and against decrees with the force of law issued by the Government (content and form). Therefore, since it is a case of form or defects of prosecution, the accused, API, should present the case within one year after it is submitted, and if, on the contrary, these cases carries material charges (levied on the bottom of the norm), the action will not have any expiration.

Indeed, the active participation by citizens in the constitutional due process, are mostly aimed to cases of institutional models that thrives to provide strong guarantees for fundamental rights, since institutional model will focus on settling conflicts and disputes between different branches of the government, therefore, it does not offer space for the citizen to participate directly. This is the reason why a judicial review in which citizens participate, to ensure judicial protection of their rights, should always based on an in-depth and rigorous study of the provisions that affect them, while a judicial review that invalidates conflicts between branches and in which citizens can not participate, "tends to develop arguments based primarily on procedural rather than content." In the case of statutory laws, they are truly amazing.

We conclude that it is the consistent participation of the citizen, either directly or indirectly, which determines the prevalence or predominance of certain objectives of institutional design over others, which is why the system should be flexible to allow public deliberation and participation by the civil society within the constitutional natural processes in the framework of rights and duties which are recognized as fundamental, and in this way the Constitution and the culture of rights will be filtered into the social fabric and will enable us to overcome the anachronistic political structures of a patronage and authoritarian court, which are usual in the colonial rule, and in our work to promote populist democracy and mobilizing the civil society to work for their own opportunity of liberation and recognition.

The question which follows that approach is the potential involvement of the citizens in the public duties, not limiting their political action solely through elections and the legislative (popular initiative), but goes beyond to the extent that due to their watchfulness and becomes holder of the judicial control, by which it is possible to participate in the annulment or invalidation of a Law, in which in due time and through its political action (representation in parliament) may have been contributed. Despite all this, one would wonder how an individual action may throw over the board the manifestation of the majority represented in Congress, which in turn has been discussed and approved through democratic procedures and majority? How is that for the sake of a democratic discourse eliminates the work of democracy itself? or if you prefer, how is it that this action concerning the Law which represent the collective interest is put against the interest of an individual?. We can say that democracy and the Constitution, likewise the constitutional law and political philosophy, are genealogically linked. In summary, THOSE WHO PREFER NOT TO TALK ABOUT DEMOCRACY SHOULD ALSO KEEP QUIET WHEN ONE TALKS ABOUT CONSTITUTIONAL RIGHT!

THE ROLE THAT THE COSTITUCIONAL COURT COULD PLAY IN STRENGTHENING DEMOCRATIC PRINCIPLES

It is evident that the leading role of the Constitutional Court is in the social jurisdiction. However, having said that, the Constitutional Court can not ignore that its judicial control also carries political dimension, which allows it to constantly go to other public to authorities directly correct their decisions or take action to ensure their efficiency . Thus, the Constitutional Court reiterately tries to apply the Constitution to those who can not read or will not apply it correctly, which has led to serious conflicts both in the court or outside the so-called "train crash".

Indeed, the new constitutional court emerges as a pioneer of the "social revolution" of the country, its controversial decisions in the defense of fundamental rights: euthanasia, abortion, drug use, housing, religion, indigenous rights and now economic and social rights, have made the dream come true to many Colombians in seeing the effective protection of their rights by respectable institution; but neither can one deny to institutional impact it has caused.

This is evident when we consider the inconsistencies and gaps in the policy of jurisprudence of the Court. Due to its desire to fulfill its role as guardian of the Constitution, is has put itself in opposition with many other state bodies who do not feel at ease with the invasion other jurisprudence in its powers. Therefore, a juncture of the different elements of existing power is maintained, which put Colombia in the institutional spotlight by various international organizations. That is why the decisions of the constitutional institution in terms of public policy, democratic security, poverty line, the displaced and health, receive crucial importance in the political-legal debate over the current social state of law in Colombia.

The control exercised by the Colombian Constitutional Court on the constitutionality of rules of the lower and equal hierarchy is, in principle, judicial control, but in some cases, this control has been more political than legal, which significantly affects the institutional balance the country. This has an important connotation, especially when their decisions touch certain issues for which the institution is not the expert, especially when it comes to issues such as economics, finance, drug addiction, medical and many other aspects including sociology, ethics or religion.

Much has been said about its limits, even more so when most of its decisions derived from its interpretative role has gone too far, ripping the boundaries of the legislative function. But these criticisms are not merely caused by the scopes of its decisions in the regulatory domain but moreover by the confrontation that these have with the Congress. There has been questions whether the Colombian constitutional judge with its interpretive function has become the creator of laws itself. Moreover, due to the impact and the interests at stake, the doctrine itself has been put in question when its decisions, many of them caused dangerous divisions, have over crossed the jurisdiction of the Court. Notwithstanding, others claims that their activity is not only legal but is the natural consequence of the principle of supremacy of the Constitution (Art. 4, CN, 1991). Such principle guarantee effectively so that the Constitution is respected and can not

be modified by rules of hierarchy, allowing it to override the provisions by the legislative and executive that are in violation to the principles of the constitution. Sometimes the exercise of this constitutional requirement is carried out without measuring the consequences.

There is a large gap that concerns the academia today which is the inability to know for sure what were the reasons which made the Constitutional Court to behave so daring and in an unprecedented way. Neither is known for sure the institutional consequences that this has caused. In short, there has been no serious study made on the Court's work, and yet many administrators, lawyers, judges, and professionals from different fields work on the daily basis with these decisions. The gap is huge and one should try to fill it through research, academicals historical writings and specialized academic reflections.

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

DEMOCRATIC BALANCE AND SEPARATION OF POWERS

Hon. Fernando La Sama de Araujo
President of the National Parliament of Timor Leste

Your Excellencies,

Ladies and Gentlemen,

I'm addressing you today in a spirit of respect not only for this institution of the Constitutional Court, but for the idea it embodies, of a political system founded on moral and political principles rather than arbitrary force. Indeed, my very presence in this room, at this conference, is a tribute to sprit and the power the rule of law and the triumph of the will of the people over the might of tyrants.

Today, I address you as the President of Parliament of the Republic of Timor-Leste, which will soon celebrate a decade of existence.

What a significant journey is has been – for my Country, and for myself personally, from a foreign administered territory to a constitutional democracy, for myself, from a political activist to lawmaker and guardian of the spirit of the Constitution.

For I believe that this is what democratic institutions are – in the best of times and in the most difficult of times. In its short history, my country has known both, sometimes concurrently.

Timor-Leste's experience demonstrates, if ever there was any doubt, that a vibrant democracy can spring to life in a short time, and that, even if at times the language of parliamentarism may be unfamiliar to us, the spirit of liberty, for which Parliament is one of the symbols, is not.

The language of constitutionalism and balance of powers may be admirable and clear, but the practice in reality requires willingness for political compromise and an acceptance of imperfect solutions.

I stand before you today proud of the long way my country has come – a witness to the truth that the longing for freedom and the fundamental quest for balance that Constitutions embody make them a powerful shield against tyranny, as well as perhaps the most solid foundation for a strong relationship across the sometimes troubled waters of history.

Democratic balance and the rule of law call for the Separation of Powers, which can not be seen as an end in itself, but as a basic principle in every democratic society that serves purposes such as freedom, legality and independence of certain organs, which exercise power, as entrusted to them by the Constitution.

Your Excellencies,
Ladies and Gentlemen,

As we all know, separation of powers is one of the key structural principles of democratic societies. Early philosophers long ago discussed it and we base our contemporary debates on legal theory that has been developed in parallel to the appearance of democratic systems in the 18th Century.

This powerful idea of separation of powers to prevent the absolute concentration of power, common in the absolute State that preceded the liberal revolutions, based on the ideas of political philosophers as John Locke and Montesquieu, constitutes the theoretical basis on which the mechanisms of checks and balances were established, mechanisms of mutual control, allowing distinct branches of State to be independent autonomous, avoiding the supremacy of one over the other.

Modern parliamentary systems came to establish the separation of powers and simultaneously mechanisms that allow the *intervention* of an organ in another. This is the case of the Timorese System in which the President of the Republic may dismiss the Executive and where the Head of State may also call an early dissolution of parliament, and the Parliament may withdraw confidence in the Government.

In accordance with our own constitutional system, in Timor-Leste different organs are assigned different powers and functions, but not in an absolutely exclusive fashion.

However, as evolution and experience of modern States has also highlighted, there are what might be called shortcomings of the traditional theory of separation of the three powers, Executive, Legislative and Judicial. Indeed, the classic tripartite division of powers, typical of liberal constitutions, became insufficient to ensure democratic exercise of power, being necessary to gradually build new ways of organizing public and state powers.

This is the case of *control* and or *supervisory* bodies such as the Timorese Public Prosecutor Office, constitutionally and legally obligated to upheld democratic principles and the rule of law, or the Court of Audit, recently established in my country, whose activity is essential for the affirmation of democracy in daily practice, when conducting public affairs, bodies with the competence to ask the Constitutional Court to review legislation against the Constitution.

There can be no doubt that the modern democratic state requires a more sophisticated system to safeguard the integrity of governance, ensuring openness, transparency and *democratised* processes of exercising public powers.

The 2002 Constitution of Timor-Leste recognized this need for a *new control function*, thus establishing a *fourth function*, a supervisory or oversight function perceived as critical to guarantee democracy and to ensure the rule of law and the safeguard of constitutional principles.

Our Constitution does not envisage a Constitutional Court as a judicial organ *per se,* rather asserts the authority of the Supreme Court of Justice the role of guardian of the Fundamental Law. Nevertheless, the Timorese Constitution defines the Supreme Court as the judicial body with the specific competence to administer justice in matters of a constitutional-law nature, thus entrusting the Court with an explicit mission that justifies the powers given to the Court regarding legislation review: prior review, successive abstract review, concrete review and review of unconstitutionality by omission.

The most significant of the Supreme Court's responsibilities is that of monitoring whether legal rules comply with the Constitution. This is a key role of the Court, and the one in which its role as custodian or *ultimate guarantor* of the Constitution, entrusted to it by the Constitution itself, is clear.

In addition to the fundamental task of considering the constitutionality of legal rules, the Constitutional Court also possesses a substantial range of competences concerning electoral disputes and political parties, and performs other important functions in relation to the statute governing political agents.

Ours is a young State, with less than a decade of existence as a sovereign independent nation and our experience still limited. However, in this short period of time the Court has already been called to decide upon the constitutionality of certain provisions of the Budget Law and on the establishment by Decree-Law of the Government of a special financial Fund, the Economic Stabilization Fund.

The Court's rulings, besides their juridical aspects, had also repercussions *vis-à-vis* the constitutional dynamic and the balance of power among different State Institutions: the President of the Republic, who referred the legislation to the Court, the Parliament that had voted that same legislation and the Government, who saw its approval as necessary to put into practice its program.

In those cases, the Court's intervention and decision generated intense public and political debate and had an important impact on the practical implementation of constitutional rules as well as on the perspectives of the future development of our constitutional system.

The clear significance of all these functions not only demands legitimating the institution charged with performing them, but also warrants informing the public, the citizens about the mission of the Court.

According to the state of affairs regarding the present debate, it can also be said that for a proper functioning democracy to thrive, there must also be a certain degree of separation between typical functions of government, of a political nature, and those of a more technical nature, or administrative functions.

In this sense, as we are witnessing in many contemporary democracies, it has been proposed to separate administrative functions from political functions, due to the need to ensure that management positions in the administrative structure of the state are not allocated based on partisan political criteria, which can compromise efficiency and distort political dynamics.

How to safeguard the integrity of governance, how to ensure good governance under the rule of law while at the same time preserving the principle of democratic legitimacy and representative government is one of the important questions in this debate.

A developed and strong constitutional culture is key to provide additional safeguards against any discretionary reaction by the Executive or even the Parliament.

The constitutional judge who respects the separation of powers between legislation and the judicial control of legislation will take due account of the margin of appreciation, of political questions and of the democratic legitimacy of decisions of Parliament. In turn, it should be entitled to expect the respect of Parliament for its own decisions, which aim to enforce the preeminence of the Constitution over ordinary legislation and executive decisions.

The situation may of course be significantly different in different States, as in the case of transitional societies, where this value is still not entirely attained. Here, we need to build up conditions that cannot be created by constitutional courts, which sometimes do not even exist.

However, institutions as the Constitutional Court or equivalent, as in Timor-Leste's case the Supreme Court of Justice, can contribute to a step-by-step development of the legal system and the societal environment. They should be an example for other constitutional organs in adhering to the legal method when interpreting constitutional rules, in respecting international standards and in that way give support to citizens seeking the protection of their fundamental rights.

In many countries, as in my own, constitutional rules might still need some clarification in defining the various powers of the State and their rapport to each other. It is important that any divergences between the texts of the constitutions and constitutional can be reduced, and democratic constitutional culture must break ground in all areas of exercising public powers. Indeed a democratic Sate calls for dignified institutions as a Constitutional Court or equivalent institutions, capable of interpreting the Constitution and the Law in accordance with the dignity of its high responsibility.

Of course, separation of powers does not imply antagonism between the various branches of the state, rather represents a *sharing of powers* between organs with distinct functions, but whose actions are complementary and must act in accordance with the principles of institutional cooperation in order to ensure consistency of public and State action, within the established constitutional architecture.

In facing the question of how to reconcile democracy, politics and good governance, it is essential to ascertain and uphold mechanisms of checks and balances, establishing autonomous institutions or bodies such as the Constitutional Court of Indonesia, thus ensuring monitoring and mutual accountability of State bodies and powers under the Constitution.

The East Timorese Constitution enshrines the separation of powers and a system of checks and balances, which is reflected in the dual accountability of the Executive before Parliament and the Head of State, or in the powers granted to the President to ensure smooth functioning of democratic institutions, as in the independence of the Judicial Power, the establishment of the Ombudsman, the existence of an autonomous Public Prosecution Office and in particular asserting the role of the Supreme Court of the keeper of the pre-eminence of the Constitution.

This is a critical debate to affirm democratic principles and the rule of law, an ongoing debate and crucial to our collective future.

Ladies and Gentlemen, let me conclude with a short final remark. Learning from the rich experience of others and learning from each other's contributions to the quality of democratic institutions and of constitutional justice all over the world has become a decisive factor of success.

These forums have a dual significance in supporting the exchange of views on common problems of constitutional justice and in assisting institutions such as the Constitutional Court to hold an independent position in the internal separation of powers.

With my best wishes on the 8th Anniversary of the Constitutional Court of Indonesia, a cornerstone in the construction of a democratic State based on the rule of law, I congratulate His Excellency the Chief Justice of the Constitutional Court of Indonesia for this great initiative.

Thank you.

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

CHECKS AND BALANCES MECHANISM AMONG STATE INSTITUTIONS (EXPERIENCE AND PRACTICE IN INDONESIA)

Hon. Hamdan Zoelva
Justice of the Constitutional Court of Indonesia

Preliminary

The principle of separation of powers is one element of the enforcement of state law. The principle of separation of powers means that in performing the functions or authorities, state institutions in their respective branches of state power has the exclusivity that should not be touched or interfered by another branch of state power.

However, in practice, it's impossible to strictly separate the branches of state power. The most likely is to separate strictly the functions of each branch of state power rather than strictly separate them as having no relationship at all. Therefore, the principle of separation of powers then gave birth to variations in administrative practices, one of which is realized through the application of the principle of checks and balances.

Principle of checks and balances arose from the need to ensure that each power does not exceed his authority. On the other hand the principle of checks and balances are also to ensure the freedom of each branch of state power as well as to avoid excessive interference from the power of one over the other powers. In other words, this principle is aimed at creating a balance in the politics of social interaction without impairing the function and reducing the independence of the authority of other institutions.

As the country's laws, Indonesia continues to build a democratic order and apply the principles and mechanisms of checks and balances. The dynamics of state administration that occurred and accompanied by leaps in the democratization

of ideas also determine how the implementation of the mechanism of checks and balances. Based on the foregoing, this paper is an exposure of practical experience and implementation of mechanisms of checks and balances that have been executed. In this paper, the emphasis is more directed to the role and contribution of the Constitutional Court of the Republic of Indonesia, as a state institution in the judicial branch of power, in creating harmonious relations within the framework of the mechanism of checks and balances among state institutions in Indonesia.

Checks and Balances in the Formation of Law

The power of law making is held by the House of Representatives. However, every bill must be discussed and agreed upon by the House and the President (Article 20 paragraph 1and 2 1945 Constitution). In certain respects, the discussion of bill should involve the Regional Representatives Council, which is a draft relating to regional autonomy, relations between central and local government, the formation, expansion and merger of regions, management of natural resources and other economic resources, as well as relating to the financial balance between central and local government and draft relating to taxes, education, and religion (Article 22D Paragraph 2 1945 Constitution). Thus the form of power laws according to the constitution of Indonesia is not a monopoly of the Parliament as a legislature, but must be discussed and agreed upon with the President that theoretically holds the executive power. Therefore, the President has no veto after the bill was discussed and approved by Parliament, but a veto is implicitly held by the President at the time of discussion with the House when the President does not approve a bill.

Constitution of Indonesia does not recognize the parliamentary system of two chambers (bicameral system) in the formation of laws, although the parliamentary system of Indonesia recognizes the Regional Representative Council, a council whose members are representatives from the provinces in Indonesia who are elected through general elections (similar to the Senate in United States). Regional Representative Council's limited legislative authority is only entitled to submit a bill relating to regional autonomy, central and local relations, the establishment, expansion and merger of regional natural resource management and other economic resources, and relating to the financial balance between central and local to the Parliament and taxes, education and religion together with the Parliament (Article 22D paragraph 1 and paragraph 2 1945 Constitution). Thus, the position of the Regional Representative Council cannot balance the authority of the House of Representatives and the President in forming legislation. Regional Representative Council's 's involvement is limited to participation in the discussion. The position and authority of such Council still raises the academic debate in Indonesia and the Regional Representative Council are still fighting for the fifth change of the 1945 Constitution to strengthen the authority of the Regional Representative Council, but there is no agenda of the Assembly for that change.

Formation mechanism of such laws (joint discussion between the House and the President) is a legacy of constitutional practice since Indonesia independence that continues to be maintained and strengthened in the 1945 Constitution

Amendment (Third Amendment 2001), except for discussions with the new Regional Representative Council known since the third 1945 Constitution Amendment . The draft discussion and agreement model between the House and the President is a reflection of the principle of consultation in the administration of state based on Pancasila, the state philosophy of Indonesia.

Constitution of Indonesia knows another representative institution, namely the People's Consultative Assembly (MPR), which consists of all members of the House of Representatives and Regional Representative Council (Article 2 paragraph 1 1945 Constitution), that has the authority to change and establish the Constitution (Article 3, paragraph 1 1945 Constitution). The authorization is the exclusive authority possessed by the Assembly of which the decision cannot be canceled or tested by any state agency. Therefore, the Assembly power to change and set a law is the supreme power which is not limited unless the restrictions by the Constitution itself.

According to the Indonesian Constitution, the legislation produced by Parliament and the President can be tested and canceled by the Constitutional Court, both in the form of formal testing on legislation procedures, as well as testing of the material content of the legislation, partially or completely (Article 24C paragraph 1 1945 Constituion).

Checks and Balances in the Implementation of Executive Power

Executive power in the constitution of Indonesia known as the power of government held by the President (Article 4 paragraph 1 1945 Constitution), assisted by ministers of state (Article 17 1945 Constitution), as well as by some council considerations of the President (Article 16 1945 Constitution). In exercising his power, President is monitored continuously by the House of Representatives and Regional Representative Council in certain respects. Parliament oversight functions is guaranteed by the constitution to give constitutional rights to Parliament, among others, the right of interpellation, the right of inquiry, and the right of expression (Article 20A Paragraph (2) 1945 Constitution). Interpellation is the right of Parliament to request information from the Government about the government policy which is important, strategic and has far-reaching impact on the life of society, nation and the state. Right of inquiry is the right of Parliament to investigate the implementation of legislation and / or policy of the Government relating to important and strategic matters and having broad impact on the life of society, nation and the state and it is allegedly contrary to laws and regulations. The Parliament has rights to express an opinion on: a) Government policies or about the extraordinary events that occurred in the country or abroad; b) follow-up exercise of the right of interpellation as referred to in paragraph 2 and the right of inquiry referred to paragraph (3), or c) allegations that the President and / or Vice President violated the law either an act of treason, corruption, bribery, other felonies, or if it is proved no longer qualify as President and / or Vice President. In addition, each member of the House of Representatives has the right to ask questions, submit suggestions, opinion, and immunities.

In addition, the President in carrying out his authority, in a variety of things, has to go through the approval of Parliament. The Constitution decides that the president has to go through the approval of Parliament in declaring war, making peace and treaties with other countries (Article 11 paragraph (1) 1945 Constitution) The President must also obtain the approval of Parliament if an international treaty will create an extensive and fundamental impact on the lives of the people relating to the financial burden of state and / or requiring changes or legislation (paragraph 2 Section 11 1945 Constitution). The constitution also requires the President to get the Parliament consideration in the appointment of ambassadors and consulates and in acceptance of other countries ambassadors (Article 13 paragraph 1 and 2 1945 Constitution), granting amnesty and abolition (Article 14 paragraph 2 1945 Constitution). As for granting clemency and rehabilitation, the President listens to the consideration of the Supreme Court (Article 14 paragraph 1 1945 Constitution).

If the House of Representatives found the President violate certain laws that's governed by the constitution, Parliament may propose impeachment of President (Article 7A 1945 Constitution). The House of Representatives begins the impeachment process, and judges whether the reasons for impeachment and procedures are in accordance with the constitution by the Constitutional Court, and the Assembly decides whether to dismiss or not dismiss the President (Article 7B 1945 Constitution).

Regional Representative Council is only authorized to supervise the implementation of laws, especially laws relating to regional autonomy, establishment, expansion, and merger of regional, national and local relationships, management of natural resources and other economic resources, the implementation of the budget, taxes, education, and religion to present the results of such supervision to the House of Representatives. Regional Representative Council's supervision is very limited because the results are submitted for follow-up supervision by Parliament so that it can be said that the Council was not fully offset the Presidential body.

In the management and responsibility of state power, the President is inspected continuously by a state agency that regulates the constitution, namely the Supreme Audit Board (BPK). The Supreme Audit Board's results are submitted to the House of Representatives, Regional Representative Council and Local House of Representative, based on their authority (Article 22E Paragraph (1) 1945 Constitution) The Supreme Audit Board's examination results is the subject of supervision of House of Representative, Regional representative Council and the law enforcement agency against the President and other executive powers.

Relating to government and local government power-sharing, the constitution does not explicitly divide. The Constitution only confirms that the provincial government and district / municipality government organize and manage their own affairs based on the autonomy principles and assistance duty (Article 18 1945 Constitution). The type and scope of authority held by local governments is determined by the laws. Therefore, within the framework of the constitution, there is no check and balance relationship

between central government and local government. That's because Indonesia adopts a unitary state, where local government is part of the state government by the President. The relationship between central and local government still becomes an academic debate until now. Local government continues to demand greater autonomy authority with the scope of greater authority.

Checks and Balances on the Judiciary Power

In the Constitution there is not an oversight mechanism among state institutions of judicial authority because the judicial power is the power held by the judiciary that are independent of the influence of other branches of power. Article 24 1945 Constitution states, "The judicial power is the power to conduct an independent judiciary to uphold the law and justice". 1945 Constitution decides that the Supreme Court and Constitutional Court holds the judicial power (Article 24 paragraph 2 1945 Constitution). In carrying out the functions and authority as the judiciary, there is no mechanism to cancel or examine the decisions of the judiciary by the state organs outside the judiciary.

Form of judicial power by offsetting other institutions found only in the mechanism of selection and appointment of Supreme Court justices as well as monitoring the behavior of justices. In the appointment of Supreme Court Justice, there are mechanisms that involve the institution of the Judicial Commission (KY), House of Representatives and the President. The Constitution decides that the Judicial Commission is authorized to propose candidates for Supreme Court to Parliament for approval and then assigned as the Supreme Court Justice by President (Article 24A and 24B 1945 Constitution). Also the process of selection and appointment of constitutional judges, the constitution determines that the nine constitutional judges, three judges are proposed by the Supreme Court, three by the Parliament, and three by the President to be appointed by the President. The President appoints the members of the Judicial Commission with the Parliament's approval.

While the Judicial Commission supervises the judges' conduct. It is ruled by the constitution as an independent institution in order to preserve and uphold the honor, dignity, and conduct of judges. Constitutional Court Decision No. 005/PUU-IV/2006 dated August 23, 2006 determined that Judicial Commision has the authority supervise the judges outside the Supreme Court and Constitutional Court.

Organs of Independent States

Indonesia Constitution also formed an independent organs that cannot be categorized on the legislative, executive and judicial branches of government, namely the central bank (Article 23D paragraph (1) 1945 Constitution) and the electoral commission (Article 22E Paragraph (1) 1945 Constitution). Both institutions are guaranteed by the constitution and laws to carry out its duties and functions independently. Judging from their function, the two institutions carry out the functions of state government, but because of their very strategic

position, they are placed as independent state institutions. It is a restrictions form on Presidential power.

Although the 1945 Constitution only recognizes the central bank and the electoral commission, but there many independent institutions established by the Act as independent supporting State institutions (supporting / auxiliary state organs), such as the National Commission on Human Rights (Komnas HAM), the Witness Protection Agency, the Corruption Eradication Commission, the Broadcasting Commission and others. The Independent institutions carry out the duties and functions independently and cannot be influenced by other state agencies. Therefore, the recruitment of members or officials who fill these institutions is done by a separate mechanism proposed by the President and selected and approved by Parliament. The establishment of independent institutions under the Act is a form of reductions and restrictions on executive power.

The Role of the Constitutional Court in Enforcing the Principle of Checks and Balances

Article 24C of the 1945 Constitution states, "The Constitutional Court authority to hear the first and last decision is final to review laws against the Constitution, rule on the dispute of the authority of state institutions whose authorities are granted by the Constitutions, decide upon the dissolution of political parties, and decide upon disputes on general election results ". With such authority, the Constitutional Court is expected to play a role in realizing the mechanism of checks and balances.

The principle of checks and balances on one hand makes each state agency equal, but on the other hand can open the possibility of disputes between agencies or state organs. It happens because the Constitution is not entirely explicit in formulating the authority of the institutions or state organs. So, there is possible difference of interpretation in understanding the authority of a state. As a consequence of the recognition function of this Court as a guardian of the Constitution as well as authoritative interpreters of the constitution, the constitution gives authority to the Constitutional Court to resolve authority disputes among states whose authorities are granted by the Constitution (Article 24C Paragraph (1) 1945 Constitution).

The subject of the authority dispute is the authority that comes from the constitution in order to ensure that the institutions of the country in performing their duties and functions do not overlap between state institutions to one another. Until now, of all authority disputes cases between state institutions examined at the Constitutional Court, no single case is granted, even most of them are not acceptable, either because of the problem of inappropriate legal status or because of misunderstanding of what which can be the object of dispute. This shows there is always potential conflict between state institutions or organs of government in a country, but not all conflicts can be categorized as constitutional issues. Only one case is a matter of dispute among state institutions whose authorities are granted the constitutional dispute between the Regional Representative Council with the President and Parliament on ignoring

the Regional Representative Council's consideration in appointing members of the Supreme Audit Board, i.e. in case Number 068/SKLN-II/2004.

The presence of Constitutional Court in the mechanism of checks and balances is also visible from one of authority delegated to the Constitutional Court to examine legislation against the Constitution. This test is formally testing the validity of forming institutions and procedures or procedures of legislation forming and material testing, which is to test the consistency and suitability of the material substance of the law, either article, paragraph or part of laws and legislation with the 1945 Constitution. With such authority, the Court plays roles to encourage institutions of state power institutions, especially the legislators not only act by consensus or majority agreement (democratic majoritarianism), but also must always pay attention and take into account the constitutional limits that have been agreed upon.

The mechanism of checks and balances in the process of legislation and laws of matter produced is a distinctive conception of Indonesia due to a presidential system, so although the authority of legislation in the hands of the House of Representatives, however, it requires the joint consideration and agreement between the House of the Representatives and the President (1945 Constitutions, Article 20 paragraph 1 and 2). Both institutions work together as a positive legislator. The cooperation is also underway with the Court that one of its authority to test laws against the Constitution. Constitutional Court's decision as an equilibrium (balance) is the result of oversight (checks) which are done through constitutional norm benchmarks written in the 1945 Constitution.

Within the framework of checks and balances, the developmental review of laws against the Constitution (constitutional review) is carried out by the Constitutional Court or a similar institution previously called negative legislation. It is in some ways expanded into positive legislation. At first, it just simply states a norm or law contrary to the Constitution then develops by giving the interpretation of a norm or law which is tested in order to qualify the constitutions so inevitably the constitutionality of the Constitutional Court makes a new norm. The shift is also performed by the Constitutional Court of the Republic of Indonesia. In several decisions, the Court has review laws in order to qualify so that the review norms or laws are constitutionally eligible. Constitutional Court's decision gives commentary (guidance, direction, and the guidelines and terms and even new norms) that can be classified as a conditionally constitutional decision (conditionally constitutional) and conditionally unconstitutional decisions (conditionally unconstitutional). If the interpretation determined in the decision of the Constitutional Court is met, a norm or law is retained constitutional legality. If the interpretation specified in the Constitutional Court's decision is not met, the law becomes unconstitutional so that it should be declared contrary to the Constitution and has no binding legal force.

Constitutional Court decisions that are qualified as conditionally constitutional include:

1. Constitutional Court Decision Number 058-059-060-063/PUU-II/2004 and Case Number 008/PUU-III/2005 dated July 19, 2005 concerning Water Resources;
2. Constitutional Court Decision No. 19/PUU-III/2005 dated March 28, 2006 concerning legal requirements for the deputy managing private placement of workers abroad;
3. Constitutional Court Decision No. 003/PUU-IV/2006 dated July 25, 2006 concerning action against the substantive law in corruption;
4. Constitutional Court Decision No. 14-17/PUU-V/2007 dated December 11, 2007 concerning the requirement for public office: never convicted;
5. Constitutional Court Decision No. 29/PUU-V/2007 dated 30 April 2008 concerning the movie censorship;
6. Constitutional Court Decision No. 10/PUU-VI/2008 dated July 1, 2008 concerning the domicile requirement for the candidates for Regional Representative Council;
7. Constitutional Court Decision No. 15/PUU-VI/2008 dated July 10, 2008 on terms 'never been sentenced' for candidates for the House of Representatives;
8. Constitutional Court Decision No. 102/PUU-VII/2009 dated July 6, 2009 regarding the use of ID cards and passports for Indonesian citizens in the Presidential and Vice-President, Election in 2009
9. Constitutional Court Decision No. 7/PUU-VII/2009 dated July 22, 2009 concerning the application of Article 160 of the Criminal Code as substantive offense;
10. Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009 dated August 7, 2009 concerning the calculation of the seat Parliament, Provincial and Regency / City in the second phase of the Political Parties Election Year 2009;
11. Constitutional Court Decision No. 49/PUU-VIII/2010 dated 22 September 2010 concerning the tenure of Attorney General.

The Constitutional Court decision that can be categorized as conditionally unconstitutional decisions (unconstitutional conditionally) are:

1. Constitutional Court Decision No. 54/PUU-VI/2008 dated 14 April 2009 concerning the division of the excise tax for tobacco-producing regions;
2. Constitutional Court Decision No. 4/PUU-VII/2009 dated March 24, 2009 concerning a selected public office-never sentenced;
3. Constitutional Court Decision No. 133/PUU-VII/2009 dated 25 November 2009 concerning the dismissal of Head of KPK on regular basis;
4. Constitutional Court Decision No. 5/PUU-IX/2011 dated June 20, 2011 concerning Head of KPK's length of service.

Constitutional Court shift that seems to be a positive legislator is due to the need to balance among the rule of law, justice and expediency proportionally.

Such a move made by the Constitutional Court is to avoid a legal vacuum if the Constitutional Court annuls a norm of law.

Thus, through its decision to be positive legislators, the position of the Constitutional Court does not mean acquiring authority and control of other state Institution that violate the principles of checks and balances. The position cannot be removed from the Constitutional Court's role as a counterweight and control over the legislative and executive powers jointly as the legislators.

Relating to election the Constitution only mentions election organizers- a general election commission which is embodied in an institution called the Electoral Commission which carries out the elections. However, in the election, there are other agencies that come into play, namely the General Elections Supervisory Body (Bawaslu) which is not mentioned in the 1945 Constitution. In carrying out the duties, General Elections Supervisory Body essentially performs the function of checks and balances against the General Election Commission (KPU). In this same election, the Constitutional Court as a judicial authority which has the authority to resolve election disputes result also performs the function of checks and balances on the implementation functions of the Commission in carrying out elections.

During its development, the Constitutional Court which has the authority to resolve election disputes at the level of legislative elections (House of Representatives, Regional Representative Council and Local House of Representatives), Presidential and Local Elections Head may assess and determine the results of elections for these results as a case filed before the Constitutional Court. Even in substantive justice, the Court's role in carrying out this authority in addition to assessing the disputed vote count, also assess the violations committed by the officers for election organizers, both the General Election Commission and General Elections Supervisory Body which may affect the quality of elections and election outcomes. In this case, the Constitutional Court role is to conduct checks and balances on the functions of the Commission and General Elections Supervisory Body when doing their job.

Another important role of the Constitutional Court is in the process of dismissal of the president and / or vice president. Although this authority has not been carried out yet by the Constitutional Court, but in 1945 the Constitutions the position of Constitutional Court is very important in the mechanism of supervision of the President as the executive. Article 7B and Article 24C of the 1945 Constitution placed the Constitutional Court as an institution that has an obligation to assess and adjudicate the opinion of the House of Representatives regarding the alleged violations committed by the President and / or Vice President which will be used by the Assembly to dismiss the President and / or Vice President. In the process of presidential impeachment, the Constitutional Court acts as the Institution that is in charge of providing legal assessment of the overall process of presidential impeachment to be undertaken by Parliament so that the dismissal of the president as the implementation of checks and balances by the legislature against the executive power is not solely based on purely political reasons .

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

SESSION THREE

The Mechanism of Checks and Balances among State Institutions

PANEL III

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

THE MECHANISM OF CHECKS AND BALANCES AMONG STATE INSTITUTIONS

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INTRODUCTION

As background, it is pertinent to state that Malaysia since Merdeka on August 31, 1957, has adopted a federal system of government. Malaysia comprises of 13 federated states and 3 federal territories (Kuala Lumpur, Putrajaya and Labuan, an island of the state of Sabah). Prior to Independence, a Constitutional Commission headed by Lord Reid, a Lord of Appeal in Ordinary, issued its Report on February 11, 1957. This Report was reviewed by a Constitutional Working Party consisting of members appointed by the British Government, the Malayan Conference of Rulers, and the Malayan Government and on the basis of its recommendations, the Federal Constitution was born.[1] The system of the Government in Malaysia is closely modelled on that of Westminster Parliamentary system. In United Kingdom where there is no written constitution, it is the fundamental principal of English Constitutional law that Parliament is supreme, that it may do anything it wishes; it can pass any law as it pleases so long as it conforms with the necessary legislative procedure. Unlike in the United Kingdom, in Malaysia, the Federal Constitution is supreme, and not Parliament. This is spelt out in Article 4(1) of the Federal Constitution which provides :

Supreme Law of the Federation

(1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void."

1 See, Au Min Wu, The Malaysian Legal System (Longmans 1999).

Thus the power of Parliament is circumscribed by the Federal Constitution. The Federal Constitution sets out the framework and the principle functions of the institutions of the state and declares the principles by which those institutions operate.

THE DOCTRINE OF SEPARATION OF POWERS

In dealing with the given topic, one cannot avoid discussing the doctrine of separation of powers as the fundamental principles of modern governments. It is a common believe that the doctrine of separation of powers has always been part and parcel of our constitutional fabric. Separation of Powers is the doctrine and practice of dividing the powers of a government among different institutions to guard against abuse of authority. On this question that great oracle; Montesquieu should always be consulted. Montesquieu recognized the need for and recommended the separation of the one institution into three.

David M Walker, in his encyclopedic The Oxford Companion to Law, offers the following definition of the separation of powers:

"A doctrine, found originally in some ancient and medieval theories of government, contending that the processes of government should involve the different elements in society — the monarchic, aristocratic and democratic elements. Locke argued that legislative powers should be divided between king and parliament, but the great modern formulation of the doctrine was that of Montesquieu in L'Esprit des Lois (1748), who contended that liberties were most effectively safeguarded by the separation of powers, namely the division of the legislative, executive and judicial functions of government between separate and independent persons and bodies. His view was founded on that of the British Constitution although his understanding of British politics was not wholly accurate. In fact, in the British Constitution there is no complete separation of powers, then or now; the Lord Chancellor is chairman of the House of Lords, an important minister and head of the judiciary; the Cabinet and the other ministers who comprise the heads of the executive departments are also members of the legislature; the judiciary has delegated legislative powers, and judges who are peers are members of the House of Lords, even in its capacity as a legislative chamber."[2]

As far as Malaysia is concerned, the Federal Constitution provides for the separation of powers and actually speaks of three branches: the Executive (Part IV Chapter 3, Articles 39-43C), the Federal Legislative (Part IV, Chapter 4, Articles 44-65), and the Judiciary (Part IX Articles 121-131A). It would appear that the Federal Constitution contemplates the division of powers into three but in practice, there are overlapping functions or no clear separation of executive-legislative power since Malaysian system is more akin to Westminster Government. We can accept that, as in the case of the United Kingdom, there is something of an indistinct border between legislative and executive powers, but since no Malaysian judge is a member of any legislature, it can safely be affirmed that the judicial power of the Federation is, apart from a necessary

2 Oxford: Clarendon Press, 1980, pp 1131–1132.

power to prescribe rules of procedure, independent of executive and legislative authority.[3]

In adherence to the said doctrine, there must be a systematic and effective checks and balances among the state institutions. This is to ensure that each institution plays its intended role in accordance with the rule of law.

INSTITUTIONS OF THE STATE

I will now briefly discussed institutions of government within the context of Malaysian Constitution.

The Yang di Pertuan Agong (YDPA)

The Constitution provides for a 'Supreme Head of the Federation' to be called the Yang di-Pertuan Agong (YDPA).[4] The Yang YDPA who shall take precedence over all persons in the Federation and shall not be liable to any proceedings whatsoever in any court except the Special Court established under Part XV. The YDPA holds office on a rotational basis for a period of five years. The YDPA is elected at the Conference of Rulers from amongst the nine Malay Rulers of the states of Perlis, Kedah, Perak, Selangor, Negeri Sembilan, Johor, Pahang, Terengganu and Kelantan.[5]

The YDPA, as the Head of State is conferred by the Constitution with specific powers. The Constitution provides that the executive authority of the Federation shall be vested in the YDPA and exercisable by him or by the Cabinet or any Minister authorized by the Cabinet.[6] However, article 40 of the Constitution provides that the YDPA, in exercising his function (including administrative function) shall act in accordance with the advice of the Cabinet or of a Minister. The other powers conferred by the Constitution are legislative powers[7], power of pardon, reprieves and respites.[8] He is also the Supreme Commander of the armed forces of the Federation.[9]

The Executive

Executive power is vested in the Cabinet of Ministers which is appointed by the YDPA.[10] The YDPA first appoints the Prime Minister, a member of the House of Representatives, to preside over the Cabinet. The Prime Minister shall be appointed from a member of the House of Representatives who in his judgment is likely to command the confidence of the majority of the members of that house. YDPA then appoints other ministers from among the members of either house of Parliament[11]. The Cabinet is collectively responsible to Parliament.[12]

3 Abdul Aziz Bari and Reginald Hugh Hickling, The Doctrine of Seperation of Powers and The Ghost of Karam Singh [2001] 1 MLJ xxi.
4 Article 32 of the Federal Constitution.
5 Ibid, Article 38(2).
6 Ibid Article 39.
7 Ibid, Article 66.
8 Ibid, Article 42.
9 Ibid, Article 41.
10 Ibid, Article 43 (1).
11 Ibid, Article 43(2).
12 Ibid, Article 43(3).

The Legislature

Under the Federal Constitution, the Parliament is accorded ultimate powers as the legislative body because its members are elected by the people. In theory, its embodies the will of the citizens. Article 44 defines the Parliament as being comprised of the YDPA and two Majlis (the Houses of Parliament) to be known as the Dewan Negara (Senate) and the Dewan Rakyat (the House of Representatives). The Dewan Negara is composed of elected and appointed members. Each state elects two representatives to the senate. The appointed members are appointed by YDPA. The Dewan Rakyat has 222 members elected from single member constituencies based on geography using the method of ballot counting during the national general election who shall hold office until the dissolution of Parliament. Parliament unless sooner dissolve shall continue for five years from the date of its first meeting.[13]

The Judiciary

The Judiciary is governed by Part IX of the Federal Constitution. Malaysian judiciary comprises of the Federal Court, the Court of Appeal and two High Courts, one in the states of Malaya and the other in the states of Sabah and Sarawak. The jurisdiction of the courts is governed by Article 121 Federal Constitution. Article 121(1A) stated that the High Courts shall have no jurisdiction in respect of any matter in the *Syariah* Courts (the courts having jurisdiction over persons professing the religion of Islam). The Federal Court is established under Article 121(2) which has the jurisdiction to determine appeals from decisions of the Court of Appeal, of the High Court or a judge thereof, such original or consultative jurisdiction as is specified in Articles 128 and Article 130 or such other jurisdiction as may be conferred by or under any other law. Article 121(1B) provides for the establishment of the Court of Appeal which has jurisdiction to determine appeals from decisions of the High Court or a judge thereof and such other jurisdiction as may be conferred by or under federal law.

Apart from the Federal Court, the Court of Appeal and the High Courts (the superior courts), there are subordinate courts established by a federal law pursuant Article 121(1) Federal Constitution namely the Sessions Courts and the Magistrates Courts. Beside that there is also the Special Court created for any proceedings by or against the YDPA or the Ruler of the State in his personal capacity.[14]

MALAYSIAN PERSPECTIVES

In Malaysia, the three principle state institutions are: the Legislative, the Executive and the Judiciary which, except for the Judiciary has distinct but sometime overlapping functions. The duty of the Legislature (Parliament) is to make laws; the Executive, to implement those laws fairly, reasonably, carefully and in good faith. The Judiciary interprets and exercises the power as conferred by those laws. All the three institutions derive their functions and powers from the Constitution, which is the supreme law of the country.

13 Ibid, Article 55.
14 Ibid, Art 182.

In a democracy, it is necessary to ensure its institutions are independent. They must function and must be perceived to be functioning independently, honestly, true to the doctrine of separation of powers. Even where their functions are overlapping, as in Malaysia and other Westminster types of systems where the Cabinet is formed out of elected representatives who are members of Parliament, it is important to have good and reliable system of checks and balances to ensure that each and every institution of the state remains within their competence. What is reflected the notion of limited government, which echoes very well with the idea of good governance not focused in any one arm of government. Each institution should exercise its responsibilities without crossing their respective jurisdictions. For example, judges are not supposed to make law, which is for the Legislature. The Executive are not supposed to interpret the law, which is for the Judiciary to do and so on. And if any institution exceeds its jurisdiction, there is recourse to restrain and sanction it. The separation of powers represents a delicate balance. Its success depends on continued public confidence in the political impartiality of our judges.[15] Therefore, it is apparent that the judiciary is an important institution of the Malaysian state. It has the power and duty of adjudicating not only over dispute between citizens, but also dispute between citizens and various institutions of the state, and indeed between a State and the Federation or between States; in performing these tasks it can review the constitutionality of legislation and the validity of executive or judicial acts, and has in its armoury a wide variety of weapons, in term of legal doctrines and remedies, to give practical effect to these powers.[16]

In Malaysia we do not have a Constitutional Court as such, but the Federal Court, as the Apex Court, is the final arbiter on the meaning of constitutional provisions. The Federal Court plays a dual role; as the interpreter of the Constitution and also as the highest appellate tribunal. Therefore, the Federal Court can be regarded as the constitutional court of the country. That being so, it plays a pivotal role in the defence of fundamental liberties as provided in Part II of the Constitution.

FEDERAL COURT AS THE INTERPRETER OF THE CONSTITUTION

The jurisdiction of the Federal Court is spelt out in Article 128. It has an exclusive jurisdiction in regard to:

[a] any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws; and

[b] disputes on any other question between States or between Federation and any States.

It also has jurisdiction to determine any question as to the effect of any provision of the Constitution referred to it by the lower court and to

15 Lord Irvine of Lairg, Parliamentary Supremacy and Judicial Independence: Keynote Address, London, Cavendish Publishing Limited, at page 30.

16 See Law, Government and the Constitution in Malaysia by Andrew Harding at page 129.

remit the same to the other court to be disposed of in accordance with the determination.

The Federal Court is also conferred with the advisory jurisdiction under Article 130 of the Federal Constitution. The YDPA may refer to the Federal Court any question as to the effect of any provision of the Constitution which has arisen or appears to him likely to arise. His Majesty has done so only once in the case of ***Government of Malaysia v. Government of the State of Kelantan***.[17] There the Kelantan Government had entered into certain commercial arrangement with a company under which it received a deposit. The Federal Government contended that this tantamount to borrowing contrary to the Constitution. The Federal Court rejected the Federal Government's contention and held that the receipt of the deposit did not amount to borrowing.[18]

In the case of ***Latifah Mat Zin v Rosmawati Sharibun & Anor***[19] the Federal Court pronounced that the interpretation of the Constitution is a matter for the Federal Court and not the *Syariah* Court. Since the Federal Court rules that the *Syariah* Court has jurisdiction over the matter in dispute in that case, the *Syariah* Court shall abide by that ruling notwithstanding the decision of the *Syariah* Court in ***Jumaaton Awang v Raja Hizaruddin Nong Chik***[20] which held to the contrary.

As stated earlier the Federal Court also has appellate jurisdiction to determine appeals from the Court of Appeal or the High Court or a Judge thereof as provided in the Courts of Judicature Act 1964.

In determining the constitutionality or otherwise of a statute it is the provision of our Constitution that matters, not a political theory by some thinkers. As Raja Azlan Shah FJ (as His Royal Highness then was) quoting Frankfurter J said in ***Loh Kooi Choon v Government of Malaysia***[21]:

"*The ultimate touchstone of constitutionality is the Constitution itself and not any general principle outside it.*"

His Lordship further said:

"*Whatever may be said of other Constitution, they are ultimately of little assistance to us because our Constitution now stands in its own right and it is in the end the wording of our Constitution itself that is to be interpreted and applied, and this wording "can never be overridden by the extraneous principles of other Constitution". Each country frames its constitution according to its genius and for the good of its own society. We look at other Constitution to learn from their experiences, and from a desire to see how their progress and well-being is ensured by their fundamental law.*"

17 [1968] 1 MLJ 129.

18 Since then the definition of "borrow" has been amended by section 8 of the constitution (Amendment) (No. 2) Act 1971, effective from 24.3.1971.

19 [2007] 5 CLJ 235.

20 [2004] 1 CLJ (Sya) 100.

21 [1975] 1 LNS 90.

JUDICIAL CHECKS OVER THE EXCECUTIVE INSTITUTION

In upholding the doctrine of separation of powers, it must be pointed out that the courts maintain constitutional supremacy by way of reviewing the executive act on constitutional as well as administrative law grounds. A number of executive actions have been invalidated by the courts for violation of the requirements of the Constitution. The judiciary has a role to ensure that the executive or the administrative bodies act within their allocated authority or jurisdiction. This is done by way of judicial review.

There is no doubt that in any given legal system where the doctrine of judicial review is allowed to operate without any hindrance, the end result would be an adherence to the principles of good governance such as respect of the rule of law, protection of human rights, accountability and answerability of the executive institution and the concept of a limited government.[22] The courts have been conferred powers by the legislation to control and review the decision of the executive and the administrative bodies. The role of courts is to keep the administrative bodies to act within the ambit of the allocated authority given to them by statutes. Excess or abuse of statutory jurisdiction is quashed as being *ultra vires* [23].

Thus, when a person is aggrieved by any act or omission of the administrative body, he may file an action in court to redress his grievance or vindication of his rights. These powers are conferred on the High Courts. The remedies available under judicial review procedure, *inter alia,* are m*andamus*, *certiorari* and prohibition.

The power of the High Courts to issue the abovementioned prerogative orders are contained in Section 25 of the Court of Judicature Act 1964("CJA"). It provides that the High Court shall have the additional powers set out in the schedule. The First Schedule of the CJA states:

Prerogative writs

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

An application for Judicial Review is subject to a stringent leave application. The application shall be made promptly and within 40 days of the grounds of application first arose or when the decision is first communicated to the applicant. [24] The applicant must then give notice of the application to the Attorney General's Chambers not less than 3 days before the hearing date.[25] Once leave has been granted by the court, the applicant must within 14 days enter application for hearing and serve to all affected party the notice and,

22 Ahmad Masum, The Doctrine of Judicial Review: A Conerstone of Good Governance in Malaysia, [2010] 6 MLJ cxiv.
23 M.P. Jain, Administrative Law Of Malaysia and Singapore, 1989, Kuala Lumpur, Malayan Law Journal, pp435.
24 Order 53 Rule 3(6) , Rules of the High Court 1980.
25 Ibid, Order 53 Rule 3 (3).

the statement and all affidavit in support of the leave application[26] where the courts would then proceed with the hearing of the judicial review. The courts will allow an application for judicial review when it is found that an administrative body's decision is tainted with illegality, irrationality and procedural impropriety.[27]

Habeas Corpus

Article 5(1) of the Constitution provides that no person shall be deprived of his life or personal liberty save in accordance with law. The order of *habeas corpus* is used to secure release of a person who has been detained unlawfully. The writ of *habeas corpus* is provided in Article 5(2) which states that:

"*5.Liberty of person.*

(2) Where complaint is made to a High Court or any Judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him."

Section 365 of the Criminal Procedure Code empowers the High Court to release any person who is being detained illegally. Section 365 reads as follows:

365. Power of High Court to make certain orders.

The High Court may whenever it thinks fit direct-

(1) that any person who:

(a) is detained in any prison within the limits of Malaysia on a warrant of extradition whether under the Extradition Act 1992 [Act 479]; or

(b) is alleged to be illegally or improperly detained in public or private custody within the limits of Malaysia, be set at liberty;

(2) *that any defendant in custody under a writ of attachment be brought before the Court to be dealt with according to law.*"

Appeal from the decision of the High Court lies to the Federal Court.[28] The procedure of *habeas corpus* is usually effective in cases whereby a statute permits detention without a trial, for example, the Emergency (Public Order and Prevention of Crime) Ordinance 1969 and the Internal Security Act 1960, if it can be shown that there was procedural non-compliance in the way the detention was ordered. If after the hearing of a *habeas corpus* proceeding, it is proven that the person is unlawfully detained, the grant of habeas corpus is as of right and not within the discretion of the court.

Mandamus

Mandamus is a high prerogative writ which is issued to some person

26 Ibid , Order 53 Rule 3.
27 Minister of Home Affairs, Malaysia v Persatuan Aliran Kesedaran Negara [1990] 1 CLJ 186.
28 Section 374 of the Criminal Procedure Code.

or body to compel the performance of a public duty.[29] It can be issued to any type of body, quasi-judicial, legislative and administrative and in respect of any type of function. What can be enforced through mandamus is a duty of a public nature, the performance of which is imperative and not optional or discretionary. The power to issue *mandamus* is spelt out by Section 44 of the Specific Relief Act 1950 which provides as follows:

44. Power to order public servants and others to do certain specific acts.

(1) A Judge may make an order requiring any specific act to be done or forborne, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or any court subordinate to the High Court:

Provided that -

(a) an application for such an order be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;

(b) such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character, or on the corporation in its corporate character;

(c) in the opinion of the Judge the doing or forbearing is consonant to right and justice;

(d) the applicant has no other specific and adequate legal remedy; and

(e) the remedy given by the order applied for will be complete.

(2) nothing in this section shall be deemed to authorize a Judge -

(a) to make any order binding on the Yang di-Pertuan Agong;

(b) to make any order on any servant of any Government in Malaysia, as such, merely to enforce the satisfaction of a claim upon that Government; or

(c) to make any order which is otherwise expressly excluded by any law for the time being in force."

In ***Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd*** [30] the respondent had obtained a monetary judgment at the High Court at Sandakan against the State Government of Sabah. The respondent then applied for and obtained a certificate of judgment sum and order for costs pursuant to s. 33(1) of the Government Proceedings Act 1956 ("GPA"). The party named in the certificate is the State Government of Sabah. As the State Government of Sabah did not make payment as required by the certificate, the respondent filed an *ex parte* application for leave for judicial review for an order of *mandamus* against the appellant, the Minister of Finance, Government of Sabah, to pay the judgment sum in accordance with said certificate. Leave

29 Osborns's Concise Law Dictionary ,1983, London, Sweet and Maxwell.
30 [2008] 5 CLJ 321.

was granted. The respondent then filed the substantive application for judicial review for the said order. The High Court dismissed the application. On appeal to the Court of Appeal, the court allowed the appeal of the respondent. The appellant appealed to the Federal Court. The issue before the Federal Court was whether Judicial Review proceedings may be taken against the Minister of Finance, Government of Sabah to compel the payment according to the abovementioned certificate. In granting the order of mandamus to be issued against the Minister of Finance, Sabah the Federal Court stated that:

" *…it would appear that under s. 33(4) of the GPAthe Government is excluded from the ordinary enforcement procedure but on the other hand by s. 33(3) of the GPA the Government is under a statutory duty to pay the judgment sum as stated in the certificate. This duty to pay under s. 33(3) of the GPA is clearly a statutory duty which is binding on the State Government. The appellant in the present case, as the Minister in charge of financial matters for the State is naturally responsible for the payment of the judgment sum. An order of mandamus may, in the circumstances, be issued to enforce such compliance by the appellant."*

In the same judgment, the Court observed that that the Government Proceedings Act 1956 is not to enable the Government to flout the law, it merely provides a special procedure in order to avoid the embarrassment of execution proceeding being taken against the government. [31]

Certiorari

Certiorari is an order by the court quashing the decision which has already been made by an inferior court or administrative tribunal or body. *Certiorari* is issued not only to statutory body but even to a non statutory body which is under a duty to act judicially and to perform a public duty.[32] Once the writ of *certiorari* is issued by the High Court, the inferior court (or administrative tribunal) is required to produce a certified record of a particular case tried therein. The purpose is to determine whether there have been any irregularities in the proceedings.

Prohibition

Prohibition is an order of the High Court to restrain an inferior court or administrative tribunal or body from exceeding its powers. The difference between certiorari and prohibition is that the former quashes the decision of a inferior court or administrative tribunal or body after it has delivered its decision whereas the latter is to prevent the bodies from or continue to abuse or acting in excess of its power.

Restriction to Judicial Review : The Ouster Clause

As stated above, the courts in Malaysia, namely the Federal Court and the High Courts have inherent jurisdiction to review the decision of a public body. However this power may be taken away by statute which expressly provides that the decision of the said administrative body is final and conclusive and

31 Ibid , para 68.
32 M.P. Jain ; Ibid , pp 126.

cannot be challenged in the court of law. These provisions are also known as finality clause or privative clause. An example of the ouster clause can be found in section 33B of the Industrial Relation Act 1967 which states:

33B. Award, decision or order of the Court to the final and conclusive.

(1) Subject to this Act and the provisions of section 33A, an award, decision or order of the Court under this Act (including the decision of the Court whether to grant or not to grant an application under section 33A (1)) shall be final and conclusive, and shall not be challenged, appealed against, reviewed, quashed or called in question in any court.

Another example cab be found in the same Act, namely in Section 9 of the Act regarding the recognition of a trade union which states as follows :

"9. Claim for recognition.

(1A) Any dispute arising at any time, whether before or after recognition has been accorded, as to whether any workman or workmen are employed in a managerial, executive, confidential or security capacity may be referred to the Director General by a trade union of workmen or by an employer or by a trade union of employers.

(1B) The Director General, upon receipt of a reference under subsection (1A), may take such steps or make such enquiries as he may consider necessary or expedient to resolve the matter.

(1C) Where the matter is not resolved under subsection (1B) the Director General shall notify the Minister.

(1D) Upon receipt of the notification under subsection (1c), the Minister shall give his decision as to whether any workman or workmen are employed in a managerial, executive, confidential or security capacity and communicate in writing the decision to the trade union of workmen, to the employer and to the trade union of employers concerned.

(2)…

(3)…

(4)…

(5)…

(6) ***A decision of the Minister under subsection (1D) or (5) shall be final and shall not be questioned in any court. "*** (emphasis added)

If the ouster clause is given a literal interpretation, then the power given to the judiciary to control the administrative body of the government will be impeded thus, in some sense rendering the doctrine of separation of powers to no effect. Nevertheless, the courts in Malaysia had given these provisions more relaxed interpretation whereby it has been allowing application for judicial review despite the existence of the privative clauses when there was an error of law committed by the administrative body while exercising their

functions. This can be seen in ***Majlis Perbandaran Pulau Pinang V. Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan***[33] ***wherein Edgar Joseph Jr FCJ said in his judgment:***

"In our view, therefore, unless there are special circumstances governing a particular case, notwithstanding a privative clause of the 'not to be challenged, etc.' kind, judicial review will lie to impeach all errors of law made by an administrative body or tribunal and, we would add, of inferior courts. In the words of Lord Denning in Pearlman v. Harrow School (ibid) at p. 70, 'No Court or tribunal has any jurisdiction to make an error of law on which the decision in a case depends. If it makes such an error it goes outside its jurisdiction and certiorari will lie to correct It'."

JUDICIAL CHECKS OVER THE LEGISLATIVE INSTITUTION

The courts in Malaysia had in the past consistently tried to avoid from reviewing the decision of legislative body as it had recognized the sanctity of the latter's proceedings. This is evident from a number of decisions by the Malaysian Courts. In ***Fan Yew Teng v Government of Malaysia***[34] where the Plaintiff, a Member of Parliament was convicted for sedition and was fined RM2,000. Deputy Minister of Co-ordination of Public Corporations on 31 October 1975, introduced in the Dewan Rakyat (Senate) a motion that the question whether by reason of the conviction and sentence the plaintiff had become disqualified for membership of the house be referred to the Committee of Privileges and that the Committee be instructed to report to the House. The motion was passed on 4 November 1975, and the matter was referred to the Committee of Privileges of the Dewan Rakyat. The plaintiff then instituted an action for declaration:

1) that no question under Art. 53 of the Federal Constitution as to the plaintiff's disqualification for membership of the Dewan Rakyat has arisen by the plaintiff's mere conviction and fine of $2,000 in default six months' imprisonment on 13 January 1975, (vide Selangor Criminal Trial No. 4 of 1974) on a charge under s. 4(1)(c) of the Sedition Act (Revised 1969);

(2) that the plaintiff has a constitutional right to exhaust his legal right of appeal to the Judicial Committee of the Privy Council and thereafter, if unsuccessful, to apply to His Majesty the Yang di Pertuan Agong for a free pardon before any question as to his disqualification can arise under Art. 53 of the Federal Constitution;

(3) that the Dewan Rakyat can only take a decision on the plaintiff's disqualification after he has exhausted his legal right to appeal to the Judicial Committee of the Privy Council and has thereafter unsuccessfully exercised his right to apply to His Majesty the Yang Dipertuan Agung for a free pardon;

33 [1999] 3 CLJ 65.
34 [1976] 1 LNS 28.

(4) that the plaintiff's pending appeal to the Judicial Committee of the Privy Council has rendered the matter sub judice; and

(5) that under Art. 53 of the Federal Constitution it is the Dewan Rakyat alone and no other authority or body which can go into the question relating to the plaintiff's disqualification as a member of the Dewan Rakyat.

Chang Min Tat J. while delivering his judgment said:

"I must necessarily go on to hold that this Court cannot interfere with the right of the Dewan to decide the question of the plaintiff becoming disqualified for membership or the corresponding right to the Dewan under the proviso to Art. 53 to decide, if it be so minded, postponing taking a decision in order to allow for the appeal to be heard or for the plaintiff to make an application for pardon. With respect, I am therefore of the opinion that the reliefs sought by the plaintiff are outside the jurisdiction of the Court."

Abu Mansor Ali J in *Abd. Ghapur Hj. Salleh v Tun Datuk Hj. Mohd. Adnan Robert Yang Di-Pertua Negeri Sabah & Ors.*[35] *[1988] 1 CLJ 317 had also taken the same stand. In his written judgment he said:*

"Following this authority I am satisfied that dissolution of the Legislative Assembly of Sabah by the 1st defendant under Article 21(2) of the State Constitution is a Legislative act and not an Executive act and that is consistent with the 1st defendant's position in Sabah Constitution, Article 13 which provides that the Legislature of the State shall consist of the 1st defendant, the Legislative Assembly. If I am right in holding that the act of dissolution is a Legislative act in no way can the Court intervene and that there is therefore no triable issue that there was encroachment."

In ***Loh Kooi Choon v. The Government of Malaya***[36] Raja Azlan Shah FJ (as His Royal Highness then was) speaking for the Federal Court said:

"The question whether the impugned Act is "harsh and unjust" is a question of policy to be debated and decided by Parliament, and therefore not meant for judicial determination. To sustain it would cut very deeply into the very being of Parliament."

As discussed above, the courts in Malaysia have not directly reviewed the decision of the legislative body. The cited cases had also illustrated the reluctance of courts to encroach into the Legislative territory. Nevertheless the courts had on numerous occasions indirectly controlled Parliament and State Legislative by determining the constitutionality of the latter's decision whereby any laws passed by the Parliament or State Legislature which is inconsistent with the Constitution shall, be void[37].

Suffian LP in ***Ah Tian v Government of Malaysia*** [38] said :

"…cl (1) of article 128 provides that only the Federal Court has jurisdiction to determine whether a law made by Parliament or by a State legislature is

35 [1988] 1 CLJ 317.
36 [1977] 2 MLJ 187.
37 Ibid, Article 4.
38 [1976] 1 LNS 3.

invalid on the ground that it relates to a matter with respect to which the relevant legislature has no power to make law. This jurisdiction is exclusive to the Federal Court, no other Court has it. This is to ensure that a law may be declared invalid on this very serious ground only after full consideration by the highest Court in the land."

In ***Dewan Undangan Negeri Kelantan & Anor. V. Nordin Salleh & Anor***[39] the plaintiffs were elected to the Dewan Undangan Negeri Kelantan (State Legislative Assembly) during the General Elections held on 21 October 1990 and subsequently sworn in as members. On 25 April 1991 the first defendant passed the State Enactment amending the state constitution which provides that if any member of the State Legislative Assembly who is a member of a political party resigns or is expelled from, or for any reasons whatsoever ceases to be a member of such political party, he shall cease to be a member of the Legislative body and his seat shall become vacant.

The plaintiffs then resigned from their party and joined another party. The first defendant passed a resolution pursuant to the impugned legislation that the first and second plaintiffs had ceased to be members of the Dewan Undangan Negeri Kelantan and declared the relevant seats vacant. Abdul Hamid Omar LP when delivering judgment of the court said:

"In all the circumstances, we have arrived at the unanimous conclusion that the direct and inevitable consequences of Article XXXIA of the Kelantan State Constitution which is designed to enforce party discipline does impose a restriction on the exercise by members of the Legislature of their fundamental right of association guaranteed by Article 10(1)(c) of the Federal Constitution, and that such restriction is not only not protected by Article 10(1)(c) of the Federal Constitution but clearly does not fall within any of the grounds for disqualification specified under s. 6(1) of Part I to the Eight Schedule to the Federal Constitution. Accordingly, we agree with the learned Judge in the Court below though on somewhat different grounds that by virtue of Article 4(1) of the Federal Constitution, Article XXXIA of the Kelantan Constitution is to that extent void."

Apart from the cases cited above, reference could also be made to other similar cases whereby the courts have played their part in subjecting both federal and state laws to the spirit of the Constitution. For example, in the case of ***Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors***,[40] it was held that the Aboriginal People Act 1954 must be brought into conformity with Article 13(2) of the Federal Constitution requiring payment of compensation.

Another equally important case to cite is ***Mamat bin Daud & Ors v Government of Malaysia***,[41] where each of the petitioners was charged for an offence under Section 298A of the Penal Code for doing an act which was likely to prejudice unity among persons professing the religion of Islam. They were alleged to have acted as an unauthorized *Bilal, Khatib* and *Imam* at a Friday

39 [1992] 2 CLJ 1125.
40 [2005] 6 MLJ 289.
41 [1988] 1 MLJ 119.

prayer in Kuala Terengganu without being so appointed under the Terengganu Administration of Islamic Law Enactment 1955. The issue before the court was whether section 298A, which was enacted by Parliament by an amending Act in 1983, was *ultra vires* Article 74(1) of the Federal Constitution, since the subject matter of the legislation is reserved for the State Legislature and therefore beyond the legislative competency of Parliament. A majority of the Supreme Court decided that section 298A of the Penal Code was a colourable piece of legislation in that it pretends to be a legislation on public order when in pith and substance, it is about Islamic religious offences which only the State Legislature has power to legislate.

The significance of these cases is that it illustrates that in Malaysia, there is no parliamentary supremacy. The Constitution is supreme. The powers of the Legislature are derived from and limited by the Constitution. Neither the federal nor the state Legislatures can make any law as they please. In this context, the cases are important examples of how rules of interpretations are employed to understand the meaning and the scope of laws. Again, this brings us back to the issue of 'ultra vires' as a backbone of judicial review.

However the powers of the courts to review the decision of the legislative body has somewhat been curtailed by the amendment of Article 121 of the Federal Constitution. It is a common belief that the doctrine of separation of powers has always been part and parcel of our constitutional fabric. This has come into question since the amendment to Article 121 in 1988. Therefore, permit me to say a few words on this.

Prior to amendment, Article 121(1) of the Constitution reads:

"Subject to clause (2) the judicial power of the Federation shall be vested in the two High Courts of co-ordinate jurisdiction and status."

After the amendment, there is no longer a specific provision declaring that the judicial power of the Federation shall be vested in the two High Courts. It reads:-

"There shall be two High Courts of co-ordinate jurisdiction and status namely - one in the States of Malaya, which shall have been known as the High Court in Malaya and shall have its principal registry in Kuala Lumpur; and one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;

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

In October 2007, the Federal Court in the case of ***PP v Kok Wah Kuan***[42] held *inter alia* that the doctrine of separation of powers "*is not definite and absolute*" in the Constitution. This landmark decision is said to have confirmed

42 [2007] 6 CLJ 34.1.

the fears expressed in 1988 when Article 121 was amended to remove the judicial power from the courts and the dangers it posed to the system of checks and balances in governmental power. It is contended by some quarters that under the system of constitutional government, the courts are always seen as the protector of the Constitution and will imply into the Constitution the basic fabric of democratic values including the doctrine of separation of powers which distinguishes a democracy from a dictatorship.[43]

Under the new Article 121 it would appear that the judicial power is no longer vested in the Judiciary as the jurisdiction and powers of the courts are limited to those conferred by or under the federal law. If this is so, then the doctrine of separation of powers no longer exists within our Constitution. There are strong arguments that the amendment should be given a restricted interpretation in order to preserve the constitutional order.[44]

This issue came to be considered by the Federal Court in ***PP v Kok Wah Kuan*** (supra). In that case the accused who was 12 years and 9 months old at the time of the commission of the offence was charged in the High Court for the offence of murder punishable under Section 302 of the Penal Code. He was convicted and ordered to be detained during the pleasure of the Yang di-Pertuan Agong pursuant to Section 97(2) of the Child Act 2001. Upon his appeal, the Court of Appeal upheld the conviction but set aside the sentence imposed on him and released him from custody on the sole ground that section 97(2) of the Child Act 2001 was unconstitutional. The Public Prosecutor appealed to the Federal Court.

The Court of Appeal held that the doctrine of separation of powers is very much an integral part of the Constitution and any post-Merdeka law that violates this doctrine must be struck down as being unconstitutional. The Court of Appeal applying what it considered settled principles went on to hold that Section 97(2) of the Child Act had contravened the doctrine of separation of powers by consigning to the Executive the judicial power to determine the measure of sentence to be served by the accused. By virtue of Article 39 of the Constitution, the executive power of the Federation vests in the YDPA who, in accordance with Article 40 of the Constitution, must act in accordance with the advice given by the Cabinet.

On appeal the majority of the Federal Court Judges rejected the finding that the amendment to Article 121 was of no effect, ruling that after the amendment, there is no longer any declaration in the Constitution that the judicial power of the Federation vests in the two High Courts. It was therefore no longer necessary to interpret the term "judicial power" and all we now need to do is to look at the federal law to know the jurisdiction and powers of the two High Courts. On that premise, Section 97(2) was held not inconsistent with the provision of the Constitution.

Alluding to the Court of Appeal's finding that Section 97(2) had violated the doctrine of separation of powers, Abdul Hamid Mohamad, PCA (who

43 Article on Federal Court decision a blow to democracy by Dato' Param Cumaraswamy.
44 See Law, Government and the Constitution in Malaysia by Andrew Harding at page 134.

later became the Chief Justice of Malaysia) dismissed the doctrine as a mere political doctrine that is not absolute. Although admitting that the doctrine had influenced the framers of the Constitution, the learned Judge was emphatic that it was not a provision of the Malaysian Constitution and no provision of law can be struck down as being unconstitutional merely because it offended that doctrine. Richard Malanjum CJSS although agreeing with the majority as to the outcome of the appeal but do not seem to agree with the view of the majority that with the amendment of Article 121 the court in Malaysia can only function in accordance with what has been assigned to them by the federal laws.

The learned Chief Judge firmly rejected the view that the amendment had the effect of removing the doctrine of separation of powers and the independence of the Judiciary as basic features of the Constitution. This case shows a divergence in approach between the majority and the minority with regard to constitutional interpretation even though their decision to dismiss the appeal was unanimous. Thus the issue is far from settled.

In ***Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd*** [45] the Federal Court had the opportunity interpreting Section 72 of the Pengurusan Danaharta Nasional Berhad Act 1998. In that case Kekatong Sdn Bhd applied for an interlocutory injunction against Danaharta Urus Sdn Bhd to restrain it from selling its charged land under the Pengurusan Danaharta Nasional Berhad Act 1998 ('the Act'). The High Court dismissed the application on the ground that there was no serious question to be tried and that S. 72 of the Act barred the court from granting the injunction against the appellant. The respondent appealed to the Court of Appeal ('CA') which held that there were serious questions to be tried and that S. 72 of the Act contravened Art. 8(1) of the Federal Constitution and was therefore unconstitutional.

The issue before the Federal Court is whether the said Section 72 contravenes Article 8(1) of the Federal Constitution. Article 8 of the Federal Constitution guarantees for equality among citizens before the law and their equal entitlement for the protection of law. For completeness, I append hereunder the provision of Section 72 of the act:

72. Limits on the grant of orders of court.

Notwithstanding any law, an order of a court cannot be granted-

(a) which stays, restrains or affects the powers of the Corporation, Oversight Committee, Special Administrator or Independent Advisor under this Act;

(b) which stays, restrains or affects any action taken, or proposed to be taken, by the Corporation, Oversight Committee, Special Administrator or Independent Advisor under this Act;

(c) which compels the Corporation, Oversight Committee, Special Administrator or Independent Advisor to do or perform any act, and any such order, if granted, shall be void and unenforceable and

45 [2004] 1 CLJ 701.

shall not be the subject of any process of execution whether for the purpose of compelling obedience of the order or otherwise."

The Federal Court in delivering the judgment referred to the Minister's speech while introducing the Bill to the Act in the Parliament and was of the opinion that Parliament's clear intention in enacting the Act was to ensure that the acquisition of non-performing loans by the appellant would ease the pressure upon banks and other financial institutions with the appellant being entrusted with the task, as the nation's Asset Management Company, to take over these bad loans (together with securities, where available) with a view to maximise recovery values. The appellant was thus given three principal duties namely the acquisition of non-performing loans and assets, management of such assets, including by way of the appointment of Special Administrators to temporarily manage the affairs of corporate borrowers in place of their directors and disposition of the acquired assets. The Court further held that the provision of Section 72 " applies to all persons in the same position as the respondent", thus ruled that the provision is not unconstitutional.

In the recent case of ***Jamaluddin bin Mohd Radzi & Ors. v. Sivakumar a/l Varatharaju Naidu***[46] the applicants had each won a seat in the State Legislative Assembly of Perak in the 12th General Election. Later they resigned from their political parties forming the coalition government in the state. The respondent, the Speaker, subsequently received resignation letters pre-signed from the three applicants and declared their seats vacant. However, the Election Commission refused to hold by-elections on the ground that there was an ambiguity as to whether the applicants had resigned voluntarily. The three applicants then filed a suit against the respondent in the High Court praying for a declaration that they were still elected representatives. They then made this application to the Federal Court by way of a direct reference relying on Art. 63 of the Perak Constitution.

The first question before the Federal Court is whether, on a true interpretation of Article 36 (5) of the Perak Constitution read together with s.12(3) of the Elections Act 1958, the Election Commission is the rightful body which establishes if there is casual vacancy of the State Legislative Assembly seat. For better appreciation of the issues at hand, it is pertinent for me to set out Article 36(5) of the Perak Constitution:

"A casual vacancy shall be filled within sixty days from the date on which it is established by the Election Commission that there is a vacancy."

Section 12(3) of the Elections Act 1958 reads:

"12. Writ of election.

(3) In relation to a vacancy which is to be filled at a by-election, a writ shall be issued not earlier than four days and not later than ten days from the date on which ***it is established by the Election Commission that there is a vacancy."*** (emphasis added)

On this point the Federal Court ruled that the Speaker cannot interfere with

46 [2009] 4 MLJ 593.

the constitutional duty of the Election Commission to establish whether there is a casual vacancy or not. The receipt by the Speaker of a letter of resignation purporting to be coming from an assemblyman will not automatically cause that assemblyman's seat to become vacant. Under Article 35 of the Perak Constitution, the Speaker's role is limited to receiving the written resignation letter of the assemblyman and forwarding the same to the Election Commission which will then by its own procedure determine whether a casual vacancy has arisen or not. Once the casual vacancy is established, then it is the duty of the Election Commission to fill the vacancy by holding a by-election.[47]

The second issue before the court is whether the Speaker enjoys the immunity from due process of the law as to the validity of any proceedings in the Assembly as guaranteed under Art 72(1) of the Federal Constitution. The Court opined that the declaration of the vacancies of the seats by the Speaker does not fall within the term "proceedings of the State Legislative Assembly", thus the immunity from due process of the law as to the validity of any proceedings in the Assembly as guaranteed under Art. 72(1) of the Federal Constitution did not apply in this case.

In ***YAB Dato' Dr Zambry Abd Kadir & Ors v. YB Sivakumar Varatharaju Naidu; Attorney-General Malaysia (Intervener)***[48] **,** another case originating from the same state, in this case, the first applicant was sworn in before His Royal Highness the Sultan of Perak as the Menteri Besar of Perak (Chief Minister of Perak) on 6 February 2009, while the second to seventh applicants were sworn in as State Executive Councilors of Perak on 10 February 2009. By a letter dated 11 February 2009, the Assemblyman from Taman Canning complained to the respondent, the Speaker of the State Legislative Assembly of Perak, that the applicants had committed acts of contempt of the State Legislative Assembly. The respondent subsequently issued summonses pursuant to Standing Order 72 of the Standing Orders of the State Assembly of Perak containing the alleged breaches of privilege and a direction against the applicants to attend before the Committee of Privileges ('Committee') on 18 February 2009. The applicants appeared at the appointed time and place as stated in the summons under protest and read out a written objection to the Committee stating that they did not recognise or submit to the jurisdiction of the Committee. On 19 February 2009 the first applicant was served with a letter dated 18 February 2009 stating that the respondent had found him guilty as charged and, in exercising his powers as Speaker, suspended him from attending sessions of the State Legislative Assembly for a period of 18 months. On the same day the second to seventh applicants were also served with letters dated 18 February 2009 stating that the respondent had found them guilty as charged and had suspended them from attending sessions of the State Legislative Assembly for a period of 12 months. The applicants filed an originating summons in the High Court seeking, *inter alia*, a declaration that the respondent's decision suspending and prohibiting the applicants from

47 Ibid, para 28.
48 [2009] 1 LNS 393.

attending sessions of the State Legislative Assembly was against the laws of the Constitution of Perak and was accordingly null and void.

The applicant subsequently raised the main issue requiring determination before this court that is, whether on a true interpretation of Article 44 of the Perak State Constitution read together with the Standing Orders of the Legislative Assembly and the Legislative Assembly (Privileges) Enactment 1959 and/or all relevant laws, the respondent's decision was *ultra vires* and, therefore, null and void. Counsel for the respondents raised a preliminary objection by stating that a challenge to his decision as the Speaker of the Legislative Assembly is a challenge to the decision of a public authority and can only be commenced by way of judicial review. The court referring to the judgment of Lord Diplock in ***O'Reilly v. Mackman*** [1982] 3 All ER 1124 dismissed the objection and ruled that the challenge of the applicants to their suspensions from the Legislative Assembly was a matter that affected their legal status within the meaning of s. 41 of the Specific Relief Act 1950. They were therefore entitled to seek a declaration of their legal right pursuant to O. 15 r. 16 of the Rules of the High Court.

The respondents then relied on Art. 72(1) of the Federal Constitution which states:

72. Privileges of Legislative Assembly.

(1) The validity of any proceedings in the Legislative Assembly of any State shall not be questioned in any court."

It was argued by the respondents that that the issues raised by the applicants were not justifiable. The court opined that Art. 72(1) must be read as being subject to the existence of a power or jurisdiction, be it inherent or expressly provided for, to do whatever that has been done. It is the Federal Court's observation that Article 44 of the Perak State Constitution read together with the Standing Orders of the Legislative Assembly and the Legislative Assembly (Privileges) Enactment 1959 do not provide for the offence of contempt and the resultant punishment of suspension from attending sessions of the State Legislative Assembly hence the respondent is not protected by Art. 72(1). In short, what the court held was that the legislature is not immune from judicial scrutiny where it oversteps its powers.

CONCLUSION

In conclusion I am proud to say that the Malaysian judiciary represents a long and distinguished tradition of judicial independence. It has striven to maintain the rule of law and constitutionalism. However, its functions and powers must be exercised with wisdom and restraint. Without wisdom and restraint, the system of checks and balances alone may not prove to be sufficient enough safeguard. In the final analysis, it is imperative that all state institutions must respect the supremacy of the constitution, with the court being the ultimate interpreter of the same.

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

CONSTITUTIONAL COURTS AND DEMOCRATIZATION: A TURKISH PERSPECTIVE

Hon. Engin Yıldırım
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In recent decades, we have been witnessing global expansion of judicial power as all over the world Constitutional Courts have been given the power to declare acts of the executive or laws enacted by the democratically elected legislature unconstitutional. Constitutional Courts are important actors in modern democracies. Although their legitimacy is still controversial in political theory and philosophy, their major role in democratization and furthering democratic governance cannot be ignored. Whether or not constitutional courts are democratic actors is a controversial issue. Proponents of a strong constitutionalism stress that without constitutional courts, fundamental rights would not be as well protected and that without constitutional protection, these individual rights would be regularly flouted by democratic majorities. The opponents of strong constitutionalism on the other hand refer to the fact that the shift of decision-making procedures from directly elected parliaments to indirectly elected judges is weakening democracy (Strauss 1999). Constitutional courts play an important role in democratization by contributing that the state does not infringe on basic political rights and civil liberties. Court-based constitutional review as a way of controlling executive and legislative action is generally viewed to be one of the most important developments in constitutionalism.

The literature on judicial empowerment is divided into two basic categories: those seeing the expanded political role of the courts as the

manifestation of a "rights revolution" and those that see judicialization as part of a conscious attempt by the dominant elite to safeguard their privileges against emerging counter elite (Shambayati and Kirdi 2009: 768). Most critics of judicial activism often blame courts and judges for being hyperactive, excessively entangled with moral and political decision making and subsequently disregarding fundamental separation of power and democratic governance principles. Portraying courts and judges as the source of evil is misguided. Courts do not operate in a political, institutional and ideological vacuum. Judicial power is politically constructed. Its expansion through constitutionalization or judicial review does not develop separately from the concrete social cultural political and economic struggles.

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

Constitutions need to be viewed more as instruments for achieving general fairness and justice than as instruments for efficiently pursuing specific public policies. There has been a general and significant move in constitutional democracies toward "rights consciousness". Under certain circumstances courts achieve a moral authority that places them above politics and allows them to make unpopular decisions. The moral authority or legitimacy means that people accept judicial decisions even those they bitterly oppose, because they view courts as appropriate institutions for making such decisions (Lutz 2000: 128).

Although we have witnessed a global expansion of judicial power and court-led rights revolutions, the Turkish Constitutional Court (TCC) became renowned for its restrictive take on civil liberties. Some high courts have been more activist than others in protecting and expanding civil rights and liberties (Belge, 2006: 653).

Turkey did not have a system of constitutional review until 1960s; Turkish constitutional court was created by the constitution drafted after the military coup on May 27, 1960. The 1961 Constitution created this institution for constitutional review of legal actions by the legislature. The general reasoning behind the establishment of a constitutional court had been the fact that, Turkey experienced a series of violations of its constitution, especially between 1950 and 1960 and that, in the absence of constitutional review, all these violations remained unsanctioned and thus provided a justificatory ground for the military coup.

The founders of the 1961 Constitution agreed on the necessity of a constitutional court to review the constitutionality of laws. Despite the debates over the structure, composition, function and organization of the Court, methods of selecting its judges and over the review of constitutionality, there was widespread conviction on the need for constitutional justice. The Turkish Constitutional Court began to carry out its activities in 1962. After the 1980 coup, a new constitution was adopted in 1982. The system of constitutional review established by the 1961 Constitution was preserved in the 1982 constitution with a few changes. Hence, the Constitution vested in significant powers to the judiciary. Any amendment with regard to the structure and duties of the Constitutional Court requires an amendment in the Constitution. The main function of the Constitutional Court has been to review the constitutionality of laws and other norms stated in the Constitution.

The power of the TCC derived not from its democratic legitimacy, but from its allegiances with the power centers of the establishment, making it more of a guardian of the state than a constitutional court of rights and liberties.

From its establishment in 1962 until 1999, the CCT struck down more than half of the statutes referred to it (Belge 2006: 654). Nullification is considered the highest form of activism by most commentators (Smithey and Ishiyama quoted in Belge 2006: 665 para note 21). The CCT's annulment rates in abstract review was 65% between 1962 and 1982 and 82% between 1983 and 1999, while these rates were 54% between 1981 and 2000 in France, 53 percent between 1991 and 2000 in Germany, and 52 percent between 1981 and 1990 in Spain (Stone Sweet quoted in Belge 2006: 665). In addition to these activities, the constitutional court has reviewed 47 party closure cases during its 46-year long history. Only 6 out of these 47 were concluded during the period between 1961 and 1982 whereas closure of 33 political parties was requested in 41 lawsuits filed after the 1982 military coup.

The Constitutional Court occupies a central and controversial place in Turkish politics and legal system. Its role and functions have attracted different reactions and responses. While some praise the court for its service as a watchdog overseeing the fundamental values of the constitution, some others harshly criticize its actions. Critics mostly make reference to its attempts of shaping the political sphere, arguing this is a role that should be played by political parties.

The court's roles throughout its history point to a regular and consistent pattern, fostered by the motive to protect the regime and institutional setting created after the introduction of the republican order. This role is perfectly embedded in its legal and institutional setting. In many cases, it considered whether the predefined regime is under threat and what would be the best action to deal with this threat. Despite a strong political actor that features visible activism in many cases, the court remains silent even in some contentious occasions including cases referring to human rights violations (Belge 2006). In other words, the court is politically active only selectively, suggesting that it appears to remain indifferent if the prerogatives of the state are at stake. It

is suggested that the TCC was pursuing an 'ideology-based' approach putting emphasis on the interests of the state as it perceives them.

The CCT was standing in the way of liberalization of Turkish democracy during the 1990s. New courts in Eastern Europe and South Africa have been celebrated for their positive contribution to democratic transitions. The CCT stood as an obstacle to a more pluralistic democracy by closing down political parties that attempted to bring excluded identities into the political sphere. It is true that the authoritarian nature of Turkey's constitution impedes TCC in departing from its ideology based approach. However, it is also true that the provisions of the Constitution with respect to the protection of rights and liberties are formulated in a vague and general way and the TCC has the discretion to interpret them in a democratic way.

In a recent referendum on constitutional amendments, Turkish Constitution now includes the procedure of "constitutional complaint" to be lodged under certain circumstances by individuals whose fundamental rights have been violated by means of legislative acts. The new constitutional complaint system is going to be come into effect in September 2012.

A constitutional complaint is a way to claim rights and is different from the examination of the unconstitutionality of laws or of the illegality of administrative acts, or the cassation and review of judgments. All individuals, claiming that one of their constitutional rights and freedoms in the scope of the European Convention on Human Rights has been violated by public power, are entitled to apply to the Constitutional Court on condition that they have exhausted legal remedies. The principles and procedures on admissibility of applications of constitutional complaints, on establishment and competence of pre-review commissions and on judgments of the Chambers shall be regulated by law.

The function of constitutional complaint is in principle the effective protection of fundamental rights by giving remedy to the individuals in case of violation of their rights by administrative or judicial decisions. This is the main justification for introducing constitutional complaint in Turkey. Constitutional complaint system in Turkey is expected to be a domestic implementation similar to that of an individual application brought before the ECHR. From this aspect, it provides a way to determine violations by the state of fundamental rights and freedoms on a factual basis and to take the necessary measures to redress violations. But besides this justification in principle, there is a more practical consideration in this case. According the expectations of the drafters – as formulated in the reasoning – "The introduction of constitutional complaint will result in a considerable decrease in the number of files against Turkey brought before the European Court of Human Rights". Thus the aim of the new regulation is to provide domestic remedy for the violation of fundamental rights.

External dynamics has also begun to play a remarkable role in the final judgments delivered by the TCC, especially with respect to controversial and

crucial cases. Particularly, the European institutions have a visible influence on the court's actions and decisions. A brief survey of bilateral relations between Turkey and the EU reveals that the latter has acted eagerly since early 1990s to revive a wave of democratic transformation in the country. This eagerness is especially due to the EU actors' awareness suggesting that Turkey places so great importance upon full membership in the EU that its institutions will comply with demands for further democratization and expansion of the sphere of fundamental rights.

Considering that full membership is central to fulfillment of its longstanding policy of Westernization, the EU often uses this as a carrot vis-à-vis Turkey to keep democratic progress on track. On the other side of the coin, there is recognition of this role of the EU by Turkey's institutions, even the most conservative ones including the Constitutional Court. This allows the external actors including the EU to exert greater pressure for more radical and determinative steps towards further democratization in Turkey.

It still, however, remains to be seen whether and in how far the TCC contributes to successful processes of democratization or the establishment of the rule of law. Constitutional justice applied by a court or a constitutional council or a specialized supreme court can only carry out its function of safeguarding the respect for the constitution and protecting human rights it is genuinely independent from power, the activates from which it controls. Constitutional courts can indeed contribute to democracy and the rule of law, if the institutional circumstances support the work of the courts and if the courts show a democracy-friendly orientation.

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THE INTERNATIONAL SYMPOSIUM
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MEASURING THE CHECKS AND BALANCES MECHANISM AMONG STATE INSTITUTIONS

Hon. Priyo Budi Santoso

Vice Speaker of the House of Representative of Indonesia

"In the past, we probably have known only one system in government management, which is the absolute monarchy. The absolute authority lies in the hands of the king, who can govern according to his will. With such power, one can run the government and pass this authority from generation to generation."

The era has changed, your life's mode of logics start to change too. Absolute authority that was arranged with restrictions, is now replaced by a power concept of *check and balances* later on translated by Montesquieu by bringing up the idea of authority separation. Because man's basic character of wanting to rule is so great, therefore the authority that he exercises must be limited as well. It is at this point that the idea of "Trias Politika" emerges, exclusively in order to create a balance in government regulating.

History has several times noted how furiously the authority dominated single-handedly, without control and without balance. Uncontrolled authority has the potential to create a frightful and furious state. Authority checks and balances is a must, so that authoritarianism that hegemonize and dominate the absolute authority can be suppressed.

For this reason, after the fourth amendment to the Indonesian Constitution (UUD 1945), it has been clearly regulated in the government system of Indonesia, how to separate the power check and balances. The Legislative Authority is carried out by the Dewan Perwakilan Rakyat (DPR) / House of Representatives and the Dewan Perwakilan Daerah (DPD) / Regional House of Representatives. The

Executive Authority is carried out by the President. Whereas the Judicial Power by the Supreme Court – Mahkamah Agung (MA) and the Constitutional Court – Mahkamah Konstitusi (MK). The Executive can present laws and participate in discussions there of together with the Legislative. The Legislative must also be involved in some strategic and critical policies. These three elements are controlling one another.

Therefore, we are basically on the right track in building the limit of authority, as introduced by John Locke. The authority can not move at its own will, but must follow the Constitution that has been set and agreed upon by the people. Much has been noted in the memory of our country's history, where the authority is carried out as if without a limit. But now we have started to step forward to always place the Constitution to be a bond for the limitation of authority.

I would like to compare the movement of *check and balances* in Indonesia and in the United States of America. America possesses a significant controlling role of the Legislative, by giving the authority to the President to veto bills that are already acknowledged by the *Congress* (the equivalent of our MPR). Indeed, the veto can be cancelled by the Congress with a support of two thirds of votes from the *House of Representatives* (the equivalent of our DPR) and the *Senat* (equivalent of a representative institution of a state). Well, in our Constitution, the Undang-Undang Dasar 1945 – UUD, there are no regulations regarding the right for veto on the Legislative. There is however room for discussion of bills, carried out by the DPR and the President, to come up with a mutual agreement.

Indonesia has undergone various kinds of changes and relations in carrying out *interstate institutions checks and balances.* In the New Order Era (1966-1988) the highest institution is the MPR which fully carries out the people's sovereignty. The control system between the Executive, Legislative and Judicial institutions therefore can not be applied fully, where the MPR gives its mandate to the President to fully manage the government. The President really holds a huge or super power.

Nowadays, the position of the Constitution - UUD 1945 must not be touched to be replaced. In order to amend the 1945 Constitution, as stipulated in the MPR decree no. IV/MPR/1983, the Indonesian people must first give their agreement through a referendum. In fact, the MPR at that moment was directed at that time to safeguard the 1945 Constitution so that no amendment be done whatsoever.

The 1998 Reformation in Indonesia, marks the end of the above mentioned system. Reformation has replaced the political system which was not fully exercised, by total democracy system. One step taken is the formation of the Constitutional Court. In the end, Indonesia decided four times to make alterations to the Constitution – UUD 1945.

1) The first amandement was made at the MPR General Assembly 14-21 October 1999. 2) The second amandement was made at the MPR annual Assembly 7-18 August 2000. 3) The third amandement on 1-9 November 2001 during the MPR Annual Assembly and 4) the fourth amandement was done at the MPR Annual Assembly 1-11 August 2002.

Various reasons for amendments of the constitution – UUD 1945 that I recorded at the time, were based among others due to its anatomy which gives a power too vast to the President. An "executive heavy" nuance in the Constitution – UUD 1945 was so obvious, where the President was given an unimpeded prerogative authority. The President was made a center of power who can regulates everything, not only regional governments, political parties, freedom of press, but the President was also given authority in carrying out legislation which in fact is the duty and the authority of the legislative institution (Dewan Perwakilan Rakyat – DPR). This legislative authority becomes a "strong hand" which gives the President domination and hegemony of the people and other state institutions.

The democracy has been restricted and the system of inter-state institutions checks and balances has been paralyzed. The huge authority given to the 1945 Constitution concerning the running of the government resulted in the democracy that could not run well, and the paralyzing of the checks and balances system, minus the transparency, and freedom to access information that can no longer be accommodated.

Before amendment of the 1945 Constitution, the Constitution was the highest law and the people's sovereignty was fully given to the People's Consultative Assembly (PCA). Next, the PCA gave the authority to five) higher state institutions like the Supreme Court (Mahkamah Agung or MA), the President, the House of Representatives (DPR), the State Advisory Council (DPA) and the Supreme Audit Board (BPK). Under this model, PCA seemingly became an omnipotent and super power institution because it was defined as the holder of the mandate from the people of Indonesia. Under this author, in its history, PCA once appointed life-time President and consecutively appointed a president for seven times.

The people of Indonesia dreamed of building a total democracy with a government that was strongly supported by the power of the people. This spirit then drove the birth of the reform process through the amendment of the 1945 Constitution. The structure and inter-connection of state institutions also changed. PCA, which previously held the top position in the state institution structure, is now put on the same level with other higher state institutions like the President and the House of Representatives. After the amendment, the Constitution remained the highest law which regulates authority of the six higher state institutions. The State Advisory Council was removed from the structure, and a new institution was established, that is the Regional Representatives (Dewan Perwakilan Daerah/DPD) and Constitutional Court (Mahkamah Konstitusi/MK). Therefore, the six higher state institutions are the People's Consultative Council Assembly (Majelis Permusyawaratan Rakyat/MPR), the House of Representatives (DPR), the Regional Representatives Council (Dewan Perwakilan Daerah/DPD), the Supreme Court (Mahkamah Agung/MA), the Supreme Audit Board Council (Badan Pemeriksa Keuangan/BPK), and the Constitutional Court (Mahkamah Konstitusi/MK).

However, there are still a number of problems concerning the existing of checks and balances mechanism among State Institutions. The basic spirit is that how to make the people of Indonesia really feel the presence of the state through the optimal function of the checks and balances mechanism among State Institutions. Building an ideal mechanism in reliving the inter-state-institution control function is needed as a means of managing the effective running of democracy. Compared to other eras, the inter-state-institution mechanism in Indonesia continuously experiences improvement, especially with the existence of the Constitutional Court which bridges the various institutional polemics.

Once a while, we certainly experience inter-state-institution conflicts on one hand, while on the other, we feel the strengthening of the role of civil society/ people power controlling the state which sometimes triggers explosions of conflicts. The spirit of freedom achieved through the reform process drives the flourishing of organized people movements to put control over the state. In achieving this, we face various challenges and conflicts that are not small in size. However, I see these conflicts as collisions of earth's plates which aim to find synergy, not anarchy. Someday, this collision is needed as a form of evidence in the journey of establishing inter-state-institution control mechanism.

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

THE CONSTITUTIONAL BASIS OF THE RELATIONSHIP OF GOVERNMENT IN THE REPUBLIC OF AZERBAIJAN: SYSTEM OF CHECKS AND BALANCES IN THE SEPARATION OF POWERS

Hon. Ali Huseynli
Chairman of Legal Committee of the National Assembly of Azerbaijan

Modern values of constitutionalism in Azerbaijan have deep historical roots. The first democratic republic in the east was established in Azerbaijan in 1918. It lasted 23 months. While no constitution was adopted back then, the Parliament of Azerbaijan Democratic Republic (ADR) was able to enact a great number of the laws of a constitutional character. Among them was the Law of ADR "On Incompatibility" adopted on 25 January 1919. This Act contained the basic provisions on the separation of powers providing for the complete separation of the executive branch of the government from the legislative one. Pursuant to this Act, the members of the Parliament of ADRs were not illegible to work as governmental officers, other than in a position of a minister. Azerbaijan's independence was restored in 1991. The Act "On the State Independence" of 1991 basically reinforced the fundamental rule of the separation of powers. The Constitution of the Azerbaijan Republic adopted as a result of the referendum held in 1995 stated the system of the separation of powers.

The Constitution of Azerbaijan represents a social and legal contract between the society and the state. As for the legal mechanism, the Constitution is supported by the system of the legal and governmental institutions, the constitutional law enforcement practices, the public sense of justice and constitutional culture of the population. The value of the Constitution lies in the equitable distribution of social interests, the determination of the legal freedom of an individual as well as the balancing of the state power and the supremacy of the legal system.

At the present stage of the development of the Azerbaijan state institutionalism, the constitutionalism represents a scientific and practical value. The constitutionalism, as a permanently evolving dynamic system, having its legal form, significantly affects towards the formation of the public legal consciousness. This interrelationship of society with the state ensures the participation of public in government and actualizes the constitutional institutions. Ultimately, the entire political and legal system built on the constitutional values ensures the establishment of the civil society, guarantees the rights and freedoms of individuals and the stability of the constitutional order and state sovereignty.

Article 7 of the Constitution specifies that the different branches of government should interact with each other and, within their respective powers, they are independent. Legislative power is vested in the Milli Majlis, the executive power – with the President, and the judiciary one – with the courts of Azerbaijan. This is a principle of the organization of the modern government - the unshakable foundation of statehood and democratic structure of society.

Milli Majlis of Azerbaijan - unicameral parliament is elected in general, equal and direct elections by secret ballot for a term of 5 years. It consists of 125 deputies elected by majority election system.

The President of the Republic of Azerbaijan represents the executive power and also is a head of state. In accordance with Article 8 of the Constitution, the President of the Azerbaijan Republic represents the unity of the people of Azerbaijan and ensures the continuity of the Azerbaijani statehood. The President represents the state in the country and in foreign affairs. The President is also the guarantor of the independence of the judiciary system.

The Cabinet of Ministers was created to implement the authorities of the President as the executive branch of the government. The Cabinet of Ministers of the Azerbaijan Republic is the highest executive body of the President of Azerbaijan Republic. The Cabinet of Ministers created by the President of Azerbaijan. However, under Article 119 of the Constitution, the Cabinet of Minister has a certain degree of the autonomy on the budgeting, operational matters of economic management and culture, and social issues. The Cabinet of Ministers is accountable to the President and reports to him.

The judicial power in Azerbaijan is carried out by the Constitutional Court, the Supreme Court, the appellate courts as well as the courts of the general and specialized jurisdiction. Judges may be persons not younger than 30 year old, with high legal education and the experience in the legal profession for at least 5 years. Judges are independent, not subject to any dismissal and immune from any legal actions during their tenure.

The constitutional model of a presidential republic has been created in Azerbaijan. The creation of a system of the separation of powers in a presidential republic pursued the centralization of economic resources, the active development of public programs and strengthening the system of state authorities. In a referendum in 2009, after almost a 10-year-old process of economic and social reforms, the Constitution has been amended to indicate

that the economic development of Azerbaijan has a social orientation. This was practically the transition to a new stage of development of the welfare state.

As we know, the public government is based on the strict control over the budget of the country. The parliamentary control over the budget is a key issue in the system of checks and balances. In accordance with the Constitution, not a Prime Minister but a President submits the Azerbaijan's budget. The Parliament reviews the budget in the few last months of the calendar year. Like all other parliaments, MPs frequently come out with proposals to increase expenditures on social needs. It is not always possible to ensure that the adoption of these proposals. However, the Audit Chamber which controls the budget is within the Parliament and this ensures an effective quality control over the budget.

Along with control over budget, the Milli Majlis is an active initiator of legislation. Almost half of laws the parliament has passed on its own initiative. However, given the budgetary costs and the subsequent enforcement issues, laws are drafted with the participation of the representatives from the relevant governmental ministries and agencies. Milli Majlis also has some supervisory functions over the presidential decrees. In particular, a presidential decree declaring a state of emergency and military requires a parliamentary approval. The parliament also approves the use of armed forces, etc.

Discussion of the draft laws proposed by the subjects of the executive power also as a policy of accord. Without the consent of the subject of legislative initiative, no amendments to the bill are allowed. And this is justified. Since the Parliament with any minor amendments made may change the nature of the bill.

In the system of relations of powers, the Constitution clearly defines the powers of the legislative and executive branches, and they can not be extended. For the extension of powers of the supreme authorities, a complex constitutional arrangement is needed.

President of the Republic of Azerbaijan does not have a constitutional right to dismiss the parliament. However, as a control mechanism under Article 110 of the Constitution, the President has a right of veto.

The constitutional practice in Azerbaijan does not have any cases of investigations of high-level executives who have abused their powers. This practice had a negative result. The parliamentary committees created to investigate these matters would serve as means for fight in the parliament. However, the parliament under Article 95 of the Constitution, has jurisdiction over impeachment of the President, removal of judges by the President and motion of no confidence to the Cabinet of Ministers.

In conclusion, I note that there are different models and forms of separation of powers but they must all be designed to protect the important values of constitutionalism. The legal system of Azerbaijan is developing within a particular constitutional model, aimed at providing basic human rights and limit restrictions of power. This model is aimed at forming a strong government that is able to provide the civil, political and social human rights and ensure their protection.

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

FINAL PLENARY SESSION

The International Symposium on Constitutional Democratic State

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

REPORT SPEECH

Panel I

The International Symposium on Constitutional Democratic State

Delivered by Hon. M. Akil Mochtar
Justice of Contitutional Court of Indonesia

Honorable Delegates,

Ladies and Gentlemen,

The principle of the constitutional democratic state means that all authorities derived from the people's will which further regulated in the constitution. To carry out that principle each state needs organs, regulations, as well as mechanisms or procedures.

It is in this context that the discussion of the Panel I had tried to further describe the development in regard to the organs, regulations as well as the mechanisms and procedures in implementing the principle of democratic constitutional state.

The main issues disscussed in this panel are "The Role of Constitutional Court and Equivalent Institution in Strengthening the Principles of Democracy" (session I), "Democratization of Lawmaking Process" (session II), and "The Mechanism of Checks and Balances among State Institutions" (session III).

Allow me on behalf of our Panel (Panel I) to address some key issues that we have discussed and concluded today:

1. In relation to the first session, representative from Kazakhstan, Mongolia, Colombia, Germany, and Indonesia – which are all represented by delegations from their respective Constitutional Court – have all mentioned the Role of the Constitutional Court and Equivalent Institution in their respective

countries, which assisted in strengthening the principles of democracy. As mentioned by most of the speakers, the presence of Constitutional Court and other equivalent institutions were believed could enhance and support the democratic value of a state. Most delegations agreed that democracy is one important social values in a democratic state which explicitly stated in each countries' constitution. It is also mentioned about various challenges and obstacles faced by the participants in enforcing the authority in Constitutional Court.

2. During the discussion, issues raised were the authority of constitutional court and the system implemented in each participating countries. Responding to the respected issues, the moderator concluded that from all the system, democracy is believed as the best system and mostly adopted by countries around the world. She then quoted Mr. Mohammad Hatta's statement, the former first Vice President of Indonesia, saying that Democracy without responsible and tolerance will result an anarchy. And finally she stated that she agree with the statement saying that Democracy will always grow along with the growth of the society. Democracy will never be completed and never had a final goal. Therefor the Constitutional Courts must always adaptating people's changing to answer the challanges from the public.
3. The law making process in a democratic state is signified by and has a strong relevance with democratic procedure or mechanism. This does not only deal with procedural aspects but also substantial. In addition, a law making process must be opened for involvement and participation of the public. Furthermore, a law making process should not be dominated by political elites.
4. The principle of transparency is an important requirement in the law making process. In the process, a wide space should be given to the public to monitor. In order to ensure that the law making process is based on democratic principles and values and do not contradict with the constitution, the involvement of the Constitutional Court or equivalent institutions is a must.
5. Regardless of the difference of the system and history, each state has its own democratic constitution which regulate the protection of the human and fundamental rights. In general, all countries that presented have implemented check and balances mechanism.
6. In transtitional democratic countries, the Constitutional Court or equivalent institutions have faced a challenging situation to carry out their function due to competing of old and the modern concepts.

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

REPORT SPEECH

Panel II

The International Symposium on Constitutional Democratic State

Delivered by Hon. Fernando La Sama de Araujo
President of the National Parliament of Timor Leste

I. The Role of Constitutional Court and Equivalent Institution in Strengthening the Principles of Democracy

1. The role of constitutional court and equivalent institutions in strengthening the principle of democracy appear to be having a significant contribution to shape constitutional democratic states. It generally reflects not only how constitutional courts play an important role in safeguarding the content of constitutions for the sake of protecting fundamental rights, of maintaining an independent judiciary, of preventing misleading impeachment. But rather constitutional court would also like to make efforts in preserving the continuation of a living constitution, and living norms which are used to guide day to day lives and the standards for all state actions.

2. Five countries which include Republic of Korea, the Republic of Lithuania, Republic of Chile, Spain and Republic of Indonesia have indeed proven in different degree to promote and strengthen the constitutional court are the most trustworthy institutions for the establishment of "an advanced democratic countries". This would possibly be achieved when fundamental principles are met to be fulfilled. On one hand, the existing of constitutional courts should become a trustworthy state institutions. This fundamental principle is demanding to be performed in order not only to establish the constitutional courts as part of supreme judicial system. But it is also a guardian or defender of constitution, as the supreme law of

the land. So, highest commitment and effective control are necessary when the law are being reviewed for achieving both procedural and substantial justices. On the other hand, at operational level, however, the role of constitutional court in strengthening the principle of constitutional democracy is concerned with the Rule of Law. It is the matter of state that an establishment of legitimate governments are determined by practicing a fair and transparent general elections, providing the rule of distributing and separating powers, protecting fundamental rights, equal opportunity before the law, the court of the basis of due process of law, and political independent.

II. Democratization of Lawmaking Process

1. The 3 countries have their own specific characteristic on the democratization of the law making process. The Philippines for an example, have a fine line on the separation of power between the law making process and the governing. but the separation of powers is in no way absolute and is purposely described in an abstract and general form, rather than a rigid one in the Constitution because it is intended for practical purposes and adopted to common sense. In Indonesia, the separation of powers is not provided by the Constitution because the power of the law making process are given to these 2 institutions in order to keep checks and balances between the 2 powers. While in Morocco, the parliament have played a crucial roles on the implementation of their constitutional duties and controlling the performance of the government as well as contributed in formulating legal texts (parliamentary laws) for the state.
2. The differences among 3 countries also reflected when it comes to Constitutional Court. The Philippines rely its constitutionalism power on the supreme Court while Indonesia and Morocco have given such power to the Constitutional Court.

III. The Mechanism of Checks and Balances among State Institutions

1. The new constitutional court in Colombia emerges as a pioneer of the "social revolution" of the country, its controversial decisions in the defense of fundamental rights: euthanasia, abortion, drug use, housing, religion, indigenous rights and now economic and social rights, have made the dream come true to many Colombians in seeing the effective protection of their rights by respectable institution; but neither can one deny to institutional impact it has caused.
2. Timor Leste have another different kind of separation of power, there is a principle based on the constitution called the principle of separation and interdependence of power. The East Timorese Constitution also enshrines the separation of powers and a system of checks and balances, which is reflected in the dual accountability of the Executive before Parliament and

the Head of State, or in the powers granted to the President to ensure smooth functioning of democratic institutions, as in the independence of the judicial power, the establishment of the Ombudsman or the existence of an autonomous prosecution office, among other examples.

3. The mechanism of checks and balances principle in Indonesia, come up from the basic needs to ensure that each power in a state that holds a principle of divided powers will not surpass its power, as well as to ensure the existence of freedom for each state power while avoiding too many interference from one power to another. In other word, this principle have a purpose to create balance in the socio-political interaction without weakening the function and the independence of the other institution.

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

REPORT SPEECH

Panel III
The International Symposium on Constitutional Democratic State

Delivered by Hon. Tan Sri Ariþn bin Zakaria
Chief Judge of the High Court of Malaya, Federal Court of Malaysia

We have heard and discussed three main issues today in three different sessions which are very interesting and valuable for all of us, particularly for the participants in Panel III. The discussed issues in respective order are, The Role of Constitutional Court and Equivalent Institution in Strengthening the Principles of Democracy (session I), Democratization of Lawmaking Process (session II), and The Mechanism of Checks and Balances among State Institutions (session III).

Allow me on behalf of our Panel (Panel III) to address some key issues that we have discussed and concluded today:

1. In relation to the first session, representative from Uzbekistan, Ukraine, Thailand, Austria, and Indonesia – which are all represented by delegations from their respective Constitutional Court – have all mentioned the Role of the Constitutional Court and Equivalent Institution in their respective countries, which assisted in strengthening the principles of democracy. As mentioned by most of the speakers, democracy is one of the most important social values that should be upheld in a democratic state. This is guaranteed by stipulating the values of democracy in the national constitutions. The presence of constitutional court and other equivalent institutions were believed to enhance and support the democratic value of a state. Delegations also mentioned various challenges and obstacles faced by them in enforcing the authority in Constitutional Court. Besides that, delegations also elaborated about the history of the establishment of constitutional court.

During the discussion, issues were raised on the subjectivity of judges in imposing sanctions, the nature of Constitutional Court as a negative legislator, and notion of "Ultra Petita" as one of the principle of constitutional court. In answering the respected issues, the panelists highlighted that judges who are elected in Constitutional Court are numerous in number and have obligations to make dissenting opinions. Moreover, judges are sworn and guided by their code of conduct and code of ethics. The judgment delivered by the court is the result of collective agreement of the judges. These steps are being taken to make sure that the decisions which are made by the court are objective and in line with the prevailing law.

From the discussions, the moderator concluded that every Constitutional Court has the authority to interpret, define, and prosecute cases of constitutionality of laws governing the legislative, executive, and judiciary power, including the protection of human rights and freedom of citizens. He noted that the Constitutional Court is fully dedicated to work independently and impartially, not to mention to uphold the transparency and equality of the judges. Moreover, the decision of Constitutional Court is binding on all bodies of state authority, and is final and conclusive. Constitutional Court plays an essential role in maintaining Constitutional Democracy, particularly to exercise the system of checks and balances based on the human rights and freedom of citizens.

2. In the second session, delegation from Thailand which represents the Senate of the National Assembly of Thailand and delegation from Indonesia which represents Inter-Parliament Cooperation Board of the House of Representative of the Republic of Indonesia explained about the lawmaking process in their respective countries and how this process contributed to strengthening the principle of democracy. The two Panelists agree that lawmaking process should be transparent and should represent the aspiration of the people. Panelist also explained about the involvement of people in the lawmaking process.

   During the discussion issues related to the mechanism of checks and balances in law making process in regards to the constitutionality of the law in Indonesia and Thailand was raised. In answering the following issue, the panelist highlighted about the importance of having institution, especially the (Constitutional) Court to review the constitutionality of Law. Since both, Indonesia and Thailand, have established the Constitutional Court, each country has experience the advantage of adopting the constitutional review mechanism to safeguard the enactment of Laws. Before a bill was sign, the democratization process in the Parliament symbolized the checking mechanism by applying steps for approval. Different approaches are taken as the steps for approval by both parliaments. Although, both countries have adopted bicameral system in their parliament, nonetheless in reaching consensus for the approval of a bill each country implemented different ways or means.

In conclusion, democracy has been the idea that covered the law making process in Indonesia and Thailand. Both parliaments introduce different approach as a checks and balances mechanism before a bill was pass. These approaches are meant to safeguard the interest of the people and not for the interest of the ruling party or the government.

3. In the third session, most of the states highlighted the importance of check and balances in a country. In order to prevent authoritarianism and overlapping authority, the implementation of the principle of check and balances is very vital. However, the courts, in exercising its functions and powers, must always execute with wisdom and restraint. Without wisdom and restraint, the system of checks and balances alone may not prove to be sufficient enought safeguard.

THE INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL DEMOCRATIC STATE

LIST OF DELEGATES

The International Symposium on Constitutional Democratic State

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		Akil Mochtar	M	Justice	
		Anwar Usman	M	Justice	
		Hamdan Zoelva	M	Justice	
		Harjono	M	Justice	
		Maria Farida Indrati	F	Justice	
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