The First Ten Years Of The Constitutional Court Of Indonesia: The Establishment Of The Principle Of Equality And The Prohibition Of Discrimination

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Abstract

As a very fundamental principle of the 1945 Constitution, principle of equality and prohibition of discrimination does not only serve as the basic norm, but most importantly it also have functions as the source of morality for the constitution, as well as for the practices of politics, socio-economics and law in Indonesia. This article will pick and analyses significant and landmark decisions that made by the Constitutional Court of Indonesia in its 10 years existence related to principle of equality and prohibition of discrimination to understand how the Court interpreted the constitution and which principle that usually used by the Court in its practices. The result is based on its 10 years of experiences, The Constitutional Court of Indonesia have gave tremendous contribution for the protection of human rights and the advancement of democracy and nomocracy in Indonesia, especially for the establishment of the principle of equality and the prohibition of discrimination based on 1945 Constitution and the principle of proportionality.

Key words: principle of equality, prohibition of discrimination, human rights.

I. INTRODUCTION

Article 1 paragraph (2) of the 1945 Constitution states that sovereignty is in the hands of the people and is exercised in accordance with the Constitution. Article 1 paragraph (3) of the 1945 Constitution states that the Indonesian state is a state ruled by law (negara hukum). This shows that the highest sovereignty is in the hands of the people. As a state affirming the rule of law, any action of the state agency and its citizen must be in accordance with the prevailing legal rule. Legal in this case is the hierarchy of norms, the pinnacle of which is the 1945 Constitution. Therefore, the implementation of democracy must also be based on the legal rule conveyed by the 1945 Constitution. On the other hand, the applied and enforced law must reflect the will of the people. Therefore, it must be ensured that there is participation by the people in the process of state decision making. Law is not made to ensure the interest of several ruling individuals; instead, it is made to ensure the interest of all citizens. The will of all citizens is reflected in the 1945 Constitution. Therefore, the 1945 Constitution is the highest law. Any lower legal norm and all practices of state and nation must be in accordance with the provisions of the 1945 Constitution.

To safeguard the supremacy of the 1945 Constitution, the Constitutional Court of Indonesia has been formed as one of the judiciary authority organizing court proceedings in order to enforce the law and justice. The Constitutional Court of Indonesia is a high state institution, the existence and authority of which are mandated by the 1945 Constitution and further stipulated in Law Number 24 of the Year 2003 regarding the Constitutional Court. The Constitutional Court of Indonesia has four authorities and one obligation as mandated by Article 24C paragraphs (1) and (2) of the 1945 Constitution. The four authorities of the Constitutional Court relate to examining at the first and final level. The Court's decisions are final in the judicial review of laws against the Constitution; deciding disputes over the authority of state institution whose authority is granted by the Constitution; deciding the dissolution of political parties; and deciding dispute over the results of general elections. Meanwhile, the obligation of the

Constitutional Court is to provide decisions based on the Constitution on the opinion of the House of the People's Representatives regarding the accusation of violations by the President and/or the Vice President.

Based on its authorities, according to Jimly Asshiddiqie, the Constitutional Court of Indonesia is the guardian of the constitution in relation to the four authorities and the obligation mentioned above. Consequently, the Constitutional Court functions as the sole interpreter of the Constitution. The Constitution as the highest law stipulates that the state be governed based on the principle of democracy and that one of the functions of the constitution is to protect human rights, which are ensured in the constitution. Based on this idea, human rights become the constitutional right of the citizen. Consequently, the Constitutional Court also functions as the guardian of the democracy, the protector of the citizen's constitutional rights, and the protector of human rights. According to Moh. Mahfud MD., all such authorities and obligations of the Constitutional Court are closely related to the concept and implementation of democracy. This is in line with the basis of the establishment of the Constitutional Court to guarantee the implementation of the Constitution as well as to strengthen the system of constitutional democracy and the mechanism of checks and balances amongst the branches of state power.

The sovereignty of the people is the fundamental principle of the constitution and does not only determine the feature and spirit to the constitution, but also is deemed as the moral source for the entirety of the nation's laws and politics. The principle of equality and prohibition of discrimination is a mandate of the constitution included in the Preamble to the 1945 Constitution which states, "And Indonesia's struggle for independence has now reached a joyful moment, leading the people of Indonesia safe and sound to the gateway of the independence of the Indonesian State, which is free, united, sovereign, just and prosperous... Furthermore, in order to form a Government of the State of Indonesia, which shall protect the entire Indonesian nation and the entire Indonesian native land, and in order to advance general welfare, to develop the intellectual life of the

nation, and to partake in implementing worlzd order based upon independence, eternal peace, and social justice, Indonesia's National Independence shall be enshrined in the Constitution of the Republic of Indonesia, established within the structure of the State of the Republic of Indonesia with the sovereignty of the people ...".

The principle of equality and prohibition of discrimination is also found in Article 27 paragraph (1) of the 1945 Constitution, which reads, "Without exception, all citizens shall have an equal position before the law and in government and shall be obligated to uphold such law and government"; Article 28D paragraph (1), which reads, "Every person shall have the right to the recognition, the guarantee, the protection and the legal certainty of just laws as well as equal treatment before the law"; Article 28D Paragraph (2), which reads, "Every person person shall have the right to work and to receive just and appropriate rewards and treatment in their working relationships." Article 28D Paragraph (3), which reads, "Every person shall have the right to obtain equal opportunities in the government"; Article 28H paragraph (2), which reads, "Every person shall have the right to obtain facilities and special treatment in obtaining equal opportunities and benefits for achieving equality and justice"; Article 28I paragraph (2), which reads, "Every person shall have the right to be free from discriminatory treatment on any basis whatsoever and shall have the right to obtain protection against any such discriminatory treatment"; Article 28I Paragraph (4), which reads, "The protection, promotion, enforcement and fulfilment of human rights shall be the responsibility of the state, particularly the government"; Article 28J paragraph (1), which reads, "Every person shall be obligated to respect the human rights of another person in the orderly life of community, nation and state"; and Article 28J paragraph (2), which reads, "In the enjoyment of their rights and freedoms, each person is obliged to submit to the limits determined by law, with the sole purpose of guaranteeing recognition and respect for the rights of others and to fulfil the requirements of justice and taking into consideration morality, religious values, security, and public order in a democratic community."

As a very fundamental principle of constitution, the principle of equality and prohibition of discrimination does not only serve as the basic norm, but most importantly it functions as the source of morality for the Constitution, as well as for the practices of politics, socio-economics, and law in Indonesia. Moreover, the principle of equality and prohibition of discrimination must not contradict the principles of human rights as these are the basis for the status of man/women and his/her dignity. This article will analyses significant decisions made by the Constitutional Court of Indonesia in its first 10 years of existence with relation to the principle of equality and prohibition of discrimination with a view to understanding how the Court has interpreted the constitution.

II. DISCUSSION

1. Significant Decisions Related to the Principle of Equality and the Prohibition of Discrimination

Since 2003, the Constitutional Court has made several decisions on a number of petitions. These decisions are significant to the conceptual shifts within the Indonesian state administration system, especially in relation to the principle of equality and prohibition of discrimination.

a. Decision Number 011-017/PUU-I/2003

The Constitutional Court of Indonesia passed a decision in a case of petition for judicial review of Law Number 12 Year 2003 regarding the General Election of members of the People's Representative Council (hereinafter Dewan Perwakilan Rakyat or DPR), the Regional Representative Council (hereinafter Dewan Perwakilan Daerah or DPD) and the Regional People's Representative Council (hereinafter Dewan Perwakilan Rakyat Daerah or DPRD) (General Election Law) against the 1945 Constitution. Article 60 sub-article g of General Election Law determines the criteria for DPR, DPD, Province DPRD and Regency/ Municipality DPRD candidate members as not being former members of banned organisations of the Indonesian Communist Party (Partai

Komunis Indonesia or PKI), including its mass organisations, or being directly or indirectly involved in the September 30, 1965 Movement by the Indonesian Communist Party (G30S/PKI) or other banned organisations.

The Constitutional Court stated that the 1945 Constitution prohibits discrimination as stated in Article 27 paragraph (1), Article 28D paragraph (1), Article 28I paragraph (2) of the Constitution. However, the aforementioned Article 60 sub-article g of Law Number 12 Year 2003 prohibits a group of Indonesian Citizens (Warga Negara Indonesia or WNI) from being nominated and from exercising the right to be elected, based on political beliefs they once adopted. Article 1 paragraph (3) of Law Number 39 Year 1999 regarding Human Rights as explanation of the provisions of Article 27 and Article 28 of the 1945 Constitution does not justify discrimination based on differences of religion, nationality, race, ethnicity, group, social status category, economic, status, gender, language or politics. Article 27 paragraph (1) of the 1945 Constitution stated, "Without exception, all citizens shall have equal standing before the law and in government and shall be obligated to uphold such law and government", Article 28D paragraph (1) which reads, "Every person shall have the right to the recognition, the guarantee, the protection and the legal certainty of just laws as well as equal treatment before the law", Article 28I Paragraph (4) which reads, "The protection, promotion, enforcement and fulfilment of human rights shall be the responsibility of the state, particularly the government" were also in line with Article 21 Universal Declaration of Human Rights which states:

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives .
2. Everyone has the right of equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be Expressed in periodic and genuine elections, which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Moreover, during the next development of human rights relating to the protection of civil and political rights, the United Nations in 1966 created the International Covenant on Civil and Political Rights (ICCPR), effective from 1 January 1991 supported by 92 state of 160 state member of the United Nations. Article 25 of the ICCPR states, "Every citizen shall have the right and the opportunity, without any of the distinctions Mentioned in article 2 and without unreasonable restrictions: a) To take part in the conduct of public affairs, directly or through freely chosen representatives; b) To vote and to be Elected at genuine periodic elections, which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; c) To have access, on general terms of equality, to public service in his country;"

The constitutional rights of citizens to vote and the right to be a candidate is a right guaranteed by the Constitution, laws and international conventions, such that if restrictions do occur, leading to the elimination and removal of said rights referred, this would amount to a violation of the human rights of citizens. It is true that Article 28J paragraph 2 of the 1945 Constitution contains a provision that allows restriction of the rights and freedoms of a person by law, but the restrictions on these rights must be on the basis of strong reasons and must be reasonable, proportionate and not excessive. Such restrictions can only be used with the "the sole purpose of guaranteeing recognition and respect for the rights of others and to fulfil the requirements of justice and taking into consideration morality, religious values, security, and public order in a democratic community"; but restrictions on the right to be a candidate as the provisions of Article 60 sub-article g of General Election Law existed only for political considerations. In addition, restrictions on the right to vote (both active and passive) in the general election are typically based only on the consideration of factors such as age and incompetence of mental state, as well as other restrictions such as the

result of having voting rights revoked by a final and binding court ruling, which in general is individual and not collective.

The prohibition against certain groups of citizens to run for the legislative position based on Article 60 sub-article g General Election Law clearly contains shades of political punishment referring to a specific group. As a state based on the rule of law, any restrictions that have a direct connection with the rights and freedoms of citizens must be based on court decisions that have binding legal force. A criminal responsibility can only be held accountable for the perpetrator (dader) or accomplice (mededader) or accessory (medeplichtige), and as such, it is an act that is contrary to law, justice, rule of law and the principles of the state based on law should sanctions be imposed on a person who is not directly involved. Therefore, the Constitutional Court states that the provision of Article 60 sub-article g of the General Election Law, which reads "Not a former member of the banned Indonesian Communist Party (PKI), including its mass organisations nor a person directly or indirectly involved in the 30 September Movement (G30S/PKI), or any other banned organisations" constitutes a denial of the human rights of the citizens or discrimination based on political beliefs, and therefore it is contradictory to the human rights protection guaranteed by the 1945 Constitution, as intended in Article 27 and Article 28D paragraph (1), paragraph (3), and Article 28I paragraph (2).

b. Decision Number 055/PUU-II/2004

The Constitutional Court of Indonesia passed a decision in a case of petition for judicial review of the Law 12/2003 (General Election Law). Article 133 (1) which provides that the decision of a District Court that penalizes a defendant for committing an offense subject to no more than 18 months' imprisonment, and the decision of a District Court as the court of the first and final level with a final decision, provides no opportunity for the Petitioner as a defendant to obtain a second opinion in the appellate level examination, unlike a defendant in a quick case

of traffic violation as set forth in Article 205 of the Criminal Procedural Code and Article 211 (5) of Law 31/1997 regarding the Military Tribunal. This is regarded by the Petitioner as a discrimination that contravenes the 1945 Constitution. According to the Court, Article 28D (1) which contains the recognition, the guarantee, the protection and fair legal certainty as basic rights protected by the Constitution, and therefore the recognition and the protection of the basic rights are not absolute; however, certain limitations are justified as set forth in Article 28J (2) which provides that "In exercising his/her right and freedom, every person must submit to the restrictions stipulated in laws and regulations with the sole purpose to guarantee the recognition of and the respect for other persons' rights and freedom and fulfill fair demand in accordance with the considerations of morality, religious values, security, and public order in a democratic society".

It is admitted that in determining the deviation from Article 205 of the Criminal Procedural Code which is regarded as the procedural law regulation that governs the rights of a defendant to file an appeal in summary proceedings for criminal cases. However, there are inconsistencies in stipulating the categories of quick cases and minor cases known in the criminal legal system and criminal procedural code, through which it is evident that the legislators did not have a specific parameter as the standard with general application, which is regarded as a weakness to such an extent that a traffic violation case as a quick case has an option for an appeal effort if the punishment involves the deprivation of freedom, while on the other hand in the case of general election crime subjected to a maximum imprisonment of 18 months, such legal remedy is not available. However, the Court is of the opinion that due to the nature of the General Election crime which requires a summary decision, the regulation of which being related to the state administration agenda that requires legal certainty, such special regulation is sufficiently grounded and does not contravene the 1945 Constitution.

c. Decision Number 006/PUU-III/2005

The Constitutional Court of Indonesia passed a decision in the case of petition for judicial review of the Law 39/2004 (the Regional Government Law). The Petitioner has argued that Article 59 (1) and (3) the Regional Government Law, which stipulates that only political parties or coalition of political parties can propose a pair of regional head/regional deputy head candidates, which has eliminated the opportunity for an individual propose him/herself directly and independently as a regional head candidate, is deemed to be contradictory to the 1945 Constitution. According to the Court, equal status and opportunities in the government which could also mean without discrimination is a different issue than the democratic mechanism of recruitment for government positions. It is true that the rights of every citizen to obtain equal opportunities in government is protected by the Constitution insofar as the aforementioned citizen meets the requirements determined in law related with it, among others, the requirements of age, education, physical and mental health as well as other requirements. Such requirements will apply to every citizen, without distinguishing people, in terms of, tribe, race, ethnicity, group, classification, social status, economy status, gender, language and political beliefs. Meanwhile, the definition of discrimination which is prohibited in said Article 27 (1) and Article 28D (3) of the 1945 Constitution has been elaborated further in Article 1 (3) of Law 39/1999.

The requirements for the nomination of a pair of regional head/ regional deputy head to be nominated by a political party, is the mechanism or procedure on how the election of the intended regional head is to be implemented, and does not eliminate the individual right to participate in the government, insofar as the conditions of nomination through a political party is conducted, so that with the formulation of discrimination as elaborated in Article 1 (3) of Law 39/1999 and Article 2 of ICCPR, which is insofar as the distinction carried out is not based on religion, tribe, race, ethnicity, group, classification, social

status, economic status, gender, language and political beliefs, then the nomination through a political party cannot be deemed contradictory to the 1945 Constitution because the choice of such system is a legal policy which cannot be tested unless conducted haphazardly (willekeur) and exceeding the legislators' authority (detournement de pouvoir). The restrictions on political rights are validated by Article 28J (2) of the 1945 Constitution, insofar as the intended restrictions are set forth in law.

Moreover, the granting of the constitutional rights to nominate for a candidate pair of regional head/regional deputy head to political parties, shall not be construed that it will eliminate the citizen's constitutional right, in casu the Petitioner to become a regional head, insofar as the Petitioner meets the requirements of Article 58 and to be conducted through the procedures mentioned in Article 59 (1) and (3) of the Regional Government Law, and that such requirements shall constitute a binding mechanism or procedure to every citizen who will become a candidate for regional head/regional deputy head.

d. Decision Number 006/PUU-IV/2006

The Constitutional Court of Indonesia passed a decision in the case of petition for judicial review of the Law 27/2004 concerning Commission for the Truth and Reconciliation (KKR Law) against the 1945 Constitution. According to the Court, there is confusion and contradiction existing in Article 27 of the KKR Law are related to the emphasis on the perpetrators as an individual in individual criminal responsibility, whereas the perpetrators and victims as well as witnesses of human rights violation incidents prior to the application of the Law on Human Rights Court can no longer be found. Reconciliation between the perpetrators and victims intended in the law a quo becomes almost impossible to be achieved, if it is conducted by applying individual criminal responsibility approach. With such approach, which depends on amnesty must be only restitution, namely compensation granted by

the perpetrators or a third party. On the other hand, if the purpose is to achieve a reconciliation and the approach applied is not of individual nature, the starting point shall be gross violation of human rights and the existence of victims serving as a parameter of reconciliation by granting compensation and rehabilitation. Those two approaches, in relation to restitution, compensation, and rehabilitation, cannot be rendered dependant on an irrelevant issue because amnesty is a prerogative right of the President, the granting or refusal of which is up to the President.

Moreover there is no legal grounds and reasons for the granting of amnesty, particularly due to the stipulation is only applicable for the gross violation of Human Rights occurring prior the application of the Law on Human Rights Court. Beside that, the formulation of the provisions and the possible implementation of the provisions to achieve the expected reconciliation, CCI is of the opinion that the basis and purpose of the KKR, as set forth in Article 2 and Article 3 of the Law, are impossible to be achieved due to the lack of guarantee of legal certainty (rechtsonzekerheid). Therefore, the Court has reviewed this Law against the 1945 Constitution and it must accordingly be declared as not having binding legal force.

e. Decision Number 028-029/PUU-IV/2006

The Constitutional Court of Indonesia passed a decision in the case of petition for judicial review of the Law 39/2004. The Petitioners argued that Article 35 Sub-Article a of the Law which required a minimum of 21 years of age for Indonesian Migrant Workers who will be employed by individual Users has discriminated the rights of the Petitioners to working and the right to an occupation. The Court is of the opinion that in order to observe whether or not the provision of Article 35 Sub-Article a of the PPTKI Law is discriminatory first established the definition of discrimination within the scope of human rights law such as from Article 1 (3) of Law 39/1999, Article 2 ICCPR which has been ratified by Indonesia with Law 12 / 2005 and in the practice of the European

Community, as included in Council Directive 2007/78/EC of November 27, 2000 that establishing a general framework for equal treatment in employment and occupation.

According to the Court, Article 35 Sub-Article a of the Law is not an elimination of the right to an occupation, but is instead a justifiable requirement in the interest of fulfilling the duty of the state to protect its citizens who are employed for individual Users overseas. Article 35 Sub-Article a of the Law also does not contain any discriminatory nature as argued by the Petitioners and is not contrary to the 1945 Constitution either. Moreover, both the intended provisions of the 1945 Constitution do not regulate the constitutional rights related to discrimination.

f. Decision Number 12/PUU-V/2007

The Constitutional Court of Indonesia passed a decision in the case of Petition for Judicial Review of Law 1/1974 (the Marriage Law). According to the Court, the provisions existing to regulate polygamy for Indonesian Citizens whose religious laws on polygamous marriage are acceptable, because according to Article 2 (1) of the Marriage Law, a marriage is legitimate insofar as it is conducted according to their respective religions and beliefs. On the contrary, it will not be acceptable if the Marriage Law regulates polygamy for those whose religious laws do not recognize the practice of polygamy. Thus, the difference in such regulation is not a form of discrimination, because the regulation does not discriminate any party, but instead, it regulates according to which matters are necessary, while discrimination is the act of giving different treatments towards two similar issues.

The articles in the Marriage Law which state the reasons, requirements and procedures of polygamy, are none other than an effort to guarantee the recognition of the rights of wives and future wives the exercise of which becomes their husbands' responsibility as the ones engaging in polygamy in the context of realizing the objective of a marriage. Thus, such an effort cannot be construed as being intended to eliminate

provisions which allow polygamous marriage. Thus the description of a condition which requires a husband who wishes to practice polygamy to be able to give fair treatment is as follows: They are not contrary to Article 28B (1) of the 1945 Constitution, because the provisions regarding the reasons, requirements and procedures of polygamy are not by any means limiting the right of every person to found a family and procreate through legitimate marriage. For Moslems, it may be achieved through either monogamous or polygamous marriage, under the condition that they fulfill the reasons, requirements and procedures of either type of the marriage as intended in the Marriage Law;

They are not contrary to Article 28E (1), Article 28I (1), Article 29 (1) and (2) of the 1945 Constitution either because the conditions required to be fulfilled by a husband to be able to practice polygamy do not in any way disallow every person to freely perform the religious observance of their adopted religions. Likewise, the 1945 Constitution only contains principles which guarantee the freedom to perform religious observance according to one's religion. The Marriage Law which regulates the intended reasons, requirements, and procedures of polygamy is not contrary to the abovementioned principles. In fact, the a quo Law reinforces such guarantee as expressly described in Elucidation on Article 2 (1) of the Marriage Law which reads, "By the formulation of this Article 2 Paragraph (1), there shall be no marriage outside the laws of one's respective religion and belief, in accordance with the 1945 Constitution. That which is intended by in the laws of one's respective religion and belief shall include the provisions of applicable laws for his/her religion and belief insofar as they are not contrary to or otherwise provided in this Law".

g. Decision Number 16/PUU-V/2007

The Constitutional Court of Indonesia passed a decision in the case of Petition for Judicial Review of Law 12/2003 (the General Elections Law). The Court is of the opinion that the provisions of Article 9 (1) and (2)

of the General Elections Law related to Electoral Threshold (ET) are not contrary to Article 28I (2) of the 1945 Constitution regarding the right to be free from discriminatory treatments because the aforementioned requirements to be able to participate in the following general elections apply to all political parties after having democratically passed the competition through general elections. Whether or not the ET provision is fulfilled as the requirements to participate in the following general elections depends on the relevant political parties and the constituents' support, and therefore it will not imply that the law is flawed if such requirements are not fulfilled. Such matter is also not discrimination according to the human rights perspective as intended in the Human Rights Law and ICCPR.

Based on the General Elections Law, it is true that political parties which have obtained the a status as a legal entity according to the Political Parties Law cannot automatically participate in general elections, since they are still obliged to fulfill the requirements provided for by the General Elections Law, such as administrative verification and factual verification performed by the General Elections Commission (vide Article 7 of the General Elections Law), and hence the existence of political parties and the participation of political parties in general elections are two distinct issues and not to be confused. At the very least, such matters are the legal policy of the legislators and such policies are not contrary to the 1945 Constitution because in fact, the 1945 Constitution has in fact mandated the freedom for legislators to regulate such matters, including the requirements to participate in the following general elections by means of the ET provision.

h. Decision Number 11/PUU-VI/2008

The Constitutional Court of Indonesia passed a decision in the case of Petition for Judicial Review of Law Number 32 Year 2004 regarding the Regional Government (Law Number 32/2004) and Law Number 29 Year 2007 regarding the Provincial Government of the Special Capital

Region of Jakarta as the Capital of the Unitary State of the Republic of Indonesia (Law Number 29/2007) against the 1945 Constitution. The Petitioner argues that the regulation which places the autonomy of the Special Capital Region of Jakarta only at the provincial level as provided for in Article 227 paragraph (2) of Law Number 32/2004, is a discriminatory treatment towards the people of Jakarta. According to the Petitioner, the people's right to elect and be elected has been impaired, since the option is limited to only members of the People's Legislative Assembly, the Regional Representative Council, the President and the Vice President, members of the Regional People's Legislative Assembly and the Governor, and therefore it is considered contradictory to Article 28I paragraph (2) of the 1945 Constitution.

The Court disagrees with such argument. The absence of the Petitioner's right to be elected as the mayor of the Special Capital Region of Jakarta, and the absence of the right of Jakarta's people to elect members of Regional People's Legislative Assembly of municipality/ regency in the Special Capital Region of Jakarta, cannot be regarded as discrimination because it is equally applicable to all citizens without exception or discrimination. Moreover, the granting of limited autonomy at the level of the Special Capital Region of Jakarta Province is irrelevant to the consideration of unequal treatment which may cause constitutional impairment to the citizens due to the fact that they cannot elect and be elected as a regent/mayor and members of the Regional People's Legislative Assembly of regency/municipality in Jakarta. Such impairment may possibly arise when the position of regent/mayor and members of the Regional People's Legislative Assembly of regency/municipality in Jakarta are indeed directly elected by the people, but there are certain people whose right to elect and/or be elected is somehow hindered. With the special regulation of the Special Capital Region of Jakarta in Law regarding Regional Government and Law regarding the Government of the Province of Special Capital Region of Jakarta, the autonomy has

been placed at the provincial level, so there will be no citizen losing the right to elect and/or be elected.

Likewise, the Petitioner's argument that Article 227 paragraph (2) of Law Number 32/2004 and Articles 19 and 24 of Law Number 29/2007 are contradictory to Article 27 paragraph (1) of the 1945 Constitution, "All citizens shall have an equal position before the law and government and shall be obligated to uphold such law and government, without exception". The regulation which places the autonomy of the Special Capital Region of Jakarta only at the provincial level renders the direct election of regent/mayor and members of the Regional People's Legislative Assembly of regency/municipality by the people within Jakarta's territory unnecessary. It has no implication whatsoever on the equal position of citizens before the law and government. All citizens shall be entitled to elect and/or be elected to assume the existing governmental positions in the government system of Indonesia without exception, insofar as the requirements pertaining thereto are met. The Court is of the opinion that such regulation is not contradictory to the 1945 Constitution.

i. Decision Number 12/PUU-VI/2008

The Constitutional Court of Indonesia passed a decision in the case of petition for judicial review of Law Number 10 Year 2008 concerning General Elections of the Members of the People's Legislative Assembly (DPR), the Regional Representative Council (DPD) and the Regional People's Legislative Assembly (DPRD) [Law Number 10/2008], against the Constitution the 1945 Constitution. The Petitioners question the constitutionality of Article 316 Sub-Article d of Law 10/2008 where it is written, "having seats in DPR RI from the result of the 2004 General Elections". Basically, the Political Parties Participants in the 2004 General Elections which do not fulfil the provisions of Article 315 of Law 10/2008 are supposed to have no more right to become participants in the 2009 General Elections, because they do not fulfil the electoral threshold

provisions, except if they fulfil the provisions of Article 9 Paragraph (2) of Law 12/2003. The Court is of the opinion that the provision of Article 316 Sub-Article d of 10/2008 is not clear in its *ratio legis* if related to the transition period from the electoral threshold to parliamentary threshold principle.

This means that the issue is whether Article 316 Sub-Article d of Law 10/2008 is intended to give convenience to become participants in the 2009 General Elections to all Political Parties Participants in the 2004 General Elections which actually do not fulfil the stipulated electoral threshold, or because of the consideration that the Law 10/2008 adopts the parliamentary threshold, then the convenience is limited to be applied on Political Parties which already have seats in the parliament (DPR). If the intention is to give such convenience, then supposedly all Political Parties Participants in the 2004 General Elections 2004 shall automatically be able to become participants in the 2009 General Elections, without having to go through the verification process by KPU, whether administrative verification or factual verification. If the intention is to give limited convenience, then supposedly, such convenience is in line with the provisions of Article 202 Paragraph (1) of Law 10/2008, namely to fulfil the minimum limit of vote acquisition of 2.5% (two point five percent) of the number of the nationally valid votes, certainly based on the result of the 2004 General Elections, but not based on the seat acquisition as provisions in Article 316 Sub-Article d of Law 10/2008. Besides, the value of seats in the system of the 2004 General Elections does not always reflect the number of votes acquired where there are Political Parties whose national vote acquisition is more than the vote acquisition obtaining seats in DPR.

The provisions of Article 316 Sub-Article d of Law 10/2008 have indeed shown unequal and unjust treatment towards Political Parties Participants in the 2004 General Elections that do not fulfil the electoral threshold [Article 9 Paragraph (1) of Law Number 12/2003 juncto Article

315 of Law Number 10/2008]. Such unjust treatment is shown by the fact that are Political Parties that only gained one seat in DPR, even though their vote acquisition was less than that of the Political Parties that do not have seats in DPR, but could be automatically free to become participants of in the 2009 General Elections; whereas the Political Parties which had more vote acquisition but did not obtain seats in DPR, have to go through a long process to be able to participate in the 2009 General Elections, namely through the administrative verification or factual verification phase conducted by KPU.

j. Decision Number 22-24/PUU-VI/2008

The Constitutional Court of Indonesia passed a decision in the case of petition for the Judicial Review of Law Number 10 Year 2008 regarding the General Election of Members of the People's Legislative Assembly, Regional Representative Assembly, and Regional People's Legislative Assembly (Law Number10/2008) against the 1945 Constitution. According to the Court, the provision of Article 214 sub-articles a, b, c, d, and e of Law Number 10/2008 stipulating that the elected candidate is the candidate acquiring more than 30% (thirty percent) of the the Voter's Denominator (BPP), or positioned at smaller candidacy number, if there is no candidates acquiring votes of 30% (thirty percent) of the BPP, or positioned at smaller candidacy number, those acquiring votes of 30% (thirty percent) of the BPP more than the proportional seats acquired by a political party participating in the General Election is unconstitutional. It is unconstitutional because it is contradictory to the substantive meaning of the sovereignty of people as described above and qualified as contradictory to the principle of justice as set forth in Article 28D paragraph (1) of the 1945 Constitution. It constitutes a violation of the sovereignty of people and their equity if the people's aspiration as reflected in their choice is disregarded in designating the legislative members. If there are two candidates acquiring extremely different votes, it is inevitable that the candidate acquiring the majority

vote is conquered by the candidate acquiring the minority vote because he/she assumes a position with a smaller candidacy number.

With the recognition of equality and opportunity before the law as adopted in Article 27 paragraph (1) and Article 28 D paragraph (3) of the 1945 Constitution, it means that every legislative member candidate has equal position and opportunity before the law. The application of different legal provisions for two similar conditions is as unfair as applying a similar legal provisions for two different conditions. According to the Court, the provision of Article 214 of Law Number10/2008 contains a double standard so that it may be deemed as unfair as it applies different laws for similar condition. The Court states, It is true, Indonesia has accepted a policy of affirmative action, which originates from Convention to Eliminate All Forms of Discrimination Against Women (CEDAW), however because in the petition the Court is given the option between the principles provided for in the 1945 Constitution and the demand for policy based on the CEDAW, the 1945 Constitution must be prioritised. Insofar as it is related to the provision of Article 28H paragraph (2) of the 1945 Constitution, whereas "every person shall be entitled to obtain special treatment" the stipulation of 30% (thirty percent) quota for woman candidate and one woman candidate from every three legislative candidates, the Court is of the opinion that it has met the provision on special treatment.

k. Decision Number 56/PUU-VI/2008

The Constitutional Court of Indonesia passed a decision in the case of petition for Judicial Review of Law Number 42 Year 2008 regarding the General Election of President and Vice President (Law Number 42/2008) against the 1945 Constitution. The substance of the formulation of Article 1 sub-article 4, Article 8, Article 9, and Article 13 paragraph (1) of Law Number 42/2008 is to determine that the Candidate Pair of President and Vice President shall be nominated and registered by a political party or coalition of political parties participating in the general

election (meeting the requirements) prior to the implementation of the general election. Such formulation according to the Court is not discriminatory because any person meeting such requirements may be nominated and registered by a political party or coalition of political parties to become President and/or Vice President without having to become the Management or Member of a Political Party.

The Court states, in a condition where people are free to establish political parties at present, a candidate may establish his/her own party along with the vision and mission of the party which is going to be established if he/she is not interested in the existing parties without any obstacle so that the reason for the nomination of President beyond political parties shall be irrelevant or groundless.

l. Decision Number 3/PUU-VII/2009

The Constitutional Court of Indonesia passed a decision in the case of Petition for judicial review of Law Number 10 Year 2008 concerning General Elections of the Members of the People's Legislative Assembly (DPR), the Regional Representative Council (DPD) and the Regional People's Legislative Assembly (DPRD) [Law Number 10/2008], against the Constitution the 1945 Constitution. The Petitioners argue that Article 202 paragraph (1) of Law Number 10/2008 violates the provision of Article 28D paragraph (1) of the 1945 Constitution which reads, "Every person shall have the right to the recognition, the guarantee, the protection and the legal certainty of just laws as well as equal treatment before the law" and is also contradictory to Article 28D paragraph (3) of the 1945 Constitution which reads, "Every citizen shall have the right to obtain equal opportunities in government." According to the Court, the Parliamentary Threshold policy stipulated in Article 202 paragraph (1) of Law Number 10/2008 absolutely does not disregard the principles of Human Rights contained in Article 28D paragraph (1) and paragraph (3) of the 1945 Constitution, since every person, every citizen, and every Political Party Participating in the General Election is treated equally

and obtains equal opportunity through democratic competition in the General Election. Indeed, there is a possibility that there are parties that succeed and those that fail in a competition referred to as General Election, but the chance and opportunity remain equal.

The Petitioners also argue that Article 202 paragraph (1) of Law Number 10/2008 is discriminatory and irrational, so that it is contradictory to Article 28I paragraph (2) of the 1945 Constitution which reads, "Every person shall have the right to be free from discriminatory treatment on any basis whatsoever and shall have the right to obtain protection against any such discriminatory treatment." With regard to such argument, the Court is of the opinion that the provision of Article 202 paragraph (1) of Law Number 10/2008 absolutely does not contain discriminatory nature and elements, since it is only applied objectively to all Political Parties Participating in the General Election and all candidate members of the People's Legislative Assembly from the Political Parties Participating in the General Election without any exception, but also that there are no factors of discrimination of race, religion, gender, social status, et cetera as intended by Law Number 39 Year 1999 regarding Human Rights and International Covenant on Civil and Political Rights (ICCPR).

2. The Limitation of Human Rights and the Principle of Proportionality

Article 29 Paragraph (2) of the Universal Declaration of Human Rights states, "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order, and the general welfare in democratic society". This limitation is almost entirely similar to the limitation formulated in Article 28J Paragraph (2) of the 1945 Constitution which reads, "In the enjoyment of their rights and freedoms, each person is obliged to submit to the limits determined by law, with the sole purpose of guaranteeing recognition and respect for the rights of others and to fulfil

the requirements of justice and taking into consideration morality, religious values, security, and public order in a democratic community."

The Constitutional Court of Indonesia rarely discusses Article 28J Paragraph (2) of the 1945 Constitution. Instead, its consideration refers to Decision Number 065/PUU-II/2004. "Although the Court is of the opinion that the overriding of the principle of non-retroactivity is justifiable, it is not the intent of the Court to state that such overriding can be undertaken at any time without any limitations. The 1945 Constitution itself, Article 28J Paragraph (2), as described above, has affirmed the limitation, namely that the principle of non-retroactivity can be overridden only to guarantee the recognition and respect of the rights and freedom of others and to fulfil fair demand in accordance with considerations of morality, religious values, security and public order in a democratic society."

According to Maruarar Siahaan, Article 28J paragraph (2) of the 1945 Constitution explicitly states that the restriction is only imposed by such law with a sole purpose to, "guarantee the recognition of and the respect for other persons' rights and freedom and fulfil fair demand in accordance with the considerations of morality, religious values, security, and public order in a democratic society". In fact, Article 28J paragraph (2) of the 1945 Constitution also includes a benchmark, which can be traced back to the principle of the constitution, namely proportionality, which also constitutes the main principle required by rule of law. Such principle is a benchmark or ground for justification. The restriction imposed through the law justifies the restriction on the right to democracy or people's sovereignty and human rights. The three benchmarks that have to be shown when applying the principle of proportionality to the restriction of basic rights of citizens in order to be considered valid and not in contradiction to the constitution are as follows:

1. The law restricting human rights constitutes a proper effort for accomplishing a purpose;

2. The instrument used to restrict such rights and freedom is required so as to achieve a stipulated legal purpose;
3. Burden on the foregoing restricted right must be proportional or equal to the benefits guaranteed by such law.

In cases concerning rights to respect of privacy, freedom of expression and freedom of peaceful assembly and association, the Constitutional Court of Turkey also adopted the principal of proportionality. It was stated by the President of the Constitutional Court of Turkey, Zuhtu Arslan at the International Symposium on Constitutional Complaint, Jakarta, 15–16 August 2015. “In cases concerning the right to respect privacy, freedom of expression and freedom of peaceful assembly and association, the Turkish Constitutional Court adopted also a rights-based approach to the criteria of necessity of a democratic society and to the principal of proportionality. As I said, Turkish Constitutional Court intended to the condition of legality in a very liberal sense and more strict sense to protect rights and liberties. It’s a kind of precondition for respecting rights and liberties. But, you won’t if any intervention restriction on any rights as prescribed by law, this restriction must also be necessary in a democratic society and this intervention must be proportionate to the legitimate aims of, for instance, providing public interest or prevention of crimes.”

3. Indonesia’s Commitment on International Human Rights

Some articles of the Universal Declaration of Human Rights especially those regarding the principle of equality and prohibition of discrimination can be found in Stipulation of the People’s Consultative Assembly of the Republic of Indonesia Number XVII/MPR/1998 regarding Human Rights, Law Number 39 Year 1999 on Human Rights and the 1945 Constitution after the 1999-2002 Amendment. However, based on Statements of the Government and statement of the People’s Legislative Assembly on Decision Number 065/PUU-II/2004, the Stipulation of the People’s Consultative Assembly of the Republic of Indonesia Number XVII/MPR/1998, applicable at that time,

assigned high level state institutions and all government apparatus to respect, uphold and disseminate the interpretation of human rights to the general public and to immediately ratify various UN Human Rights Instruments as long as they are not contradictory to Pancasila and the 1945 Constitution. Related to that, The Constitutional Court of Indonesia in Decision Number 055/PUU-II/2004 explained:

> "The basic rights set forth in the abovementioned articles of the Constitution—respectively non-discrimination, equality before the law and right to equal treatment before the law with no discrimination—are the basic principles in the protection of human rights, while the Constitution provides no clear definition of the principles, so that the Court should also consider the national and international instruments of human rights, since as a member of the United Nations, the state has the moral and legal responsibility to uphold such instruments of human rights which have been accepted by the Republic of Indonesia."

According to Maruarar Siahaan, the adoption of Human Rights in the 1945 Constitution as the basic norm has a consequence. Human Rights shall become the benchmark to judge the constitutionality of law that affects and relates to the dignity and status of persons. In interpreting the provisions in the principal part of the 1945 Constitution, the development and interpretation of relevant concepts need to be observed. Moreover, the ratification of Human Rights instruments, such as ICCPR and International Covenant on Economic, Social and Cultural Rights and the entry of the Republic of Indonesia into the United Nations Human Rights Council, have created Indonesia's commitment to international obligation. This commitment, which has arisen from the international convention and participation in international organisations, will also give colour to how the Constitutional Court as a State Institution understands the constitutional norms stated in the 1945 Constitution.

The Constitutional Court of Indonesia often uses International Human Rights to strengthen the consideration of decisions, especially in cases related to the principle of equality and the prohibition of discrimination. However, the Court still uses 1945 Constitution as primary roles.

Important decision to show that condition is in Decision Number 22-24/PUU-VI/2008 that states:

> "It is true, affirmative action is the policy that has been accepted by Indonesia which originates from Convention to Eliminate All Forms of Discrimination Against Women (CEDAW), however because in the petition the Court is given with the options between the principles provided for in the 1945 Constitution and the demand for policy based on the CEDAW, the 1945 Constitution must be prioritized."

III. CONCLUSION

Former Justice Maruarar Siahaan states, "The presence of a Constitutional Court in a new democracy, as an institution needed for the strengthening of democracy and human rights protection in a transitional period." Based on it's 10 years of experiences, The Constitutional Court of Indonesia has given tremendous contribution for the protection of human rights and the advancement of democracy and nomocracy, especially for the establishment of the principle of equality and the prohibition of discrimination based on 1945 Constitution and the principle of proportionality.

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