

Human Rights Protection and Constitutional Review: A Basic Foundation of Sustainable Development in Indonesia

Pan Mohamad Faiz *

*Faculty of Law, University of Delhi
Chhatra Marg, New Delhi - INDIA*

Email: pan.mohamad.faiz@gmail.com

Website: www.panmohamadfaiz.com

Abstract— Many people strongly believe that rising the challenge of sustainable development can help the country go forward in a better direction. One of the best approaches for promoting the sustainable development of Indonesia can be viewed from the perspective of human rights protection of the people. Basically, sustainable development encompasses three pillars based on environmental, economic, and social values that are interdependent and that mutually reinforce human rights. Moreover between sustainable development and human rights there is an inseparable relationship and a respect for human rights that has been recognized as a prerequisite for development. In this context, the current paper seeks to present an integrated conception and the relationship between these two formations. The paper also presents the measures of human rights protection, particularly constitutional review mechanism before the Court as the newest instrument established after the amendment of 1945 Constitution.

Index Term— Constitutional Complaint, Constitutional Review, Human Rights, Indonesia, Sustainable Development

I. INTRODUCTION

According to the Human Development Report 2007, launched by the United Nation Development Program, the Human Development Index (HDI) for Indonesia is 0.728, giving the country a ranking of 107th out of 177 countries, and 7th among the Southeast Asian countries.¹

One of the most significant reasons for this situation is the drawbacks caused by sustainable development in Indonesia. At the heart of the problem, therefore, people are trying to find solution how to deal with promoting the sustainable development of Indonesia. In my opinion, an alternative approaches can be viewed from the perspective of human rights protection for the people.

This approach comes from the following reasons: *First*, sustainable development encompasses three pillars based on environmental, economic, and social values that are interdependent and that mutually reinforce human rights; *Second*, between sustainable development and human rights

there is an inseparable relationship and a respect for human rights that has been recognized as a prerequisite for development, particularly on the right to development.

To understand it simply, for instance, the ability to participate in sustainable development is hindered when fundamental human rights are threatened by a lack of food, health, education, shelter, freedom of expression and the right to political participation. In other words, without respect for human rights, the ability of people to move toward a sustainable future will be hindered.

Furthermore, development is unsustainable where the rules of law and equity do not exist; where ethnic, religious or sexual discrimination is rampant; where there are restrictions on free speech, free association, and on the media; or where large numbers of people live in abject and degrading poverty.

The Constitution of Indonesia has clearly provided provisions of human rights protection under Chapter XA as the fundamental rights of citizens. The legal system of Indonesia is based on basic premise of supremacy of the Constitution whereby the Constitution is given the highest authority. Consequently, the protection of human rights becomes imperative as a prerequisite for development.

Then the question arises, what mechanism can protect human rights as constitutional rights of citizens? According to Danie Brand, a concrete way to deal with human rights protection is to challenge the state and constitutional issues through the courts.² The constitutional review before the Constitutional Court can be one of the best mechanism in this context.

II. GENERAL CONCEPTION

Before going into the main part of this paper and its analysis, let us observe the meaning of some related terminologies in this paper in order to get a common understanding about the conceptions that we are going to discuss.

A. Sustainable Development

* Pan Mohamad Faiz is a postgraduate student in *Comparative Constitutional Law* at Faculty of Law, University of Delhi. He is the President of Indonesian Students Association in India.

¹ The Human Development Index Report of Indonesia 2007/2008 is available at http://hdrstats.undp.org/countries/country_fact_sheets/cty_fs_IDN.html, last accessed March 20th, 2008.

² See Danie Brand, 'Introduction to socio-economic rights in the South African constitution' in D. Brand and C Heyns, Eds., *Socio-economic Rights in South Africa*, Pretoria University Law Press, 2005, pp. 38-39.

The meaning of sustainable development has been defined in various ways, but this expression generally dates back to Report of the World Commission on Environment and Development (WCED), *Our Common Future* (the Brundtland Report) of 1987. Its understanding is the most frequently adopted by many people and institutions.³

“Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts:

- *the concept of needs, in particular the essential needs of the world's poor, to which overriding priority should be given; and*
- *the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs.”*

From the perspective of international law framework, Dominic McGoldrick suggested that sustainable development can be structurally conceived as having a pillared as temple-like structure. Those pillars are composed from several International law fields, namely international environmental law, international economic law and international human rights law.⁴ The center of this paper will be more focused on the latest framework.

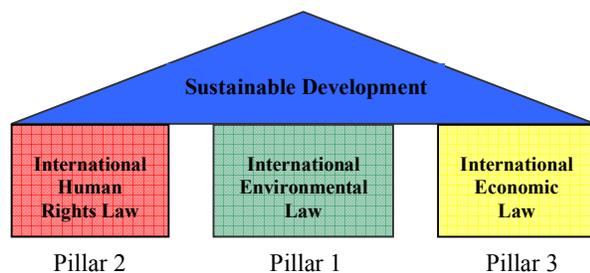


Fig. 1 Sustainable Development Pillars based on International law framework.

B. Human Rights

Broadly speaking, human rights are those fundamental rights to which every man inhabiting any part of the world entitled by virtue of having been born a human being, because these rights are required for the full and complete development of human personality.⁵ Over these years, however, even entitlements to socio-economic demands are also clubbed with human rights.⁶

Human rights are institutionalized by means of their transformation into positive law. When human rights are guaranteed by a written Constitution, they become unenforceable fundamental rights. The foundation of

fundamental rights is essentially a foundation for judicially enforcing human rights.⁷

Before examining the human rights protection chapter of this paper, it is pertinent to observe Clarence Dias' notions on the characteristics, principles and the human right based-approach in order to build a common understanding about human rights.⁸

1) *Characteristic*: Human rights are universal, indivisible, inalienable, interdependent and interrelated. Human rights are 'universal' and 'inalienable', thus across centuries, across civilization, across religions, human rights have existed for all human beings and for all peoples. Human rights are 'interdependent' and 'interrelated', thus the right to food is related to the right to work, the right to health, the right to social services, and most importantly, the rights of women. Certain rights such as freedom from discrimination are crosscutting and intimately related to the enjoyment of several other human rights. However, the 'indivisibility' of priorities and inter-relatedness of human rights do not preclude the setting of priorities in human rights programming.

2) *Principles*: Three human rights principles are of special relevance to development assistance. *Firstly*, 'participation'. The Declaration on the Right to Development elaborates as being free, active and meaningful. It further clarifies that participation is both an interdependent means and end of development; *Secondly*, 'non-discrimination'. The Declaration also stresses the principle of non-discrimination and equitable sharing in the benefit of development; *Thirdly*, 'rule of law'. This principle is of considerable relevance to governance programming. It stresses that no one is above the law. All persons are entitled to the equal protection of laws. It also states that for every right, there must be a remedy, and therefore, the right to a timely and effective remedy provides a challenge for programming in the sectors of legal and justice sector reform.

3) *Human Rights Based-Approach*: A human rights-based approach is founded on the conviction that each and every human being, by virtue of being human, is a holder of rights. A human right entails an obligation on the part of government to respect, promote, protect and fulfil such a right. The legal and normative character of human rights and the associated governmental obligations are based on international human rights treaties and other standards, as well as on national constitutional human rights provisions and laws.

Meanwhile, according to Indonesian Act No. 39 of 1999 concerning Human Rights and Act No. 26 of 2000 concerning Human Rights Court, the term of human rights is defined as:

³ World Commission on Environment and Development (WCED), *Our Common Future*, Oxford University Press, Oxford, 1987, p. 43.

⁴ Dominic McGoldrick, "Sustainable Development and Human Rights: An Integrated Conception", *The International and Comparative Law Quarterly*, Vol. 45, No. 4, Oct., 1996, pp. 2-7.

⁵ Hendrik Keptin, "The Morals of Post-Modern Human Rights", *Indian Socio-Legal Journal*, Vol. XIX, No. 2, 1993, p. 33.

⁶ See J.L. Kaul, et al., "Globalization and Human Rights: Some Remarks" in S.C. Raina, Ed., *Law and Development: An Anthology of Topical Legal Studies*, 2003, pp. 368-390.

⁷ D.D. Basu, *Comparative Constitutional Law*, Prentice Hall of India, 1984; See also Robert Alexy, "Discourse Theory and Fundamental Rights" in Agustin José Menéndez and Erik Oddvør Eriksen, Eds., *Arguing Fundamental Rights*, The Netherlands: Springer, 2006, pp. 17-22.

⁸ Clarence Dias, "Understanding the UN Common Understanding on a Human Rights-Based Approach to Development Programming", in C. Raj Kumar and DK. Srivastava, *Human Rights and Development: Law, Policy and Governance*, Hong Kong: LexisNexis, 2006, p. 318-321.

“a set of rights bestowed by God Almighty in the essence and being of humans as creations of God which must be respected, held in the highest esteem and protected by the state, law, Government, and all people in order to respect and protect human dignity and worth”.⁹

Based on the above explanation, those existential rights, which are essentially a manifestation of human dignity, provide the nucleus around which a number of other rights have been created, such as: freedom rights to several freedoms (e.g. freedom of speech, conscience, religion, assembly and association); equality rights (equality before the law and equal protection of the law, protection against discrimination on the grounds of sex, race, colour, religion, ethnic, or social origin, etc.).

Other rights are political rights (right to vote, equal access to public service, freedom to form a political party, right to petition, etc.); rights of economic life (right to own property, freedom of movement, right to work and free choice of employment, freedom of provide services); collective rights (the right of people to self-determination, protection of minorities and indigenous peoples, rights to development, etc.), procedural rights (especially for administration of criminal justice); or specific rights for children, the elderly, the sick, the disable, aliens, asylum seekers as well as for other vulnerable groups.

TABLE I
HUMAN RIGHTS TERMINOLOGY

Human Rights Terminology	
Human Rights (International Law)	Fundamental Rights (National Law)
Human Rights (to everyone)	Citizen’s Rights (for citizens)
Human rights (individual rights)	People’s rights (collective rights)

C. Correlation between Development and Human Rights

As explained above that sustainable development and human right to development has an inseparable relationship. Therefore the correlation between development and human rights ought to be one of obvious complementarities as well. Both human rights and development promote, and indeed are essential to, human well-being.

In many United Nation Declarations, the right to development has been frequently mentioned and further elaborated, for instance at the UN World Conference on Human Rights, 1993 (Vienna), the International Conference on Population and Development, 1994 (Cairo), the World Summit on Social Development, 1995 (Copenhagen) and the Fourth World Conference on Women (Beijing). Therefore, the right to development is a human rights undoubtedly guaranteed by international law.

All these Declaration have made three major contributions to the relationship between development and human rights, namely:¹⁰

- 1) Provided a normative redefinition of the very concept and rationale of development. It defined “development” as, a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals, in which all human rights and fundamental freedoms can be fully realized.
- 2) Affirmed that development is an inalienable human right of every human person and all peoples.
- 3) Prescribed certain normative principles about how development is to be undertaken. The development process was to be one which assured to every person and to all peoples active, free and meaningful participation in development and the right to fair distribution of the benefits from development.

D. Constitutional Review

In recent history, the concept of a constitutional adjudication has become a consistent feature of democratic governance, particularly in Europe. At present, however, this no longer applies only to Europe. Other countries across other continents have also incorporated this feature. One of the remarkable constitutional innovations of the amendment of the Constitution of the Republic of Indonesian (hereinafter called as 1945 Constitution) is the creation of the Constitutional Court which has a power of constitutional adjudication or it is referred as “constitutional review”.

1) *Constitutional Court*: The Court is an independent organ in relation to parliament, and even more, in relation to the executive. It is separate (and different) and independent of the regular judicature. The functions of regular courts (Supreme Court) and of Constitutional Court are different and do not coincide, though they complement each other in a determined way.

The constitutional court is a specialized court of constitutional adjudication organized apart from and independent of the regular judicial establishment. Powered by Article 24C of the 1945 Constitution, the Court is authorised to hold trials at the first stage and final stage and will produce final decisions on the following:¹¹

1. review of laws against the 1945 Constitution;
2. dispute settlement over the powers of state institutions whose authorities are mandated by the 1945 Constitution;
3. dissolution of political parties;
4. disputes on the results of general election; and
5. obligated to decide upon House of Representatives’ opinion in the case of impeachment based on the reasons stipulated in Article 7 of the 1945 Constitution.

2) *Constitutional Review*: The device of constitutional review is a salient characteristic of great number of modern constitutions. The decisive impact on the development of constitutional review was established in the famous *Marbury v. Madison* Case (1803), in which the Supreme Court of

⁹ See Art. 1 (1) Indonesian Act No. 39 of 1999 concerning Human Rights and Art. 1 (1) Indonesian Act No. 26 of 2000 concerning Human Rights Court.

¹⁰ Clarence Dias, *supra note*. 8, p. 310.

¹¹ See Art. 24C of 1945 Constitution and Art. 10 of Act No. 24 of 2003 concerning the Constitutional Court of the Republic of Indonesia.

America arrogated the power of judicial review¹² concerned with the conformity of statutes with the Constitution. It is basically akin to the institution proposed by Hans Kelsen in the 1920s and enacted in the Austrian Constitution of 1929, and widely adopted with many variations in European countries after the end of World War II.¹³

The basis of this mechanism that constitution is *Lex Superior* in democratic society which is the fundamental and highest law, foundation of the entire legal order, and a legal basis of the existence and functioning of constitutional and political systems, as well as the guarantor of rights and freedoms of man and the citizen.¹⁴ So that any legislative, executive or administrative act which contravenes the provision of the Constitution shall be annulled and the Court must invalidate them as unconstitutional.¹⁵

In the context of fundamental protection, the power of constitutional adjudication by reviewing laws against the Constitution, known as a "Constitutional Review", is the core of the jurisdiction of the Indonesian Constitutional Court.

Along these lines, seen in its entirety, the constitutional review of laws by constitutional courts appears in a modern democratic state like Indonesia as an efficient and appropriate instrument for the protection of the constitutional rights and thereby also of freedoms and rights of man and the citizen and democratic relations in general. This opens the prospect of further world expansion of constitutional review of laws exerted by constitutional courts.¹⁶

III. HUMAN RIGHTS GUARANTEES

When government do an act injuring their citizen either physically or non-physically, we are likely to describe those actions as violation of human rights. Appealing to human rights in order to describe and criticize the human rights violation has long been common not only among philosopher and lawyers but also activist, journalist, politicians and the public in many parts of the world. Talk of international human rights and constitutional rights has become common as a popular phenomenon nowadays.

In order to correctly evaluate the situation of the protection of human rights in Indonesia, we must first go deep into the various international documents that give guarantee of human rights. Moreover, we should also connect those documents with the provision of human rights protection stated in 1945 Constitution and our national laws.

A. International Bill of the Human Rights

¹² Judicial review is usually employed in the context of judicial power of reviewing not only constitutional validity but also administrative action or decision. It is mostly not used by the countries that follow continental constitutional review system (Austrian model) wherein they set up the review systems separately. Hence, the term of judicial review will not be interchangeably used in this paper.

¹³ Christopher F. Zurn, *Deliberative Democracy & the Institutions of Judicial Review*, Cambridge University Press, 2007. pp. 274-275.

¹⁴ See J. Djordjevic, *Constitutional Law*, 15ff, 86ff, Beograd, 1982.

¹⁵ D. Basu, *Commentary on the Constitution of India*, Vol. 1, 1955, p. 165.

¹⁶ Pavle Nikolić, "Constitutional Review of Laws by Constitutional Courts and Democracy" in M.P. Singh, Ed., *Comparative Constitutional Law*, V2:2:2 M9, LFF, India, 1998, pp. 29-42.

The international Bill of the Human Rights comprises of the following:

1) *The Universal Declaration of Human Rights, 1945*: The Declaration enumerated the basic postulates and principles of human rights in a most comprehensive manner. It dealt not only with civil and political rights, but with social and economic rights as well. Articles 2 to 21 deal with those civil and political rights which have been generally recognised throughout the world. Meanwhile, articles 22 to 27 of the Declaration deal with the economic and social rights.

The Declaration has exercised a profound influence upon the enunciation of people. It is primary proclamation of the international community's commitment to human rights as a common standard of achievement for all peoples and for all nations. Its message is one of hope, equality, liberation and empowerment. It is a message to all who are committed to freedom, justice and peace in the World.¹⁷

2) *The International Covenant on Civil and Political Rights, 1966*: The Covenant (ICCPR) consists of 53 Articles and it is divided into six parts. While Parts I, II and III various rights and freedoms are enumerated, the other parts are devoted with implementation procedures for effective realisation of these rights along with the final clauses. Articles 6 to 27 Part III of the Covenant enumerated specific substantive and civil and political rights.¹⁸

3) *The Covenant of Economic, Social and Cultural Rights, 1966*: The Covenant (ECOSOC) is consisted of 31 Articles which are divided in five parts. Part I deals with the rights of peoples to self-determination as provided in Article I of the ICCPR. Other rights of the individuals are enumerated in Part III of the Covenant

4) *The Optional Protocol to the International Covenant on Civil and Political Rights, 1966 and The Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of Death Penalty, 1989*: The purpose of adopting the Optional Protocol has been made clear in the Preamble. The Preamble to the Optional Protocol states that "considering" that in order further to achieve the purpose of the Covenant on Civil and Political Rights and the implementation of its provision it would be appropriate to enable the Human Rights Committee set up in Part IV of the Covenant to receive and consider as provided in the present Protocol, communications from individual claiming to be the victims of violations of any of the rights set forth in the Covenant.

Besides the International Bill of the Human Rights above, several remaining core human rights treaties that have been ratified by Indonesian Government, excluding ICCR Protocols, are:

¹⁷ H.O. Aggarwal, *International Law and Human Rights*, 13th Edition, Allahabad: Central Law Publication, 2006, p.735.

¹⁸ These rights set forth in the Covenant are not absolute and are subject to certain limitations, for instance in order to protect national security, public order, public health or morals or the rights and freedom of others.

- The International Convention on Elimination of Discrimination against Women/CEDAW (ratified by Act No. 7 of 1984);
- The International Convention on the Rights of the Child/CRC (ratified by Presidential Decree No. 36 of 1990);
- The International Convention against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment/CAT (ratified by Act No. 5 of 1998);
- The International Convention on the Elimination of All Forms of Racial Discrimination/ICERD (ratified by Act No. 29 of 1999).

B. Regional Protection on Human Rights

The Declaration of the Vienna Conference on Human Rights in 1993 stated that regional arrangements play a fundamental role in promoting and protecting human rights. They should reinforce universal human rights standards, as contained in international human rights instruments, and their protection. According to Aggarwal, the regional bases are likely to help the promotion of human rights in more effective manner than to machinery of the United Nations which is already very complex and over-burdened.

1) *European Convention on Human Rights*: The European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred as ECHR) was signed at Rome on November, 1950 to protect fundamental freedoms and human rights concerned with civil and political rights. It is still the only international human rights agreement providing such a high degree of individual protection whereby any person who feels his right have been violated under the Convention by a state party can take a case to the European Court of Human Rights. The decisions of the Court are legally binding and the Court has the power to award damages.¹⁹

In addition, European Social Charter is adopted by the Council of Europe with a view to develop and protect social and economic rights and to achieve greater unity between its members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage. The Charter protects rights such as to work, to just conditions of work, to safe and healthy working conditions, to freedom of association, to social security, to benefit from social welfare services etc.

2) *The American Convention on Human Rights*: The American Convention was adopted at the Inter-American Specialized Conference on Human Rights in 1969 known as 'Pact of San Jose de Costa Rica'. The Preamble of the Convention state that the essential rights of man are not derived from one's being a national of certain State, but are based upon attributes of the human personality, and they therefore, justify international protection in the form of a Convention reinforcing or implementing the protection provided by the domestic law of the American States. Beside the Convention, in American region there are also Inter-

American Commission on Human Rights and Inter-American Court of Human Rights

3) *African Charter on Human and People's Rights*: The African Charter, also known as Banjul Charter, was adopted on June 27, 1981 and entered into force on October 21, 1986. It is unique in the sense that it has given emphasis on 'people's rights' which reflect African social tradition of collective and group life. The individual is not seen as independent of society and it is subordinated to the requirement of group which has rights as well and the individual has duties to the group.²⁰ Moreover, the Charter established an African Commission on Human and People's Rights as well as African Court on Human and People's Rights to promote human and people's right and ensure their protection in Africa.

4) *Asian Human Rights Charter*: Asian Human Rights Charter is a people's charter. It was adopted in Kwangju, South Korea on May 17th, 1998 as part of an attempt to create a popular culture on human rights in Asia. The charter is presented to deepen the Asian debate on human rights, to present the people's views on human rights as against those of some Asian leaders who claim that human rights are alien to Asia. Asian Human Right Commission has been established also to promote political, social and legal reforms for ensuring human rights in the countries of the region. In sub-regional of Asia, particularly in Southeast Asia where Indonesia is located, the leaders of the 10 Association of Southeast Asia Nations countries signed the first ever ASEAN Charter.²¹ Based on Article 14 of the Charter, ASEAN will have separate human rights body. The article addresses human rights as follow:

ARTICLE 14: ASEAN HUMAN RIGHTS BODY

1. In conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN human rights body.

2. This ASEAN human rights body shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting.

While any mention of human rights in the ASEAN charter can be read as progress, clearly the details of implementation remain to be filled in.

Through this fascinating development, the promotion and protection of human rights in Southeast Asia is expected to become the inter-regional human rights replica for whole part of Asia.

C. Constitutional Protection on Human Rights

In this part we will address the human rights protection enshrined in 1945 Constitution as Constitutional guarantees of the citizens.

Prior to the Constitutional amendment in 2000, Indonesian Constitution only had one article directly related with human rights provision which is Article 28. But the current

¹⁹ See the Protocol 11 to the European Convention on Human Rights.

²⁰ H.O. Aggarwal, *supra note* 17, p. 859.

²¹ ASEAN Charter was signed in Singapore on November 20th, 2007.

Indonesian Constitution bears the imprint of the Universal Declaration of Human Rights as well as others International Bill of the Human Rights provisions.²² These provisions have been incorporated in Chapter XA entitled “Human Rights” following the 2nd amendment of 1945 Constitution by the People’s Consultative Assembly of Indonesia.

The second founding fathers of the 1945 Constitution were influenced by the concept of human rights and guaranteed most of human rights provisions contained in the Human Rights Declaration and Conventions. The Constitution provides number of rights to citizens in Chapter XA which have been termed as ‘fundamental rights’. The expression ‘fundamental’ denotes that these rights are inherent in all the human beings and are essential for the individuals for blossoming of the human personality and soul.

The following table is being given below to indicate the human rights provisions which have been incorporated in 1945 Constitution.

TABLE III
ICCPR *VIS-A-VIS* 1945 CONSTITUTION

Specific Rights	ICCPR	1945 Constitution
The right to life	Article 6	Article 28I (1)
Freedom from inhuman or degrading treatment	Article 7	Article 28G (2)
Freedom from slavery, servitude and forced labour	Article 8	Article 28I (1) and Article 28D (2)
Right to liberty and security	Article 9	Article 28G (1) and 28I (1)
Right of deprived to be treated with humanity	Article 10	Article 28G (2)
Freedom from imprisonment for inability to fulfil a contractual obligation	Article 11	-
Freedom of movement and to choose his residence	Article 12	Article 28E (1)
Freedom of aliens from arbitrary expulsion	Article 13	-
Right to a fair trial	Article 14	-
Non-retroactive application of criminal law	Article 15	Article 28I (1)
Right to recognition as a person before the law	Article 16	Article 28D (1)
Right to privacy, family, home or correspondence	Article 17	Article 28B (1), Article 28F & Article 28H
Freedom of thought, conscience and religion	Article 18	Article 28E (1), (2); Article 28I (1) and Article 29(2)
Freedom of opinion and expression	Article 19	Article 28 & Article 28E (3)
Prohibition of propaganda of war	Article 20	-
Right of peaceful assembly	Article 21	Article 28 and Article 28E (3)

²² The amendment of 1945 Constitution was done in four stages in 1999, 2000, 2001 and 2002. As a result, the original Constitution has grown from 16 Chapter to 21, from 37 articles to 73, from 49 clauses to 170 clauses. Another important thing elucidation of articles has been removed from the Constitution.

Freedom of association	Article 22	Article 28 and Article 28E (3)
Right to marry and found a family	Article 23	Article 28B
Rights of the child	Article 24	Article 28B
Right to take part in the conduct of public affairs, to vote and to be elected	Article 25	Article 27(1) Article 28D (3)
Equality before the law	Article 26	Article 27(2) and Article 28D
Rights of minorities	Article 27	Article 28C

TABLE IIIII
ECOSOC *VIS-A-VIS* 1945 CONSTITUTION

Specific Rights	ECOSOC	1945 Constitution
Right to work	Article 6	Article 27 (2) and Article 28D
Right to just and favourable conditions of work	Article 7	Article 27 (2)
Right to form and join trade unions	Article 8	Article 28 and Article 28F
Right to social security	Article 9	Article 28H (3)
Right relating to motherhood, childhood, marriage and the family	Article 10	Article 28B (1), (2) and Article 28G
Right to adequate food, clothing, housing and standard of living and freedom from hunger	Article 11	Article 27(2), Article 28A and Article 28H (1)
Right to physical and mental	Article 12	Article 28H
Right to education including a plan for implementing compulsory primary education	Article 13	Article 28C, Article 31(1) and (2)
Undertaking to implement the principle of compulsory education free of charge	Article 14	-
Right relating to science and culture	Article 15	Article 28C (1) and Article 31 (5)

The above tables show that most of the civil and political rights as well as the economic, social and cultural rights enshrined in the international human rights instruments also find mention in the Constitution of Indonesia, particularly in Chapter XA of Human Rights as fundamental rights.

However, there are certain rights which are contained in the international human rights instruments but have not been expressly mentioned in the Constitution. These rights are related with the imprisonment, trial, alien’s rights and the implementation of compulsory education free of charge, and many others. Nonetheless, it would not be correct to contend that the above rights are not recognized in national human right protections atmosphere, though they do not find express mention in the 1945 Constitution, these right has been placed in various national laws in Indonesia.

Several Indonesian regulations that have relevancy with human rights protection issue are:

- People’s Consultative Assembly Decision No. XVII of 1999 concerning Human Rights;

- Law No. 9 of 1998 concerning Freedom of Expression in Public Area;
- Law No. 8 of 1999 concerning Consumer Protection;
- Law No. 30 of 1999 concerning Human Rights;
- Law No. 26 of 2000 concerning Human Rights Court;
- Law No. 23 of 2002 concerning Children Protection;
- Law No. 23 of 2004 concerning The Elimination of Domestic Violence;
- Law No. 13 of 2006 concerning Protection of Witness and Victim;
- Presidential Regulation No. 65 of 2005 concerning National Commission of Anti-Domestic Violence;
- Presidential Decree No. 40 of 2004 concerning National Plan Action of Human Rights 2004-2009.

IV. HUMAN RIGHTS PROTECTIONS

A number of Declarations recognized as International Bill of Human Rights including other international treaties, have primary aim to protect the human rights. However, they shall be binding only on those States which have become parties to the treaties (*pacta tertiis nec nocent nec prosunt*). It is indeed commendable that Indonesia not only has become a party to a number of human rights conventions but also has implemented them by distinct legislations. Thus, all the human rights provisions stated in the Conventions shall be binding on Indonesian government.

In this context, human rights carry with them four correlative duties owed by the State, namely:²³

- 1) The duty to promote, which requires raising public awareness as to the right and procedures for asserting and protecting the right, and
- 2) The duty to respect, which requires refraining from interfering with the enjoyment of the right;
- 3) The duty to protect, which requires the prevention of violations of such rights by authorities of the state as well by third parties;
- 4) The duty to fulfill, which requires the state to take appropriate measures towards the full realization of the right.

These duties has been acknowledged as constitutional obligation for Indonesian government based on Article 28I (4) of 1945 Constitution. The article reads as follow:

“The protection, advancement, upholding and fulfilment of human rights are the responsibility of the state, especially the government.”

Principally, there are two basic approaches to working on human rights at national level; *first* is the reactive approach and *second* is the proactive approach. Both the approaches are complementary and reinforce one another wherein the reactive approach focuses on violations and the proactive approach focuses on prevention of violations and on securing the realization on human rights. One of the aspects of a preventive approach can be contributed by strengthening the mechanism

for the protection of human rights such as national human rights commissions, ombudsperson, the media and the judiciary.

The latest will be the main feature of our discussion due to the recent judicial trend of the Indonesian Courts. Particularly Constitutional Court is quite enthusiastic in using the 1945 Constitution as a tool of social transformation in promoting human rights protection. Through constitutional review mechanism, people who suffer because their fundamental rights have been violated can petition the Court. Furthermore, constitutional review enhances the protection of important individual rights enshrined in the Constitution, such as right to education, right to development, freedom of person, speech, assembly and conscience, and the right against torture and arbitrary detention.²⁴

Nonetheless, this mechanism has just been established for four years. Therefore it becomes more necessary for us to analyse deeply the system since too many Indonesian citizens are unaware of this new constitutional adjudication feature.

V. CONSTITUTIONAL REVIEW SYSTEM

Constitutional rights are meaningless if there is no machinery for their enforcements. The 2nd framers generations of 1945 Constitution were conscious about providing adequate provision for enforcement of fundamental rights provided in Chapter XA of the Constitution. Therefore, the Constitutional Court was established referred to Article 24C of 1945 Constitution as a protector and interpreter of the 1945 Constitution’s soul.

A. Constitutional Review Mechanism

The notion of this development lies from the doctrine of constitution as supreme law. One the Constitution is regarded as the supreme law of the land and the powers of all the other organs of government are considered as limited by its provisions, it follows that not only the legislature, but also the executive, and all administrative authorities, are equally limited by its provisions, so that any executive or administrative act which contravenes the provisions of the constitution must similarly, be void and the courts must invalidate them.

1) *Legal Standing*: To achieve the notion, thus Constitutional Court was given the authority to hold trials to solve the so-called constitutional disputes. According to Article 51 of Act No. 24 of 2003 concerning Constitutional Court, the parties who believe that their constitutional rights and/or authorities are disadvantaged by the issuance of any act can be the applicant for constitutional review (legal standing), and they are:

1. individuals, citizen of Indonesia;
2. union of customary law community, provided that it is still alive and in line with the community development and the principles of the Unitary State of the Republic of Indonesia as regulated by law;

²³ The duties are both positive (relating to acts of commission) and negative (relating to acts of omission), and may be either individual or collective. See Clarence Dias, *supra note*. 8, pp. 318-319; and H.O. Aggarwal, *supra note*. 17, p. 914.

²⁴ Ziyad Motala and Cyril Ramaphosa, *Constitutional Law: Analysis and Cases*, Oxford University Press, 2002, p. 54.

3. public or private legal entities, or
4. state institution.

2) *Trial and Decision*: After the petition has been registered, the Court will examine, conducts trial and decide cases in the Constitutional Court's plenary session attended by nine Constitutional Justices. The cases shall be decided by the Court referring to the 1945 Constitution based on evidences and the justice's discretion. The decision of the cases will be divided into three alternates:

1. Application is denied: In cases where the applicant do not fulfil the requirements stated in Article 51;
2. Application is granted: In cases where the application is reasonable (in material) and/or the disputed formulation of act does not fulfil the requirements of law formulation (in procedural);
3. Application is rejected: In cases where the disputed act does not contravene against the 1945 Constitution.

If the application is granted, thus the material content of the sub-article, part of the act, and/or the whole act are not legally binding anymore at the time the verdict is declared. The decision of the Court also attains a permanent legal force once the decision is announced in a final plenary session open to the public.²⁵

3) *Number of Cases*: From all of the cases that have been accepted and registered till December 31, 2007, the Constitutional Court has decided 174 cases or around 93.55% of the cases. Specifically on Constitutional Review cases, the Court has reviewed 63 Acts wherein four Acts have been declared void entirely and 19 Acts void partially. The result placed that every one out of four constitutional review cases have been declared unconstitutional.

As of late 2007, barely three years after its establishment, the Constitutional Court has decided 33 out of 133 cases of constitutional review, with the verdict that the laws reviewed were unconstitutional. Most of these cases concerned violation of human rights guaranteed under the Constitution, for instance, unconstitutionality has been declared in several following Acts:

- Act No. 1 of 1946 *juncto* Act No. 73 of 1958 concerning Criminal Penal Code
- Act No. 22 of 2001 concerning Oil and Gas;
- Act No. 20 of 2002 concerning Electricity Power;
- Act No. 20 of 2003 concerning National Educational System;
- Act No. 27 of 2004 concerning Truth and Reconciliation Commission;
- Act No. 40 of 2004 concerning National Social Security;
- Act No. 39 of 2004 concerning Placement and Protection of Indonesian Workers Abroad;
- Act No. 18 of 2006 concerning State Budget 2007.

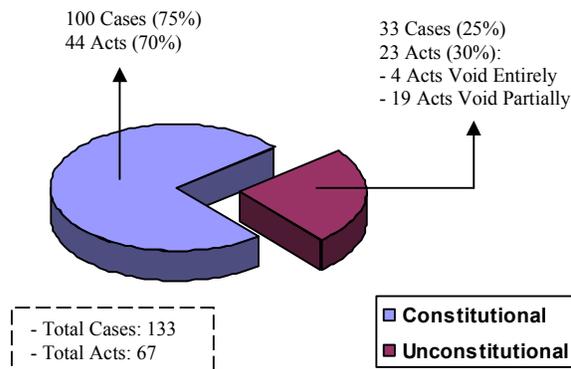


Fig. 2 Constitutional Review cases 2003-2007

B. Constitutional Complaint

From an overview of reviewed cases, we can say that constitutional review is conducive to the improvement of human rights protection and the concept of development by law. Nonetheless, when we deeply analyse we find the constitutional gap with this constitutional review mechanism. Both the 1945 Constitution and Constitutional Court Act are silent on the constitutional review apart from the Acts. The system merely allows the review of Act against 1945 Constitution not the review of other types of legislations. Meanwhile, the Indonesian Supreme Court only has authority to review ordinances and regulations made under the Acts against the Act itself.²⁶ Consequently, all government actions and government regulations believed to violate the provisions on human rights contained in the Constitution cannot be reviewed comprehensively either by the Constitutional Court or the Supreme Court.

According to Christopher F. Zurn in his Book entitled *“Deliberative Democracy and the Institutions of Judicial Review”*, Constitutional Court should be specialized not only in the function of constitutional review but also be the exclusive court for deciding constitutional complaints. From the particular proceduralist conception of deliberative democratic constitutionalism, he suggest that one of six core jurisdictional areas in which a constitutional court should ideally play the role of a protector of legitimacy-guaranteeing constitutional rules is review of any others legal norms despite the Act such as regulations or directives issuing from agencies with properly delegated powers.²⁷

An example that illustrates this ideal mechanism is Article 93(1) (no. 4a) of Basic Law of the Federal Republic of Germany (*Auslegungshilfe*), which provides that a “constitutional complaint” (*Verfassungsbeschwerde*) can be raised by anyone on the ground that his or her fundamental rights *qua* rights, listed in the first part of the Basic Law under the heading “*Grundrechte*”, or right contained in Articles 20(4), 33, 38, 101, 103, and 104, have been infringed by a public authority.²⁸

²⁵ See Jimly Asshiddiqie, *Hukum Acara Pengujian Undang-Undang (Constitutional Review Procedure)*, Jakarta: Konstitusi Press, 2005.

²⁶ See Article 24A (1) of 1945 Constitution and Article 31A of Act No. 5 of 2004 concerning Supreme Court.

²⁷ Christopher F. Zurn, *supra* note 13, pp. 274-300.

²⁸ See Robet Alexy, *supra* note 7, pp. 15-16.

From 1952 to 2005, the Federal Constitutional Court of Germany (*Bundesverfassungsgericht*) had disposed of an astounding 149,442 cases, 96.2 percent of which were constitutional complaints. Individual citizens in particular have relied heavily on the Court for vindication of rights that the state has allegedly violated. Nevertheless, roughly, only some 2.5 per cent of all constitutional complaints are accepted by a full senate, and these cases make up the bulk of the FCC's published opinion.²⁹ Moreover, the establishment of the European Court of Human Rights as one of regional protection on human right elements has brought the double protection for its citizens, national and at European level.

The constitutional complaint system has also been recognized in many other non-European countries. In Asia, Korean Constitutional Court has adopted constitutional complaint mechanism as enacted in Article 111 § 1, cl. 5 of Korean Constitution. Article 68 Section 1 of the Korean Constitutional Court Act says that a person who has had his constitutional rights infringed by any act or omission of public authority, "except for a court's decision," can lodge a constitutional complaint to the Korean Constitutional Court. Like the elements in Germany, the complaint should have exhausted other available judicial remedies. The period of claim, when the complainant can apply for the complaint, is restricted to a short period in the interest of legal stability. The period is sixty days in Korea and one month in Germany after knowing of the infringement.³⁰

Thus, in order to seek judicial remedies for human rights and an efficient remedy the defects in the system and current legislation as well as to safeguards human rights completely, constitutional review system in Indonesia have to be improved by giving some new features in the following manners:

- 1) The constitutional review system should be allowed to review the constitutionality of all type of legislation;
- 2) The mechanism of constitutional review should be modified into the form of centralized whereby judicial review of a constitution is exercised by a single judicial organ, preferably by Constitutional Court; and
- 3) Constitutional complaints should be added as another authority of Constitutional Court. The complaint can be lodged by an individual toward their constitutional rights.

Using three additional features of constitutional review mentioned above, we can promote the human rights protection of the people much better than before as the basic foundation of sustainable development in Indonesia.

VI. CONCLUSIONS

Making sense of Human rights protection in environmental, economic and social values is dreadfully important in building people's development. The accomplishment of basic rights

²⁹ Donald P. Kommers, "Germany: Balancing Rights and Duties" in *Interpreting Constitutions: A Comparative Study*, Oxford University Press, 2006, pp. 175-176. For updating the cases, see <http://www.Bverfg.de/cgi-bin/link.pl?entscheidungen>.

³⁰ Jibong Lim, "A Comparative Study of the Constitutional Adjudication Systems of the U.S., Germany and Korea", *Tulsa Journal of Comparative. & International Law*, Spring, 1999, pp. 150-153.

automatically will also bring the people to hold up the concept of sustainable development.

We are aware that Indonesia as a developing country has a long way to go to promote and protect human rights completely. Although the Vienna Declaration and Programme of Action reaffirms that the promotion and protection is the first responsibility of Government, however, the active participation of civil society acting in concert is vital to ensuring rule of law and the realisation of human rights. Indonesian Civil society can use the latest innovation of constitutional review mechanism in order to ensure the guarantee of constitutional rights and in promoting fundamental rights protection. With the practice of constitutional review, people will realize the importance of the fundamental rights and will lead to the implementation of sustainable development gradually. The declaration of Human Rights Charter in Southeast Asia is a progressive step towards promotion of human rights in the region as well.

To sum up, respecting right to development is a responsibility we each owe to current and future generations in Indonesia. The human rights protection of citizens, therefore, shall be recognized as the basic foundation to establish sustainable development in Indonesia.

ACKNOWLEDGMENT

This paper is prepared for the International Students' Scientific Meeting 2008 in Delft University of Technology, Delft, The Netherlands on 13-15 May 2008 organized by The Institute for Science and Technology Studies (ISTECS) and Indonesian Student Association in the Netherlands.

The writer would like to express his gratitude to Prof. Jimly Asshiddiqie, the Chief Justice of the Constitutional Court of the Republic of Indonesia, who encourages the writer all the way in completing the paper. The writer also gratefully acknowledges Professor J.L. Kaul, Professor of Law in International Human Rights and Constitutional Law at University of Delhi, for his useful comments on a previous draft of this paper.

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