

DIGITAL CONSTITUTIONALISM ERA IN THE DEVELOPMENT OF BANKING LAW IN INDONESIA

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Submitted: 30 June 2022 - Last revised: 31 August 2022 - Accepted: 5 September 2022

Abstract

Digitalisation has changed, bringing the world in an almost borderless direction, and impacting various fields. Banking law in particular has been disrupted by the rapid development of digitalisation, as well as shifting paradigms of thinking across the banking world. As a result of the digital economy era, conventional banking services have been forced to adapt to the development of the concept of digital constitutionalism. The digital economy era must provide better banking services to guarantee the protection of citizens' constitutional rights, especially related to the use of technology in banking services. This concept of the digital economy must be able to improve the quality of banking services in terms of ease and speed of access, efficiency, effectiveness, and optimal management of risk. Thus, it is expected that the development of the era of digital constitutionalism in banking law in Indonesia can provide a more optimal guarantee of protection of future constitutional rights protection for its citizens. This study describes the transitional process of the digital constitutionalism era in the development of banking law in Indonesia as a factual condition by using normative juridical research methods and library approaches, as well as comparative approaches. The study finds that the development of the digital constitutionalism era in banking law in Indonesia has progressed rapidly. This progress has benefitted users of banking services, but it also has led to a residual deviant behaviour due to the ease of access to technology.

Keywords: *banking law development, digital constitutionalism*

I. INTRODUCTION

The progress and ease of access to data and information in the current era of technology, has removed barriers and boundaries to various aspects or fields. This ease of access, which is almost unlimited, provides an excellent opportunity for everyone to develop their business in the field of cross-border services. The development of digital technology since the end of the 20th century, not only provides benefits and positive impacts, but also poses challenges in fulfilling the fundamental rights of individuals regarding

the right to privacy protection and data protection.¹ Digitalisation in various economic aspects encourages the development of the digital economy, namely the implementation of economic activities supported by digital technology and devices. One of the characteristics of economic digitalisation is the application of vertical networking, which means that the network does not recognise hierarchies or barriers. Tapscott interprets the digital economy as a socio-political phenomenon and an economic system that has characteristics as an intelligence space, including information, various access instruments, capacity, and ordering information.²

Based on data released by AISPI (Association of Internet Service Providers Indonesia), since 2017 there has been an increase in the number of internet users reaching 132.7 million people or approximately 51.5% of the 256.2 million total population in Indonesia.³ In 2020, the number of internet users in Indonesia increased by 73% or 194.844 million people, out of the total population in Indonesia that reached 266.91 million people.⁴ The enormous growth of internet users has become one of many props to the development and economic growth which has significantly grown the social economy.

Digital financial innovation has spread massively in the core of human life dynamics that have become more complex, coining the term ‘constitutional horizontal integration.’ Horizontal integration is a form of acquisition or the merger of several links in the supply chain in a similar industry, to run a business at the same level. *Horizontal integration* is a kind of business strategy, where several companies merge in order carry on the same level operational system in a certain industry. The benefits of horizontal integration include that a company can rapidly grow the revenue and developed, expand markets, creating new variety of goods and services that could be offered and decrease the tendency of unhealthy business competition.⁵ Some of these characteristics is the spread of the Internet of Things (*IoT*) by internet users on digital platform, digital marketing, digital transactions, and digital logistics.⁶

¹ Giovanni De Gregorio, “The Rise of Digital Constitutionalism in the European Union,” *International Journal of Constitutional Law* 19, no. 1 (2021): 41–70, <https://doi.org/10.1093/icon/moab001>.

² Walt Crawford, *The Digital Economy: Promise and Peril in the Age of Networked Intelligence*, *The Journal of Academic Librarianship*, vol. 22, 1996, [https://doi.org/10.1016/s0099-1333\(96\)90098-1](https://doi.org/10.1016/s0099-1333(96)90098-1). This article was later updated in the published book by Don Tapscott, *The Digital Economy: 20th Anniversary Edition, Rethinking Promise and Peril In The Age of Networked Intelligence*, Mc Graw Hill Education, 2015.

³ Sinta Dewi Rosadi and Zahra Tahira, “Consumer Protection in Digital Economy Era : Law in Indonesia,” *Yustisia Jurnal Hukum* 7, no. 1 (2018): 81, <https://doi.org/10.20961/yustisia.v0i0.20144>.

⁴ APJII, “Di Balik Tren Edge Data Center Di Indonesia,” Buletin APJII, 2020, <https://apjii.or.id/download/file/BULETINAPJIIEDISI91Juli2021.pdf>.

⁵ Sandra Keiser and Phyllis G. Tortora, “Horizontal Integration,” *The Fairchild Books Dictionary of Fashion*, 2022, <https://doi.org/10.5040/9781501365287.1355>.

⁶ Xiaojuan Jiang, “Digital Economy in the Post-Pandemic Era,” *Journal of Chinese Economic and Business Studies* 18, no. 4 (2020): 333–39, <https://doi.org/10.1080/14765284.2020.1855066>.

Digitalisation and technological development has changed the banking world bringing it more “down to earth” and accessible by anyone anytime without any borders of time or space. Digital banking can be said to implement Bill Gates’ statement in 1994 that, “*banking is necessary, banks are not.*”⁷ The development of digital banking businesses that focus on efficiency, transparency, and customer satisfaction could be more achievable through technology support. The conventional banking system should be able to adapt rapidly to adjust in order to face challenges that are brought by digital banking and fintech companies. Both explore and bring innovation through technology, to create banks in the future that promote the importance of digital touch, by providing mobile banking facilities which are customer-centric. However, from the description above arise some questions on how the development of banking should be done to face the phenomenon of digital constitutionalism. Therefore, this article would like to answer these following questions: 1) is Indonesian digital constitutionalism in line with digital constitutionalism as implemented in the European Union, and how are the parameters of implementation of digital constitutionalism? And 2) is there a sufficient banking legal framework that fulfils digital constitutionalism so that it provides fairness and justice for all Indonesians?

II.A.1. Defining Constitutionalism

Constitutionalism according to Carl J. Friedrich is “*an institutionalised system of effective, regularised restraints upon governmental action,*” namely an idea that government is a collection of activities organised by and on behalf of the people, but imposing some restrictions so that the power exercised by the government is not abused.⁸ Another expert opinion, namely that of Herman Heller,⁹ distinguishes the notion of constitution as constitution and *grundgesetz*, and defines constitution as *Constitutio* *flerfassung*, and divides constitution into three element:

- 1) The constitution reflects the political life in society as a reality (*Die politische Verfassung als gesellschaftliche Wirklichkeit*) and is not yet a constitution in the legal sense (*ein Rechtsverfig*), or in other words, the constitution is still merely a sociological or political sense;
- 2) The constitution in the sense of law whose legal elements are sought from the constitution that lives in society to be used as a unitary rule of law (*Die verselbstandigte Rechtsverfassung*); and

⁷ Jakarta Post, “The Future Banking is Not for Banks”, <https://www.thejakartapost.com/academia/2020/10/19/the-future-of-banking-is-not-for-banks.html>

⁸ Dahlan Thaib, *et.al, Teori dan Hukum Konstitusi*, Jakarta: Rajawali Press, 1991, hlm. 22.

⁹ Ni'matul Huda, *Lembaga Negara dalam Masa Transisi Demokrasi*, UII Press, Yogyakarta, 2007, hlm.4.

- 3) *Die Geschriebene Verfassung*, namely the constitution in the written sense and codified as a state document.

Within the scope of a democratic rule of law, a constitutional system which is one of the ideas of the rule of law imperative, has the consequence that a rule of law must follow the four imperative principles of constitutionalism, namely:

- 1) All political power must be subject to the law;
- 2) The existence of guarantees and protection of human rights;
- 3) A clean and independent judiciary; and
- 4) Public accountability, as the main crux of people's sovereignty.¹⁰

Experts who adhere to modernism by equating constitution with *grundgesetz* are C.F Strong and James Bryce. The opinion of James Bryce as quoted by C.F Strong¹¹ in his book defines a constitution as:

“a framework of political society (state) organised by and through law. In other words, the law stipulates the existence of permanent institutions with recognised functions and assigned rights. The constitution can also be said as a collection of principles that regulate the power of government, the rights of the governed (the people), and the relationship between the two. The constitution can be in the form of a small note, found in the form of a document that can be changed or amended according to the needs of the times; The constitution can also take the form of a separate set of laws and through special authority as constitutional law. The basics of the constitution can also be set out in one or two constitutions, the rest depends on the authority of the power of customs or habits.”

Walton W. Hamilton stated that “constitutionalism is the name given to the trust which men repose in the power of words engrossed on parchment to keep a government in order.” For the purpose of keeping a government in check, it is necessary to guaranty such arrangements so that the power dynamics in the political process can be limited and controlled. This idea naturally arises from the need to respond to the development of the relative role of general power in human life. Therefore, constitutionalism today is considered a necessary concept for every modern nation.¹²

The constitutionality of the economy and its management in Indonesia is regulated in the 1945 Constitution, specifically Articles 33 and 34, which contain the basics of economic management for the welfare of the people.

¹⁰ Bernard L. Tanya, dkk, *Ilmu Negara Beberapa Isu Utama*, Surabaya: Sukardi, 2005, hlm.130.

¹¹ C.F Strong, *Konstitusi-Konstitusi Politik Modern*, Nusamedia, Bandung, 2004, hlm. 15.

¹² M. Marzuki, *Konstitusi dan Konstitusionalisme*, *Jurnal Konstitusi*, vol. 7, 2010, <https://consrev.mkri.id/index.php/jk/article/download/235/231>.

The substance of the two articles was broadened after the fourth amendment to the 1945 Constitution to consist of nine paragraphs, five paragraphs in Article 33 and four paragraphs in Article 34. Post-reformation, policies and regulations in the economic sector, especially banking, should not contradict the 1945 Constitution. After the establishment of the Constitutional Court as the guardian of the constitution, there has been a mechanism for citizens to be able to test a regulation (in banking matters) if it is felt that there is a violation of the constitutional rights of citizens in the application of a norm. Constitutional review (judicial review), is one of the mechanisms to realise the principles of constitutionalism and the application of digital constitutionalism, in order to protect the constitutional rights of all Indonesian citizens.¹³

II.A.2. Constitutionalism and the Role of the Indonesian Constitutional Court

The Indonesian Constitutional Court has played a role in shaping banking law. This is in line with the increase in constitutional rights awareness marked by the judicial review petition filed by a group of Indonesian citizens. Regarding this issue, there have been at least three Constitutional Court Decisions related to the development of banking law. **First**, Constitutional Court Decision Number 102/PUU-XVIII/2020 concerning judicial review of Article 12A paragraph (1) of Law Number 7/1992. The Constitutional Court considered the position of commercial banks and rural banks that haven't explicitly been ruled as falling under the banking law to buy collateral, through collateral auction process to solve troubled loan problems. In fact, the troubled loan and collateral problems management would affect the rural banks' efforts and management of customers' collateral. It is due to the unbalanced position between rural banks and commercial banks. Therefore, the Constitutional Court through its decisions stated that the rural banks should be equal in position with commercial banks to take action to be able to participate in the purchasing collateral, through auction or outside of auctions in an effort to solve the matter of undercollateralised loans.

Second, Constitutional Court Decision number 109/PUU-XII/2014 that reviewed Law Number 10 of 1998 concerning Banking on Article 49 paragraph (2) letter b, specifically examining the "*for bank*" phrase. In this decision, the Constitutional Court held that the judicial/court decisions that have binding legal force (*inkracht van gewijsde*) becoming part of the legal provisions that must be obeyed by bank management in carrying out their duties as banking business operators. Disobedience of court decisions could

¹³ Prof. Dr. Jimly Asshiddiqie, S.H. "Konstitusi Ekonomi (Ekonomi Pasar, Demokrasi, dan Konstitusi), http://www.jimly.com/makalah/namafile/164/Pengantar_Ekonomi_Konstitusi.pdf

be considered a law and regulation violation in Indonesia as a state of law based on the 1945 Constitution. Therefore, bank management must not only implement the provisions of laws and regulations in the banking sector but also implement judicial decisions about banks that have binding legal force (*inkracht van genjisdé*).

Third, Constitutional Court Decision Number 64/PUU-X/2012 that reviewed Law Number 10 of 1998 concerning Banking in Article 40 paragraph (1), specifically related to customer data confidentiality. In this decision, the Constitutional Court considered that in order to protect the joint assets owned by a married couple deposited in a bank, the Constitutional Court addressed certainty and adequate legal protection by interpreting the Article 40 paragraph (1) as follows: “Banks are required to keep information and confidentiality about their customers and their deposits, except in for the purposes of the judiciary regarding joint assets in divorce cases.”

The Constitutional Court decisions above concerning three main issues related to the equality of the position of rural banks with commercial banks, the obligation of bank administrators to comply with court decisions on banking institutions that already have binding legal force, and the confidentiality of customer data regarding joint assets. Those issues cannot be separated from the discourse on digital constitutionalism, due to the development of digital banking law, which can't be separated from the development of digitalism of judicial institutions, customer data protection, and the legal standing of banks in the legal system and law or regulations.

II.A.3. Comparison With Digital Constitutionalism in the European Union

The emergence of digital constitutionalism in the European Union, begins with three phases or stages of understanding constitutionalism itself.¹⁴ The three phases are as follows:

1. Digital liberalism

Barlow stated that cyberspace is a new and separate part of the natural world where the legal concepts of property, expression, identity, displacement, and context cannot be implemented.¹⁵

2. Judicial activism

The end of the era of digital liberalism can produce two events that will at the very least trigger the development of the phase of judicial activism. This began with the emergence of new actors in the digital environment

¹⁴ Giovanni. De Gregorio, *ibid*.

¹⁵ John Perry Barlow, “A Declaration of the Independence Cyberspace” <https://www.eff.org/cyberspace-independence>.

(online platforms), which were followed by the increasing role of the EU Charter in regulating protections for the rights of the citizens of the European Union.¹⁶ Second, the recognition of the binding nature of the EU Charter and its inclusion in the main laws of the European Union contributed to the codification of the constitutional dimensions of the digital environment in Europe.¹⁷ The protection of freedom of expression, protection of privacy, and protection of data in the European context is not limited to the domestic level, but also the European Convention on Human Rights (the ECHR).¹⁸ The Strassbourg Court has played an essential role, which is not limited to protecting fundamental rights but also highlighting constitutional challenges arising from digital technology's development.¹⁹

The increase in constitutional rights protections as one change in digital constitutionalism was marked by the Lisbon Agreement. The rights to have a family, privacy rights, rights to personal freedom, has been agreed to through the Nice Charter and bonded European Union member states and organisation in the European Union. These rights can only be "denied" through a series of regulations under Article 52 of the European Union Charter.²⁰ The European Union Charter has also added some details that are not accommodated by the European Constitution through rights violations or prohibition consisting of "destruction of any of the rights and freedoms recognised in the Charter or at their limitation to a greater extent than is provided for herein."²¹

Within this new constitutional framework, the Court of Justice of the European Union (the CJEU) has begun to rely on the EU Charter to address the challenges posed by the digital environment. In terms of both content and data, the CJEU interprets the rights and freedoms regulated by the EU charter to ensure the effective protection of constitutional interests. However, the lack of legislative review, both from the aspect

¹⁶ Gráinne De Búrca, "After the Eu Charter of Fundamental Rights: The Court of Justice As a Human Rights Adjudicator?," *Maastricht Journal of European and Comparative Law*, 2013. Baca pengaturan yang lebih detail dalam

¹⁷ Tarleton Gillespie, *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions That Shape Social Media*, 2018. Baca pengaturan yang lebih detail dan komprehensif dalam Treaty on the European Union, art. 6(1), 2012 O.J. (C 326)13.

¹⁸ European Convention on Human Rights (ECHR), November 4, 1950, note 30, arts.8, 10.

¹⁹ Oreste Pollicino, "Judicial Protection of Fundamental Rights in the Transition from the World of Atoms to the Word of Bits: The Case of Freedom of Speech," *European Law Journal* 25, no. 2 (2019): 155–68, <https://doi.org/10.1111/eulj.12311>.

²⁰ Koen Lenaerts, "Exploring the Limits of the EU Charter of Fundamental Rights," *European Constitutional Law Review* 8, no. 3 (2012): 375–403, <https://doi.org/10.1017/S1574019612000260>.

²¹ EU Charter, note 10, art.54.

of the e-Commerce Directive or the Data Protection Directive, judicial activism has highlighted the challenges to the protection of fundamental rights relating to the dissemination of information in a community, so as to encourage the transition from a very limited economic perspectives to a new phase, namely (European) digital constitutionalism.

3. Digital constitutionalism

Technological evolution, that is combined with a liberal constitutional approach, has allowed online platforms to achieve a prominent role in the digital environment. Reliance on algorithmic technologies to moderate content and process data has led to new ways and models for extracting value from information.²² This technology has also contributed to more opaque platform decision-making, raising questions about transparency and accountability.²³ Aside from this, technology has grown wary of the reluctance of fundamental rights protections,²⁴ such as freedom of expression and privacy as well as democratic value in an information society.²⁵ Technology users are subject to the exercise of “private” forms of authority exercised by online platforms through a mix of private law and automated technology (i.e. platform law). By privately managing their digital infrastructure, online platforms can independently dictate not only how to interact, but also how they can assert and protect their rights.²⁶ In the absence of regulation, this business option fulfils the role of law in a digital environment on a global scale. Indeed, by implementing Terms of Service (ToS), a platform unilaterally establishes the rules that users must comply with when accessing providers’ services, which determine how their data is processed. As a result, the de facto platform performs tasks normally assigned to public authorities. To borrow Teubner’s statement, this framework can be described as a “constitutionalization of the multiplicity of autonomous subsystems of world society.”

The characteristics of this new constitutional phase in the EU are based, firstly, on the codification of the CJEU’s efforts to protect basic rights in the information society and, second, on limiting the power of online platforms

²² Luciano Floridi, *The Fourth Revolution: How the Infosphere Is Reshaping Human Reality*, 2017.

²³ Jenna Burrell, “How the Machine ‘Thinks’: Understanding Opacity in Machine Learning Algorithms,” *Big Data and Society* 3, no. 1 (2016), <https://doi.org/10.1177/2053951715622512>.

²⁴ Jack M. Balkin, “Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation,” *SSRN Electronic Journal*, 2017, <https://doi.org/10.2139/ssrn.3038939>.

²⁵ Paul Friedrich Nemitz, “Constitutional Democracy and Technology in the Age of Artificial Intelligence,” *SSRN Electronic Journal*, 2018, <https://doi.org/10.2139/ssrn.3234336>.

²⁶ Luca Belli, Pedro Augusto Francisco, and Nicolo Zingales, “Law of the Land or Law of the Platform? Beware of the Privatisation of Regulation and Police,” *Platform Regulations: How Platforms Are Regulated and How to They Regulate Us*, 2017, 41–64, <https://bibliotecadigital.fgv.br/dspace/handle/10438/19922>.

through the implementation of legal instruments, aimed at increasing the level of transparency and accountability in the moderation of online content and data processing. Both of these characteristics can be found in the EU's Digital Single Market (DSM) strategy.²⁷ Despite the fact that the implementation of new digital technologies raises serious concerns, the rise of digital constitutionalism in the EU has mainly been driven by the role of global online platforms, which, although owned as private actors, are increasingly carrying out quasi-public tasks such as the provision of goods and services for the benefit of the public. As the European Commission underlined, online platforms must "protect core values" and promote "transparency and fairness to maintain user trust and foster innovation." The role of online platforms in the digital environment implies "wider responsibilities." Similarly, the Council of Europe has emphasised, on the one hand, the positive obligation of member states to ensure respect for human rights and on the other, the roles and responsibilities of online intermediaries in managing content and data processing. As observed, "the power of intermediaries such as protagonists of online expression makes it important to clarify their roles and impacts on human rights, and their associated duties and responsibilities."

II.A.4 Parameter for the Implementation of Digital Constitutionalism

The expansion of economic relations between countries in the world, accompanied by the development of information technology and the need for efficiency in meeting daily needs, are factors that support the growth of the digital economy. Therefore, it is important to understand the impact of technological developments and transformations, especially in the economic and information sectors. This transformation is very influential for the formation of various economic sectors, including the industrial economic sector, education, health, law, and others.²⁸

The parameters of constitutionalism in general are as the basic laws of the state that regulates the power of state institutions, as an extension of the state in providing protection of the constitutional rights of citizens. While the parameter for digital constitutionalism according to the author, there are at least four aspects that must be met, as follows:

First, the availability of law and regulations that accommodate people's needs to interact and participate in the digital world. The laws and regulations

²⁷ De Gregorio, Giovanni, "The Rise of Digital Constitutionalism in the European Union", *International Journal of Constitutional Law*, 19.1 (2021), 41–70 <<https://doi.org/10.1093/icon/zoab001>>

²⁸ Alexandra D. Borremans, Irina M. Zaychenko, and Oksana Yu Iliashenko, "Digital Economy. IT Strategy of the Company Development," *MATEC Web of Conferences* 170 (2018), <https://doi.org/10.1051/mateconf/201817001034>.

enacted must accommodate the interests and protection of constitutional rights, especially when it comes to the use of technology and digital information.

Second, there is a need to ensure the public's understanding of existing laws and regulations and the government must maintain the ease of public access to these regulations. Regtech (regulation technology) can be an example of the use of technology to ease accessibility of statutes to the public.

Third, the availability of digital infrastructure that is accessible in all regions. The development of digital infrastructure is the responsibility of the government and be carried out by relevant stakeholders such as the Coordinating Ministry for Economic Affairs, Ministry of Communication and Information Technology, Ministry of National Development Design/National Development Planning Agency, Ministry of Villages for Development of Disadvantaged Regions and Transmigration. However, the development of digital infrastructure will not perform optimally without the intervention of the private sector, which also develops digital infrastructure for the wider community.

Fourth, there is a necessity to build community capacity so that all can access and utilise digital infrastructure optimally, and maintain an equitable distribution of community capacity in utilising technology and information (digital talent). Digital talent is the obligation of everyone so that they will not be trapped in a narrow-minded understanding of constitutionalism. However, to include people in remote areas, the government needs to take part in educating the nation's life, through building the capacity of people in disadvantaged villages/areas, so that they can take advantage of more optimal digital infrastructure.

II.B. History of Banking Law Development

The development of banking law in Indonesia cannot be separated from the basis of banking law history. If the legal instruments in the development of banking law do not provide a sufficient legal basis that can accommodate the development of digital banking in Indonesia, the development of digital banking law cannot be accommodated under the existing legal framework. This proves that the development of existing banking law has been able to anticipate and accommodate the growing digital banking world. However, it must be realised that it is still necessary to update laws and regulations to keep up the development of a very dynamic digital banking law.

The policy direction of the economic sector has continued to develop since the 1998 reformation. One of the post-reform policies in terms of economic development issued by the government is the Decree of the People's Consultative Assembly Number IV/MPR/1999 concerning the 1999-2004

Outline of the State Direction (*Garis Besar Haluan Negara / GBHN*). This policy was born from the nuances of mysticism that are inseparable from the economic crisis in Indonesia that year. Economic development that grows from people's creativity and innovation provides hope for the growth and development and stability of the Indonesian economy. This is reflected in the formulation of Chapter IV, letter B, number 20, which states that "Improving the mastery, development, and utilisation of science and technology including the nation's technology in the business world, especially small and medium enterprises and cooperatives in order to increase the competitiveness of products based on local resources."²⁹

In the new order era, there was a fundamental change related to licensing and supervision of regulatory agencies for the banking sector. Amendment to Law Number 7 of 1992 concerning Banking Principles into Law Number 10 of 1998 concerning Banking changed the licensing authority in the banking sector from the Minister of Finance to the head of Bank Indonesia. As the supervisory authority for banks during this crisis, Bank Indonesia exercised its authority to address difficulties that endangered the continuity of the bank's business. Amendment to Law Number 7 of 1992 concerning Banking Principles became Law number 10 of 1998 concerning Banking, resulting in a drastic change in the role of Bank Indonesia in shaping banking policy. These changes regulated:

1. Transfer of licensing authority over the banking sector from the Minister of Finance to the Head of Bank Indonesia;
2. Ownership of banks by foreign parties is not restricted but still prioritises the principle of partnership;
3. Development of a Sharia-based banking system;
4. Changes to the scope of bank secrecy, which originally covered the assets and liabilities side of the bank's balance sheet, to focus on the privacy of depositors and their accounts;
5. Establishment of a deposit guarantee institution (*Lembaga Penjamin Simpanan/LPS*); and
6. Establishment of a temporary special agency focusing on banking restructuring.

Under Law Number 3 of 2004 concerning amendments to Law Number 23 of 1999 concerning Bank Indonesia, one of the tasks of Bank Indonesia is to regulate and supervise commercial banks. The scope of this task includes establishing regulations, granting and revoking licenses for certain institutions

²⁹ Lukman Hakim and Nalom Kurniawan, "Perlindungan Hak Konstitusional Ekonomi Warga Negara Melalui Hak Paten Di Indonesia," *Jurnal Konstitusi* 17, no. 3 (2020): 582, <https://doi.org/10.31078/jk1736>.

or business activities from banks, bank oversight, and imposing sanctions on banks in accordance with the prevailing laws and regulations. Apart from Bank Indonesia, there are also several institutions that supervise banks but with a more limited oversight scope, namely:

1. The Audit Board of Republic of Indonesia has the task of supervising state-owned banks.
2. The Capital Market and Financial Institution Supervisory Agency (Badan Pengawas Pasar Modal dan Lembaga Keuangan, abbreviated Bapepam) is authorised to supervise banks that have gone public.
3. The Financial Transaction Reports and Analysis Centre (PPATK) which was established in 2002 (based on Law No. 15 of 2002 as amended by Law No. 25 of 2003 concerning White Collar Crime and Money Laundering) has the authority to request and receive reports from Financial Service Providers as well as auditing Financial Service Providers regarding compliance with obligations in accordance with the provisions of this Law and the reporting guidelines regarding financial transactions.
4. The Deposit Insurance Corporation (LPS) is authorised to obtain data on customer deposits and bank financial reports as well as verify and confirm data in order to formulate and determine policies for implementing deposit insurance and implementing deposit insurance Law number 23 of 1999 concerning Bank Indonesia.

Some of the mechanisms designed to strengthen the banking system that were implemented in the New Order era include:

Infrastructure improvement	<i>Best Practices in Corporate Governance Implementation</i>	Regulation and Supervisory improvement
The firmness of the authority of Financial service Authority	Eligibility and Proper screening of controlling shareholders, management, and executive officers.	Firmness of sanction for ineligibility and impropriety.
Certainty of guarantee scheme	Compliance Director banking obligation	Cooperation in order to law enforcement
Certainty of financing source for a systemic problem that might occur		Implementation of international standard on bank supervisory
Development of Sharia Banking.		

The existence of Bank Indonesia as the central bank that regulates and supervises monetary policy has experienced various dynamics following the Indonesian government system, which has changed several times. In general, the provision of banking financial services is regulated in Law Number 10 of 1998 concerning Amendments to Law Number 7 of 1992 concerning Banking. Meanwhile, Bank Indonesia as the central bank is a separate legal umbrella

although it is still constrained by what is regulated under the Banking Law. The following is a sequence of laws and regulations governing banking matters in Indonesia, up to the first regulation which is the history of the establishment of an institution that issues regulations and carries out banking supervision, namely Bank Indonesia as the central bank:³⁰

1. Law No. 6 of 2009 on Stipulation of Government Regulation in Lieu of Act No. 2 of 2008 on Second Amendment to Law No. 23 of 1999 on Bank Indonesia to become Law.³¹
2. Law No. 3 of 2004 on Amendments to Law No. 23 of 1999 concerning Bank Indonesia.³²
3. Law No. 13 of 1968 on Central Bank.³³
4. Law No. 84 of 1956 on the Amendment to Article 16 and Article 19 Bank Indonesia Law.³⁴
5. Law No. 11 of 1953 on the Stipulation of Basic Law on Bank Indonesia.³⁵

Hereby some regulations that support the financial system whether by banking or non-bank financial institution:

1. Law No. 3 of 2011 on Funds Transfers.
2. Law No. 24 of 1999 on Foreign Exchange and the Exchange Rate System.

In this part of the paper, it is important to understand how banking was regulated and developed historically until the Bank of Indonesia was eventually granted the authority to manage all financial sectors in Indonesia. As time went on, as a large amount of non-bank financial institutions growth the Financial Service Authority was built and regulated to hold the authority of financial service activity, whether by bank or non-bank institutions. Along

³⁰ Otoritas Jasa Keuangan, 'Regulasi Perbankan', <<https://www.ojk.go.id/id/kanal/perbankan/regulasi/undangundang/Default.aspx#>>.

³¹ This regulation is the ratification of a government regulation in lieu of a law issued in 2008 as an effort to maintain public confidence in the banking system after the global economic crisis that affected financial system stability. One of them is by stipulating that BI can provide credit or financing based on Sharia Principles for a maximum period of 90 days to banks to overcome short-term funding difficulties of the bank concerned.

³² This regulation was prepared to emphasise the independence of BI as a Central Bank that is free from interference from the Government and or other parties in carrying out its duties and authorities. BI's monetary policy is also focused on maintaining rupiah stability in a sustainable, consistent, transparent manner, and taking into account the general government policies in the economy.

³³ This regulation was drawn up in the context of securing State Finances in general, and supervision and restructuring of banking systems in particular by reviving the Central Bank in accordance with Provisional People's Consultative Assembly Decree Number XXIII/MPRS/1966.

³⁴ regulation contains basic rules regarding policy limits for controlling the amount of money circulating in the community, without disturbing the course of development and monetary balance.

³⁵ This regulation was addressed as the government effort to nationalise *De Javasche Bank*

with the arrival of digital constitutionalism, the government enacted Financial Service Authority Regulation Number 12/POJK.03/2018 concerning the implementation of Digital Banking Services by Commercial Banks in order to regulate banking in the digital era. This regulation was enacted to be law basis for the digital banking sector management.

II.B.2 Banking Law Development in Indonesia

The government drafted Law No. 21 of 2008 on Sharia Banking as the legal umbrella under which the implementation of the Sharia banking system has existed. By the time the development of the sharia system, which is also practiced in the banking business, developed under this legal umbrella. In order to strengthen Bank Indonesia institutions so that they can focus on implementing the government's financial policy, in its development supervision of the implementation and management of banks and non-bank financial institutions is carried out by the Financial Services Authority (OJK). OJK has several powers, including:³⁶

1. The authority to stipulate procedures for licensing (right to license) and establishment of a bank, including issuing permits and revocation of bank business licenses, granting permits for opening, closing and relocating bank offices, granting approvals for ownership and management of banks, granting permits to banks to carry out certain business activities.
2. The authority to promulgate provisions (right to regulate) concerning aspects of banking business and activities in the context of creating healthy banking in order to fulfil the banking services desired by the public.
3. The authority to supervise including:
 - direct bank oversight (on-site supervision) consisting of general audits and special audits with the aim of getting an overview of the bank's financial condition and to monitor the level of bank compliance with applicable regulations, as well as to find out whether there are unhealthy practices that endanger the sustainability of the bank and banking business; and
 - Indirect oversight (off-site supervision), namely supervision through monitoring tools such as periodic reports submitted by banks, inspection reports, and other information.
4. The authority to impose sanctions (right to impose sanctions), namely the authority to impose sanctions in accordance with the provisions of the legislation on banking if a bank does not comply with the provisions.

³⁶ Otoritas Jasa Keuangan, "Pengaturan dan Pengawasan Bank", <https://www.ojk.go.id/id/kanal/perbankan/ikhtisar-perbankan/Pages/Peraturan-dan-Pengawasan-Perbankan.aspx> baca juga dalam Erpiana Harahap, Nur Khotia, Siregar, "Pengaturan Dan Pengawasan Bank Syariah," Jurnal Islamic Circle, 2021.

This action contains an element of guidance so that banks can operate in accordance with sound banking principles.

5. The authority to investigate, namely the authority to conduct investigations in the financial services sector, including banking. Investigations are carried out by investigators from the Indonesian National Police and agents from the OJK. The results of the investigation are submitted to the Prosecutor for prosecution.
6. The authority to protect consumers (right to protect), namely the authority to protect consumers in the form of preventing consumer and public fraud, resolving consumer complaints, and defending the law.

Recently, conventional banks have also adapted to the evolving digital landscape by building digital-based businesses to fulfil customer demands. The government through the Financial Services Authority has issued several regulations that accommodate the implementation of digital banks, including:

1. Financial Services Authority Regulation (POJK) Number 12/POJK.03/2021 concerning Commercial Banks; and
2. Financial Services Authority Regulation (POJK) Number 12/POJK.03/2018 concerning the Implementation of Digital Banking Services by Commercial Banks.

These two regulations were issued in order to improve banking operational efficiency through the use of IT, encouraging banks to innovate in the use of technology responsibly. Electronic and digital services provided by banks are now required to apply risk management, sound financial management principles and comply with the provisions based on the applicable laws and regulations.³⁷

Problems that arise from the use of digital banks by public include risk management and security of banking customer data.³⁸ The risks in implementing a digital bank arises from various aspects such as biodata, technology, risk management, collaboration, institutional arrangements, and customers. The following is a description of the supervision or assessment of banking maturity based on the Deloitte consulting firm. In this digital era, everything related to business is transforming. Everyone must be able to understand where to go before reaching that goal. This is called digital maturity.³⁹

³⁷ Financial Service Authority Regulation No. 12/POJK.03/2021 concerning Commercial Banks Art. 2 point 2.

³⁸ Monica Wareza, "Awat! 3 Masalah Ini Rentan Hantui Bank-Bank Digital RI," n.d., <https://www.cnbcindonesia.com/market/20211026145711-17-286662/awat-3-masalah-ini-rentan-hantui-bank-bank-digital-ri>.

³⁹ Otoritas Jasa Keuangan, "Transformasi Digital Perbankan," n.d., [https://www.ojk.go.id/id/berita-dan-kegiatan/info-terkini/Documents/Pages/Cetak-Biru-Transformasi-Digital-Perbankan/CETAK BIRU TRANSFORMASI DIGITAL PERBANKAN \(SHORT VERSION\).pdf](https://www.ojk.go.id/id/berita-dan-kegiatan/info-terkini/Documents/Pages/Cetak-Biru-Transformasi-Digital-Perbankan/CETAK%20BIRU%20TRANSFORMASI%20DIGITAL%20PERBANKAN%20(SHORT%20VERSION).pdf).



Source: Deloitte Report--- Picture. *Digital Maturity Assesment for Bank*⁴⁰

The implementation of fintech and the massive presence of digital banking is one form of banking is necessary. Banks are not simply an adage as once stated by Bill Gates. This phenomenon, coupled with the possibility of implementing digital constitutionalism in Indonesia, should be supported through the development of banking law that accommodates the balance between the legal system, the economic system, and the political system, which is constantly shifting. This is intended to realise economic democracy which is the ideals of the nation in accordance with the constitution.⁴¹

This year, Indonesia is hosting the presidency of the G20, a multilateral platform to bring together countries to determine strategic policies for the future of world economic growth. The 2022 Annual Summit of G20 member countries held in Bali is focused on two main themes, namely related to finance

⁴⁰ Ibid., page 48.

⁴¹ Budi Endarto et al., "Global Perspective on Capital Market Law Development in Indonesia," *Journal of Management Information and Decision Sciences* 24, no. Special Issue 1 (2021): 1–8.

and the Sherpa track. The six themes that will be the focus of discussion in the finance track of the G20 meeting are as follows: 1) exit strategy coordination, 2) scarring effect, 3) payment system strengthening, 4) sustainable financial development, 5) inclusive financial system development, and 6) the international tax agenda.⁴²

II.C. Digital Constitutionalism in Indonesia and the Development of Banking Law

In the digital economy era, laws and regulations related to the digital economy bring many important issues to the forefront, such as data protection, where privacy is a major actor that must be considered in the context of collaborative economic development and its legal framework. Data in the digital era of the economy and digital constitutionalism is a paramount concern, not only for the protection of privacy but also for the security of the data. The trend of changing from the traditional economy to the digital economy era, must be supported by a set of legal rules that contain the protection of privacy and responsive personal data security.⁴³

Edward J. Malecki mapped the digital economy through the following chart:⁴⁴

Chips and processors	The spearhead
Computer and telecommunications	The Core
IT enables services and advanced manufacturing	The Main
Other manufacturing and services sector	The Periphery

The top line of the table is called “The spearhead.” In this section are placed the technological findings and products of the silicon and semiconductor industries. Although it is not the largest sector, this sector is very important because its products are the core of computer hardware and information technology. The second part of the pyramid, which is under “the spearhead,” consists of the computer and telecommunications manufacturing and service industries. This industry is referred to as the “core sector” because it is the core of the Digital Economy and allows the sectors below the pyramid to work. The third part is called the “main body,” as a representation of the

⁴² About G20, <https://doi.org/10.1016/j.strueco.2004.02.001>.

⁴³ Sinta Dewi Rosadi and Garry Gumelar Pratama, “Urgensi Perlindungan data Privasidalam Era Ekonomi Digital Di Indonesia,” *Veritas et Justitia* 4, no. 1 (2018): 88–110, <https://doi.org/10.25123/vj.2916>.

⁴⁴ Edward J. Malecki and Bruno Moriset, “The Digital Economy: Business Organisation, Production Processes and Regional Developments,” *The Digital Economy: Business Organisation, Production Processes and Regional Developments*, 2007, 1–274, <https://doi.org/10.4324/9780203933633>.

main driver of the digital economy. Included in this section are manufacturing activities and services that are highly dependent on digital technology. Most of the people working in this industry contribute their time in front of computers and other means of telecommunication. Several service industries including e-commerce, media and entertainment as well as financial services are part of this industry. The basis of the Pyramid are sectors that are not affected by digitisation, or feel few affects from digital technology. Examples of these industrial sectors are the agricultural industry, or public services such as household assistants, garbage cleaning services, hairdressers, where most of the business actors do not use computers in a significant way.

Kieran Tranter maintains a fairly extreme opinion in this regard, that technological advances can interfere significantly with law enforcement very significantly. Based on his opinion, modern law should be able to manage technological disruption, but in fact this is difficult to implement.⁴⁵ Lyria Bennett Moses stated that there is one important point at the intersection between law/regulation and technology on the other side.⁴⁶ In the context of fulfilling the constitutional rights of citizens in the judicial review of laws at the Constitutional Court, technology has actually become a means of supporting the realisation of justice. Digital disruption in the trial at the Constitutional Court has a positive impact on the fulfilment of justice for all citizens without the limitations of space and time. This is stated normatively in the Regulation of the Constitutional Court Number 1 of 2021 concerning the Implementation of Remote Trials aimed at the efficiency and effectiveness of the trial process.⁴⁷

The presence of the *metaverse*⁴⁸ in the law enforcement process cannot be denied by the various inventions and developments of digital technology adapted in the process of fulfilling justice and constitutionalism. This can have an impact on the influence of big tech in shaping the individual rights and freedoms of society. It can be said that technology companies, have an expanded role not only as gatekeepers of global information but also

⁴⁵ Kieran Tranter, "Disrupting Technology Disrupting Law," *Law, Culture and the Humanities* 17, no. 2 (2021): 158–71, <https://doi.org/10.1177/1743872117704925>.

⁴⁶ Lyria Bennett Moses, "How to Think about Law, Regulation and Technology: Problems with 'Technology' as a Regulatory Target," *Law, Innovation and Technology* 5, no. 1 (2013): 1–20, <https://doi.org/10.5235/17579961.5.1.1>.

⁴⁷ Mery Christian, *et.al*, "Disrupsi Digital Dalam Proses Penegakan Hukum Pada Masa Pandemi Covid-19," *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 10, no. Vol 10, No 1 (2021): April 2021 (2021): 79, <https://rechtsvinding.bphn.go.id/ejournal/index.php/jrv/article/view/625/260>. merupakan sebuah ruang di dunia maya yang menyediakan ruang-ruang digital baru untuk manusia dapat bekerja, berinteraksi, dan melakukan aktivitas melalui avatar.

⁴⁸ *Metaverse*, is a space in cyberspace that provides new digital spaces for human to work, interact, and carry out activities through avatar.

institutions of private power.⁴⁹ The following are examples of the influence of big tech in determining government policy:

1. Twitter's decision to silence former United State of America President Donald Trump after the Capitol Hill violence;
2. Facebook bans content uploaded by Australian publishers and YouTube's decision to block anti-vaccine content.

Digital constitutionalism doesn't mean revolutionising the roots of modern constitutionalism, namely the principles that include a responsible and accountable government, individual rights, and the rule of law. However, digital constitutionalism places a new framework on the role of constitutional law in the digital era. Modern constitutionalism has always pursued two missions, protecting fundamental rights and limiting power through constitutional checks and balances.

One of the main concerns is about the use of public power to threatens citizens' rights and freedoms, for example internet restrictions or surveillance. This became striking in the Snowden case involving an employee of the National Security Agency (the NSA). He is accused of leaking documents and demonstrating surveillance by the NSA in the United States, which has sparked a debate weighing national security and individual privacy. Private companies, however, now dominate the internet and enforce service rules or community guidelines that apply to billions of users worldwide. This regulation is an alternative benchmark that competes with the constitutional protection of fundamental rights and democratic values.

Challenges to constitutional democracy no longer come from state authorities. Instead, the big concern now arises from institutions that are formally private but control things that are traditionally governed by public authorities - without restrictions. The ability of technology companies to define and enforce rights and freedoms on a global level is a testament to their growing power over the public. For example, when Facebook or Google moderate online content, and make decisions about freedom of expression and the rights of other individuals, or the public interest based on private standards that do not necessarily conform to constitutional rules. These policies are implemented directly by the company, and not by the courts.

This situation has fuelled calls for transparency and accountability. The Cambridge Analytica scandal, which demonstrated the massive collection of personal data for political advertising purposes, and findings from Facebook's own research that demonstrated the potentially harmful impact of social media

⁴⁹ Bagaimana big tech menentukan siapa yang berkuasa atas hak dan kebebasan kita.", <https://theconversation.com/bagaimana-big-tech-menentukan-siapa-yang-berkuasa-atas-hak-dan-kebebasan-kita-172416>.

on young people's mental health, have heated debate over the responsibilities of big tech.

Digital constitutionalism offers multiple perspectives to analyse the protection of rights and the use of power by big tech companies. Digital constitutionalism also encourages us to have a deeper debate about how individual rights and freedoms are no longer objects in state power, but also for big tech companies. Basically, Indonesian constitutionalism relies on three elements of a general agreement, namely (i) agreement on *staats idee*, (ii) agreement on the rule of law, as the basis of government and (iii) agreement on the form of state institutions and procedures or regime format. So digital constitutionalism must be able to fulfil additional elements, namely the availability of laws and regulations that accommodate people's access to the digital world, participation in forming regulations that are equal to all citizens, the availability of digital infrastructure that reaches all regions with good accessibility, optimisation of digital talent so that citizens have capabilities and sufficient capacity to access all constitutionalism tools.

II.C.2. Development of Banking Law in the Era of Digital Constitutionalism

The development of banking law in the era of digital constitutionalism as described above, has been quite successful when viewed from the side of the availability of regulations and laws, they are Financial Services Authority Regulation (POJK) Number 12/POJK.03/2021 concerning Commercial Banks and Financial Services Authority Regulation (POJK) Number 12/POJK.03/2018 concerning the Implementation of Digital Banking Services by Commercial Banks. If linked to a digital device, the availability of various laws and regulations is essentially software that plays a very important role in the successful functioning of the device. Therefore, the laws and regulations as the output of legal development in the banking sector has become software for the successful use of banking and its various developments for the welfare of society. However, there is still a gap in infrastructure development that can be a factor in building digital economic growth.⁵⁰ Equitable infrastructure is very important to support the use of digital banking, especially for marginalised people who live in remote areas as well as indigenous people.

The government still needs to carry out capacity-building evenly and proportionally for all people, both living in cities with good digital facilities and infrastructure, as well as people in remote areas. Regarding the development of human resources, there are at least two things that are the responsibility of

⁵⁰ Mediana, "Infrastruktur Tidak Merata, Potensi Bisa Terganjil," n.d., <https://www.kompas.id/baca/ekonomi/2022/06/17/potensi-besar-tapi-terganjal-belum-meratanya-infrastruktur-telekomunikasi-dan-koordinasi-kebijakan>.

the government in order to realise equitable development of banking law in the era of digital constitutionalism, namely:

1. Capacity-building for people who already have good enough digital talent; and
2. Capacity-building for some people who do not have the ability at all to be able to access digital infrastructure that supports the digital economy/banking.

Things that should not be ruled out in the realisation of justice in the process of developing banking law in the era of digital constitutionalism are related to the protection of people's personal data. Currently, personal data protection is still a very crucial issue because there are many cases of personal data breaches by individuals which can lead to the loss of certain individuals or communities.

III. CONCLUDING REMARKS

The development of banking law in Indonesia has been in line with the development of the era of digital constitutionalism as implemented in the European Union. Currently, digital and fintech developments have been followed and based on a variety of adequate laws and regulations, to be able to achieve justice for all people in the use of banking and economic equity. As this paper has discussed, there are four parameters for the implementation of digital constitutionalism, namely the availability of adequate laws and regulations, sufficient understanding from the community of existing regulations, equitable development of digital infrastructure, and public access to existing digital infrastructure, and development of human resources for the use of digital infrastructure.

In the context of equitable distribution of justice in the development of banking law in the era of digital constitutionalism, there are several factors that need to be implemented and improved, namely: *first*, good synergy between stakeholders from both the government and private sectors to support equitable development of digital infrastructure; *second*, increasing human resource development to grow the community's digital talent in utilising digital infrastructure in the banking sector. This ultimately aims to improve the economy while simultaneously realising the nation's goals for the welfare of the entire community with justice and legal certainty.

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