

# **THE COMMON ACCESS AS PRO PEOPLE MANAGEMENT OF NATURAL RESOURCES (AN ANALYSIS OF DECISION NUMBER 3/PUU-VIII/2010 ABOUT JUDICIAL REVIEW OF LAW 27/2007)**

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## **Abstract**

This paper aims to explore the new concept as an alternative management of natural resources (specifically Coastal Areas and Small Islands/CA-SI). In Decision Number 3/PUU-VIII/2010 (the Court Decision), the Constitutional Court uses the new concept as considerations to cancel the Concession Rights on Coastal Waters (CR-CW) as the mechanism of management of CA-SI in Law Number 27 Year 2007 about Management of Coastal Area and Small Islands (Law 27/2007). Some important questions in this paper are why did the Constitutional Court annul CR-CW in Law 27/2007? Whether the new concept offered in the Court Decision and consistent with 1945 Constitution? And how is the new concept offered consistent with people empowerment?

The revoke of CR-CW in Law 27/2007 is caused that the concept of concession is contrary to the norms of natural resources management in the 1945 Constitution and the spirit of people empowerment. The new concept offered in the Decision is the common access. In this concept of access, CA-SI is regarded

as the common property with the rules from members of the community itself. The provisions to access CA-SI as the common property are also determined by agreements of the community itself. Management of CA-SI on the common access is in accordance with people empowerment. The consistency is shown by the relevancy of concept of common access to include three key issues of people empowerment (access, assets and collective capabilities).

**Keywords:** Coastal Areas and Small Islands, Concession Right on Coastal Waters, the Common Access, the 1945 Constitution, and People Empowerment.

## I. INTRODUCTION

### 1.1. Background

The basic concept for management of natural resources in the 1945 Constitution is intended to provide the greatest prosperity for all Indonesian people (the People). This provision is mandated by Article 33 paragraph 3 of the 1945 Constitution which states: “the land, the waters and the natural resources within the land of Indonesia are be under the State’s control right and shall be used to the greatest benefit of the People.” The state of Indonesia (the State) is blessed with rich natural resources which mostly located over coastal areas and small islands. This blessing has a tremendous wealth for the country and it holds potential prosperity for the people<sup>1</sup>.

In order to manage coastal areas and small islands, the State made a special law which governs it, called Law Number 27 Year 2007 on Management of Coastal Areas and Small Islands (Law 27/2007). The norm used to manage coastal areas and small islands (CA-SI) is a concession right in coastal waters (CR-CW). CR-CW is the mechanism governed by the State to open up the opportunity for private corporations to participate in management of CA-SI.

Unfortunately, the norms in CR-CW were debated. In 2010, there were groups of people applying for judicial review of several articles in Law 27/2007. The petitioners stated that the managemet of CA-SI through the mechanism of CR-CW is contrary to the norms in the 1945 Constitution. It

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<sup>1</sup> In this paper, some times the term of “the People” is replaced by local (*masyarakat biasa*) and customary communities (*masyarakat adat*).

means that the mechanism has the potential impact to neglect the greatest welfare and prosperity of the People. The results of judicial review is also significant. The Constitutional Court (the Court) granted the petitions of judicial review, contained in Decision Number 3/PUU-VIII/2010 (the Court Decision). The Court declared that some articles in Law 27/2007 are contrary to the 1945 Constitution. Some canceled are Article 1 Sub Article 18, Article 16, Article 17, Article 18, Article 19, Article 20, Article 21, Article 22, Article 23 paragraphs 4 and 5, Article 51, Article 60 paragraph 1, Article 71 and Article 75. For the purpose of this paper, only articles relevant to the concept of people empowerment will be analysed, which include Article 1 Sub Article 18, Article 16, Article 18, Article 20, Article 23 and Article 60 of Law 27/2007.

The Court Decision –which canceled some articles in Law 27/2007– refers to the 1945 Constitution. The referred choices are Article 18B paragraph 2, Article 28A, Article 28C paragraph 1, Article 28H paragraph 2, Article 28G paragraph 1, and Article 33 paragraphs 1, 2, 3 and 4. Article 18B argues that the State recognizes the right of (*adat*) customary communities. Article 28A is about the rights of every person to live and survive. Article 28C paragraph 1 is about the right of every people to advance themselves. Article 28H paragraph 2 is about affirmative action. Article 28G paragraph 1 is on the right of every person to ownership. Article 33 is about the basic concepts of natural resources management. From some articles of the 1945 Constitution used as considerations of the Court to cancel some articles of Law 27/2007, there is a brilliant offer that the Court Decision comes with the concept of common property as a basic provision to recognize the existence of CA-SI. The concept also represents how ideally to manage CA-SI in accordance with the norms of natural resource management in the 1945 Constitution. The concept of common property comes with the common access as mechanism in management of CA-SI instead of CR-CW

## **1.2. Questions**

Based on the foregoing backgrounds, the research questions are as follows:

1. Why did the Court Decision cancel the former concept for management of CA-SI in Law 27/2007?
2. Whether the new concept for management of CA-SI found in the Court Decision and consistent with 1945 Constitution?
3. How is the new concept offered consistent with people empowerment?

## **II. DISCUSSION**

### **2.1. Urgency of Revoke of the Former Concept**

#### **2.1.1. The Decision of Constitutional Court**

The Court canceled some articles in Law 27/2007. The Court declared that some articles in Law 27/2007 are contrary to the 1945 Constitution. Some canceled are Article 1 Sub-Article 18, Article 16, Article 17, Article 18, Article 19, Article 20, Article 21, Article 22, Article 23 paragraphs 4 and 5, Article 51, Article 60 paragraph 1, Article 71 and Article 75. Thus, the Decision canceled CR-CW as the mechanism to manage CA-SI.

The revoke of CR-CW is caused to have a conflict with the norms of natural resource management in the 1945 Constitution underpinned by the following reasons<sup>2</sup>. Firstly, CR-CW in Article 1 Sub-Article 18, Article 16 paragraph 1-2, and Article 18 of Law 27/2007 has the potential that legally will evict customary and local communities whose living space is in coastal areas. CR-CW does not consider the management on the basis of the sea customary (*ulayat*) right and traditional coastal area. Law 27/2007 governs that customary communities intended to manage CA-SI must apply for CR-CW. As a human right, the customary rights should have been enough required the recognition from the State. However, mechanism of CR-CW places the customary rights as the granted concessions from the State. This character indicates that CR-CW

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<sup>2</sup> It is summarized from Decision Number 3/PUU-VIII/2010.

did not put the customary right as human rights. Such provision is a disadvantageous for customary communities. If the customary right is recognized as human right on recognition of the State, the existence could not be revoked. But if the customary right is regarded as the granting of rights or licenses from the State, it can be revoked at any time. These provisions are contrary to the norms of natural resource management mandated by the 1945 Constitution. Article 18B of the 1945 Constitution rewards the customary rights and Article 28H rewards the provision of special treatment for vulnerable groups such as customary communities.

Secondly, CR-CW in Article 20 of Law 27/2007 and other interpretation of Article 18 as well as Article 1 Sub-Article 18 changed the existence of CA-SI (from the common property<sup>3</sup> to the private property<sup>4</sup>). Based on the natural character, CA-SI should be as the common property. However, CR-CW turned it into property right. The change is contrary to the 1945 Constitution which puts CA-SI as the natural resources to fulfill the prosperity of the People (as the common property). When the State transferred CA-SI to private corporations through the mechanism of CR-CW, the State can not direct the management for the promotion of people welfare. As the holders of CR-CW, Private corporations have the exclusive access<sup>5</sup>. CA-SI should be as the object that could be used for the common access<sup>6</sup> instead of the the individually accessed objects. The Court Decision proves that CA-SI is more appropriately considered as the common property. The concept of common property and access is more in line with the constitutional mandate. Article 33 of the 1945 Constitution stipulates that natural resources associated with the lives of many people are the goods under the state's right to control. As a

<sup>3</sup> The term is used to refer the resources under communal ownership. The common property belongs to all members of the community. The common property could not be monopolized or sold by one of the members. See the further exploration in sub chapter 2.2.1.

<sup>4</sup> The term is used to refer the resources under individual ownership. The private property belongs to individual one. The private property could be monopolized or sold by an individual owner. See the further exploration in sub chapter 2.2.1.

<sup>5</sup> By the exclusive access, only the holder of CR-CW could utilize and monopolize the right to management of CA-SI. See the further exploration in sub chapter 2.2.1.

<sup>6</sup> By the common access, every members of communities could participate in utilization of coastal resources. See the further exploration in sub chapter 2.2.1.

part of resources associated with the people lives, CA -SI should be used for the welfare of the people and the public interest. It is the State that controls CA-SI with the status of the State's right to control. By the right, the State has the responsibility to direct the management for the greatest prosperity of the People (Article 33 of the 1945 Constitution).

Thirdly, CR-CW (Articles 23 and 60 of Law 27/2007) allows the eviction of customary and local communities through the mechanisms of consultations and compensations. These two articles threaten legal certainty for local and customary communities to utilize CA-SI because it could be misused for legalizing the oppressive management of CA-SI in the name of law. Mechanisms of consultations and compensation can be misused as a means not only to eliminate the management of CA-SI (on the characteristic of the common access) but also to evict customary and local communities from coastal areas as their living space. Consequently, it could be said that These provisions have potential to eliminate the right to survival/livelihood of local and customary communities living in coastal areas. This is contrary to the 1945 Constitution that guarantees the right of every person to preserve life, develop themselves, to get protection on properties, and to receive special treatments (affirmative action) for vulnerable groups (Article 28C, 28G and 28H 1945).

The considerations of the Court Decision to cancel CR-CW show the objective of State to govern the management of CA-SI in accordance with the 1945 Constitution. The decision could be used as arguments that there is the change of legal opinion about the existence as well as the management of CA-SI (from the private property to the common property and from the exclusive access to the common access). The use of the common access in management of natural resources is not only in Indonesia. In fact, the concept is also practiced in some countries as researched by Ostrom<sup>7</sup>. The concept of common property

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<sup>7</sup> Ostrom researched about some communal managements of irrigation. One of the results is the system of *Subak*. He concluded that *subak* is one of the most effective water-users associations. By the *subak*, the Balinese build the infrastructure of irrigation as the common property resources. They manage and operate it on the common access. The Balinese *subaks* have been organized

and common access is very friendly to the existence of sea customary right and traditional coastal area management. The concepts can be used as an alternative model offered in the management of CA-SI after elimination of CR-CW.

### **2.1.2. Inconsistency of CR-CW with the 1945 Constitution**

Actually, formulation of Law 27/2007 aims to manage the national natural resources. One of these resources is the coastal areas and small islands (CA-SI). According to some articles of Law 27/2007 (Article 1 Sub-Article 18, Article 16, Article 17, Article 18, Article 19, Article 20, Article 21, Article 22, Article 23 paragraphs 4 and 5, Article 51, Article 60 paragraph 1, Article 71 and Article 75), the State provides the access for communities to manage CA-SI through the mechanism of the concession rights on coastal waters (CR-CW). Unfortunately, this legal mechanism to access was criticized. Judicial review of CR-CW was underpinned by the reason that the concessions is conflicts with the basic concepts of natural resources management in the 1945 Constitution. A sign of contradiction to the 1945 Constitution can be seen in the definition of CR-CW (Article 1 paragraph 18 of Law 27/2007), which states that the concession right on coastal waters (CR-CW) is the rights on certain parts of coastal waters for business marine and fisheries, as well as other businesses associated with utilization of CA-SI including the surface area of seas and the water up to the floor area of seas with the certain boundaries. The definition represents that CR-CW is the right of any individuals (including private corporations) to an exclusive access.

Based on the definition, private corporations possessing CR-CW on certain coastal areas could utilize it on their own interest. Such definition indicates that CR-CW has potential to legalize the privatization of coastal waters and thus raise the gap between private corporations and the people. CR-CW is potentially monopolized by one person or group.

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over the centuries by the farmers themselves without guidance from central authorities. See Elinor Ostrom, *Crafting Institutions for Self-Governing Irrigation System*, San Fransisco: Institute for Contemporary Studies, 1992, p. 10.

Private corporations will exclude customary and local communities from catching fishes at the areas of CR-CW. The loss of sovereignty of local and customary communities will become more apparent when in fact majority of the holders of CR-CW are from private corporations. The monopoly by private corporations certainly lessen the State's role in managing natural resources for the welfare and prosperity of the People.

Furthermore, the petitioners of judicial review also criticized the character CR-CW that makes CA-SI as the private property and the objects that can be transferred. Article 20 paragraph 1 of Law 27/2007 states that CR-CW is as the private property that may be transferred, assigned and even made as the debt security. CR-CW changed the legal opinion about the existence as well as the management of CA-SI (from the common property to the private property and from the common access to the exclusive access).

Actually, the opinion about CA-SI as the common property could be used to recognize the legal certainty of CA-SI at customary (*ulayat*) areas and to protect vulnerabilities of local and customary communities in management of CA-SI. However, the opinion about CA-SI as the private property will sacrifice it. The common property refers management of CA-SI on the common access, while the private property refers on the exclusive access. By the common access, every members of communities could participate in utilization of coastal resources. In contrast, by the exclusive access, only the holder of CR-CW could utilize and monopolize the right to management of CA-SI. It is the change of legal procedure for managing natural resources that is susceptible to trigger high rates of poverty in coastal communities. CR-CW will sacrifice traditional and customary fishermen.

Therefore, the concept of CR-CW in Article 1 paragraph 18 and Article 20 paragraph 1 of Law 27/2007 is considered contrary to Article 33 of the 1945 Constitution. The article mandates that the natural resource management should be based on the greatest prosperity of the

people. The existence of CA-SI is one of the national natural resources necessary for overall prosperity of the people as mandated by Article 33 of the 1945 Constitution. When the state granted CA-SI to private corporations in the name of CR-CW, the state is no longer able to direct the management of SDP-PPK for prosperity of the people.

Some other canceled norms in Law 27/2007 are impact of CR-CW on recognition of customary rights to the sea (*hak laut ulayat*) and arrangements regarding the legal subjects for CR-CW. Article 16 paragraph 1 and 2 of Law 27/2007 states that the sole permitted mechanism for managing CA-SI is only through the CR-CW. If it is further analyzed, this provision contains a disharmony with the rights of customary communities. CR-W is contrary to the spirit of the 1945 Constitution to appreciate and respect the rights of customary communities over coastal areas and islands. The recognition of customary rights is mandated in Article 18B paragraph 2 of the 1945 Constitution, which state that “the State recognises and respects customary communities along with their traditional customary rights as long as these remain in existence and are in accordance with the societal development and the principles of the Unitary State of Republic of Indonesia”.

In the meantime, Law 27/2007 states that existence of CR-CW as the administrative provision in the management of CA-SI is required for every person or group—both local as well as customary communities, and private corporations. This provision suggests that the presence of Law UU 27/2007 is intended to cancel the habituality of customary communities for utilization of CA-SI in the customary territories. CR-CW could threaten the right to life and the right to survive/advance the life of local and traditional communities living in coastal areas.

The petitioners of judicial review also debated on the legal subjects to get certificate of CR-CW. Law 27/2007 did not give a special treatment (affirmative action) for customary and local communities. Article 18 of Law 27/2007 regulates the classifications of legal subjects to hold the certificate

of CR-CW. They are individual Indonesian citizens, legal corporations established under the Indonesian laws (such as private corporations), and customary communities. To become these legal subjects, each has the same administrative requirements in fulfillment of CR-CW. This means that Law 27/2007 puts local and customary communities in the same position as private corporations. These conditions indicate that the participation of customary and local communities seems just as 'complementary'.

The administrative requirements of CR-CW will only benefit for corporations. The differences between corporations and the People for accessing CR-CW are very clear. The provisions of administrative fulfillment to get CR-CW are definitely not easy for customary and local communities. The mechanism of CR-CW is potentially monopolized by private corporations. Such provisions indicate the State has not responded vulnerability of local and customary communities. The People will have difficulties in completing the administrative requirements to obtain the certificate of CR-CW. They do not have adequate knowledge and capabilities to prepare the administrative requirements. On the other hand, private corporations must have been benefited to complete the administrative requirements to obtain the certificate of CR-CW. The corporation has sufficient knowledge and capabilities to prepare the administrative requirements.

Law 27/2007 also provides the article that threatens the guarantee on legal certainty for the rights of customary and local communities to enjoy CA-SI as the source of life (Article 23). The threat is shown with the character of CR-CW that could be used by private corporations to take over CA-SI from local and customary communities. Article 23 paragraph (4, 5, and 6) of Law 27/2007 states that legal subjects (private corporations and so on) can apply for CR-CW to the Central or Local Government, although at the same time, local or customary communities have utilized CA-SI as a source of fulfilling their needs of livelihoods. In

order to respond to the applications, the Central or Local Government can grant CR-CW to private corporations after consultations between private corporations and the People. Article 23 of Law 27/2007 refers to the Central or Local Government as facilitators of consultations between the People and private corporations. Such mechanisms are still potential used to eliminate the rights of customary or traditional communities that inherited from generation to generation. The mechanisms of consultations could be used as the strategy of eviction over the People so that their areas can be used for CR-CW. The mechanism of consultations to get CR-CW (Article 23 of Law 27/2007) is contrary to Article 18B paragraph 2 of the 1945 Constitution on recognition of customary rights, and Article 28C paragraph 1 concerning the right of every people to develop themselves, and Article 28H paragraph 2 concerning the right to get special treatment for vulnerable people.

Furthermore, Article 60 paragraph 1 is also one of the articles in Law 27/2007 which threatens legal certainty for the People in the management of CA-SI. The article uses mechanisms of compensation as a means to take CA-SI from vulnerable communities. The Central or Local Government can permit CR-CW for private corporations after agreement of compensation between the People and corporations. The word 'compensation' is more directed at expulsion of local and customary communities so that their areas can be used for CR-CW. In other words, it is just as an effort to weaken capabilities of local or customary coastal communities. This provision is contrary to Article 28G paragraph 1 of the 1945 Constitution, which states that the State guarantees protection and fulfillment of properties (including the common property) as human rights of the People

### **2.1.3. CR-CW as Non-People Oriented Management of CA-SI**

The reason to analyze contradiction between CR-CW and spirit of pro people management was based on the function of law. Roscoe Pound argued that law serves as a social engineering (law as a tool of

social engineering). Such rules of law could be realized by means of legal planning, coordinating and controlling-monitoring-evaluating. Law as a means of social engineering is the usage of law to achieve an order state as ideals of lawmaking<sup>8</sup>. In accordance with the theory of Roscoe Pound, legislators should think that Law 27/2007 is intended to the People.

The concept of people oriented management or pro people menegement is to build the power of the People in management of CA-SI as the common property resources. In the perspective of social science, power is defined as any ability, capability and rights of people to control the behavior and life of another person or group. In the Blackwell Dictionary of Modern Social Thought, power is defined as the capacity to produce, or to contribute outcomes—to make a difference to the world<sup>9</sup>. In this discussion, power could be considered as the capability to do the things (to manage CA-SI) through social relationships: it is the capacity to produce, or to contribute the outcomes by significantly affecting another or others.

Power or authority in the discussion is referred in the context of capabilities. As Foucault said, the discussion on power is not restricted only to the area of power relations in the interaction between the individual of People and the state apparatus, but also to the power relations extended throughout the various areas of life; as an example of relationship between private corporations and workers in the field of employment<sup>10</sup>, relationship between investors and local communities in management of natural resources, and so forth. Power in the discussion is seen as capabilities of the People to compete in the interaction management of CA-SI.

<sup>8</sup> Satjipto Raharjo, *Hukum dan Perubahan Sosial*, Bandung: Penerbit Alumni, 1979, p. 126.

<sup>9</sup> The Blackwell Dictionary of Modern Social Thought. (2002). [http://www.blackwellreference.com/public/tocnode?id=g9780631221647\\_chunk\\_g978063122164720\\_ss1-44](http://www.blackwellreference.com/public/tocnode?id=g9780631221647_chunk_g978063122164720_ss1-44). Accessed 19 November 2015.

<sup>10</sup> Paul Patton, "Michel Foucault" in *Creating Culture*, ed. Diane J. Austin-Bross, Sydney, London, Boston: Allen & Unwin. Patton, 1987, p. 234.

In this context, management of CA-SI is as an arena of power relations between the People and private corporations. Such competitions raise the question, could the People compete with private corporations? The answer is possible or impossible. It depends on power relations to build. Although the People do not have the same capitals as corporations have, the People can also compete with as long as it has the power from the Central or Local Government (affirmative action). This special treatment could encourage strength of the People institutionalized into collective capabilities<sup>11</sup>. Such capabilities will never be accepted by the People in an instant way, but it must be fought and legalized in legal way.<sup>12</sup>

Based on the considerations of the Court, CR-CW is considered much less to accommodate the spirit of people oriented management. CR-CW just put local and customary communities as the subordinated objects. The norms of the management of CA-SI in CR-CW (Article 16 paragraph 1-2 and Article 18 of Law 27/2007) are examples that the law puts local and customary communities as the complementary groups to compete with corporations in participation of management of CA-SI. The law does not recognize CA-SI at the customary (*ulayat*) territories as the customary rights. Customary communities are treated equally by corporations, which must fulfill the licensing requirements of CR-CW to manage CR-SI although at the customary territories. In fact, the customary as human rights only requires acknowledgment (recognition) from the State. Mechanisms of CR-CW are clearly contrary to spirit of pro people management.

After finding the destructive impact of CR-CW on management of CA-SI, therefore, the concept of the common access is offered to encourage the concept of people oriented management. The concept

<sup>11</sup> Geoff Danaher, Tony Schirato & Jen Webb, *Understanding Foucault*, London, Thousand Oaks and New Delhi: Sage Publication, 2000, p. 70.

<sup>12</sup> Michael Foucault, *Power/Knowledge: Selected Interviews & Other Writing 1972-1977*, ed. Colin Gordon, New York: Pantheon Books, 1980, p. 89-90.

is intended to put the People as the subjects or the actors and not as the objects or the targets; to manage powers (the management of CA-SI) simultaneously. Such concepts will emerge the spirit of people empowerment that encourage the people as part of disclosure of power, medium power and not points of application of power<sup>13</sup>. It means that spirit of people oriented management in utilization of CA-SI through concept of the common access and the spirit of people empowerment supports the establishment of self-reliance program for the People.

## **2.2. The New Concept in Management of CA-SI**

### **2.2.1. The Common Access in Management of CA-SI**

The concept is offered by Ostrom<sup>14</sup>. For the sake of comprehensive understanding, the author need to explore some terms related to the concept including property rights, common property, common access, common property regimes and open access. Property right is a general term of rights for rules governing access to and control of land, water, irrigation, forestry and other material resources. From the concept of property right, there are two species of property arrangement: private property and common property. In a private, property rules are constructed around the idea that resources are assigned to the decisional authority of particular individuals. The individual to whom a given object is assigned has control over the object: it is for him to decide what should be done with it. The private property belongs to individual one. The private property could be monopolized or sold by an individual owner. Related to management of utilization, the private property recognizes with the point of throwing authority behind individual control (or behind the individual disposition of access) over material resources<sup>15</sup>.

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<sup>13</sup> Angela Cheater, "Power in the Postmodern Era", in *The Anthropology of Power: Empowerment and Disempowerment in Changing Structures*, ed. Angela Chetaer, London and New York: Routledge, 1999, p. 3. The further discussion on people empowerment is in sub chapter 2.3.

<sup>14</sup> Elinor Ostrom is an international expert on the issue of common pool resources. She shared the Nobel Prize in Economics in 2009. The prize was dedicated for her lifetime of scholarly work investigating how communities succeed or fail at managing common pool resources such as grazing land, forests and irrigation waters. Ostrom is a political scientist at Indiana University.

<sup>15</sup> Bruce Ackerman, *Private Property and the Constitution*, New Haven: Yale University Press, 1977, p. 116.

The common property belongs to all members of the community. The common property could not be monopolized or sold by any members of the community. In a *common property*, resources are managed by rules whose point is to make available for use by any members of the society. The resources as the common properties could be such as fisheries, groundwater basins, irrigation systems and other material resources. The common property resources are governed by members of the community with the common access. In some works, Ostrom refers the system management of common property as common property regimes. By the term, Ostrom also reviews the confusions that generate misunderstanding between common property and open-access regimes. Some misunderstands that the management of common property utilization is based on open access. For Ostrom, open-access regimes only include the open seas and the atmosphere. These two resources have long been considered in legal doctrine as involving no limits on who is authorized to use<sup>16</sup>. Consequently, if anyone utilize it, no one could exclude him/her from using it. Based on such explorations, the open access regimen usually will lead to misuse and overconsumption. However, the performance of the concept does not include to the management of coastal resources and small islands.

The common property regime (the common access on management of the common property) controls the access and the utilization on such rules. The use of common property regime must follow these eight conditions: to define clear group boundaries, to match rules governing use of common goods to local needs and conditions, to ensure that those affected by the rules being able to participate in modifying the rules, to make sure the rule-making rights of community members respected by outside authorities, to develop a system carried out by community members for monitoring members' behavior, to have low-cost means for dispute resolution, to use graduated sanctions for rule violators, and to

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<sup>16</sup> Elinor Ostrom, 'Private Property and Common Property Rights', <http://encyclo.findlaw.com/2000book.pdf>, page. 336. Accessed 15 April 2016.

build responsibility for governing the common resource in nested tiers from the lowest level up to the entire interconnected system.<sup>17</sup>

In the context of Indonesia, one important of such principles of common access is that the performance should not be independent from the State's control. The provision of "the rules should be respected by outside authorities" ensures that the performance should be in accordance with the policies of higher legal authorities such as the State (the Local or Central Government). In the common access, members of the community do not only have the right to utilize the common property but also have the responsibility to preserve it. Members of community could not utilize the common resources on individual interest, they must follow on collective interest as collective agreements. Members of community could exclude other members because of violating agreements. Ostrom found that the common access as mechanisms to govern that common property has evolved over long periods of time in all parts of the world. The concept should be given formal status in the legal codes of natural resources management. In the context of management of coastal resources and small islands, the application of common property regimes involve participants who are proprietors and have the above eight rules. However, the participants of common property resources do not possess the right to sell their management even though they most frequently have the right to bequeath it to members of their family and to earn income from the resources.<sup>18</sup> Such rules benefit to preserve the common property resources from generation to generation

### **2.2.2. The Common and the 1945 Constitution**

The authors find consistency of the common access with the norms of natural resource management in the 1945 Constitution in three issues which include: implementation of Article 33 on natural resources for

<sup>17</sup> Elinor Ostrom, 'Private Property and Common Property Rights', <http://encyclo.findlaw.com/2000book.pdf>, page. 341. Accessed 15 April 2016.

<sup>18</sup> It is cited from Decision Number 3/PUU-VIII/2010.

the greatest prosperity of the People, Article 18B on recognition of customary rights, and Some Articles 28 on access of natural resources as human rights.

The first issue is about the greatest prosperity of the People. Article 33 paragraph 3 of the 1945 Constitution applies as a base of the state's right to control and as the economic system in Indonesia. The article provides that the land, the waters and the natural riches contained therein shall be controlled by the State (the concept of State's right to control). The Court mentioned the concept of state's right to control as the considerations of the decision of the case of judicial review of the Oil and Gas Law, Electricity Law and Natural Resources Law. The Court interpreted that the State's right to control is not the sense of state's ownership but in the sense that the state has five authorities; including to formulate policies (*beleid*), to make regulations (*regelendaad*), to perform the administration (*bestuursdaad*), to perform the management (*beheersdaad*) and to perform supervision (*toezichthoudensdaad*) all being intended for the greatest prosperity of the people.<sup>19</sup>

Actually, Article 33 of the 1945 Constitution is not a stand-alone provision or state-oriented, but it is rather related to social welfare<sup>20</sup>. The concept here has a broad meaning and scope, where the People should be free to enjoy it. The purpose of state's right to control over natural resources (including coastal resources and small island) is social justice and the overall prosperity of the people. Specifically related to the state's policies in the management of marine resources, it can be explained that there are at least two characteristics of marine resource management policies, namely a centralized way and a system based on the doctrine of common property and access. The paper discusses on the common property and access.

<sup>19</sup> Bagir Manan, *Menyongsong Fajar Otonomi Daerah*, Yogyakarta: Pusat Studi Fakultas Hukum Ull, 2004, p. 55.

<sup>20</sup> Aceng Hidayat, 'Institutional Change At Local Level: How Gili Indah Villagers Build an Effective Local Governance of Coral Reef Management?', *Journal of Coastal Development*, Volume 8, Number 2, February 2005: 123-154, p. 131.

In the consideration of the Decision, the Court states that the transfer of responsibility of state's control over the management of CA-SI to private corporations through the mechanism of CR-CW is wrong. The concession changed coastal waters from the common property to the private property. The State's authority of policy making (*beleid*), regulation (*regelendaad*), administration (*bestuursdaad*), management (*beheersdaad*) and supervision (*toezichthoudensdaad*) of coastal waters and small islands (CW-SI) must be transferred to the spirit of for the purpose of the greatest prosperity of the people. The spirit could only be transferred by the common access. By this system, the state is still allowed to fully control and supervise the management of coastal water areas and small islands for the sake of national interest.

Eight conditions of the common access will ensure utilization of CA-SI on the spirit of Article 33 paragraph (4) of the 1945 Constitution. The article provides "the national economy shall be organized based on economic democracy with the principles of brotherhood, efficiency with justice, sustainable and environmentally insight, independence and by keeping a balance between progress and unity of national economy". Some rules of the common access will transfer the principle of togetherness in such a way that management of CA-SI involves the People to the greatest possible extent and shall be profitable for the people's prosperity in general. Some provisions of the common access (such as the responsibilities of communities to preserve CA-SI and the enforcement of graduated sanctions for rule violators) will ensure management of natural resources not merely to take efficiency principle into account to obtain maximum economic benefits, but also to improve the People's prosperity in a fair, sustainable and environmentally insight.

The second issue is about recognition on customary communities. Many regions in Indonesia still practice management system of coastal resources on customary laws. Aceng Hidayat collected usage of some

customary laws in governance of marine resources in his research. The first example is the customary system of *sasi*. In Maluku, customary communities recognizes the *sasi* system. The governance of the system underlines a social agreement among community members on how to manage and use fish resources. The second example is the *rompong* system in South Sulawesi. Bugis-Mandar communities in South Sulawesi perform a local system called as the *rompong* system, i.e., a traditional set of claims to marine areas, in terms of both marine fish cultivation and fishing grounds. The performance of the system still exists in the Bugis-Makasar communities of South Sulawesi. The third example is the *seke* system. Fishermen of Sangihe-Talaud, North Sulawesi, manage coastal and marine resources with the *seke*, i.e., a mechanism of fishery resource management. The *seke* system governs coastal communities in this district into three main fishing grounds (the system of *Sanghe*, *Elie* and *Inahe*). The *Sanghe* means fishing grounds within or around coral reef systems. The *Elie* is defined as a offshore, the furthest fishing grounds from the mainland. The *Inahe* is fishing grounds between the other two. The fourth example is the *Ola Nua* system. Customary communities of Lamalera village, District of Lembata, East Nusa Tenggara, governs tradition of *Ola Nua* for restricting fish and capturing activities. They performs some limitations, such as focusing on catching large-sized fish and fishing restriction only from May to September. The system prohibit fishermen from catching whales in puberty or ones that have recently given birth. It also apply selected fishing equipment<sup>21</sup>.

Such concepts are in accordance with implementation of Article 18B of the 1945 Constitution that states “the State recognises and respects customary communities along with their traditional customary rights as long as these remain in existence and are in accordance with the societal development and the principles of the Unitary State of Republic of Indonesia”. Similar to the spirit of the common access,

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<sup>21</sup> Deepa Narayan, *Empowerment and Poverty Reduction*, Washinton D.C.: the World Bank, 2002, p. 11.

these traditions regulate fish size, establishment of a closed season and attempts to protect the resources from greedy exploitation. These customary laws on management of coastal and marine resources are normally effective enough to halt destructive fishing activities. Therefore, the implementation of common access through customary law does not contradict to the national interest.

The third issue is about access on natural resources as human rights. Protection of people's access on CA-SI should be performed in relating to as mechanisms of fulfillment of human rights as mandated in some 28 articles of the 1945 Constitution. The first related is Article 28A which states "every person shall have the rights to live and to defend his/her life and existence". The article could be interpreted that the state also has the responsibility to provide availability of natural resources as tools to make every people fulfill the rights to live and to defend his/her life and existence. For coastal communities, the only tool is coastal resources. Therefore, for the State, to give coastal resources for the community is as mechanisms to fulfill their rights of livelihood. The second related is Article 28C paragraph 1 of the 1945 Constitution, stating 'every person shall have the right to develop him/herself through the fulfilment of his/her basic needs for the purpose of improving the quality of his/her life and for the welfare of the human race'. The recognition on the common access to coastal resources is a part of the State's responsibility to implement that Article 28C. As a common property, the People could utilizes coastal resources by a common access without possessing the right to sell their management. The third related is Article 28H paragraph 2 of the 1945 Constitution, stating 'every person shall have the right to receive facilitation and special treatment to have the same opportunity and benefit in order to achieve equality and fairness'. The recognition on the common access to coastal resources is a part of the State's responsibility to implement Article 28H. The giving of common access for the People is as proper treatment for local communities "vulnerable groups" to have the fair and equal opportunity to utilize CA-SI

## **2.3. Consistency of the Common Access with People Empowerment**

### **2.3.1. People Empowerment and the 1945 Constitution**

The reason to analyze the spirit of people empowerment related to the common access is because that the spirit is in accordance with the 1945 Constitution. Before describing the connections, the authors need to explain about the discourse of people empowerment. According to Deepa Narayan, empowerment is expansion of assets and capabilities for people who do not have power (generally as the poor and backward people) in order to influence public policy.<sup>22</sup> It means that empowerment is a concept that seeks to encourage the People to have power in terms of capability empowerment. This word is one of the campaigns often used by the government in management of natural resources.

Nowadays, there is an improper interpretation on the terms 'empowerment' and 'development' in the context of Indonesian studies. In some studies, some could not distinguish between development and empowerment. Some translations in Indonesia show that these terms have the same meaning. Such translations are not really true. Community development means the program to build society. While community empowerment refers the program to give people the power. In some time, the term 'empowerment' is often associated with the word 'people'. Such associations aim to ensure that empowerment is a program for special people (poor, powerless, indigenous people and diffable man) and not to general public. The differences between community development and people empowerment could be seen in the scope of meaning. The implication of development only refers to build assets of the People. Meanwhile, the meaning of empowerment refers not only to build assets of the People but also to strengthen collective capabilities of the People. Etzioni identifies assets as materials useful for the holder such as the ownership of economic, technical, administrative, labor and so on.<sup>23</sup>

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<sup>22</sup> Etzioni, *State And Civil Society*, New York: Long Mann, 1992, p. 364.

<sup>23</sup> *Ibid.*, p. 13.

Furthermore, the term 'capabilities' is defined as the ability and the independence of the people to take action in achieving goals, both for his own benefit and for the communal benefit. That ability is a combination of knowledge, skills, experiences, creativity (innovativeness), and desire. Capabilities could be found in individuals as private ones and in communities as collective ones. Capabilities at communities are derived from processes of mutual learning between individuals, cooperation, mutual assistance, setting up, organizing, and other social ones and the State formed legal provisions.<sup>24</sup> Individual capabilities must be managed in order to strengthen collective capabilities in community life

Programs of empowerment are not only directed towards micro-scale (individual) but also towards macro-scale (communities). Empowerment to communities will further bring the greatest benefits because capabilities of communities will increase collectively. Empowerment to individuals will only increase capabilities of certain individuals and would only create a gap between communities. Superiority of certain individuals will only create monopolization of assets and threatens welfare of the People.

The consequences of differentiation between development and empowerment can be seen from the impact to communities. Programs of development refer that the Government just allocates natural resources for communities. Meanwhile, programs of empowerment denote that the Government does not only allocate natural resources (assets) but also strengthen capabilities. The concept of community development merely reproduces policies of community building<sup>25</sup>. In worst circumstances, formulation of community development just manages natural resources without participation of communities. Therefore, the People just become the target and the object of development. They did not become independent in making decisions, but only used for the sake of the project.

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<sup>24</sup> Rhonda Phillips and Robert H. Pittman, "A framework for community and economic development," in *An Introduction To Community Development*, ed. Rhonda Phillips and Robert H. Pittman, New York: Routledge, 2009, p. 10.

<sup>25</sup> Aceng Hidayat, 'Institutional Change At Local Level: How Gili Indah Villagers Build an Effective Local Governance of Coral Reef Management?', *Journal of Coastal Development*, Volume 8, Number 2, February 2005: 123-154, p. 131.

Based on the exploration of people empowerment, the authors find that the spirit is in accordance with the mandate of the 1945 Constitution. There are three key issues in the concept of people empowerment (including assets, access and collective capabilities) that could be found in the 1945 Constitution. Similar to the objective of people empowerment to build the people-oriented assets and access, the 1945 Constitution recognizes the natural resources as human rights of the People to prevent them from being only as the object or the targetted of development. Consequently, the People do not only have the rights to enjoy or obtain from management of natural resources but also have the rights as subjects to manage natural resources (Article 28A, 28C and 28G). The Constitution also recognizes customary people and guarantes natural resources governed by customary rights (Article 18B). The mandate of Article 18B is in accordance with the objective of people empowerment to strengthen capabilities of vulnarable groups such as customary communities. The 1945 Constitution also ensures that management of natural resources is for the greatest prosperity of the People (Article 33). Paragraph 4 of Article 33 strengthens that the organisation of the national economy shall be conducted on the basis of economic democracy upholding the principles of togetherness. This principle is in accordance with the spirit of people empowerment which governs that the asset is intended to perform collective capabilities and not to individual capabilities.

### **2.3.2. Consistency of the Common Access with People Empowerment**

As the new concept suitable to be the next concept of constitutional management of CA-SI, the character of common access is not only analyzed in relating to people empowerment but also analyzed with the 1945 Constitution. Therefore, the authors conclude consistency of the common access and the 1945 Constitution with idea of people empowerment for the management of CA-SI, which include:

## **First Point**

The Common accommodates the recognition of customary rights and the concept of affirmative action in the management of CA-SI. This spirit encourages the management of natural resources on pro vulnerable groups such as poor people, customary and local communities. Affirmative action is intended to give power for powerless groups of the People in competing with private corporations. As a form of positive discrimination, affirmative action should be given to the People because they compete with private corporations who have strong technology and rich capital. Application of this spirit is to give a special treatment for customary and local systems in the management of CA-SI, such as the *Sasi* system in Maluku, the *Rompong* system in Bugis-Mandar-South Sulawesi, the *Seke* system in Talaud-North Sulawesi, the *Ola Nua* system in Lembata-East Nusa Tenggara, the *Awig-Awig* system in Tanjung Luar-East Lombok, the *Sawenan* system in Kayangan and Sukadana-Lombok Island, etc<sup>26</sup>. The recognition of customary rights in the Common is in accordance with mandate of Article 18B of the Constitution.

In addition to such provisions, Article 28H of the 1945 Constitution also regulates that the State guarantees to a special treatment (affirmative action) to vulnerable groups in order to obtain a balanced justice. The norms contained in this constitution are in accordance with the concept of empowerment, which aims to increase capabilities and strength to powerless people. They need capabilities to influence the public policy related to their interests. Such concepts are proved to be used the Court to cancel CR-CW. According to Decision Number 3/PUU-VIII/2010, provisions of CR-CW (Article 1 Paragraph 18, Article 16 Paragraph (1 & 2) and Article 18 of Law 27/2007) threaten the position of customary and local communities who depend on the management of CA-SI as the source of their livelihoods.

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<sup>26</sup>Elinor Ostrom dan Schlager, "The Formation of Property Rights" in *Rights to Nature*, ed. Folke Hanna and Maler, Washington D.C: Island Press, 1996, h. 30.

## **Second Point**

The concept of the common access formulates communal capabilities in management of natural resources. This spirit encourages development of a bargaining position for the People to compete with the more powerful groups such as private corporations. The application of the second point is that management of CA-SI must maintain the status of CA-SI as the common property. This concept is in accordance with the norms (the state's right control) of natural resource management in Article 33 Paragraph 3 of the 1945 Constitution. Management of CA-SI in a common access could be a special model for implementing the mandate of the state's right to control with the spirit of the greatest prosperity for the People.

Similar to the objective of people empowerment, management of CA-SI in a common access aims to build collective power and capabilities of the People. The existence of the State should be able to make regulations that protect the People (to act as the small player) not to be dominated by the interests of corporations (to act as the major player). The spirit of people empowerment and the rhetoric of the common access are used by the Court as academic considerations to cancel CR-CW. The Court uses Article 33 Paragraph 3 of the 1945 Constitution as a significant consideration in reviewing CR-CW. The interpretation of the article resulted in the thought that recognition of CA-SI as a private property and its management on an exclusive access is incorrect. The Court considered that the concept of single ownership and close ownership on the management of CA-SI through the mechanism of CR-CW is wrong. When the law gives authority to individuals or private corporations to control certain areas of CR-SI (through CR-CW), then they will close the access for every person.

The Court is also in the opinion that CR-CW (in Article 1 Sub Article 18, Article 18 and Article 20 Paragraph 1 of Law Number 27/2007) does not match four benchmark orientations for the greatest prosperity of

the People (people empowerment). Four orientations are as follows: The CR-CW did not make a significant impact in utilization of CA-SI for the People; CR-CW does not guarantee the equity in utilization of CA-SI for the people; CR-CW ignores participation of the People in determining the benefits of natural resources; and CR-CW ignores the rights of next generation of the people to exploit CA-SI. Therefore, revocation of CR-CW and offer of the common access are appropriate means to restore management of CA-SI into the spirit of the greatest prosperity for the people in accordance with Article 33 Paragraph 3 of the 1945 Constitution. In the perspective of people empowerment, implementation of Article 33 Paragraph (3) of the 1945 Constitution is a means to build collective capabilities of the people. Ultimately, such capabilities are useful to build their bargaining position in order to compete with corporations.

### **Third Point**

The common access formulates the modeled management of CA-SI as the pro people access. Ostrom defines the term access as the right to enter a defined physical area and enjoy non-subtractive benefits. The concept of this definition emphasizes to the right of person to benefit non-subtractive values. The nature of these benefits can be enjoyed together. Based on the model of Ostrom's access, CA-SI is a common property allowed to be accessed by communities. Therefore, the management should be used for the greatest prosperity of the People.

Access is one of the prerequisites for building assets and collective capabilities of the People to realize the spirit of people empowerment. The people will never be able to reproduce assets, if they cannot get access. As a consequence, the people will not be able to build collective capabilities. The relationship between access and assets is similar to relationship between a door and a key. The position of access is as a key and asset is as a door. The people should be able to get a key and a door (access and asset) to enter a room (building capability).

The thought in third point is strongly needed to prevent the chance of private corporations from eliminating the right to survival/ livelihood of local and traditional customary communities living in coastal areas. In contrast, CR-CW set up a mechanism for corporations to take over CA-SI from the community through the consultation and compensation. Article 60 Paragraph (1) Law 27/2007 allows the 'expulsion' of local communities through the mechanism of compensation. This compensation could be paid by private corporations to the People whose living space is in coastal areas. This model of access does not side with the people. It is very clear to result in the loss of jobs for the majority of local communities who work as fishermen. Article 23 Paragraphs (4, 5 and 6) of Law 27/2007 provides mechanisms for corporations to take CA-SI from the community through consultations. Although the Law refers to the Local Government as a facilitator in consultations, such provisions potentially deprive the People.

In the Decision Number 3/PUU-VIII/2010, the Court uses a way of thinking of such access (the common access) as considerations for canceling Article 23 and Article 60 of Law 27/2007. The Court strengthens the considerations on some articles of the 1945 Constitution. They are Article 28A of the 1945 Constitution on the right of every person to sustain life; Article 28C on the right of every person to improve quality of life; Article 28G on the right to properties. Thus, these articles of the 1945 Constitution are in accordance with the common access on the protection of pro people management (people empowerment) of CA-SI.

### **III. CONCLUSION**

The former concept in management of coastal areas and small islands (CA-SI) used by Law 27/2007 are the concessions right on coastal waters (CR-CW). The concept of concessions were revoked by the Court Decision because it is contrary to the norms of natural resources management in the 1945 Constitution and the spirit of people empowerment. Some provisions of CR-CW reflect non-people

oriented management of CA-SI. CR-CW in Article 1 Sub-Article 18, Article 16 paragraph 1-2, and Article 18 of Law 27/2007 changed the existence of CA-SI from the state's right to control into the private corporation's right (contradiction to the spirit of the greatest prosperity of the people/Article 33 of the 1945 Constitution). Then CR-CW in Article 20 and other interpretation Article Article 18 as well as Article 1 Sub-Article 18 of Law 27/2007 did not recognize the customary rights (contradiction to Article 18B of the 1945 Constitution). CR-CW in Articles 23 and 60 of Law 27/2007 provided mechanisms to take over CA-SI belonging to local and customary communities (contradiction to protection of the state on livelihood, prosperity and property of the people in Article 28A, 28C paragraph 2 and Article 28G paragraph 1 of the 1945 Constitution).

The new concept offered in the Court Decision is the common access. In this concept of access, CA-SI is regarded as the common property with the rules from members of the community itself. The provisions to access CA-SI as the common property are also determined by agreements of the community itself. (such requirements of common property regime). Although as the system from communities, the provisions of management of CA-SI on the common access are still under the limitations by the State's law. The performance of common access that recognizes the customary system of access should follow the provisions of Article 18B of the 1945 Constitution. The objective of common access that intends to collective prosperity of the people should follow the procedures of Article 33 of the 1945 Constitution. Furthermore the spirit of common access to protect the access of people on CA-SI as mechanisms of fulfillment of human rights of the people should follow the limitations of Article 28A, 28C and 28H of the 1945 Constitution.

Management of CA-SI on the common access is in accordance with people empowerment. The consistency is shown by the relevancy of concept of common access to include three key issues of people empowerment (access, assets and collective capabilities). The performance of common access to recognize the customary system on management of CA-SI is in accordance with with the spirit

of people empowerment to concern about vulnerability of customary communities in accessing CA-SI. The recognition could also be regarded as consistency of the common access with spirit of people empowerment to build power relations of natural resources management on the basis of people-oriented asset. Furthermore, the common access governs exploitation of CA-SI by members of communities on the basis of collective agreement and interest. Therefore, this principle is also accordance with the objective of people empowerment to build collective capabilities in the utilization of assets

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