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The contents, norms and values of modern constitutions influence lots of aspects of legal and political life including the development of the work of constitutional courts. Issues which concern this influence, the work of the Constitutional Court of the Russian Feeration, traditional community laws in Indonesia, transitional justice, Constitutional Court decision against money laundering and the work of the Indonesian Constitutional Court in the first ten years present interesting discussion in this second edition of *Constitutional Review*

Jimly Asshiddiqie, the first Chief Justice of the Constitutional Court of the Republic of Indonesia, discusses the influence of universal democratic constitutionalism towards the way of working of constitutional courts including Indonesian Constitutional Court. The author asserts in his writing the importance of catching the moral signs and messages of that universal values in the decision of constitutional courts as an institution that safegueard democracy and as the upholder of the constitution.

Comparative perspective is presented in the second article discussing the appraaches of the Constitutional Court of the Russian Federation. Eugenie Taribo and Dimitrii Kuznetcov who co-authored this article analyze the appraches taken by the Russian Constitutional Court in addressing issues of freedom of speech

and freedom of assembly which involve civil servants, religious organisations and LGBT.

The third article written by I Nyoman Nurjaya discusses the recognition of traditional community laws which is known as "adat" community in diverse Indonesia both from constitutional and legal perspectives. By using legal anthropological approach, the author, in this writing, tries to provide answers to a question whether the 1945 Constitution of the Republic of Indonesia recognises and protects the traditional communities and their adat laws.

Learning from the cases of Aceh, Papua and East Timor, the fourth article discusses transitional justice in Indonesia. Munafrizal Manan, the author, describes the efforts of Indonesia, both judicial and non-judicial, in resolving past human rights abuses under the mechanism of transitional justice after the fall of President Soeharto. The author focuses its analysis in the cases of Aceh, Papua and East Timor.

The fifth article is co-auhtored by Somawijaya and Ajie Ramdan. The authors analyze two recent decision of the Indonesian Constitutional Court which concern the indictment of cumulative charges of money laundering and the broadened range of pretrial objects which greatly affects the principles of formal criminal law.

The last article of this edition tries to capture and analyzes the role of Indonesian Constitutional Court in the first ten years of its existence. Luthfi Widagdo Eddyono, the author, focuses his analyses and landmark decisions of the Court that show the Court's contribution in enhancing the principle of equality and prohibition of discrimination.

Editors

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Jimly Asshiddiqie

Universalization of Democratic Constitutionalism and The Work of Constitutional Courts Today

Constitutional Review Vol. 1 No. 2 pp. 001-022

Modern constitutions with its content of values and legal norms and universal ethics contained therein continuously influence the paradigm of thought and the system of practice and constitutional democratic political regimes in the world. We may say that nowadays we are in the midst of the current development of new thoughts in the study of constitution and the practice of constitutional judiciary in the world, namely the phenomenon of "universal democratic constitutionalism." Indonesia and all the states are experiencing the development of the same influence, so that way of working of the Constitutional Court as an institution to safeguard democracy and being the upholder of the constitution shall also catch the moral signs and messages behind that new development with a critical stance, so that each of its decisions can truly produce justice, certainty, and is solvent in nature vis-à-vis the constitutional problems occurring in the public of the respective states.

Keys words: Constitutional Court, Constitutional Ethic, Supreme Court

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Eugenie Taribo and Dmitrii Kuznetcov

Approaches Of The Constitutional Court Of The Russian Federation Towards Freedom Of Expression And Freedom Of Assembly

Constitutional Review Vol. 1 No. 2 pp. 023-048

The paper consists of seven sections describing the Constitutional Court's practice in respect of freedom of expression and freedom of assembly issues. The matters covered by the paper includes challenges of the constitutionality of laws forbidding civil servants to give public statements, regulation of religious organisations public events, regulation of restricted urban areas where freedom of assembly is limited, the content-based restrictions in respect of LGBT-speech.

Key words: The Constitutional Court of the Russian Federation, freedom of assembly, freedom of expression, individual complaint, constitutional review.

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I Nyoman Nurjaya

Is The Constitutional And Legal Recognition Of Traditional Community Laws Within The Multicultural Country Of Indonesia A Genuine Or Pseudo Recognition?

Constitutional Review Vol. 1 No. 2 pp. 049-068

Indonesia is well known amongst Southeast Asian countries for it multi-cultural identity in terms of ethnicity, religion, race and social stratification. Indonesia embodies its motto of Unity in Diversity, which refers to the culturally rich configuration of Indonesia, containing cultural capital and cultural power. However, cultural diversity also yields conflict due to inter-ethnic and inter-religious disputes that have the potential to generate social disintegration and even threaten the fragmentation of Indonesia as a Nation State. In the eyes of legal anthropologists, sources of conflict are often based on discriminatory policies expressed within the State's law and legislation with regard to the recognition and protection of local communities across the country, namely 'adat' communities practising traditional, customary law, known as 'adat'. Thus, State laws enacted and enforced by the Government tend to dominate and marginalise, even ignore the rights of the local communities, particularly regarding access to and control over natural resources, which is otherwise governed by the adat law of the region. This paper attempts to offer an answer to the fundamental question of whether the 1945 Constitution recognises and protects the traditional communities and their adat laws by employing a legal anthropological approach, with the purpose of obtaining a better understanding of development of State law in a multicultural Nation and looking towards a more just and equitable Indonesian State law.

Key words: Traditional Community Laws, Recognition, Multicultural

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Munafrizal Manan

Seeking Transitiona Justice In Indonesia: Lessons From The Cases of Aceh, Papua And East Timor

Constitutional Review Vol. I No. 2 pp. 069-098

This article analyses the Indonesian efforts to resolve past human rights abuses under the mechanism of transitional justice following the downfall of President Soeharto on May 21, 1998. The focus of analysis is the implementation of transitional justice in the cases of Aceh, Papua, and East Timor during the transitional period. This article shows that the efforts to enforce transitional justice in these cases have been faced with obstacles. Although there have been notable efforts in terms of both judicial and non-judicial to enforce transitional justice, the final results are not satisfactory. Transitional justice mechanism to resolve past human rights abuses was implemented only with half-baked and supported with half-hearted. As a result, it has failed to bring justice for the victims. There are lessons can and should be learned from these transitional justice cases for resolving other past human rights abuse cases in Indonesia today. The current Indonesian government should pay attention to the lessons in order to resolve past human rights violations in accordance with its promise during presidential election campaign in 2014. Otherwise, it is likely to repeat the same mistake and failure of justice dealing with past human rights violations.

Key words: Transitional Justice, Human Rights, Indonesia, Aceh, Papua, East Timor

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Somawijaya and Ajie Ramdan

The Influence Of The Constitutional Court Decision Against Combating Money Laundering In The Context Of Criminal Law Reform

Constitutional Review Vol. I No. 2 pp. 099-118

According to Moeljatno, Criminal Law is a part of a country's legal system that prohibits certain acts with the threat of sanction for those who break said laws, determines when and in what cases such punishments should be imposed upon those who commit said acts and determines precisely how punishments should be carried out in the event that a person is accused of such acts. This paper will analyse Constitutional Court Decision No. 77/PUU-XII/2014 and Decision No. 21/PUU-XII/2014 regarding Criminal Law reform. Looking to the theory of procedural criminal law, an indictment of cumulative charges of money laundering requires that the underlying predicate offences be proven. If, for example, the predicate offence is corruption, the corruption must be proven as multiple crimes have been committed by the same suspect, namely corruption leading to money laundering. the Decision of the Pretrial Judge of the Court of South Jakarta, Sarpin Rizaldi, and Constitution Court Decision No. 21/PUU-XII/2014 on the review of Article 77 of Act No. 8 Year 1981 concerning the Law of Criminal Procedure broadened the range of pretrial objects and greatly affected the principles of formal criminal law.

Key words: Criminal Law, Cumulative Charges, Pretrial, Money Laundering, Corruption

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Luthfi Widagdo Eddyono

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

Constitutional Review Vol. I No. 2 pp. 119-146

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

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

Universalization of Democratic Constitutionalism and The Work of Constitutional Courts Today

Jimly Asshiddiqie
Professor of Constitutional Law at the University of Indonesia, The Founding Chief Justice of the Constitutional Court of the Republic of Indonesia (2003-2008)

Abstract

Modern constitutions with its content of values and legal norms and universal ethics contained therein continuously influence the paradigm of thought and the system of practice and constitutional democratic political regimes in the world. We may say that nowadays we are in the midst of the current development of new thoughts in the study of constitution and the practice of constitutional judiciary in the world, namely the phenomenon of "universal democratic constitutionalism." Indonesia and all the states are experiencing the development of the same influence, so that way of working of the Constitutional Court as an institution to safeguard democracy and being the upholder of the constitution shall also catch the moral signs and messages behind that new development with a critical stance, so that each of its decisions can truly produce justice, certainty, and is solvent in nature vis-à-vis the constitutional problems occurring in the public of the respective states.

Keys word: Constitutional Court, Constitutional Ethic, Supreme Court

I. INTRODUCTION

Nowadays the organized wise conduct of power in the joint livelihood of mankind wheresoever and in whatsoever field is agreed to be bound and be based on system of norms applying equally for all members/citizens set out in one document or in various forms of documents named as a constitution. The development of the aforesaid constitution can be seen from (i) the aspect of its subject: *the state, the civil society, the market*; (ii) from the aspect of its

substance: *politics, integrating legal norms, social-oriented, economic, cultural, welfare, civic education, social engineering, social emancipating, etc.*;[1] and also (iii) from the aspect of its organization: state organization, non-state organization, professional organization, organization of the business realm, public organization, village community organization , etc.

From the aspect of the organization subject as regulated by the constitution it can be in the form of the subject of the state organization as well as non-state organization which comprises corporations in the business realm or the organizations of public legal entities, like the foundations, associations, public organizations or civil society organizations, and even political parties. All the aforesaid organizations require a legal document to be their guidance in conducting their work which is named a constitution. Even among organized civil societies, I advocate to develop a perspective about social constitution which should have been made as one among the new study objects in the studies on constitution nowadays and in the future.

From the aspect of substance or its material content, the constitution of nowadays can be said as loading a very extensive content of values and norms, and not only limited to political matters as used to be understood according to the tradition of constitution of the United States of America being made a model for the drafting of the constitutions of many states in the world. The Constitution of the United States of America is no other than only a "*political constitution*", wherein no rules regarding policies for the field of economy and socio-culture have been loaded at all. Compared to the Constitution of the State of the Republic of Indonesia of 1945 (the Constitution of 1945) which specifically loads provisions in Chapter XIV on National Economy and Social Welfare which comprises Article 33 and Article 34 regulating that policy on economy and social welfare. Therefore, we can say that the Indonesian Constitution is not only a political constitution, but it is also an economic constitution.[2]

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[1] Jimly Asshiddiqie, *Gagasan Konstitusi Sosial: Institusionalisasi dan Konstitusionalisasi Kehidupan Sosial Masyarakat Madani*, LP3ES, Jakarta, 2015; *Ibid*., *Konstitusi Ekonomi*, Kompas, Jakarta, 2010; *Green Constitution: Nuansa Hijau Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*, Rajagrafindo, Jakarta, 2009.

[2] Jimly Asshiddiqie, *Konstitusi Ekonomi* (*Economic Constitution*), Kompas, Jakarta, 2010.

From the aspect of institutional organization which forms and requires a constitutional arrangement as referred to, we may put forward that such could also be developed extensively. Organizations having a constitution would not only be the state organizations, but all forms of public organizations, the business realm, and even in the villages being legal entities can also be institutionalized with the support of a document of a constitution as is practiced in the environment of the customary village government of the Indian tribes in the United States of America. In short, the constitution of nowadays continuous to develop in the various fields of scientific legal and political studies as well as studies in social sciences generally. In due time all these dynamics of development will also influence our perspective on the way how the system of the constitutional judiciary works in the frame of supporting the development process in the progress of civilization of each nation and the civilization mankind in general.

II. DISCUSSION

Constitutional Values and Norms: Law and Ethics

Among the scholars of law and constitution nowadays, the constitution in general is only understood as a manuscript which contains legal norms of the constitution (*legal norms)*. In the past, we could not have imagined that in the prevailing constitutions there are also non-legal values and norms, but ethical norms. Let alone among the law scholars and studies in the environment faculties or law schools, referred to as constitution is none other than merely a source of constitutional law. Nevertheless, in the development of nowadays, the need to develop efforts towards the system structuring of the ethical infra-structure in the environment of state organs and public offices as well as professional offices in all over the world has grown increasingly stronger. Therefore, there appears the need to develop various theoretical studies on "constitutional ethics" besides "constitutional law."[3]

[3] *Vide* Keith Whittington, "On the need for A Theory of Constitutional Ethics", 2005, *vide* in Jimly Asshiddiqie, *Peradilan Etik dan Etika Konstitusi*, Rajagrafindo, Jakarta, 2014.

By using such a way thought, as of the year 1997 I have also continuously advocated various studies on the system of the infra-structure of ethics in the environment of public offices in Indonesia. As of the Reformation of 1998, Indonesia has also formed an institution for the upholders of ethics of the judiciary which has been specifically contained in Article 24B of the Constitution of 1945, named as the Judicial Commission (*Komisi Yudisial*, KY). As of then, many state institutions and even all professional organizations have formed a code of ethics along with the mechanism for its effective enforcement by an ethics committee or an honorary council. What is more, as of the year 2009, when I was entrusted to become the Chairperson of the *Honorary Council of the Electoral Commission*, an institute for the upholders of the code of ethics for the commissioners of that Electoral Commission, we have developed it as an institution for judiciary ethics of a special nature. This model of judiciary ethics for public officers was carried on when I was entrusted to become the Chairperson of the *Honorary Council of the General Election Committee of the Republic of Indonesia* up to date.[4]

With the existence of the mechanism of enforcement of the code of ethics, we may expect that the system of ethical norms may support and complete the shortage of the system of legal norms in the control of and to guide the public at large towards an ideal behavior. Therefore, in the book "*Peradilan Etik dan Etika Konstitusi*" (*The Judiciary of Ethics and Constitutional Ethics*),[5] I have introduced a new term regarding "*constitutional ethics*" besides the *"constitutional law"*. I have also introduced a new perspective regarding the "*Rule of Ethics*" to complete the doctrine we know to date, namely the "*Rule of Law*", which comprises the term regarding "*code of law and the court of law*" and "*code of ethics and the court of ethics*". Even based on the provisions in the laws, in the environment of the People's Representative Council (*Dewan Perwakilan Rakyat,* DPR) it has also been established the Honorary Court of the DPR (*Mahkamah Kehormatan* DPR) initially named the Honorary Body of the DPR (*Badan Kehormatan* DPR).

[4] Jimly Asshiddiqie, *Menegakkan Etika Penyelenggara Pemilu*, Rajagrafindo, Jakarta, 2013.
[5] Jimly Asshiddiqie, *Peradilan Etik dan Etika Konstitusi*, Rajagrafindo, Jakarta, 2014.

That means, the mechanism for the enforcement of the code of ethics for the representatives of the people sitting in the parliament in Indonesia nowadays has formally been developed as a process of judiciary ethics or honorary court.

In the environment of the other state institutions and also in all the environment of professional organizations, a system of ethical infra-structure has also been developed supported by the institutionalization of a commission of ethics or an honorary council to enforce the applicable code of ethics. Even in the environment of judicial power, a special commission has also been established as separately regulated in the Constitution of 1945, namely the Judicial Commission which has the function of the upholders of the code of ethics for the judges. By the time all these will be arranged completely so that an integrated system of judiciary ethics can be established based on the principles of constitutional ethics.

The Universalization of Constitutional Values

In the midst of globalization and dynamics of relations and interplay of influence among cultures, inter-economies, and the political systems of modern states, there appears also new terms regarding values deemed good to be developed in the practice of each state. Let alone the modern state of nowadays can no longer elude from the must to be active and even be pro-active in the dynamics of international relations.

In the aforesaid arena of the dynamic global inter-communication, the constitutions of the modern states as a legal document contribute mutually ideas deemed ideal for the development of joint livelihood in all the modern states. The comparative study of constitutions and constitutionalism has also developed very rapidly producing a comprehension regarding a system of universal values which integrate all the ideal aspirations of being in a state wheresoever mankind dreams about the progress of civilization. After Amos Peaslee published the "*Constitutions of Nations*" in the year 1965,[6] HTJF van Marseeven GFM van der

[6] *Vide* Amos J. Peaslee published the *Constitutions of Nations*, HTJF van Marseeven GFM van der Tang, *Written Constitutions: A Computerized Comparative Study*, 1978.

Tang published "*Written Constitutions: A Computerized Comparative Study*[7] in 1978, then nowadays in the 21st century there are lots of comparative studies conducted by experts regarding the comparison of constitutions which produced a conclusion that nowadays, modern constitution and constitutionalism are undergoing a process of a very rapid universalization of values. [8]

Even Professor Thomas Fleiner, Director of the Institute of Federalism at the University of Fribourg, Switzerland, characterizes the modern era as '*the age of the constitution*' which tends to (i) ignore diversity of different peoples, (ii) proclaim universality and inclusiveness, (iii) subsume sovereignty of nation states into a globalized world, and (iv) profess to recognize the worth of individuals.[9]

Mark Tushnet wrote also in the Minnesota Law Review (2005): "When Is Knowing Better Than Knowing More-Unpacking the Controversy over Supreme-Court Reference to Non-US Law."[10] In his keynote speech at the Annual Meeting of the American Society of International Law (2004), Justice Stephen Breyer stated that "*comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights*."[11]

What is more was said by Vicki C. Jackson, that in quite a lot of cases, the judges deciding on case which are domestic in nature, have increasingly read and considered decisions made by foreign judges abroad as non-binding comparison material but applied as material to decide on a case they handled respectively.[12] As matter of course, the use of these foreign materials has given rise to its pros and cons *per se*. Included is also Chief Justice Rehnquist known for being conservative strongly opposed this. For instance, in one among the dissenting opinions made in the case involving the death penalty, Justice Rehnquist wrote: "*I write separately... to call attention to the defects in the Court's decision to place*

[7] HTJF van Marseeven GFM van der Tang, "Written Constitutions: A Computerized Comparative Study, 1978.

[8] *Vide*, e.g., Dennis Davis, Cheryl Saunders, and Alan Richter (Eds.), *An Inquiry into the Existence of Global Values through the Lens of Comparative Constitutional Law* (Hart Studies in Comparative Public Law, United Kingdom: Bloomsbury, 30 July 2015.

[9] Thomas Fleiner, 'The Age of Constitutions' in Robert French, Geoffrey Lindell and Cheryl Saunders (Eds), *Reflections on the Australian Constitution*, (2003), page 236, UNSW Law Journal 25, 2003, 26 (1), 327.

[10] Mark Tushnet, Minn. Law Review, 90, (2005-2006), page 1275.

[11] *Vide* Harold Hongju Koh, "International Law as part of our law", The American Journal of International Law, page 43-57. *Vide* also Roger P. Alford, "Misusing International Sources to Interpret the Constitution" in The American Journal of International Law, Vol. 98, No. 1 (Jan, 2004), page 57-69.

[12] Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, Harvard Law Review, Vol. 119, No. 1 (Nov, 2005), page 109-128.

weight on foreign laws. ... In reaching its conclusion today, the Court... adverts to the fact that other countries have disapproved imposition of the death penalty for crimes committed by mentally retarded offenders.... I fail to see, however, how the views of other countries regarding the punishment of their citizens provide any support for the Court's ultimate determination...."[13]

Nevertheless, irrespective of the heat of the debate, the general trend indicates that nowadays the phenomenon of the universalization of constitutional values idealized in the joint livelihood of mankind in all over the world is developing continuously. This general phenomenon is also supported by the increasingly developing contributions of scientific research produced by quite a lot of comparative legal studies, *'International Law and Comparative Constitutional Law'*. The comparative study of constitution nowadays has developed very rapidly, and therefore, S. Choudry, in the Indiana Law Journal (1999), named it as *"a central component of contemporary constitutional practice."*[14] This has actually been described by Bruce Ackerman in his article: "*The Rise of World Constitutionalism*" (1997).[15]

This development can also be read in the writings of Cheryl Saunders (professor of comparative constitution, Melbourne Law University)[16] or the handbook written by Mark Tushnet *et al.*[17] describing the extensive influence of universal values related to themes of constitutionalism, structure of government, and various ideas which are '*commonly shared*' in various states in the world. Let alone the larger part of the various instruments of human rights being universal in nature and stemming from various instruments of International Human Rights have been made into a barometer regarding as to how far an applied constitution in a state is modern or not, so that one among the measures of a modern ideal constitution is when that constitution has adopted universal values contained in an instrument of the international law prevailing in the field of human rights.

[13] Taavi Annus, "Comparative Constitutional Reasoning: The Law and Strategy of Selecting the Right Arguments", Duke Journal of Comparative and International Law, Vo. 14, (2004), page 301.
[14] S. Choudry, "Globalization In Search of Justification: Towards A Theory of Comparative Constitutional Interpretation", Indiana Law Journal, 1999.
[15] Bruce Ackerman, "The Rise of World Constitutionalism", Virginia Law Review, Vo. 83, No. 4 (May, 1997), page 771-797.
[16] Cheryl Saunders, "The Use and Misuse of Comparative Constitutional Law", Indiana Journal of Global Legal Studies, Vol. 13, 2006.
[17] *Vide* Mark Tushnet et al., Routledge Handbook of Constitutional Law, Routledge, 2015.

Therefore, the phenomenon of universalization of the content of rules values of the constitution of modern states in the world is indeed not avoidable. One of the examples is the Constitution of 1945 post Reformation adopting almost all instruments of the International Human Rights to become the material of Article 28A up to Article 28J of the Constitution of 1945. This has given cause to the most material content in articles of the Constitution of 1945 that are provisions regarding the constitutional guaranty of human rights. That is the reason why I frequently state that the Constitution of 1945 prevailing nowadays is one among the examples of the most modern constitution in the world.

Modern constitutions with its content of values and legal norms and universal ethics contained therein continuously influence the paradigm of thought and the system of practice and constitutional democratic political regimes in the world. We may say that nowadays we are in the midst of the current development of new thoughts in the study of constitution and the practice of constitutional judiciary in the world, namely the phenomenon of "*universal democratic constitutionalism*." Indonesia and all the states are experiencing the development of the same influence, so that way of working of the Constitutional Court as an institution to safeguard democracy and being the upholder of the constitution shall also catch the moral signs and messages behind that new development with a critical stance, so that each of its decisions can truly produce justice, certainty, and is solvent in nature vis-à-vis the constitutional problems occurring in the public of the respective states. According to Gary Jeffrey Jacobson,[18] the political leaders and the judges in a state shall try to overcome the disharmony in determining the constitutional identity as a product of the influence of the dynamics of universal values with typical elements in a culture living in the midst of the people.

The Court and the Enforcement of the Constitution in Practice

The development of the institutionalization of the mechanism of constitutional review in history, starting as of the controversial decision of the Chief Justice

[18] Gary Jeffrey Jacobson, *Constitutional Identity*, Harvard University Press, Cambridge, 2010, page 143-144.

of the Supreme Court of the United States of America John Marshall in 1803, namely in the renowned case of Marburry versus Madison.[19] It was this decision of the Supreme Court Justice John Marshall which for the first time determined the inapplicability of a prevailing law as a binding law based on a decision of the parliament, in accordance with the doctrine of separation of power among the branches of the legislative, executive, and the judicative powers. With that decision of John Marshall of 1803, the Supreme Court indeed took over the authority of the Congress for determining the validity or non-validity of a law.

As of the aforesaid case of Marburry versus Madison, the practice of reviewing the constitutionality of controversial laws invited a sharp debate, but at the end it was accepted as a good practice for guarding the system of democracy which only rely on the principle of '*majority rule*'. This review mechanism became later on known as '*judicial review*' to be practiced continuously, not only by the Federal Supreme Court of the United States of America, but also the Supreme Court of the states and even in all over the judiciary levels. It is such a system that later on is named the '*decentralized model of judicial review'* followed by other states, mainly by states with a '*common law'* tradition. '*Judicial review'* is conducted by all courts, without the need to form a new institution at all.

Nevertheless, that good practice which has already been commenced as of the year 1803 in the United States of America, could only be accepted in the environment of the Continental Western European '*civil law*' states at the end of the 19th century. A lot of scholars in Germany and in France have discussed the importance of '*judicial review'* to be implemented in the system of the civil law of Continental Europe. Nevertheless, its implementation in the practice occurred only following the adoption of the idea of Hans Kelsen regarding the establishment of the first Constitutional Court (*Verfassungsgerichtshof*) in Austria. The idea of a Constitutional Court independent from the Supreme Court and the Court of State Administration (*Verwaltungsgerichtshof*), became contained in the New Constitution of Austria only in 1919 and only one year later, namely in 1920, the first Constitutional Court in the world was established by virtue of a

[19] Jimly Asshiddiqie, *Model-Model Pengujian Konstitusional di Berbagai Negara*, Konpres, Jakarta, 2005.

law. All the functions of the constitutional judiciary became integrated into the jurisdiction of this Constitutional Court (*Verfassungsgerichtshof*), so that it was mentioned that the model of constitutional review conducted by this Austrian Constitutional Court is a "*centralized model of judicial review.*" As a result of the thought of Hans Kelsen, this Austrian model is also named the "*Kelsenian Model of Judicial Review.*"

The third model, which is slightly different is the model of '*constitutional review*' in France. In the French system as of the year 1958, a Council of the Constitution (*Conseil Constitutionnel*) which is not a Constitutional Court (*Corte Constitutionnel*) was established.[20] Its work mechanism is also slightly different from the Austrian and German Constitutional Court, as it is not a *'judicial review'* but a *'judicial preview'*, namely following the bills are approved by the parliament and prior to endorsement by the President, there is time to conduct a review by the Council of the Constitution (*Conseil Constitutionnel*). If a bill has been submitted for review to the Council of the Constitution, the President would only endorse it if the Council of the Constitution resolved that the bill is constitutional. Besides, as of the year 2010, the French Council of the Constitution also obtains a new authority to decide on petitions from parties having a case in an ordinary court regarding the constitutionality of the provisions being made to be a base by the parties to litigate or a base for the prosecutor general to accuse a defendant.[21]

This French model, particularly with regard to the *'a priori'* mechanism of *'judicial review'* can be said to be very different from the model of the United States of America and the Kelsenian model. The positive side is, the system of legal norms can be more stable in its implementation. However, problems of injustice due to the legal norms used to be discovered only when the laws are enforced in practice, cannot be settled through efforts of 'judicial *review*' to the

[20] Alec Stone Weet, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective*, New Haven: Oxford University Press, 1992, hal.46-47.

[21] As of the 1st of March 2010, the Council of the Constitution of France also receives petitions to review posterior submitted by individual citizens litigating in court by filing a petition to the Council of the Constitution to conduct review on the constitutionality of provisions of laws being made a base for prosecuting or claim against it.

Council of the Constitution. This might be the weak side of this review model of the French Council of the Constitution. Nevertheless, many states influenced by the French legal system have imitated the pattern of the Council of the Constitution France. The remaining democratic states with a '*civil law*' tradition, save to the Kingdom of the Netherlands, almost all follow the Kelsenian pattern. The average of the new democratic states, including those stemming from the communist regimes, following their reform and becoming democracies, they always follow with the establishment of a Constitutional Court according to this Kelsenian model.[22] Whereas the commonwealth states (the *Commonwealth*), save to the United Kingdom, and states influenced by the constitutional system of the United States of America, all have developed a "*decentralized model*" like that in the United States of America. All the authorities of '*constitutional review*' are conducted by courts culminating at the Federal Supreme Court.

We may say that nowadays, almost all states have already this constitutional judiciary mechanism with the intention: (a) to guarantee the uprightness and the guarding of the constitution in a democratic system, (b) to ensure the uprightness of justice as a counterweight of freedom and simultaneously to ensure the unity of the system being in a state through system integration of controlling norms, (c) to ensure and to protect the freedom and basic rights of the citizens, and (d) to protect human rights as *fundamental rights*, (e) to check the trend of *'abuse of power'* mainly in the execution of '*the power for rule-making*', (f) to safeguard the balance between the principle of '*majority rule*' and the '*minority rights*', (g) to muster the aspirations of living together in one vessel of a modern constitutional state which may motivate and guide the pace of the development of civilization of the citizens organized in a vessel of a state.[23] There are exceptions as states like only (a) the United Kingdom,[24] (b) the Kingdom of the Netherlands,[25] (c) several remaining communist countries, or (d) several other states which are yet to embrace the principle of democracy.[26]

[22] Jimly Asshiddiqie, *Model-Model Pengujian Konstitusi di Berbagai Negara*, Konpres, Jakarta, 2006. Tom Ginsberg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, Cambridge University Press, Cambridge, 2003.
[23] Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme Indonesia*, PSHTN-FHUI, Jakarta, 2004.
[24] Dawn Oliver, *Constitutional Reform in the UK*, Oxford University Press, 2003, page 95.
[25] *Vide* also Hilaire Barnett, *Constitutional and Administrative Law*, Clavendish Pub. Ltd, 2004, page 88.
[26] Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, Cambridge University Press, 2003.

The Constitutional Court of Indonesia

By its early development, when Indonesia was preparing its independent constitution in 1945, the idea of the establishment of a Constitutional Court had been discussed at the proposal of Prof. Muhammad Yamin. Nevertheless, his idea was still integrated into the function and the authority of the Supreme Court, and this was rejected by Prof. Soepomo as it was deemed not yet the time.[27] By the time, the importance of making a comparison with a resembling court which was already existing in Austria and Czechoslovakia. It is just finally, that the idea of reviewing the constitutionality of the laws *per se* was not accepted yet by '*the founding leaders'* of Indonesia who formulated the Constitution of 1945. One among the reasons was that the formulators of the Constitution of 1945 were still quite influenced by the legal tradition of the Netherlands which embraced the principle of "*de wet is onschendbaar*", namely that the laws cannot be rated or challenged by a judge.

Following the Reformation of 1999-2002, the idea of '*judicial review*' and the establishment of the Constitutional Court gained its momentum to be adopted into the Third Amendment of the Constitution of 1945 in the year 2001 and the Fourth Amendment in the year 2002. According to Article III of the Transitional Provisions of the Constitution of 1945, "The Constitutional Court will be established the latest on the 17th of August 2003 and prior to its establishment, all its authorities will be conducted by the Supreme Court." With the passing of the Law Number 24 of 2003 regarding the Constitutional Court on the 13th of August 2003, and the designation of nine Constitutional Justices based on a decision of the President on the 15th of August 2003, and who had taken the oath of office on the 16th of August, 2003, the Constitutional Court of the Republic of Indonesia was formally established.

The formal authorities of the Constitutional Court of the Republic of Indonesia comprise:

[27] Jimly Asshiddiqie, *The Constitutional Law of Indonesia: A Comprehensive Overview*, Maxwell Asia, 2009.

1) The constitutional review of Laws;
2) Dispute of constitutional authority among state institutions;
3) Disputes regarding the result of general elections;
4) The dissolution of political parties; and
5) Impeachment against the president/vice the president.[28]

Legal subjects who have *'legal standing'* being eligible to file a petition for a case:

1) For '*judicial review*' case: (a) individuals or group of citizens, (b) public legal entities, (c) corporate legal entities, (d) an institution of the state;
2) For disputes of state institutions, an institution the authorities of which is determined by the Constitution;[29]
3) For cases of Disputes on the Result of General Elections: (a) candidates or participants of a general election or public organizations acknowledged as a party eligible to represent the interest of the voters;
4) For cases of the dissolution of political parties, for the time being (based on the provisions of the prevailing laws) only the Government is entitled to file a petition for such a case. Nevertheless, the government should be prohibited to file a petition.[30] As the government is led by the President supported by Political Parties being winners of a general election, it is quite improper if he/she is given the right to demand the dissolution of a political party being a political adversary of the government. Therefore, in the future it is the public who should be given the right to demand the dissolution of a political party, not the government; and
5) For cases demanding '*impeachment*' against the President and/or the Vice President, it is the People's Representative Council (*Dewan Perwakilan Rakyat*, DPR) which is eligible to file a petition in the Constitutional Court.[31]

[28] Jimly Asshiddiqie, *Hukum Acara Pengujian Undang-Undang*, Rajagrafindo, Jakarta, 2004.
[29] Jimly Asshiddiqie, *Sengketa Antarlembaga Negara*, Konpres, Jakarta, 2004.
[30] Jimly Asshiddiqie, *Kebebasan Berserikat, Pembubaran Partai Politik, dan Mahkamah Konstitusi*, Konpres, Jakarta, 2006.
[31] Hamdan Zoelva, *Impeachment Presiden: Alasan Tindak Pidana Pemberhentian Presiden Menurut UUD 1945*, Konpres, Jakarta, 2011.

The Dynamics of the Function of the Constitutional Judiciary in the Future

Besides the authorities used to be handled by the Constitutional Court variably in various states nowadays, there are also several functions of the constitutional judiciary which might be developed in the future. Noted are also several functions of the constitutional judiciary which have been used to be implemented in practice in several states, but not in other several states. If described in all, the following matters can be put forward:

1) Constitutional Review[32] (abstract norm and concrete norm, a priori and posterior, judicial and executive review, constitutional question, constitutional challenge, constitutional complaint)[33]. For instance, the French Council of the Constitution has commenced to practice the '*constitutional question*' as of the year 2010 whereby the parties litigating in the court can file a petition to the Council of the Constitution to review the constitutionality of an article of the laws being made a base in the case. In the future, Indonesia may also consider to practice the same.
2) Constitutionally Institutional Disputes Resolution, various conflicts of constitutional authority among state institutions shall be settled through a constitutional judiciary. The conflict of authority among state institutions occurred frequently without the existence of a forum which may settle it effectively and efficiently. To date, disputes of authority which can be turned into a case object as referred to, be limited only for authorities which are explicitly determined by the Constitution. Nevertheless, in the future, the constitutional authority can be extended, not only those explicitly mentioned or determined, but to the extent the institutional authority as referred to is constitutional in nature and gives rise to a dispute with another institution in its implementation as well as with another legal subject or state institution, then such a case may also be deemed as a dispute of constitutional authority of a state institution.

[32] Jimly Asshiddiqie, *Pengantar Ilmu Hukum Tata Negara*, Rajagrafindo, Jakarta, 2007; and *Perihal Undang-Undang*, Sinar Grafika, Jakarta, 2008;

[33] On this "Constitutional Complaint" *vide* I Dewa Gede Palguna, *Pengaduan Konstitutional: Upaya Hukum terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara*, Sinar Grafika, Jakarta, 2013.

3) *Adjudication of the* Freedom of Association and Party Dissolution. Political parties and public organizations being a reflection of the *Freedom of Association* are protected by the Constitution. Therefore, political parties and public organizations can only be dissolved if conducted through a constitutional judiciary process.[34] The demand for dissolution shall not be conducted on the initiative of the government but from the members or public citizens voting for political parties and members of or public citizens in general for the dissolution of public organizations. The objective is (i) to protect the freedom of organization peacefully and constitutionally, and (ii) to protect the public from others organizing themselves to spread hatred and hostilities as well as treason against the constitutional state;

4) Democratic Electoral Result Disputes Resolution.[35] The function of dispute settlement regarding the result of general elections, in my opinion, should indeed be settled by the constitutional judiciary. The reason is, general elections and as such also political parties are the pillars of democracy and constitution. Therefore, it would be more proper if it be settled by a system of constitutional judiciary and not by an ordinary judiciary. Moreover, the nature of the judiciary which has to be fast and its management of examination shall also be '*judex facti*' in nature and simultaneously '*judex juris*' render the examination in a high court as well as in the Supreme Court improper. Nowadays people elect directly the following offices: (i) the President and the Vice President, (ii) Governors and Vice Governors, (iii) Regents and Vice Regents, (iv) Mayors and Vice Mayors, (v) Members of the DPR, (vi) Members of the Regional Representative Council (*Dewan Perwakilan Daerah*, DPD), (vii) Members of the Regional Council of People's Representatives (*Dewan Perwakilan Rakyat Daerah*, DPRD) of the Provinces, (viii) Members of the DPRD of the Regencies (*Kabupaten*), and (ix) Members of the DPRD of the Cities (*Kota*).

[34] Jimly Asshiddiqie, *Kebebasan Berserikat, Pembubaran Partai Politik, dan Mahkamah Konstitusi*, Konpres, Jakarta, 2006; "The Idea of Social Constitution: Institutionalization and Constitutionalization of Public Life of Civil Society", LP3ES, Jakarta, 2015;
[35] Jimly Asshiddiqie, *Menegakkan Etika Penyelenggara Pemilu*, Rajagrafindo, Jakarta, 2013.

5) The impeachment of 'Directly' Elected Officials, including the elected president and/or vice president, the elected governor, etc. In order to be consistent with the judiciary on the result of general elections, then the mechanism of dismissal of an officer produced by a general election should also only be conducted through the mechanism of '*impeachment*' which involves the participation of the judiciary forum and political forum simultaneously. In this case, for the 'impeachment' of officers directly elected by people, the constitutional judiciary should better be given a role for legal verification on such base, the political forum is given the authority to impose the sanction of dismissal as it should be. This is consistent with the mechanism of impeachment against the president/vice president, namely that following the Constitutional Court has succeeded to proof and determine the element of mistake of the President or the Vice President, it is the forum of the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat*, MPR) which will impose the sanction of dismissal against the President and/or the Vice President as it should be. [36]

The aforesaid second function up to the fifth function are related with cases involving '*concrete norms*', whereas the first function, *judicial review*, may be related to an '*abstract review*' and may also be a '*concrete review*', like for instance it is related with an '*individual complaint against the state*' assessed to have violated the human rights of the victim which in Indonesia is conducted through the Court of Human Rights. However, the focus of the Constitutional Court should be better be directed to handle '*abstract cases*' only, rather than '*concrete cases*' like cases of Human Rights violations be better kept by the Supreme Court and its ranks for the handling thereof. As such, in the future, the Constitutional Court shall remain focused on efforts to handle cases related to efforts of '*constitutional review*' on the '*abstract norms*' only.

Nevertheless, to the extent it involves this '*constitutional review on abstract norms*', many scopes can be imagined in the frame of strengthening these

[36] Compare with the mechanism of *impeachment* of the President of the United States of America which embraces the presidential government system, and the mechanism of *impeachment* as practiced in the environment of states embracing parliamentarian government system or semi-presidential government system.

functions of the constitutional judiciary in the future. The vertical and horizontal hierarchical system of legal norms should be well integrated and be subject to one unity of review system only. What is practiced in Indonesia and also in South Korea is dualistic in nature by differentiating between review of the constitutionality of the laws and review of the legality of the regulations of the laws beneath the laws can be deemed to not assuring an equitable and efficient legal certainty, as well as it does not assist efforts to develop an integrated legal system under the control of the constitution being the highest law.

In order to overcome various burdens of cases, the work mechanism of the constitutional judiciary can also be developed variably through two means which should be available simultaneously, namely the review by a superior executive officer and/or review by the constitutional judiciary through '*review*' or '*preview*'. As such, the process and mechanism of the review can be developed through several means as follow, namely: (a) *executive preview*, (b) *executive review*, (c) *judicial preview*, and/or (d) *judicial review.*[37]

In the practice in Indonesia now, '*Executive preview*' is conducted by the Central Government *casu quo* the Ministry of Home Affairs against the material as well as formal validity of a product of a Regional Regulation deemed to be contrary to the regulation of the central government, particularly the Laws. A '*preview*' is conducted prior to a Regional Regulation is endorsed and published in a Regional Gazette. Nevertheless, following a Regional Regulation (*Peraturan Daerah*, Perda) is valid and in force, the Central Government remains to be given the authority by Laws to revoke or to cancel regional regulations deemed contrary to the laws of the central government by granting a right to the respective regional government to submit an objection by filing a petition directly to the Supreme Court. The Supreme Court is given the authority to state its agreement on a decision to cancel a Regional Regulation by the Central Government, or otherwise to justify the Regional Regulation and ordering the revocation of a decision cancelling the aforesaid Regional Regulation to the Central Government. I name this mechanism the "*executive preview*" and "*executive review*" which have been implemented in practice.

[37] Jimly Asshiddiqie, *Perihal Undang-Undang*, Sinar Grafika, Jakarta, 2008.

Meanwhile, the mechanism of *'judicial review'* which has been practiced indeed by the Constitutional Court and the Supreme Court to date either against the constitutionality of laws or against the legality of a regulation beneath the laws. Besides, in my view, the Constitutional Court is also authorized to review the constitutionality of either a bill pending to formal legalization to become a law or a Government Regulation in Lieu of Laws (*Peraturan Pemerintah Pengganti Undang-Undang*, Perpu) pending to its submission to the People's Representatives Council. If a Perpu having been stipulated by the President violates human rights and obviously will give rise to serious casualties, it should not be that the Constitutional Court being the supervisor of democracy and guardian of the constitution being the highest law to sit idle and wait for the political process in the DPR (Parliament) while openly witnessing casualties as a result of the validity of a Perpu being proven to be unconstitutional. Such is also with a bill which have been stipulated by the DPR, awaiting the formal endorsement by the President within 30 days, shall not wait to review the constitutionality of such bill, if it has been filed by parties feeling aggrieved of their constitutional rights. Let alone is the constitutional loss as referred to, is linked to serious human rights. This mechanism can be mentioned as *'judicial preview'* which shall be conducted by the Constitutional Court for the upholding of the constitution and the constitutional democracy.

III. CONCLUSION

Such are several developments, in the world as well as in Indonesia, the information of which can be shared with the participants. All states shall be open to learning and imitate whatsoever and from wheresoever where there are good examples to be developed and implemented in the respective states. Indonesia also learned from the other states for the establishment of the Constitutional Court, including from 78 states which have institutionalized the mechanism of '*constitutional review'* earlier into a system of their respective constitutions. Therefore, if there are one or two states perceiving that the Constitutional

Court of Indonesia imitates one among those states, I may ensure that such is incorrect. Which is correct is that the Constitutional Court of Indonesia has learned all the way from the good and the not good things from 78 states as reflected in the book of compilation of '*constitutional rules of constitutional adjudication in 78 countries*' which has been published only in the year 2003,[38] but has been made a discussion material as of the year 2001, when the ideas of the Constitutional Court was being drafted and planned in the formulation of the Constitution of 1945 and for the preparation of the first bill regarding the Constitutional Court in the years of 2002-2003.[39]

The world nowadays has indeed become more open. Constitutional values and norms among states have increasingly achieved a very smooth level of development and open for receiving from and rendering influence to wheresoever for the interest of universal mankind. All of us should no way ignore the importance of the factors of history, political systems, economy, and socio-culture of the respective states which would certainly determine the dynamics of the progress of a nation and state. However, the willingness to learn the exemplar and the giving of exemplar in inter-communication among nations and among mankind in the era of globalization nowadays, is one which cannot be avoided.

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[38] Jimly Asshiddiqie and Mustafa Fakhry, *Mahkamah Konstitusi: Kompilasi Ketentuan Konstitusi-Konstitusi, Undang-Undang, dan Peraturan di 78 Negara*, PSHTN-FHUI, Jakarta, 2003.

[39] *Vide* Bill on the Constitutional Court, 2002-2003.

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Approaches Of The Constitutional Court Of The Russian Federation Towards Freedom Of Expression And Freedom Of Assembly

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Abstract

The paper consists of seven sections describing the Constitutional Court's practice in respect of freedom of expression and freedom of assembly issues. The matters covered by the paper includes challenges of the constitutionality of laws forbidding civil servants to give public statements, regulation of religious organisations public events, regulation of restricted urban areas where freedom of assembly is limited, the content-based restrictions in respect of LGBT-speech.

Key words: The Constitutional Court of the Russian Federation, freedom of assembly, freedom of expression, individual complaint, constitutional review.

I. INTRODUCTION

The Russian Constitution guarantees both freedom of expression and freedom of assembly. These two freedoms are enshrined in the text of the Constitution's Chapter 2, "The rights and freedoms of man and citizen" in Article 29 and Article 31.[1] These articles correspond to the European Convention for the Protection of Human Rights and Fundamental Freedoms[2] which Russia has been a part of since 1998.

[1] The Constitution of the Russian federation, 1993, available at: http://www.ksrf.ru/en/Info/LegalBases/ConstitutionRF/Pages/Chapter1.aspx [accessed 15 September 2015].

[2] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: http://www.refworld.org/docid/3ae6b3b04.html [accessed 15 September 2015].

Association of people is one of the channels to express their opinions on various social and political matters in the country. However, association is not intended solely to the expression of citizens' opinions and translating it to the authorities or other citizens. This social institute is designed to make collective solutions to problems related to the activities of parties, trade unions, commercial, public and religious organisations. As it concerns freedom of expression, it is implemented not only by the way of rallies (meetings, demonstrations, marches and pickets), but also through the media, through creative and educational activities etc. Thus, freedom of assembly and freedom of expression can be considered either individually or in conjunction. This paper discusses these freedoms from a perspective of the Constitutional Court practice in two ways: individually and in their interrelation.

Before describing the Constitutional Court case law, there is a need for a brief introduction. The Constitutional Court expresses its opinions in respect of constitutional rights and freedoms when it receives complaints from citizens on the matters of law.[3] However, jurisdiction of the Constitutional Court is limited. Many complaints are solved by ordinary courts or through non-judicial activities of prosecutors and ombudsmen. Moreover, some issues are not in the agenda of the Constitutional Court due to the passivity of citizens in defending their rights using the constitutional complaint procedure. Therefore, on the one hand, the practice of the Russian constitutional justice is not able to show the whole picture of the problems in the sphere of realisation of freedom of assembly and freedom of expression. On the other hand, the practice of the Constitutional Court, of course, can be regarded as a mirror, which reflects the most acute problems in this area with the highest degree of popular interest. Below we discuss these problems and the ways constitutional justice solves them.

[3] See: Federal Constitutional Law on the Constitutional Court of the Russian Federation, available at: http://www.ksrf.ru/en/Info/LegalBases/FCL/Pages/default.aspx [accessed 15 September 2015].

II. DISCUSSION

Constitutional Court of Russia: a brief overview

The legal grounds for the functioning of the Constitutional Court of the Russian Federation are Articles 118-128 of the Constitution of the Russian Federation adopted on 12 December 1993; Federal Constitutional Law "on the Constitutional Court of the Russian Federation" of 21 July 1994 (with amendments). The Constitutional Court is composed of 19 judges appointed by the Federation Council upon nomination made by the President of the Russian Federation. The term of office is not limited to a fixed term; however, judges shall resign when they reach the age limit of 70 years. The latter does not apply to the Chairman of the Court.

The Constitutional Court in its sessions considers and decides any question within its competence. The sessions of the Constitutional Court are called by the Chairman, who runs the preparation of the sessions and presides. Decisions of the Constitutional Court are passed in its sessions provided that two thirds of the total number of judges are present. In case the petition meets the formal requirements of the Federal Constitutional Law, the Chairman of the Constitutional Court assigns judges for a preliminary review of the petition. Conclusions of the judges on preliminary review of the petition are reported in the Court session, where the decision on the admissibility of the petition is delivered. Parties are notified about the result of the preliminary review of the petition.

When the petition is found to be admissible the Constitutional Court takes a decision on the procedure of examination of the case. Cases assigned for the hearing are considered in the open sessions. The hearings are oral. The Court hears the arguments of the parties and testimonies of experts and witnesses and reads available documents. In cases provided for by Article 47.1 of the Federal Constitutional Law, the Court may decide cases without holding a hearing. The Constitutional Court:

1. decides cases on conformity with the Constitution of the Russian Federation of:
   a. federal laws as well as enactments issued by the President of the Russian Federation, the Federation Council, the State Duma or the government;
   b. constitutions and charters of republics as well as laws and other enactments issued by component entities of the Russian Federation on matters pertaining to the jurisdiction of bodies of State power of the Russian Federation and to the joint jurisdiction of bodies of State power of the Russian Federation and bodies of State power of component entities of the Russian Federation;
   c. agreements between bodies of State power of the Russian Federation and bodies of State power of component entities of the Russian Federation, and agreements between bodies of State power of component entities of the Russian Federation;
   d. international treaties of the Russian Federation that have not come into force;
2. settles disputes about the competence:
   a. between federal bodies of State power;
   b. between bodies of State power of the Russian Federation and bodies of State power of component entities of the Russian Federation;
   c. between supreme bodies of State power of component entities of the Russian Federation;
3. following complaints on the violation of constitutional rights and freedoms of citizens, verifies the constitutionality of a law that has been applied in a specific case;
4. following inquiries of courts, verifies the constitutionality of a law that ought to be applied in a specific case;
5. interprets the Constitution of the Russian Federation;
6. delivers an advisory opinion on the observance of a prescribed procedure for charging the President of the Russian Federation with high treason or with the commission of other serious offences;
7. takes legislative initiative on matters within its jurisdiction.

The Court rules exclusively on matters of law. The Court refrains from establishing and investigating of actual facts whenever this falls within the competence of other courts or other bodies. The final decision on the case is usually a ruling. The rulings are passed in the name of the Russian Federation. The final decision on the merits of the inquiry on the observance of a prescribed procedure for charging the President of the Russian Federation with high treason or with the commission of other serious offences is an advisory opinion. All other decisions of the Court are interlocutory orders. The decisions of the Constitutional Court are binding on all representative, executive and judicial bodies of State power, bodies of local government, businesses, agencies, organisations, officials, citizens and their associations. The decisions are final, may not be appealed and come into force immediately upon announcement.

Applicable standards of international law

The ICCPR's perspective

The International Bill of Rights is the most universal means of human rights protection[4] which has its own approach towards balancing and limiting fundamental rights. Article 18 of the International Covenant on Civil and Political Rights says that:

> Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.[5]

Freedom of expression according to the Covenant

> Shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.[6]

[4] Whereas one can argue that different parts of the Bill have different nature. For example The Declaration – is not binding document for the UN members. Another example is the Covenant on Economic, Social and Cultural rights which is not ratified by the United States.

[5] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, art.18 para. 1.

[6] *Ibid*. Art.19 para.1.

Paragraph 3 of art.19 of the ICCPR permits only two types of limitations towards freedom of expression, i.e. "respect of the rights or reputations of others; and for the protection of national security or of public order *(ordre public),* or of public health or morals".[7] In any case limitations should be necessary and proportionate.[8] The UN Human Rights Committee considered the case of a Canadian teacher who was fired by the Government on the grounds that he had published certain materials stirring up religious hatred. The Committee found that limitations were necessary to protect the interests of believers.[9]

The Human Rights Committee in its 102nd session adopted General Comment No. 34, where among other issues it explained the Committee's view towards correlation between art. 18 and art.19 of the ICCPR.[10] This commentary is a good illustration of the current state of international law towards these principles.

General approach of the ECtHR towards freedom of expression and freedom of assembly

As it was highlighted above, Russia is a party to the European Convention on Humna Rights (*hereinafter* the ECHR). Cases where fundamental rights to freedom of assembly and freedom of expression were discussed by the European Court of Human Rights (*hereinafter* the ECtHR) separately or together are quite often. The Court in every case has to apply the following criteria: the interference must be prescribed by law,[11] it must fulfil a legitimate aim,[12] the interference must be necessary in a democratic society,[13] and the interference must be proportionate.[14]

As it concerns, freedom of expression (including freedom of the press, freedom of artistic expression) and freedom of assembly, which are considered as deeply connected, the Court established the following:[15]

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[7] *Ibid*. Art. 19 (3).

[8] UN Human Rights Committee (HRC), *General comment no. 34, Article 19, Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/34 , available at: http://www.unhcr.org/refworld/docid/4ed34b562.html, paras. 33 – 34, [accessed 15 September 2015].

[9] *Malcolm Ross v. Canada*, CCPR/C/70/D/736/1997, UN Human Rights Committee (HRC), 26 October 2000, available at: http://www.unhcr.org/refworld/docid/3f588efco.html [accessed 15 September 2015].

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[11] See: Foka v. Turkey, App. No. 28940/95 (ECtHR: 24 June 2008).

[12] See: Gorzelik and others v Poland App. No. 44158/98 (ECtHR: 17 February 2004).

[13] Handyside v the United Kingdom, App. No 5493/72 (ECtHR: 7 December 1976), at para 49.

[14] See: *Vajnai v. Hungary*, App. No. 33629/06 (ECtHR: 8 October 2008).

[15] Criteria cited by the ECtHR decision on the case of *Mosley v. United Kingdom*, App. No. 48009/08 (ECtHR: 10 May 2011).

- The Court "must determine whether the reasons adduced by the national authorities to justify the interference were "relevant and sufficient", and whether the measure taken was "proportionate to the legitimate aims pursued";[16]
- The Court takes into account the role which the press has in a democratic society, the role of "public watchdog", contribution of the press into political debates, solving of questions of political importance;[17]
- It is not for the Court to establish methods of the press' work;[18]
- Freedom of expression implies that information which shocks, provokes and is disturbing also has the right to be delivered;[19]
- The Court makes a distinction "between reporting facts – even if controversial – capable of contributing to a debate of general public interest in a democratic society, and making tawdry allegations".[20]

All the standards described above are applied by the Strasburg Court when it deals with cases where there is a conflict between fundamental rights. When requirements towards these cases are strict enough the Court has to apply balancing approach towards both freedoms. The first case explaining the ECtHR methodology is the case concerning prohibition of the film "Visions of Ecstasy" in *Wingrove v. The United Kingdom*. Mr. Wingrove, the applicant, was a film director who directed a movie named Vision of Ecstasy. The movie was telling the story about life of a nun who experienced powerful ecstatic visions of Jesus. The film was submitted to the British Board of Film Classification for an expertise. The Board rejected the application on the grond that the movie could be offensive towards religious feelings.[21]

[16] See: UJ v Hungary, Application No. 23954/10 (ECtHR: 19 July 2011); Chauvy and Others v. France, App. No. 64915/01 (ECtHR: 29 June 2004), para. 70.

[17] See: Financial Times Ltd and Others v. the United Kingdom, App. No. 821/03 (ECtHR: 15 December 2009), para. 59; De Haes and Gijsels v. Belgium, App. No.19983/92 (ECtHR: 24 February 1997), para. 37.

[18] See: *Times Newspapers Ltd v. United Kingdom (nos. 1 and 2),* App. Nos. 3002/03 and 23676/03 (ECtHR: 10 March 2009), para. 42; *Jersild v. Denmark,* App. No. 15890/89 (ECtHR: 23 September 1994). para. 31.

[19] See: *Gündüz v. Turkey,* App. No. 35071/97 (ECtHR: 4 December 2003); *Handyside v. The United Kingdom.*

[20] *Mosley v. United Kingdom,* para. 114.

[21] *Wingrove v. The United Kingdom*, App. No. 17419/90 (ECtHR: 25 November 1996).

The case touched upon the issue of blasphemy. The ECtHR in its decision found no violation of Mr. Wingrove's right on freedom of artistic expression. Firstly, the Court stressed that there is no universal European understanding of what constitutes blasphemy: "national authorities must therefore be afforded a degree of flexibility in assessing whether the facts of a particular case fall within the accepted definition of the offence".[22] Then the Court held that the interference in the Applicant's rights was legitimate as it was aimed at protection of interests of Christians.[23] The main argument of the Court was that a blasphemy law in principle does not prohibit views or statements which are contrary to the religious doctrine, the law prohibits (restricts) the manner in which such an expression is made.[24] The last argument is connected with the possibility of the movie to be widely distributed once it appeared on the market.

The second case is the case of *Otto Preminger Institut v. Austria*. The applicant association was intended to screen the film *Das Liebeskonzil* (Council in Heaven). The public prosecutor initiated suspension of the movie screening because of attempted criminal offence of disparaging religious precepts. The applicant lost the case in national courts on the ground that there could be a "severe interference with religious feelings caused by the provocative attitude of the film outweighed the freedom of art".[25]

Like in the previous case, here the Court found no violation. Firstly, the Court reiterated that states have a certain margin of appreciation when there is a matter of protection of public order and the interest of the society.[26] Secondly, the Court took into account the fact that the Roman Catholic religion was the dominant religion in the Tyrol region. When the movie was banned from screening the Austrian authorities were searching prevention of offensive effect of it towards religious feelings of the Tyroliennes.[27] And the last argument of the Court was that article 10 cannot be interpreted as prohibiting forfeiture of the movie.[28]

[22] *Ibid*, para. 41.
[23] *Ibid*, para. 45.
[24] *Ibid*, para. 57-58.
[25] *Otto Preminger Institut v. Austria, App. no. 13470/87 (ECtHR: 20 September 1994).*
[26] *Ibid*, para. 55.
[27] *Ibid*, para. 56
[28] *Ibid*, para. 57.

Both cases have been much criticised.[29] Since the Court has left the states – parties wide margin of appreciation towards balancing two fundamental rights. Article 9 states that "Everyone has the right to freedom of thought, conscience and religion…".[30] It does not say that religions themselves have certain rights. But in both cases the Court took the position of protecting religions *per se*.[31] The Court departed from protection of religious freedom and moved out of the conventional frames towards protection of religious feelings. In conclusion of this paragraph we have to admit that at the international level, including the level of the Council of Europe there are certain standards in respect of freedom of expression and freedom of assembly. These standards are applicable towards the conflict between these rights and interests of the others or public order. Because of the practical reasons international tribunals and other instruments of human rights protection leave to the states wide margin of appreciation which national judiciary deals with. In the next paragraphs we will discuss the practice of the Constitutional Court of Russia and reflection of these international principles in its case-law.

Freedom of expression

In 2011 the Constitutional Court considered the complaint of the citizens who challenged constitutionality of laws forbidding civil servants to give public statements, evaluations and to estimate activities of state bodies or their heads in the media, when it was not within their competence. In case of violation of this provision an employee shall be subjected to official dismissal. As it was stressed in the media, such a ban to some extent was caused by spreading of the Internet video services, such as the U-Tube. These web-pages were utilised by some officials who posted their revelatory videos describing the state of affairs in the departments where they were serving (the newspaper "Kommersant", №118,

[29] See: Sir Patrick Elias and Jason Coppel, *Freedom of expression and freedom of religion: Some Thoughts on the Glenn Hoddle case* in *Freedom of Expression and Freedom of Information. Essays in Honour of Sir David Williams* (edited by Jack Beatson and Yvone Crips) Oxford: Oxford University Press (2000) pp. 51-63.

[30] European Convention for the Protection of Human Rights and Fundamental Freedoms.

[31] See: joint dissenting opinion to *Wingrove*.

01.07.2011).[32] One of the applicants in this case posted a video message on the Internet, where he criticised the police department, where he was serving. Then, in an interview, he said that the abuses in the abovementioned police department, as they were mentioned in the video, are still not eliminated. On the basis of this information, the applicant was dismissed from his duty for repeated violations of the ban on expression of public opinions in respect of a state body. On June 30th, 2011 the Constitutional Court announced its Judgement on the case.[33] The Court found that the challenged law cannot be applied automatically to any out of public criticism by a civil servant. The disputed provision of the law cannot be considered as prohibiting public expression of civil servants opinions (including in the media), in respect of the work of state bodies. The Constitutional Court elaborated a number of tests which must be regarded when evaluating the actions of a public servant:

a. the content of public statements, their social significance and motives;
b. the ratio of real or potential damage to the state or public interests to the harm, prevented as a result of the civil servant's actions;
c. whether there is a possibility for a civil servant to protect his or her rights or state or public interests, which caused the act of expression, in other legal ways; are there any other relevant circumstances.

Law enforcement decisions which provoked the appeal to the Constitutional Court in case if they were adopted on the basis of the contested law, interpreted differently than the Court's interpretation, shall be subjected to review. This decision of the Constitutional Court is of great importance for the ordinary courts, which have to move away from formalism in consideration of disputes on dismissal for public criticism of the authorities, and have to seek the objective truth. The courts need to act in such a way which shows the fine line that separates unauthorised slander and disloyalty from a legitimate expression in the lawful form.

[32] Available in Russian, URL: http://www.kommersant.ru/doc/1670271 [accessed 15 September 2015].
[33] Judgement No. 14-P of 30th of June, 2011.

Freedom of Assembly

In 2012, the Constitutional Court reviewed the complaint of the Commissioner for Human Rights (the Federal Ombudsman) concerning the Federal Law on Rallies and Regional Law (the Republic of Tatarstan) on Freedom of conscience. The Ombudsman lodged the complaint protecting the religious organization "Jehovah's Witnesses".[34] The organisation was fined for not having informed the authorities of the municipality about its religious meeting. This meeting was held not in the prayer house of the said organisation but in one of the public buildings of the city, which had been rented by the organisation. Both the Federal and the Regional laws prescribe that the rules of holding rallies are fully applicable to any religious meetings if they are held outside the places of worship, as well as outside cemeteries or hospitals where certain rituals are performed. In particular, the contested legislative provisions oblige to notify the municipality about an upcoming religious gathering.

What is the purpose of this regulation? From the first sight it is unclear why should the municipality be notified if a religious organisation conducts a public event in a rented space situated not in a private but in a public building. In a multi-religious country the aim of such provisions is that the municipality must be aware of the upcoming meeting to assess whether to take steps to ensure security and order in the area of the event. However, it is not always when religious meetings are held in conditions which require mandatory adoption of preventive measures. For example, they may be held outside the places of worship, not in the municipal buildings, but in private houses.

Therefore, the Constitutional Court declared that the disputed laws do not contradict the Constitution of the Russian Federation. This is so to the extent that they introduce (as a general rule) the notification procedure in respect of worship and religious gatherings in places such as those places where the citizens, on whose behalf the Ombudsman addressed the Court, held their meetings. At the same time the Constitutional Court declared the challenged provisions partly unconstitutional. They were declared unconstitutional to the

[34] Judgement No. 30-P of 5th of December, 2012.

extent applicable to prayer and religious meetings, procedures for holding rallies, demonstrations and marches to the extent applicable without distinction between religious meetings, which may require the public authorities to take measures to ensure public order and safety, and those religious meetings which does not involve such a necessity.

Interrelation of freedom of expression and freedom of assembly

Abovementioned examples of freedom of expression and freedom of assembly cases were considered as their own, outside of any relationship between them. Now we consider the situation where these freedoms are realised one through another, namely: freedom of expression of citizens is realised through meetings, marches, demonstrations, pickets. As the Constitutional Court case law shows conflicts over freedom of assembly were not associated with restrictions on the expression of certain opinions as such, while processions, rallies, and demonstrations exist for expression of an opinion on a particular political issue. In other words, the difficulties in conducting meetings occurred not because of the content of the problems submitted for public discussion, but because of the technical conditions of such meetings. Opposition groups of citizens often challenge organisational modalities of the meetings. And this is a manifestation of these opposition views against the power of the government, which, in their opinion, has established such rules which are disproportionate and unreasonable. In several press publications the position of some opposition leaders, who were encouraging "instead of protesting against a specific issue" "just gather", was considered as the non-constructive one ("Literary Gazette" № 39 (6293) of 6 October 2010).[35]

The first block of the Constitutional Court decisions concerns regulation of venues, prohibited for public gatherings. Currently the law names a number of areas where conduct of public events is prohibited. In particular these are areas around the courts. Back in 2007, the Federal Ombudsman lodged a complaint to the Constitutional Court, arguing that the boundaries of the territories directly

[35] Available in Russian, URL: http://www.lgz.ru/article/N39--6293---2010-10-06-/ [accessed 15 September 2015].

adjacent to the buildings occupied by the courts are uncertain. When these boundaries are not specified clearly, it is difficult to comply with the ban on holding the public event, punishable with administrative liability in the form of fine.

By the decision of 17th July, 2007[36] the Constitutional Court rejected the complaint of the Ombudsman, but at the same time the Court gave a detailed answer to the question in the complaint. The Constitutional Court pointed out that restricted areas, adjacent to buildings and other facilities, are territories the boundaries of which are defined by decisions of regional authorities or decisions of municipalities in accordance with the legislation in the field of land management, the use of land and urban planning. The Court concluded that if there is no decision of a public authority on designation of the appropriate territory, there is no reason to consider picketing or another public event violating the prohibition of public events on the territory adjacent to the building with a special legal regime. Consequently, there is no reason to find protestor liable. Thus, the legal uncertainty about compliance with the ban on holding public events near buildings with a special regime has been overcome.

In 2014 the Constitutional Court considered the notion of unconstitutionality of the regional law of St. Petersburg on rallies. The law prohibits holding meetings, rallies, marches and demonstrations in the Palace Square, St. Isaac's Square and the Nevsky Avenue. However, the city's public authorities designated a special place for holding public gatherings in the heart of St. Petersburg: a platform located on the Field of Mars. Moreover, there is no requirement of notification of public authorities on an event there. The applicant claimed that this regulation is groundlessness because the disputed law does not prohibit organising cultural, sport, and other celebrations on the Nevsky Avenue. The Constitutional Court decision of 22nd April 2014,[37] rejected the complaint, stressing that non-political public events are not as controversial as public events or celebrations of a political nature. Taking into account the designation of a special place at the very city

[36] Decision No. 573-O-O of 17th July, 2007.
[37] Decision No. 976-O of 22nd April, 2014.

centre, the Court found that the ban on public rallies of political nature on the Nevsky Avenue cannot be considered as a violation of constitutional rights of citizens and has no objective justification. The Constitutional Court also referred to the decision of an ordinary court (the decision of the St. Petersburg City Court) which, while considering the applicant's case, said that the ban on holding meetings on the Nevsky Avenue appears objectively necessary, as this avenue is one of the main highways for public transportation and is characterised by high pedestrian congestion.

Another example of the dispute over the conduct of a public event in the territory with a special regime is the decision of the Constitutional Court from June, 2015. The complainant, an organiser of a public event, submitted to the prefecture of one of the Moscow districts a notice of intention to hold a march promoting healthy lifestyle and Vaishnavism beliefs. Deputy Prefect informed the applicant that the public event must be coordinated with agencies in charge of the relevant territory. The territory in question was the territory of the nature reserve "Sparrow Hills". In the constitutional complaint the applicant challenged the constitutionality of the law which was the legal foundation for the prefect's answer. He believed that this provision allows arbitrary decisions with regard to refuse to conform public religious missionary activities. The Constitutional Court decision of 23rd June, 2015[38] № 1296-O dismissed the appeal, stating that the law obliges the executive authority, in case when they have a reasonable expectation that a public event could violate legal restrictions, to warn the organiser of a public event about it. The Constitutional Court emphasised that the applicant was not denied the right to organise a procession. Since the selected place is situated within the protected territory, the applicant was asked to communicate with the agency responsible for the maintenance of the protective regime of this area about the conduct of a public event there.

The second block of the Constitutional Court decisions is not bound to the "forbidden" or "regime" territories, but it is devoted to the debates over coordination of conventional (non-proscribed) venues of meetings. Issuing decisions of 2nd April,

[38] Decision No. 1296-O of 23rd June, 2015.

2009[39] and of 1st June, 2010[40] № 705-O-O, the Constitutional Court reviewed the provisions of the Federal law, which implies the need to negotiate a place and time of a public event if the place and time offered by organisers were rejected by the authorities. The Constitutional Court took into account the information from the report of the Federal Ombudsman (Commissioner for Human Rights in the Russian Federation). Ombudsman provided examples of the challenged norm application, when it *de facto* blocked public events. Nevertheless, not all such activities were subjected to the actual restrictions, but only those which were perceived (perhaps imaginary) not just as disagreement with public authorities but as denial of their legitimacy, the possibility of any cooperation with them and, more importantly, change of the constitutional order.

It is clear that when a proposal to change the location and time of the event is not only a pretext for its factual ban, and is really conducted to negotiate a venue and time, the goals of participants and third parties, such a restriction of freedom of assembly correspond to constitutional goals. However, if the provision of approval of the location time of the public event is utilised for blocking it, such a practice, of course, contradicts the purpose of the rule. The Constitutional Court clearly indicated in its decision that a public authority may not prohibit an event solely on the ground of this provision. It can only suggest another venue or time. Moreover, such a change is permissible if it does not impede the achievement of the legitimate objectives of the public event. In this regard, the Court's decision included the principle *dictum*: the suggestion should be of adequate social and political significance. The Constitutional Court also elaborated in respect of the reasons why a public authority has the right to offer a different place and time of the meeting. As it was pointed out, establishing an exhaustive list of such reasons would unreasonably restrict the discretion of public authorities in respect of the implementation of their constitutional duties. In respect of the decision it should be noted that if the legislature cannot in a case like this limit the administrative authority's discretion, there are great

[39] Decision No. 484-OP of 2nd April, 2009.
[40] Decision No. 705-O-O of 1st June, 2010.

opportunities for the judiciary to check the validity of a particular administrative decision on the ban of a meeting. Whether the decision of the administrative body is motivated? Whether there are substantial reasons for the ban, were not they imaginary, and were they really obstacles to the rally? The Constitutional Court as well as the legislator, which adopted the 2015 Code of Administrative Justice, focuses ordinary courts on the fact that in dealing with such disputes they have to play an active role in collecting evidence on their own initiative.

In addition, the Constitutional Court has made guidelines regarding the timing for consideration of such disputes. It is crucial for the organisers of the meeting to hold their event on a specific date where the event as such is reasonable if it is confined to a specific holiday or a memorial day. Therefore, the Constitutional Court has expressly stated that judicial review of such cases should be conducted as soon as possible, as provided for dispute resolution in the field of electoral rights, i.e., before the date of the scheduled public event. The Constitutional Court stressed that otherwise the judicial protection would be significantly weakened.

The third block of the Constitutional Court decisions reflects other conflicts around the rules governing the technical organisation of meetings. Application of the law on meetings identified the problem of fulfilling the time requirements for the appropriate applications for public gatherings. The law establishes a specific period of time when one can fill a notice of a public event (no earlier than 15 and no later than 10 days before the alleged date of the event). However, with regard to regulation of public holidays, as well as by-laws regulating the process of filing of such notifications, in reality there were insurmountable obstacles for public events. Such obstacles take place when the deadline for the notice of the public event is during non-working holidays.

In respect of this problem the Constitutional Court adopted the Judgement of 13th May, 2014[41], in which it noted: the parameters of public events, including its form, timing and venue are subjected to change and adjustment only within the framework of conciliation between the organiser and competent public

[41] Judgement No. 14-P of 13th May, 2014.

authorities. Implementation of specific time limits for notification about the meeting ensures equal conditions for the realisation of the right to freedom of peaceful assembly and prevents possible abuse of this right. The establishment of the initial terms of the notice about the meeting is related to the notification submitted long before the intended date of a public event, seeking prevention of other stakeholders from having their gatherings at the same time and in the same place. The deadline for submission of notifications is intended to ensure appropriate time opportunities for the coordination of the public event with the competent public authority. Meanwhile, the legal regulation of labour relations can permit a situation when a number of consecutive public holidays may exceed the period when the organiser of a public event shall submit a notice of the event. As a result, the organiser is in a situation of intolerable uncertainty as to the proper procedure for submitting an appropriate notice, and he or she is deprived of the opportunity to hold this public event, what violates the Constitution. That was the reason why the Constitutional Court declared the contested provision unconstitutional, and ordered the Federal Legislator to introduce necessary changes in the legal regulation for ensuring the possibility of submitting a notice of a public event, in cases when the period of submission, while counting as a general rule, is identical to non-working holidays.

The next example concerns disputes over alleged inconsistencies in a number of participants in a public event as it was suggested by the organisers of the event and an actual number of participants. In identifying the inconsistency the organiser of the action was subjected to liability in the form of a significant monetary penalty. This issue was considered by the Constitutional Court, which as a result adopted its Judgement No. 12-P on 18th May, 2012.[42] In Particular the Constitutional Court pointed out:44

A number of participants exceeding the number which was stated in the notice of its organiser in itself is not sufficient to bring him or her to administrative liability, as well as exceeding the rules of occupancy limit of the venue space in itself;

[42] Judgement No. 12-P of 18th May, 2012.

Responsibility of the organiser in case of violation of the established order may occur only when the excess of the declared number of participants of the public event and creation of a real threat to public safety and order were caused by the organiser of the public event; or when the organiser, allowing the excess of the participants, has not taken appropriate measures to limit the access of citizens to the event, and did not maintain public order and security, which led to a real threat of violation of public order and security, as well as damage to property;

Liability of the organiser for violation of the public order in case when a number of participants exceeded the number stated in the notification is possible only when the organiser is undoubtedly guilty.

The final conclusion of the Constitutional Court is that the challenged statute is not unconstitutional only when abovementioned conditions are met. Thus, the Constitutional Court *de facto* added its own binding instructions to the contested regulation.

Constitutional review of the proposed reform of the legislation on assemblies of 2013

The Judgement of 14th February, 2013[43] has a special and very important place in the Constitutional Court practice. This decision is characterised with the fact that there is no assessment of the constitutionality of a specific provision or provisions regarding the notion of meetings (i.e. it is not limited to some narrow aspect). Firstly, it evaluated a large complex of norms governing the exercise of freedom of assembly. From a perspective of quality, the Constitutional Court was assessing not just a set of rules on a range of issues. In fact, the Constitutional Court verified the legislation reform of rules of conduct of public events. This reform substantially toughened these rules and liability for their violation. It is not surprising that much of the opposition MPs who voted against the reform, appealed to the Constitutional Court requesting review of the constitutionality of these legislative innovations. Along with the request of opposition MPs, the

[43] Judgement No. 4-P of 14th February, 2013.

Constitutional Court also received a complaint of a citizen. Both appeals were reviewed in a Court session with the participation of all stakeholders.

The applicants challenged the provisions which:

prohibited a person from being an organiser of a public event, if he or she was brought to administrative responsibility for offenses in the sphere of organisation of rallies twice or more times;

included disproportionate administrative fine as well as the possibility of such punishment as mandatory works for violating the rules of conduct or holding of a public event, if it has led to public order violations;

permitted a preliminary agitation campaign from the date of coordination of time and place of the public event with the authorities.

This is not the whole list of innovations in the reform of the rules of holding rallies. There is no need to name all the provisions, since the core challenge was the new legal regime of holding rallies as such, which was much stricter than the prior one. The Constitutional Court in its Judgement significantly softened the severity of the contested regulations and, in fact, softened the legal regime of rallies, lowering the degree of the reform.

For example, the Constitutional Court stated that a citizen, who was twice punished for violation of the rules of conducting of the rally, has no right to act as an organiser of a new event only where the re-imposition of responsibility took place within the sentence for the offense committed earlier – that is the period of 1 year. Moreover, such a ban may not be imposed indefinitely: it is designed only for the period during which the person is considered to be punished. The Constitutional Court noted that during this period the organiser of a public event has the right to be the initiator of such events, acting indirectly, for example, referring to the initiative to other citizens, political parties and other public associations and religious organizations. He or she is not deprived of an opportunity to take a personal part in public gatherings, including the role of the person performing administrative functions at the time of the meeting or demonstration.

Increased fines were found inconsistent with the Constitution. The legislator was called to amend the relevant legislation, and before that the courts were allowed to reduce the penalty below the lower limit prescribed for the commission of a relevant offense. However, the statute providing for mandatory work as a form of administrative punishment was found constitutional, with certain reservations. Such a penalty may not be imposed for violations of the formal rules of rallies. It can be imposed only if the offense had serious consequences: for example, when it caused harm to the health of citizens, property of individuals or legal entities, or if there were other similar consequences.

From the point of view of the Judgement of the Constitutional Court the applicants did not have a "complete victory": they were not satisfied with the result, as their desire to reset the reform failed. But the defence - a parliamentary majority - also embraced the decision critically. The Upper Chamber of the parliament, the Council of the Federation, was critical about the decision. However, despite the complaints about the fact that the effectiveness of measures in the framework of the reform is weakened, the parliamentarians stressed: the decision should be respected and enforced.[44]

Substantive aspect of freedom of expression

The only decision of the Constitutional Court, not on the organisational but on the substantive aspect of freedom of assembly was uphold in respect of public actions of sexual minorities, which voiced the matters that these community believed relevant and socially significant. The Constitutional Court in the Judgement No. 24-P of 23rd September, 2014[45] assessed the Statute prescribing punishment for the propaganda of non-traditional sexual relations among minors. The applicants who appealed to the Constitutional Court were referring to the fact that their goal was not to propagate but to inform minors. However, as the only possible means to achieve this goal they have chosen a public space in the immediate vicinity of a school. They were considering any restrictions in respect

[44] The news agency "Interfax", 14th February, 2013.
[45] Judgement No. 24-P of 23rd September, 2014.

of such public gatherings as a violation of freedom of expression. Thus forefront was not to inform or convey their opinion in itself (what is feasible through contacts with authorities in the field of education, school authorities, parents committees), but holding a public event near the children facility.

The impugned provision was recognised not contrary to the Constitution with certain reservations. Firstly, the provision is aimed at protecting constitutional values such as family and childhood, as well as at preventing harm to the moral and spiritual development of minors. Secondly, it does not involve intervention in the sphere of individual autonomy, including sexual self-determination of individuals. Thirdly, the rule is not intended to prohibit or reprimand non-traditional sexual relationships. The Constitutional Court emphasised that the law cannot be considered as impeding the unbiased public debate on the legal status of sexual minorities, as well as the use by their representatives of legal ways of expressing their position on these issues and protection of their legitimate rights and interests, including the organisation and conduct of public events.

According to the media the applicants were largely satisfied with this decision, arguing that despite some incompleteness, it is a step forward in protecting the rights and freedoms of sexual minorities, including protection of freedom of expression through public gatherings. One of the applicants considered the decision of the Constitutional Court as a "grand breakthrough for the rights of sexual minorities in Russia." Although other gay activists said that "nothing fundamentally new in the CC decision was stated", and the only new position in the Court's decision "is equating the crimes against the LGBT community to criminal acts against the social group".[46]

III. CONCLUSION

Summarising the practice of the Constitutional Court of Russia regarding freedom of expression and freedom of assembly, one could come to following conclusions. Decisions of the Constitutional Court do not reflect the entire

[46] "BBC - Russian Service" 25th September, 2014.

spectrum of the issues in this area, which is related only to challenges of the constitutionality of law by the citizens and the parliamentary opposition. These are the laws, which set certain limits on freedom of expression and freedom of assembly. Nevertheless, the practice of the Constitutional Court is a mirror which reflects the most acute and urgent problems of the implementation of these freedoms. These problems demonstrate an increased conflict level in this area.

The practice of the Constitutional Court until 2012 primarily constituted of the Court's decisions rejecting constitutional complaints. However, in the recent years the Court adopts judgements more often, considering the cases involving all stakeholders, and allowing them also to use the written procedure. This shows that problems in this area has accumulated to a certain critical mass and have been exacerbated by a complex legislative tightening the public events regulation.

The main feature of these problems was that the conflict and sometimes just misunderstanding about the rules of holding rallies are not related to the content of the ideas, opinions or calls. The authorities are not following one ideology, they demonstrate practicality, readiness to perceive critical or opposition opinions on a wide range of issues. They demonstrate openness to a variety of ideologically different rallies. They also create advisory councils and advisory bodies for consideration of abovementioned critical opinions at a maximum. Decisions of the Constitutional Court illustrate that tension occurs around the organisational aspects of public actions. This applies to the territory of rallies, the rules for notification about a rally or a demonstration, specific timing and places of their holding, the number of participants, the role and responsibilities of the organisers. It may seem that for the organisers of public events, and for government bodies the technical aspects of rallies rather than ideological ones are of primary importance. For the participants of public rallies the participation is a way of organised and sometimes force or psychological pressure on the government. For the government to establish a clear mode of organisation and holding of rallies and marches is a way of preserving public order and safety and preventing undue influence upon the work of public authorities, including

the judicial, the electoral ones, etc. And there is only one decision of the Constitutional Court which demonstrates a certain conflict or tension regarding the content of the opinion which was translated trough the assembly. That was the abovementioned decision concerning public activities of sexual minorities.

Such characteristics of disputes over the rules of public actions are reflected in the place of the Constitutional Court as an arbiter – whether it takes an active or restrained role. To a greater extent this is a restrained role. But this does not exclude that the same decision of the Constitutional Court may be perceived by the opposition as insufficiently bold and by the authorities as intemperate and unreasonably levelling efforts of the legislator. In any case, decisions of the Constitutional Court, in spite of their compromise nature, eliminate unnecessary tension around the rules of the public rallies. Even acknowledging that contested legislative provisions do not contradict to the Constitution, the Court has supplied the contested norms with correct interpretation, obliging the ordinary courts and non-judicial bodies to be guided by such an interpretation. At the same time, the Constitutional Court gave the legislator certain instructions for making adjustments to the regulation of freedom of assembly. And in cases where the rules governing public rallies were obviously irrational, arbitrary or block freedom of assembly (as in the case of the deadlines for notification) the Constitutional Court found such rules clearly unconstitutional.

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Jersild v. Denmark, App. No. 15890/89 (ECtHR: 23 September 1994).

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Is The Constitutional And Legal Recognition Of Traditional Community Laws Within The Multicultural Country Of Indonesia A Genuine Or Pseudo Recognition?

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Abstract

Indonesia is well known amongst Southeast Asian countries for it multi-cultural identity in terms of ethnicity, religion, race and social stratification. Indonesia embodies its motto of Unity in Diversity, which refers to the culturally rich configuration of Indonesia, containing cultural capital and cultural power. However, cultural diversity also yields conflict due to inter-ethnic and inter-religious disputes that have the potential to generate social disintegration and even threaten the fragmentation of Indonesia as a Nation State. In the eyes of legal anthropologists, sources of conflict are often based on discriminatory policies expressed within the State's law and legislation with regard to the recognition and protection of local communities across the country, namely 'adat' communities practising traditional, customary law, known as 'adat'. Thus, State laws enacted and enforced by the Government tend to dominate and marginalise, even ignore the rights of the local communities, particularly regarding access to and control over natural resources, which is otherwise governed by the adat law of the region. This paper attempts to offer an answer to the fundamental question of whether the 1945 Constitution recognises and protects the traditional communities and their adat laws by employing a legal anthropological approach, with the purpose of obtaining a better understanding of development of State law in a multicultural Nation and looking towards a more just and equitable Indonesian State law.

Key word: Traditional Community Laws, Recognition, Multicultural

I. INTRODUCTION

Indonesia is well known for it multi-cultural identity in terms of ethnicity, religion, race and social stratification. Indeed, an official motto of the State is "Unity in Diversity" (Bhinneka Tunggal Ika), referring to the empirical social and cultural diversity of Indonesia. Indonesian territory, which stretches from Sabang (North Sumatera) to Merauke (West Papua) is rich in both natural resources and cultural resources.[1] On the one hand, the diversity refers to a cultural configuration which reflects the very National identity of Indonesia. This cultural diversity provides Indonesia with both cultural capital and cultural power as well as generating a unique living dynamic for the Nation State of Indonesia. On the other hand, however, this cultural diversity also leads to conflict, especially of an inter-ethnic or inter-religious nature, with the potential for social disintegration. It is said that conflict is an unavoidable part of human interaction; conflict and tension are inherent in all kinds of society.[2] Hence, if such conflict cannot be managed wisely by the Government and collectively by all components of society in the Nation State, Indonesia faces social disintegration and fragmentation of the national identity and even of the Nation State.

Over the last four decades Indonesia has increasingly been faced with conflict based on cultural pluralism, such as has emerged in Aceh Province, Abepura and Timika of West Papua, Sampit and Palangkaraya of Central Kalimantan, Pasuruan and Situbondo of East Java, Mataram of West Lombok, Lampung of South Sumatera, Poso of Central Sulawesi, and Pontianak and Sambas of West Kalimantan. These conflicts all demonstrate elements of inter-ethnic conflict resulting from incongruence of values, norms and interests between ethnic communities in the multicultural country of Indonesia. It can further be observed that cases of laws governing tenure and management of natural resources have been increasing with the national development in various sectors,

[1] Joan Hardjono (ed), 1991. Indonesia, Resources, Ecology, and Environment, New York:Oxford University Press.

[2] Paul Bohannan (ed.). 1987, Law and Warfare, Studies in the Anthropology of Conflict, Austin and London: University of Texas Press; Laura Nader and Harry F. Tood Jr. (eds.). 1978. The Disputing Process-Law in Ten Societies, New York: Columbia University Press; James Spradley P. and David W. McCurdy. 1987, Conformity and Conflict, Reading in Cultural Anthropology, Boston and Toronto: Little, Brown and Company.

namely industry, agro-industry, transportation, transmigration, settlement and real-estate, as well as commerce and tourism.[3]

Conflicts over ownership and use of natural resources were primarily caused by both conflicting interests over the control and tenure of said natural resources, as well as differing perceptions on how to deal with the environmental and natural resource laws between the Government and the local people.[4] In this sense, the Government tends to enforce State law and regulations to control and manage natural resources in the name of national development, and the local traditional people, namely the adat communities, employ their own customary laws, called adat laws, to control and manage their environment and natural resources in the territories they depend on.

From the perspective of legal anthropology, the source of these conflicts is resultant of discriminative policy and treatment by the Government, expressed through the enactment of State laws and regulations in line with the recognition and protection of rights of the local adat communities regarding tenure and management of and access to natural resources. In this respect, State laws enacted and enforced by the Government have a tendency to dominate and marginalise the local values, traditions and religions as well as the customary adat laws of traditional communities. It is conventionally stated that the basic function of the law is to keep social order and protect legal order in maintaining the function of

[3] Sukri Abdurrachman. 2004, Konflik Pertanahan di Era Reformasi: Hukum Negara, Hukum Adat dan Tuntutan Rakyat (Conflict of Land Tenure in Reformation Era: State Law, Adat Law and Claiming of the People), Jakarta: Pusat Penelitian Kemasyarakatan dan Kebudayaan LIPI; Al Araf and Awan Puryadi. 2002, Perebutan Kuasa Tanah (The Contest of Land Tenure and Control), Yogyakarta: Lappera Pustaka Utama; Dianto Bachriadi et. al. (eds). 1997. Reformasi Agraria, Perubahan Politik, Sengketa, dan Agenda Pembaruan Agraria di Indonesia (Agrarian Reformation, Political Change, Conflicts and Agrarian Reform Agendas in Indonesia) , Jakarta: Repetto, Robert and Malcolm Gillis. 1988, Public Policies and the Misuse of Forest Resources, New York: Cambridge University Press; Konsorsium Pembaruan Agraria (KPA) dan Lembaga Penerbitan Fakultas Ekonomi Universitas Indonesia; Dianto Bachriadi, Dianto. 1998, Sengketa Agraria dan Perlunya Menegakkan Lembaga Peradilan yang Independen (Agrarian Disputes and the Needed for Enforcing the Independently Agrarian Court), Bandung: Kertas Posisi KPA 002/1998, Konsorsium Pembaruan Agraria (KPA): Charles V. Barber. 1989, "The State, The Environment, and Development:The Genesis and Transformation of Social Forestry Policy in New Order Indonesia", Berkeley: Unpublished Doctoral Desertation University of California; Benny K. Harman. 1995, Pluralisme Hukum Pertanahan dan Kumpulan Kasus Tanah (Pluralism in Indonesian Land Law and Compilation Land Tenure Cases), Jakarta: Yayasan Lembaga Bantuan Hukum (YLBHI); Endang Suhendar dan Ifdal Kasim. 1996, Tanah sebagai Komoditi, Kajian Kritis atas Kebijakan Pertanahan Orde Baru (Land as Economic Commodity, Critical Study of Land Tenure Policy in the New Order Era), Jakarta: Lembaga Studi dan Advokasi Masyarakat (ELSAM); Maria S. Sumardjono, 2008, Tanah dalam Perspektif Hak Ekonomi, sosial, dan Budaya (Land in the Perspective of Ecnomic, Social and Cultural Rights), Jakarta: Kompas Press; Iwan Tjitradjaja, Iwan. 1993, "Differential Acess to Resources and Conflict Resolution an A Forest Consession in Irian Jaya", in Ekonesia, A Journal of Indonesian Human Ecology Vol. 1 Mei 11993, Jakarta; Gunawan Wiradi, 2000, Reforma Agraria, Perjalanan Yang Belum Berakhir (The Unfinished Journey of Agrarian Reformation), Yogyakarta: Insist Press; Benedanto, Pax. 1999, Menggugat Ekspansi Industri Pertambangan di Indonesia (Reclaiming over Maining Industrial Expantion in Indonesia) , Bogor: Pustaka Latin.

[4] Anthony Allot and R. Woodman Gordon (eds). 1975, People's Law and State Law, Dodrecht-Holland: Foris Publication.

law as a tool for social control and the ordering of society.[5] In doing so, another function of the law is improved as an instrument of orderly change, namely social engineering.[6] In the development of complex society across the Nation State, such functions of law are questioned as to whether the role of State Law can also be improved as an instrument for maintaining and strengthening social integration within such a multicultural Nation State.

It is interesting to analyse such legal phenomena for the purpose of obtaining a better understanding of what causes the conflicts originally, either the inter-ethnic disputes or the question of the State's ideology and the policies of the Government as defined within the 1945 Constitution and State's law and regulations. This paper attempts to answer this fundamental question by employing a legal anthropology approach in order to find another atmosphere in building a better, more holistic understanding with regard to whether the 1945 Constitution defines a genuine or pseudo recognition and protection of adat communities and their traditions, especially concerning rights to and tenure of natural resources?

Ideology of the State in Recognising and Protecting Traditional Adat Communities: A Legal Anthropology Point of View

Anthropological studies with regard to the function of law as a system of social control within societies have primarily been conducted by anthropologists.[7] It is, therefore, recognised that anthropologists have offered more significant contribution to the development of the concept of law as an instrument of securing social control and legal order within the dynamic life of a society. Anthropologists have focused their study on the micro-processes of legal action and interaction. They have made the universal fact of legal pluralism a central element in understanding the workings of law in society, and they have self-consciously adopted comparative and historical approaches and drawn the necessary conceptual and theoretical conclusions from these choices.[8]

[5] Edwin W. Patterson, 1950. "Introduction", in The Legal Philosophies of Lask, Radbruch, and Dablin, translated by Kurt Wilk, Cambridge University Press.
[6] Lawrence M. Friedman, 1975. The Legal System, A Social Science Perspective, New York: Russell Sage Foundation.
[7] Donald Black. 1984. Toward a General Theory of Social Control, New York: Academic Press.
[8] John Griffiths. 1986, What is Legal Pluralism ?, in Journal of Legal Pluralism and Unofficial Law No. 24/1986, The Foundation for

In this respect, law has not been studied by anthropologists only as a product of the abstract logic of a group of people that mandate particular authorities, but also, indeed mainly, as a social behaviour of a society.[9] Hence, law has been studied as product of social interaction strongly influenced by other aspects of culture, including politics, economy, ideology, religion. In other words, law has been observed as an integral part of culture as a whole along with other elements of culture[10] and studied as a social process within society.[11] It is difficult to articulate a precise definition of law that effectively captures the multiple aspects and actions of the State. In this regards, Hart argued to use the concepts of rule and authority to bring law into focus in analysing the role of law in the State.[12] Law must be understood as generic, and the term used in a way that is general enough to embrace the whole spectrum of legal experience.[13] Thus, Moore later formulated law as a short term for a very complex aggregation of principles, norms, ideas, rules, practices and the agencies of legislation, administration, adjudication and enforcement further backed by political power and legitimacy.[14]

Law is a defining characteristic of the State and an object of efforts of the State to order and control its territory and the natural resources contained therein. It is therefore important to pay attention to the role of law as an ideology and to analyse how the State establishes and enforces the ideology.[15] In the case of Indonesia, it is clearly observable that law was developed and employed as an ideology to order and control the territory of Indonesia and the natural environment contained therein. This is clearly defined within the Preamble to the 1945 Constitution, which states: ".....to form a Government of the State of Indonesia that shall protect all the people of Indonesia and control the territory and natural resources contained therein, mainly for the purpose of

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Journal of Legal Pluralism.

[9] Donald Black. 1984, Toward a General Theory of Social Control, New York: Academic Press; Donald Black and Maureen Mileski (eds). 1973, The Social Organization of Law, New York: Seminar Press: Roger Cotterel. 1995, Law's Community, Legal Theory in Sociological Perspective, Oxford: The Clarendon Press.

[10] Leopold Pospisil, 1971, Anthropology of Law, A Comparative Theory, New York: Harper & Row Publisher.

[11] Sally F. Moore, 1978, Law as Progress, An Anthropological Approach, London: Routhledge & Kegan Paul Ltd.

[12] H.L.A. Hart. 1960, The Concept of Law, Oxford: Oxford University Press.

[13] Phillip Selznick, 1969, Law, Society, and Industrial Justice, New York: Transaction Books.

[14] Sally F. Moore, 1978, Law as Progress, An Anthropological Approach, London: Routhledge & Kegan Paul Ltd.

[15] Charles V. Barber. 1989, "The State, The Environment, and Development:The Genesis and Transformation of Social Forestry Policy in New Order Indonesia", Berkeley: Unpublished Doctoral Desertation University of California.

improving prosperity and public welfare, educating the people and to participate toward the establishment of a world order based on freedom, perpetual peace and social justice."

Such Preamble naturally reflects the main goal of the establishment of the Unitary State of Indonesia, as well as outlining the kind of ideology that should be used as a foundation upon which to build the character of the country. This ideology is reaffirmed in Article 33 paragraph (3) of the Constitution, which states: "The earth and water and natural resources contained therein should be controlled by the State and shall be utilised for the greatest prosperity of the people". Key words of the ideology of the State in controlling and managing natural resources can be seen to be "...should be controlled by the State" and "shall be utilised for the greatest prosperity of the people".

In relation to the recognition and protection of the indigenous peoples of Indonesia, referred to as adat communities, that are spread across the country, Article 18B paragraph (2) of the 1945 Constitution defines that "the State recognises and respects the adat communities and their traditional rights as long as they remain in existence and are in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia and shall be regulated by the law". In this sense, key words of the Article that should seriously be paid attention to are "..... as long as ....". It means that the 1945 Constitution defines an official restriction that the adat peoples will be recognised and respected by the State only as long as they fulfil certain conditions, namely that they are in existence, surviving and living in the civilised society, and are not in contradiction with the principle of the State, and that they shall be regulated by the law of the State.

Said conditions have been reconfirmed by the State's legal instruments that regulate the control over and management of natural resources within the territories of adat communities, such as Basic Agrarian Act No. 5 Year 1960 that deals with the tenure and use of land, Forestry Act No. 41 of 1999 pertaining to the control over and management of forest resources, Biological Diversity Conservation

Act No. 5 Year 1990, Spatial Use Act No. 24 of 1992, Water Resources Act No. 7 of 2004, Plantation Act No. 18 Year 2004, Fishery Act No. 31 of 2004, Coastal Zone and Small Islands Management Act No. 27 of 2007, Mineral Mining and Coal Act No. 4 Year 2009, and Human Environment Protection and Management Act No. 32 Year 2009. The conditions defined by the phrase "as long as" in the aforementioned Act with regard to the recognition and respect of the adat peoples clearly lead to restrictions on and neglect of the rights of adat communities to control, manage and utilise the natural resources they depend on for survival in the territory. Consequently, the traditional environmental wisdom reflected in the customary laws of these communities is automatically dominated and subordinated by the State's Acts over natural resources.[16]

Adat communities have been in existence for generations, living in peace within a given territory mostly in and around forest areas or coastal zones and small islands, controlling and managing their natural environment and the resources they depend on under the supervision of their own customary adat laws. This was the status quo for a long period of time before the independence of Indonesia on August 17, 1945. It shows that the ideology and character of State laws, in which the concept of "as long as" is attached as legal instrument to restrict the rights of the communities are in contradiction with the principle of *ad prima facie*. Which one is prior and posterior in existence in the territory of Indonesia, the traditional adat communities or the Nation State of Indonesia? It is generally recognised that adat people and communities in the country were naturally basic elements of the establishment of Unitary State of the Republic of Indonesia.

From the point of view of legal anthropology, such ideology has the consequence that the State law tends to dominate, marginalise, and even ignore the adat laws of these local communities that are still in existence within the country. While adat law was declared the only basic principle of the Basic Agrarian Act of 1960, the capacity and standing of such adat law requires

[16] I Nyoman Nurjaya. 2014. "Progressive Environmental Law of Indonesia: Global Principles of Stockholm and Rio Declations As Defined Within The 2009 Act on Human Environment Protection and Management", in The US-China Law Review Volume 11, Number 1, January 2014 (Serial Number 97), Illinois-USA: David Publishing Company, Illinois.

further clarification in the context of Indonesia's system of law. In this sense, as pointed out by Hart, the position of adat law within the State law could be seen as the rule of recognition.[17] The fundamental question then is whether this is genuine recognition or merely pseudo recognition? In my opinion, the recognition of adat law within State law is naturally only pseudo recognition, as defined by Hart, because of the restriction provided by the phrase "as long as" within the 1945 Constitution and the conditions within a number of Acts pertaining to the control over and tenure of natural resources that which bring about consequences whereby the legal standing and capacity of adat law is decreased both in the ideology and the legislation of the State's law. In other words, there is pseudo-constitutional and legal recognition of the adat rights regarding natural resources, including relevant adat law.[18]

What faces criticism in these legislations in relation to the State's ideology is the legal position and capacity, as well as the legal recognition, afforded to adat communities within the Nation State of Indonesia. On the one hand, adat communities and customary laws have been officially recognised by the 1945 Constitution and by legislation. On the other hand, the existence of adat communities has been restricted with the condition that they must be extant. This means that even though it is clearly stated that laws governing natural resources, with specific regard to the earth, water and air space and the natural resources contained therein, recognise adat law, the requirement that the adat communities be extant decreases their legal standing and capacity in the foundation of the State's ideology and legislation.

In other words, this restriction goes to prove that adat law has actually been subordinated to the State's natural resource laws at the level of ideology and legislation. What then can be concluded from this brief description of the legal plurality in the multicultural country of Indonesia? The answer seems to

[17] H.L.A. Hart. 1960, The Concept of Law, Oxford: Oxford University Press.

[18] I Nyoman Nurjaya. 2011. "Adat Community Lands Right As Defined Within the State Agrarian Law of Indonesia: Is It A Genuine or Pseudo Legal Recognition?", in The US-China Law Review Volume 8, Number 4, April 2011, Illinois-USA: David Publishing Company. I Nyoman Nurjaya. 2012. "State Law in Multicultural Country of Indonesia: Toward A Just and Equitable State in Legal Anthropology Point of View", in the US-China Law Review Volume 9, Number 1, Febroary 2012, Illinois-USA: David Publishing Company.

be clear: that the fundamental principle that adat law should form the basis of State law is so heavily restricted by the qualification, "as long as", written into the 1945 Constitution and legislation. We must doubt seriously whether it can in fact continue to give sufficient recognition. There is certainly little room for the view that the legislature has supported or underwritten adat law as the main source of natural resource laws, except to the extent that it does not conflict with the limits imposed upon it.[19] In line with the political aspects of national law as developed by the Government, this could be the so called political ignorance of the State in terms of the existence of adat peoples and communities, as well as their rights to tenure and utilisation of natural resources and the existing customary laws as legal entities in the national law system.

At the level of implementation and enforcement it can be witnessed in many cases that customary adat lawsnhave been neglected and ignored by State law in times of tension and conflict between Central and Regional Governments and local adat communities over the control over and tenure of natural resources in various regions of Indonesia. The Government can be observed to tend towards disregarding the rights of adat communities in term of their access to, control over and utilisation of resources. In fact, the traditional adat communities have proven powerless to meet the Government at times when their traditional rights regarding territory and the natural resources contained therein were neglected, ignored and undermined in the name of national development.[20] In this respect, John Bodley said that the people whose traditional rights regarding natural resources and culture were neglected and ignored in the name of development were naturally "victims of development". In his words Bodley states:

> "Government policies and attitudes are the basic causal factors determining the fate of tribal cultures, and that governments throughout the world are

[19] H.B Hooker. 1978, Adat Law in Modern Indonesia, Oxford: Oxford University Press.

[20] Michael R. Dove. 1981, Peranan Kebudayaan Tradisional Indonesia dalam Modernisasi (The Role of Traditional Culture in Modern Indonesia), Jakarta: Yayasan Obor Indonesia; Person, Gerard. 1991, "The Tension Between State Law and Local Culture", Unpublished Paper; I Nyoman Nurjaya (ed) (1993), Politik Hukum Pengusahaan Hutan di Indonesia (Politic of Law on Forestry Management of Indonesia), Jakarta: Wahana Lingkungan Hidup Indonesia (WALHI); Nancy L. Peluso, 1992, Rich Forest, Poor People: Resource Control and Resistance in Java, California: University of California Press; Sandra Moniaga, 1991, "Toward Community-based Forestry and Recognition of Adat Property Rights in the Outer Islands of Indonesia", unpublished paper; Maria W. Sumardjono, 2008, Tanah dalam Perspektif Hak Ekonomi, sosial, dan Budaya (Land in the Perspective of Ecnomic, Social and Cultural Rights), Jakarta: Kompas Press; Iwan Tjitradjaja, 1993, "Differential Acess to Resources and Conflict Resolution an A Forest Consession in Irian Jaya", in Ekonesia, A Journal of Indonesian Human Ecology Vol. 1 Mei 11993.

> concerned primarily with the increasingly efficient exploitation of the human and natural resources of the areas under their control. It is becoming increasingly apparent that civilisation's "progress" destroys the environment as well as other people and cultures."[21]

Hence, it is understandable that the national development implemented by the Government has faced serious difficulties and obstacles in regional parts of the country. It is because of the State's ideology of pseudo recognition of adat communities in addition to State legislation that ignores the existence and capacity of living customary laws in the daily lives of adat peoples. The State's ideology and legislation with regard to the recognition and protection of traditional adat communities and their customary laws were both inconsistent within the 1945 Constitution and saw uncertainty at the level of State law. In summary, when we observe the development of national law in the country, it can be said that State law has become an idiom for expression of power to control its territory and manage the natural resources contained therein and has systematically ignored and neglected the legal position and capacity of customary law as a naturally living law of traditional peoples in the country.[22] It has the consequence that the implementation and enforcement of control over and management of natural resources at the level of of legislation are mostly dominated by conflicts between Government and local adat communities, particularly over access to an tenure of natural resources. These conflicts reflect larger tension between the central and regional Government and the local people in most regions of Indonesia.

In order to obtain a better understanding of the law in its social and cultural context, our attention should be directed to the relationship between law and culture. In this respect, law is actually part of culture, and therefore law should be studied as an integral part of culture as a whole, and not regarded as an autonomous institution.[23] Consequently, when we are speaking about the establishment of State law, other aspects of culture such as economy, politics

[21] John Bodley, 1982, Victims of Progress, California: Mayfield Publishing Company.
[22] Starr, June and Jane F. Collier. 1989, History and Power in The Study of Law, New Direction in Legal Anthropology, Ithaca and London: Cornel University Press.
[23] Leopold Pospisil, 1971, Anthropology of Law, A Comparative Theory, New York: Harper & Row Publisher.

and ideology must also be taken into account. In fact, these aspects of culture powerfully influence the development of State law. That is why obstacles resulting from ideological, economical and political factors can be observed in the establishment of national law both at the level of law making as well as implementation and enforcement. Law can not be understood without regard for the realities of social life. Thus, if we wish to clarify the standing and the capacity of adat law within the total structure of Indonesia's legal system. I encourage the employment of a semi-autonomous social field as introduced by Moore.[24] Moore described society as a social arena in which a number social fields have rule-making capacities, generate rules, customs, internal symbols and the means to induce or coerce compliance, resulting in self-regulation or legal order. These principles, though, should be simultaneously set in a large social matrix which can, and does, effect and invade through its autonomy and means of legislation. Therefore, these social fields may be called semi-autonomous social fields within the complete structure of society.

The above theoretical framework is clearly significant in order to obtain a better understanding of such legal issues in the greater system of Indonesian law, particularly in understanding the ideology of the State and the standing and capacity of adat law as the naturally living law of the traditional communities of Indonesia.

II. DISCUSSION

From the point of view of legal anthropology, formal law is not the only type of legislation that is shaped and enforced by State law. In the daily life of communities, we also observe the existence of religious law, folk law, indigenous law or customary law as legal facts within human interaction, which also include self-regulation or inner-order mechanisms that play an essential role, mainly as tools for securing social order, legal order, and social control within society. Therefore, it is confirmed that law as a product of culture comprises folk law,

[24] Sally F. Moore, 1978, Law as Progress, An Anthropological Approach, London: Routhledge & Kegan Paul Ltd.

religious law, State law and self-regulation/inner-order mechanisms. This is the so called legal plurality within the dynamic life of society.[25] The anthropological study of law focuses its study on the interaction between the law and the social and cultural phenomena that occur in society, as well as the workings and functions of law as an instrument of social order and social control. Precisely, legal anthropology refers to the study of cultural aspects which relate to the legal phenomenon of social order and legal order within society. Hence, legal anthropology in the specific sense refers to the study of social and cultural processes in which the regulation of rights and obligations of the people are created, changed, manipulated, interpreted, and implemented by the people. In this respect, law as it functions for maintaining social control and order could be State law or other sorts of social control mechanisms that emerge and exist as living law within communities, namely adat law.

Legal anthropology also studies the phenomenon of legal pluralism within society. Accordingly, we should think of law as a social phenomenon pluralistically, as regulation exists in many forms in all kinds of relationship, some of which are quite tenuous, amongst the primary legal institutions of the centralised state. Legal anthropology has almost always worked with pluralist conceptions of law.[26] As such, a legal fact of a pluralistic nature generally refers to a situation of two or more systems of law interacting with each other and co-existing in a social field.[27] Friedman stated that law as a system, particularly in actual operation, is basically a complex organism in which structure, substance, and legal culture interact with one another. Legal culture refers to those parts of general culture, namely customs, opinions, norms and thought, that bend social forces toward or way from the law. Therefore, the law naturally expresses and defines the legal norms of the community.[28]

[25] Brian Tamanaha, 1992, "The Folly of the Concept of Legal Pluralism", paper presented at the International Congress the Commission on Folk Law and Legal Pluralism in Victoria University of Wellington, New Zealand; John Griffiths. 1986, What is Legal Pluralism ?, in Journal of Legal Pluralism and Unofficial Law No. 24/1986, The Foundation for Journal of Legal Pluralism.
[26] Roger Cotterel, 1995, Law's Community, Legal Theory in Sociological Perspective, Oxford: The Clarendon Press.
[27] M. B. Hooker. 1975, Legal Pluralism: Introduction to Colonial and Neo-Colonial Law, London: Oxford University Press.
[28] Lawrence M. Friedman, 1975, The Legal System, A Social Science Perspective, New York: Russell Sage Foundation.

Legal pluralism has conventionally considered to contradict with the ideology of legal centralism, whereby State law is the only official law put into effect over all people and natural resources within the territory of the State. This ideology of legal centralism tends to disregard adat communities and other kinds of legal system, such as folk law or customary law. That is why the recognition of adat rights regarding natural resources within the State law of Indonesia is defined as only pseudo-legal recognition and not as genuine-legal recognition. It has been outlined above that law from the perspective of anthropology must be studied as a basic system of social order and social control within society. Anthropologists have similarly concentrated on what they regard as law, typically the most formal and dramatic aspects of social control in tribal and other simple societies, although this often includes non-governmental as well as governmental processes. Furthermore, law has also played its role in the facilitation of human interaction as well as functioning as a social instrument for dispute settlement within the community. In the development of a politically organised society, namely the Nation State, the basic function of law has been increased and established as an instrument for social engineering in order to build a certain social condition, as intended by the State, and the Government in particular.[29]

As pointed out by Gustav Radbruch, all kinds of law are ideologically oriented firstly toward justice. A second element of the idea of law is expediency, suitability of purpose, and the third element of the idea of law is legal certainty, that is the law as an ordering of society must be one order over all members of society, and therefore it requires positive law.[30] In this regard, the basic question remains whether the function and role of the State law could also be oriented toward maintaining and strengthening social integration within a multicultural country such as Indonesia. It is a fact that Indonesia is a multicultural country with a pluralistic system of law, with State law on the one hand and customary law and religious law on the other hand. These co-existing laws simultaneously govern

[29] Darji Darmodiharjo and Arief Shidarta, Pokok-pokok Filsafat Hukum, Apa dan Bagaimana Filsafat Hukum Indonesia (Basic Legal Philosophy, What and How Indonesian Legal Philosophy), Gramedia Pustaka Utama, Jakarta, 1996.

[30] Edwin W. Patterson, "Introduction", in The Legal Philosophies of Lask, Radbruch, and Dablin, translated by Kurt Wilk, Cambridge University Press, 1950, i-xxxix.

all members of the various communities in the territory of Indonesia. Even so, it can clearly be observed that over the last four decades, the Government has tended to enforce the ideology of legal centralism in the development of national law. Consequently, a large number of State legal products, namely legislation and regulations, indicate this, such as the State's policy of legal unification and codification, as well as legal uniformity enacted by the Government. This is the so called rule-centred paradigm, which has the consequence of dominating, ignoring and marginalising adat law, which has in empirical fact proven to work much more effectively in the life of traditional communities in their regions.[31]

In this regard, such kinds of political law employed by the Government has intentionally functioned as an instrument of social control,[32] the servant of repressive power,[33] as well as the command of a sovereign backed by sanction.[34] It is a repressive instrumentalism in which law is bent to the will of the governing power. Therefore, from the point of view of legal anthropology, it could be said that the source of legal conflicts, which have increased in frequency in the last five decades, might primarily be based on the employment of the paradigm of legal centralism in the establishment of national law. On the contrary, the empirical legal fact refers to social and cultural pluralism in which local adat communities have the capacity to create and develop their customary laws in ordering society.

What should be carried out to establish an ideology and atmosphere of legal pluralism is to reformulate legal policy of State law to take into consideration the country's multicultural identity as a source of legal action in recognising and protecting traditional communities and the living adat laws across the country. The consequence will be that in the process of State law making, those values and principles of customary adat law must be accommodated, even integrated into the system of national law in the form of State legislation. Hence, the

[31] I Nyoman Nurjaya. 2012. "State Law in Multicultural Country of Indonesia: Toward A Just and Equitable State in Legal Anthropology Point of View", in the US-China Law Review Volume 9, Number 1, Febroary 2012, Illinois-USA: David Publishing Company.
[32] Donald Black, 1984. Toward a General Theory of Social Control, New York: Academic Press.
[33] Philippe Nonet and Philip Selznick, 1978. Law and Society in Transition, Toward Responsive Law, New York: Harper Colophon Books.
[34] Hilaire McCoubrey and Nigel D. White, 1996. Textbook on Jurisprudence, London: Blackstone Press Limited.

characteristic of State law as reformed by the Government will be a national law that successfully expresses the cultural diversity of Indonesia. In line with the types of law introduced by Nonet and Selznick,[35] this is known as responsive law, whereby the State law is more responsive to the cultural diversity and the particular needs of traditional adat communities. That is the reason why the paradigmatic function of State law as an instrument of social order and control, as well as a tool of social engineering, could also be directed to strengthen social integration of the Nation State toward a just and equitable State law for all people of Indonesia.

III. CONCLUSION

To end this discussion, let me quote John Griffiths on legal pluralism within universal societies:

> "The Ideology of legal centralism is that the law is and should be the law of the State, uniform for all persons, exclusive of all other law, and administered by a single set of State institutions. Those of other legal systems are in fact hierarchically subordinate to the law and institutions of the State. ..... Legal pluralism is the fact. Legal centralism is a myth, an ideal, a claim, an illusion. Legal pluralism is the name of a social state of affairs and it is a characteristic that can be predicted of any social group."[36]

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[35] Philippe Nonet and Philip Selznick, 1978. Law and Society in Transition, Toward Responsive Law, New York: Harper Colophon Books.

[36] John Griffiths, 1986, What is Legal Pluralism ?, in Journal of Legal Pluralism and Unofficial Law No. 24/1986, The Foundation for Journal of Legal Pluralism.

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Seeking Transitiona Justice In Indonesia: Lessons From The Cases of Aceh, Papua And East Timor

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Abstract

This article analyses the Indonesian efforts to resolve past human rights abuses under the mechanism of transitional justice following the downfall of President Soeharto on May 21, 1998. The focus of analysis is the implementation of transitional justice in the cases of Aceh, Papua, and East Timor during the transitional period. This article shows that the efforts to enforce transitional justice in these cases have been faced with obstacles. Although there have been notable efforts in terms of both judicial and non-judicial to enforce transitional justice, the final results are not satisfactory. Transitional justice mechanism to resolve past human rights abuses was implemented only with half-baked and supported with half-hearted. As a result, it has failed to bring justice for the victims. There are lessons can and should be learned from these transitional justice cases for resolving other past human rights abuse cases in Indonesia today. The current Indonesian government should pay attention to the lessons in order to resolve past human rights violations in accordance with its promise during presidential election campaign in 2014. Otherwise, it is likely to repeat the same mistake and failure of justice dealing with past human rights violations.

Key words: Transitional Justice, Human Rights, Indonesia, Aceh, Papua, East Timor

I. INTRODUCTION

After the political turmoil in 1998, Indonesia has immediately been faced with how the best way to deal with past human rights abuses committed by the repressive predecessor regime.[1] The victims and civil societies have been pushing the post-Soeharto governments to enforce transitional justice since the early years of transition to democracy, which is popularly called *Era Reformasi* (the Reformation Age). A number of victim-based groups, community based-movements, and human rights non-governmental organizations (NGO) have emerged during this transitional period seeking justice and addressing human rights issues. In the meantime, international community has also pressured Indonesia to deal with transitional justice measures.

The issue of past human rights abuses remain relevant in Indonesia today. During the presidential election campaign in 2014, the issue was politicized to persuade the voters. The presidential and vice-presidential candidates of Joko Widodo dan M. Jusuf Kalla pledged to solve past human rights abuses if they are elected to be the president and the vice-president. Following their inauguration as the President and the Vice-President of the Republic of Indonesia on 20 October 2014, people have become impatient waiting for the implementation of their promise. It took six months after the inauguration the current government begins to take an initial step resolving past human rights abuses.[2] On 21 April 2015, the Indonesian Attorney General revealed that the government will prioritize seven cases of past human rights violations to be resolved, these of Talangsari, Wamena, Wasior, the forced disappearance of persons, the mysterious shootings, the G30S PKI, and the May 1998 riot.[3] In his first State of the Nation address at the Parliament Building on 14 August 2015, President Joko Widodo delivered that the government prefers to choose reconciliation mechanism dealing with past

[1] Satya Arinanto, *Hak Asasi Manusia dalam Transisi Politik di Indonesia*, Jakarta: Pusat Studi Hukum Tata Negara Fakultas Hukum, Universitas Indonesia, 2003, p. 37 & 56.

[2] "Pemerintah Bertekad Tuntaskan Kasus Lama, *Kompas*, 22 April 2015, p. 4; "Presiden Pastikan Penuntasan Kasus Masa Lalu", *Kompas*, 29 May 2015, p. 3.

[3] "Ini Tujuh Kasus Pelanggaran HAM yang Akan Diusut Pemerintahan Jokowi", <http://nasional.kompas.com/read/2015/04/21/17120411/Ini.Tujuh.Kasus.Pelanggaran.HAM.yang.Akan.Diusut.Pemerintahan.Jokowi?utm_campaign=related&utm_medium=bp-kompas&utm_source=news&> (accessed 11 November 2015).

human rights violations.[4] It means that truth-seeking and criminal prosecution mechanism dealing with past human rights abuses is likely not a choice. It is therefore questionable whether it can be implemented on the basis of transitional justice mechanism. [5]

This article aims to explore the efforts and obstacles of the implementation of transitional justice in Indonesia especially in the cases of Aceh, Papua, and East Timor. This article argues that it is critically important to understand these cases as a mirror to resolve other past human rights violations. Despite there have been efforts to enforce transitional justice, it is apparently not easy to implement it successfully. With regard to the mentioned cases, the efforts to enforce transitional justice found obstacles and therefore it did not give satisfactory results. There are two central questions to be discussed here. First, to what extent transitional justice mechanism has been implemented to cope with past human rights abuses? Second, what lesson can and should be learned from transitional justice mechanism in the cases of Aceh, Papua, and East Timor? To answer the questions, the analysis of the article uses relevant studies, reports, and academic works that have been written by scholars and researchers.

The article is structured as follows. It begins by reviewing theoretically common responses to human rights violations under transitional justice mechanism. The article then proceeds by describing in general past human rights abuses committed by the Indonesian New Order regime. It is followed by focusing on three cases of the most notable of human rights violations: Aceh, Papua, and East Timor. The next section discusses the implementation of transitional justice mechanisms in Indonesia in protecting human rights especially in relation to the mentioned three cases. A conclusion will be provided at the end of the article emphasizing the lesson of the mentioned three cases.

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[4] "Presiden Inginkan Rekonsiliasi Nasional Terkait Pelanggaran HAM", <http://nasional.kompas.com/read/2015/08/14/10575231/Presiden.Inginkan.Rekonsiliasi.Nasional.Terkait.Pelanggaran.HAM> (accessed 11 November 2015).

[5] For example, see the opinions of Albert Hasibuan, "Penyelesaian Beban Sejarah", *Kompas*, 24 April 2015, p. 7; Mugiyanto, "Rekonsiliasi dan Partisipasi Korban", *Kompas*, 16 June 2015, p. 7; Albert Hasibuan, "Penyelesaian Pelanggaran Berat HAM", *Kompas*, 25 July 2015, p. 7; and Artidjo Alkostar, "HAM dan Keadilan Transisional", *Kompas*, 30 July 2015, p. 6.

II. DISCUSSION

A. Transitional Justice: Common Responses to Human Rights Violations

The Indonesian transitional governments inherited past human rights violations from the previous regime. As a consequence, there is legal and moral obligation to resolve past human rights violations in accordance with human rights values and standards. In addition, the amended Indonesian 1945 Constitution strongly guarantees human rights for all Indonesian citizens. The post-Soeharto governments have therefore been pushed to enforce transitional justice for the victims. In light of this, an overview on theory of transitional justice is necessary to examine its applicability to Indonesian transitional justice case. This section therefore concerns theory of transitional justice as formulated by scholars and used as a practical framework of transitional justice in other countries.

Theoretically, there is no a universal definition of transitional justice. Ruti G. Teitel defines transitional justice as "the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes".[6] According to Jon Elster, "[t] ransitional justice is made up of the processes of trials, purges, and reparations that take place after the transition from one political regime to another.[7] Roht-Arriaza prefer to define transitional justice as the "set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law".[8] For N. Kritz, as cited by Cynthia M. Horne, "[t]ransitional justice is most basically defined as the way a society confronts the wrongdoings in its past, with the goal of obtaining some combination of truth, justice, rule of law, and durable peace".[9] In the view of the UN Secretary-General Kofi Annan, transitional justice is defined as "the full set of processes and mechanism associated with a society's attempts to come to terms with a

[6] Ruti G. Teitel, "Transitional Justice Genealogy", *Harvard Human Rights Journal*, Vol. 16, 2003, p. 69.
[7] Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective*, Cambridge: Cambridge University Press, 2004, p. 1.
[8] As cited by Clara Sandoval Villalba, "Transitional Justice: Key Concepts, Processes and Challenges", Briefing Paper, Institute for Democracy and Conflict Resolution, the University of Essex Knowledge Gateway, 2011, p. 3.
[9] Cynthia M. Horne, "Lustration, Transitional Justice, and Social Trust in Post-Communist Countries. Repairing or Wresting the Ties that Bind?", *Europe-Asia Studies*, Vol. 66, No. 2, March 2014, p. 226.

legacy of large-scale past abuse, in order to secure accountability, serve justice and achieve reconciliation".[10]

Although there is no scholarly agreement regarding the definition of transitional justice, it is obvious that transitional justice dealing with human rights issues. Transitional justice is a concept to reckon past gross human rights violations committed by predecessor regime. It is often viewed as a crucial issue for new democracies that are struggling to get through transitional phase and pursue democratic consolidation successfully. Basically, the main purpose of transitional justice is to bring justice for victims and to end impunity to perpetrators. In the words of Eva Brems, "human rights norms require that a posttransition democratic regime bring to justice the perpetrators of gross human rights violations under the previous repressive regime".[11] In light of this, "[t]he actual prosecution and conviction of perpetrators after regime change and/or the end of armed conflict is the most spectacular aspect of transitional justice." [12]

Referring to a study conducted by the Office of the United Nations High Commissioner for Human Rights (OHCHR) in 2009, Clara Sandoval Villalba points out that the core of transitional justice basically has four processes as follows:

> Usually, a transition encompasses a *justice process*, to bring perpetrators of mass atrocities to justice and to punish them for the crimes committed; a *reparation process*, to redress victims of atrocities for the harm suffered; a *truth process*, to fully investigate atrocities so that society discovers what happened during the repression/conflict, who committed the atrocities, and where the remains of the victims lie; and an *institutional reform* process, to ensure that such atrocities do not happen again.[13]

Central to transitional justice is seeking justice for victims. Ruti G Teitel notes that "the conception of justice in periods of political change is extraordinary and constructivist: It is alternately constituted by, and constitutive of, the transition".[14] Teitel then distinguishes five types of justice under transitional justice framework:

[10] As cited by Clara Sandoval Villalba, *loc.cit*.
[11] Eva Brems, "Transitional Justice in the Case Law of the European Court of Human Rights", *The International Journal of Transitional Justice*, Vol. 5, 2011, p. 298.
[12] *Ibid*.
[13] Clara Sandoval Villalba, *op.cit.*, p. 3. Original emphasizes.
[14] Ruti G. Teitel, *Transitional Justice*, New York: Oxford University Press, 2000, p. 6.

criminal justice, historical justice, reparatory justice, administrative justice, and constitutional justice.[15] To enforce transitional justice, these five types of justice should be taken into account throughout transitional justice processes.

With respect to justice, the establishment of truth commissions is believed as an important part of transitional justice framework. People, especially victims, need to know what exactly happened in the past, why they became the victims, and who must responsible for past atrocities. All this can be facilitated by a truth commission. Thus, "[t]ruth seeking is an essential aspect of a society's efforts to address a violent or authoritarian past".[16] According to Priscilla B. Hayner:

> A truth commission (1) is focused on past, rather than ongoing, events; (2) investigates a pattern of events that took place over a period of time; (3) engages directly and broadly with the affected population, gathering information on their experiences; (4) is a temporary body, with the aim of concluding with a final report; and (5) is officially authorized or empowered by the state under review.[17]

Ruti G. Teitel points out that "[a] truth commission is an official body, often created by a national government, to investigate, document, and report upon human rights abuses within a country over a specified period of time".[18] In the view of Hayner, the desired goals of truth commissions are "to discover, clarify, and formally acknowledge past abuses; to address the needs of victims; to "counter impunity" and advance individual accountability; to outline institutional responsibility and recommend reforms; and to promote reconciliation and reduce conflict over the past".[19] Nonetheless, "the expectations for truth commissions are often much greater than what these bodies can in fact reasonably achieve".[20] Moreover, "[i]n practice, it is likely to occur that seeking justice to human rights violations of the past is sidelined by the urgent needs to pursue peace, security, stability and social cohesion."[21]

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[15] *Ibid.*
[16] Eva Brems, *op.cit.*, p. 287.
[17] Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, Second Edition, New York: Routledge, 2011, p. 11-12.
[18] *Ibid.*, p. 78.
[19] *Ibid.*, p. 20.
[20] *Ibid.*, p. 5.
[21] Eva Brems, *op.cit.*, p. 282.

It should be added that seeking justice is not the only measure in transitional justice. Reconciliation is also an important element of transitional justice. The enforcement of justice can be meaningless if it is unable to prevent the same atrocities in the future. To be sure, reconciliation is needed to heal the trauma, to harmonize societies, to unite national integration, and to build a better future. Nevertheless, in practice sometimes there is a tension and dilemma between justice mechanism and reconciliation mechanism. Elin Skaar points out that "[j]ustice and reconciliation have been seen both as conflicting and as mutually reinforcing".[22] With regard to this notion, "publicly revealing the truth about past abuses has been considered an obstacle to reconciliation (especially in the short run) but also a prerequisite for reconciliation (in the long run)".[23] Several transitional justice cases suggest that "[r]econciliation may be conceived as a goal or a process or both".[24]

The experience of transitional justice in several post-communist countries in Central and Eastern Europe and the former Soviet Union shows that there is a relationship between transitional justice, lustration and social trust building. For these countries, lustration policy is an integral part of transitional justice measures. As a result of bitter experience living under totalitarian regimes, the levels of institutional and interpersonal trust among post-communist societies are very low and it is not conducive for new democracies. In this vein, "[l]ustration programmes are framed as intentional trust-building measures, designed to restore trust in public institutions, interpersonal trust, and trust in government, and thereby positively contribute to the process of democratisation."[25] To make it legitimate, lustration must be based on laws. Basically, "[l]ustration laws typically prevent individuals registered as collaborators in the files of former state security agencies from occupying certain positions in the post-communist government".[26] In European human rights system, lustration is allowed in principle under the European Convention of Human Rights (ECHR). However, the European Court of

[22] Elin Skaar, "Reconciliation in a Transitional Justice Perspective", *Transitional Justice Review*, Vol. 1, Issue 1, 2012, p. 64.
[23] *Ibid*.
[24] *Ibid*., p. 65.
[25] Cynthia M. Horne, *op.cit.*, p. 225-226.
[26] Eva Brems, *op.cit.*, p. 295.

Human Rights (ECtHR) "has set some limits on the allowed scope of lustration measures".[27]

Having described the concept of transitional justice, it can be argued that transitional justice has two different levels. At minimum level, transitional justice should consist of truth-seeking process, trial and justice process, and reparation process. At maximum level, transitional justice should also include reconciliation and lustration process. It is the view of this article that transitional justice in the case of Indonesia should have taken the maximum level in order to guarantee its successful implementation. In addition, this article argues that the implementation of transitional justice for the case of Indonesia should not be limited to the period of political change which is called as transitional period. The momentum of transitional justice has now out of dated if it is only limited to transitional period because Indonesia has been away from democratic transition phase and now continuing its democratic consolidation phase. For that reason, past human rights violations should remain be resolved under transitional justice mechanism even though Indonesian has now accomplished its democratic transition process. The question is to what extent the implementation of Indonesian transitional justice has been in conformity with transitional justice theory.

B. Past Human Rights Abuses of the New Order Regime

Before discussing transitional justice in the post-New Order era, it is important to overview the gloomy portrait of Indonesian human rights in the period of the New Order regime. Obviously, transitional justice in the post-New Order is dealing with human rights violations committed by the New Order regime. The New Order regime emerged out of the assassination of seven high-level Indonesian military officers on 30 September 1965 in an attempt to unconstitutionally seize the power and destabilize the country. Soon after this tragic event, General Soeharto, who had an important position in Indonesian military hierarchy at the time, took an initiative destroying the alleged Indonesian communist and leftist groups and then formally banning the existence of the Indonesian Communist

[27] *Ibid.*, p. 296.

Party (*Partai Komunis Indonesia*: PKI) throughout Indonesia. The chaos spread out across the country and was likely to become a civil war. Between 1965 and 1966 it is estimated 500,000 to a million people had been killed[28] and tens of thousands was imprisoned and sent to the detention camps without a fair trial. Furthermore, all manifestations of communism were strictly prohibited during the New Order regime. The anti-communism campaign was manipulated and legitimized by the regime to threaten, frighten and control its opponents.[29]

In relation to the issue above, it is important to note that the decision of the Indonesian Constitutional Court on 24 February 2004 has rehabilitated political right (right to be candidate) of the ex-PKI members to be elected as national and local parliament members. The Constitutional Court argued that Article 60 (g) of Law Number 12 of 2003, which prohibited the ex-PKI members to be parliament candidates, is a discriminatory provision and therefore it is unconstitutional.[30] In addition, an initiative to expose the 1965 mass atrocities is recently taken by civil society from Indonesia and also outside the country in terms of the so-called "the International People's Tribunal 1965" held in The Hague, The Netherlands, from November 10 to November 13, 2015. This is not a formal trial, but it is conducted resembling a court format. There are judges, prosecutors, registrar, witnesses, and expert witnesses during the hearing process of the Tribunal.[31] The Tribunal becomes an international forum to reveal the truth. Since it is only a pseudo-court, the decision of the Tribunal is certainly not legally binding. Perhaps the Tribunal will be a turning point to attract more attention from international communities on the 1965 case. Indonesians themselves have pro and contra comments regarding the Tribunal, however. Meanwhile, the Indonesian Government gives a negative response to the Tribunal.[32]

[28] There is no exact estimation of the death victims, unfortunately. But it is believed that a moderate number is no less than 500,000 peoples had been killed at the time as a result of horizontal conflicts and the involvement of the Indonesian military. See, for example, Robert Cribb (ed.), *The Indonesian Killings 1965-1966: Studies from Java and Bali*, Clayton, Victoria: Centre of Southeast Asian Studies, Monash University, 1991; Mary S. Zurbuchen, "History, Memory, and the "1965 Incident" in Indonesia", *Asian Survey*, Vol. 42, No. 4, July/August, 2002, p. 565-566.

[29] See, for example, Ariel Heryanto, *State Terrorism and Political Identity in Indonesia: Fatally Belonging*, Oxon: Routledge, 2006; Wijaya Herlambang, *Kekerasan Budaya Pasca 1965: Bagaimana Orde Baru Melegitimasi Anti-Komunisme Melalui Sastra dan Film*, Serpong, Tangerang Selatan: Marjin Kiri, 2013.

[30] See, Case Number 011-017/PUU-I/2003.

[31] See, http://1965tribunal.org/1965-tribunal-hearings-the-judges/; http://1965tribunal.org/1965-tribunal-hearings-the-prosecutors/; http://1965tribunal.org/1965-tribunal-hearings-the-registrar/ (accessed 13 November 2015).

[32] "Government brushes off Hague tribunal on 1965 massacre", http://www.thejakartapost.com/news/2015/11/10/government-brushes-hague-tribunal-1965-massacre.html# (accessed 13 November 2015).

Obviously, the emergence of the New Order regime was started by gross human rights violations. Throughout the New Order regime period, repressive and oppressive manner against civilians had been used as an effective measure to consolidate and preserve the dominant and hegemonic power of the regime. It was also used to guarantee economic policies and development programs as well as to preserve political stability and national unity.[33] In doing so, "Soeharto's New Order regime used terror and violence to control the people and oppress various social layers and sectors that opposed it."[34] Human rights violations committed by the state during the authoritarian New Order regime were therefore rampant both in terms of both individual detentions and mass killings. The scale and the variety of human rights violation occurred during the period of the regime show clearly that the regime had a notorious human record. Such a condition demonstrated what Ariel Heryanto calls as "state terrorism" which is defined as "a series of state-sponsored campaigns that induce intense and widespread fear over a large population".[35] The most notable violations of human rights are including the mysterious shootings (known *penembakan misterius* or *Petrus*) of suspected criminals in urban centres, the massacre of Moslem demonstrators in Tanjung Priok, North Jakarta, in 1984, the massacre of villagers in Talang Sari, Lampung, in 1989, the attack on the office of the Indonesian Democratic Party (PDI), the forcibly disappearance of pro-democracy activists in 1997-1998, the killing of student demonstrators of Trisakti University in 1998 as well as the incidents of Semanggi I in 1998 and Semanggi II in 1999, and the riots in Jakarta in May 1998.[36]

The other most notable of human rights violations are in Aceh, Papua, and East Timor, which will be elaborated in the next paragraphs. Different from the human rights violations mentioned above which dealing with political reasons, human rights violations in these three provinces are more related to separatist issues. It is noted that "[s]ecurity forces committed systematic, large-scale human

[33] Mohtar Mas'oed, *Ekonomi dan Struktur Politik Orde Baru 1966-1971*, Jakarta: LP3ES, 1989.
[34] Hilmar Farid and Rikardo Simarmatra, *The Struggle for Truth and Justice: A Survey of Transitional Justice Initiatives Throughout Indonesia*. International Center for Transitional Justice Occasional Paper Series, January 2004, p. 15. Available at [http://ictj.org/].
[35] Ariel Heryanto, *op.cit.*, p. 19.
[36] See, for example, ICTJ and Kontras, *Indonesia Derailed: Transitional Justice in Indonesia Since the Fall of Soeharto: A Joint Report*, March 2011, p. 94-102. Available at [http://ictj.org/]; Suzannah Linton, "Accounting for Atrocities in Indonesia", *Singapore Year Book of International Law*, 10 SYBIL, 2006, p. 1-3.

rights violations against civilians in the context of operations against independence movements in East Timor, Aceh, and Papua."[37] Consequently, it created a hostile relationship between Indonesian central government and these areas.

Human rights violations in Aceh were as a result of the conflict between the disgruntled Acehnese and the central government began on 4 December 1976. Led by a charismatic leader Hasan di Tiro, the Acehnese formed *Gerakan Aceh Merdeka* (GAM) (Free Aceh Movement) and then declared unilaterally Acehnese independence from Indonesia. The dissatisfaction with the central government policies was the reason for separatist aspiration. It was justified by historical claim that Aceh had never been acceded to Dutch colonial rule. As a consequence, for them, Aceh was never become part of Indonesia as proclaimed by Indonesian state founders on 17 August 1945. Acehnese believed that they were discriminated and their rich natural resources were greedily exploited by Indonesian central government.[38] In response to this, President Soeharto sent thousands of troops to Aceh to suppressing the separatist movement. As a result, the military wing of the GAM and the Indonesian security forces had involved in weapon conflicts for years. Innocent civilians had become the victims of this protracted conflict. In the middle of the army conflict, di Tiro and a few GAM leaders fled to Sweden in 1980 and continued their struggle from there. The army conflict in Aceh still continued, however. To strengthen its suppression to the GAM, President Soeharto in 1989 declared Aceh as a Military Operation Area (*Daerah Operasi Militer*: DOM). The declaration justified sending more troops, weapons, and other military equipment to Aceh. Many human rights abuses occurred during the period of DOM. The military operation was then stopped just after the fall of President Soeharto in 1998.[39]

Human rights violations have also occurred in Papua and West Papua, formerly Irian Jaya (hereafter referred as Papua). Papua is located in the eastern-most of Indonesia. Ethnically and historically, Papua is different from the rest of the

[37] ICTJ and Kontras, *ibid*., p. 11.
[38] Scott Cunliffe, *et. al.*, *Negotiating Peace in Indonesia: Prospects for Building Peace and Upholding Justice in Maluku and Aceh*, ICTJ and ELSAM, June 2009, p. 17. Available at [http://ictj.org/].
[39] *Ibid*.

country. Papua is rich in natural resources such as gold, timber, and oil. It has attracted multinational corporations to exploit it, such as Freeport McMoran, a US based multinational company. Initially, Papua was not part of Indonesia when it declared its independence on 17 August 1945 and gained sovereignty recognition from the Dutch on 27 December 1949. Papua has officially become part of Indonesia based on the agreement between the Dutch and the newly country Indonesia stating that what was the Dutch East Indies becoming parts of Indonesia. However, Papua remained under Dutch authority until it was handed over to Indonesian control in 1962 after achieving an agreement between the two which was mediated by the United Nations. As part of the agreement, a referendum of self-determination under the UN auspices was held in 1969 to determine the final status of Papua. The result is Papua become a part of Indonesia which is endorsed by the UN. This is not the end of the story of Papua, however. Conflicts and discontents have been arising in this region since then.[40] As a result, "[f]rom the early 1960s through the present, Papua has been the site of numerous human rights abuses by Indonesian security forces in the context of both military operations against a small armed separatist movement and the suppression of nonviolent independence activists."[41]

The next region where human rights violations also occurred is East Timor (also known as Timor-Leste). Unlike Papua, the status of East Timor as part of Indonesia from the very beginning was disputed by international community. East Timor was colonized by Portuguese, not by the Dutch, and therefore it was not part of Indonesia. The integration of East Timor into Indonesia was a result of Indonesian occupation and annexation in 1976 with the support of pro-integrationist East Timorese factions and the silent support of anti-communist western countries such as the USA and Australia. However, the majority of countries did not recognize East Timor as the 27th province of Indonesia. Only several countries, such as Australia, had initially recognized it either de facto or de jure. The UN never endorsed it, however. The East Timorese opponent factions had

[40] ICTJ and ELSHAM, *The Past That Has Not Passed: Human Rights Violations in Papua Before and After Reformasi*, June 2012, p. 3. Available at [http://ictj.org/]; ICTJ and Kontras, *Indonesia Derailed:, op.cit.,* p. 48-49.
[41] ICTJ and ELSHAM, *ibid.*

resisted the integration and then committed to armed struggle against Indonesia until 1999. Fighting between the two was therefore unavoidable. Human rights abuses had occurred since the beginning of the occupation in 1976 until the end of rule of Indonesia in the region in 1999 in terms of arbitrary detention, torture, violence sexual offence, forced displacement, enforced disappearance, and murder that took hundred thousand lives. The most notable human rights abuses were the cases of the Dili massacre or also known Santa Cruz massacre in 1991 when the Indonesian military cracked down East Timorese who were attending a pro-independence march and the violence and destruction of 1999 after the referendum to determine the final status of East Timor. The result of the referendum, held on 30 August 1999, was 78 per cent of the East Timorese population had rejected special autonomy within Indonesia offered by the Indonesian government. It means that East Timorese people chose to be an independent state from Indonesia. Soon after that Indonesia withdrew from the East Timor after ruling the region for 23 years.[42]

C. TRANSITIONAL JUSTICE MECHANISMS IN INDONESIA TO THE PROTECTION OF HUMAN RIGHTS

In response to public demands and to certain extent international pressures, Indonesian finally agreed to reopen several past cases of human rights violations. The post-Soeharto governments provided and established supporting instruments for the implementation of transitional justice. A number of notable achievements are providing legal base for commissions of inquiry, truth and reconciliation commissions, an agency for the protection of victims and witnesses, establishing permanent human rights courts and ad hoc human right courts for specific cases, inserting human rights guarantees into the amended national constitution, and ratifying international conventions on human rights.[43] In addition, the Indonesian parliament passed the Law Number 26 of 2000 which gave the National Human Rights Commission (Komnas HAM) the power to conduct

[42] Caitlin Reiger and Marieke Wierda, *The Serious Crimes Process in Timor-Leste: In Retrospect*, ICJT, March 2006, p. 4-6. Available at [http://ictj.org/]; ICJT, JSMP, *Impunity in Timor-Leste: Can the Serious Crimes Investigation Team Make a Difference*?, June 2010, p. 7. Available at [http://ictj.org/].

[43] ICTJ and Kontras, *op.cit.*, p. 1.

inquiries and determine whether crimes against humanity or genocide were committed, and then recommend investigation and prosecution to the Attorney General's Office (AGO).[44] In short, as Ehito Kimura points out, "[t]ransitional justice mechanisms in the Indonesian experience can be grouped into four major categories: investigations, trials, truth and reconciliation, and apology".[45]

The sub-section below focuses on three major cases of human rights violations as illustrated above: the cases of Aceh, Papua, and East Timor. It discusses transitional justice mechanisms in relation to the mentioned cases.

1. Transitional Justice in Aceh

In 1999, the Indonesian government officially apologized to Acehnese for past human rights abuses during the military operations in the area. However, the military conflict between the Indonesian government and separatist GAM was still continued. Although there was a series of meeting between the Indonesian government and the GAM facilitated by the third parties to end the old conflict and reach a peaceful resolution, it was only after an earthquake of 9.0 on the Richter scale hit Aceh and followed by Indian Ocean tsunami swept over much of Aceh on 26 September 2004 the peaceful resolution could be achieved by both parties. It is estimated approximately 150,000 Acehnese dead and thousands more displaced in one day. As a result of this tragic tsunami, both parties had agreed to go to the table talking about peace agreement. The next year after tsunami, on 15 August 2005, both parties finally signed a perpetual peace agreement in Helsinki (the Helsinki Memorandum of Understanding) after five rounds of meeting brokered by the former Finnish President Martti Ahtisaari. The thirty years conflict between the government of Indonesia and GAM has now been over.[46] Under the MoU Aceh enjoys self-government and special autonomy.

It is admitted that, "[f]rom the perspective of transitional justice, the Helsinki MoU appeared to represent a step forward in Indonesia's attempts

[44] *Ibid.*, p. 3.
[45] Ehito Kimura, "The Problem of Transitional Justice in Post-Suharto Indonesia", *Middle East Institute*, 2014, http://www.mei.edu/content/problem-transitional-justice-post-suharto-indonesia, (accessed on March 12, 2014).
[46] Scott Cunliffe, *et. al.*, *op.cit* , p. 17.

to address past human rights violations".[47] The Helsinki MoU contains many transitional justice elements, including:

- Amnesties for those imprisoned for their participation in GAM activities, with a reaffirmation of the government's obligations to adhere to international human rights instruments.
- Specified benchmarks and timetables for the demobilization, disarmament, and decommissioning of GAM and Indonesian security forces in Aceh.
- A reintegration program for former combatants, political prisoners, and "civilians who suffered a demonstrable loss".
- Provisions for the establishment of the Human Rights Court and Truth and Reconciliation Commission (TRC) for Aceh.
- Specified institutional reforms to help strengthen the rule of law.[48]

Related to truth and justice seeking, the MoU mandated Indonesia to establish a TRC and human rights court for Aceh whose jurisdiction over human rights violations committed only after 2000. This obligation was included in the Law on the Governing of Aceh, a law that transferred most provisions of the MoU into national law, passed in August 2006 by the Indonesian Parliament. Yet, the government has not created either one.[49] The provision of the establishment of human court itself subjected to different interpretation on the court's jurisdiction, whether retroactive or non-retroactive. The Indonesian parliament decided that the prosecution could not be enforced retroactively. Such limitation has made the prosecution "by and large meaningless as a tool to provide accountability for abuses committed during the conflict".[50]

In the meantime, the legality of the Law Number 27 of 2004 on Truth and Reconciliation Commission as a legal base to establish a TRC both for Aceh and for other cases was deemed unconstitutional by the Constitutional Court due to it allowed an amnesty for perpetrators before being eligible for

[47] *Ibid*., p. 22.
[48] International Center for Transitional Justice (ICTJ), "The Need for Accountability: The Helsinki Memorandum Five Years", August 2010, [http://ictj.org/sites/default/files/ICTJ-Indonesia-Aceh-MoU-2010-English.pdf], (accessed on April 13, 2014).
[49] ICTJ and Kontras, *op.cit*., p. 51.
[50] Ross Clarke, Galuh Wandita, and Samsidar, *Considering Victims: The Aceh Peace Process from a Transitional Justice Perspective*, Occasional Paper Series, International Center for Transitional Justice, January 2008, p. 33. Available at [http://ictj.org/].

reparations and therefore considered against human protection guaranteed in Indonesia's 1945 Constitution. Unexpectedly, the Constitutional Court invalidated the whole of the Law, rather than only the related provision.[51] Such a decision created legal uncertainty regarding the establishment of a national TRC, while the members of the TRC had not been appointed yet.[52] To make a new legislation on the TRC, a new draft law has been prepared by the government for a discussion with the parliament, but not much political support to pass it.[53] Disappointed with such a condition, victims' groups and civil societies in Aced then initiated to establish a local TRC by and for Aceh within the framework of the Helsinki peace agreement.[54] However, it is not clear about the progress of the proposed local TRC.

The MoU also provided a reparation mechanism in terms of compensation payment to those affected by the conflict such as former combatants, political prisoners, and all civilian who suffered a demonstrable loss. The compensation consist of suitable farmland, employment, or social security for those who unable to work. To implement the compensation and an extensive reintegration program, the central government had established the Aceh Reintegration Agency (BRA). Some $26.5 million had been disbursed to 1,724 villages that received the money approximately from 60 million to 170 million rupiahs.[55] However, the implementation was not too successful since it did not address victim-specific needs or provide any kind of acknowledgement of their suffering. It was then discontinued in 2007. Outside the scheme of the MoU, previously there was another form of reparation initiated by the governor of Aceh in 2002 for the death or disappeared victims' family members. Under the so-called *diyat* compensation, meaning traditional Islamic compensation, approximately 20,000 victims had received an annually

[51] See, the Decision of the Constitutional Court on Case Number 006/PUU-IV/2006 promulgated on December 7, 2006. The Petitioners were civil society groups and human rights defenders asking the Constitutional Court to invalidate Article 1 Section (9), Article 27, and Article 44 of the Truth and Reconciliation Commission Law since the Articles were considered unconstitutional. According to the Decision of the Constitutional Court, the whole of the Law is unconstitutional, not only the Articles asked by the Petitioners. As a result, the Law is invalid wholly and cannot be applied to establish a TRC.

[52] Scott Cunliffe, *et. al.*, *op.cit.*, p. 21.

[53] ICTJ and Kontras, *op.cit.*, p. 14.

[54] Ross Clarke, Galuh Wandita, and Samsidar, *op.cit.*, p. 41-45.

[55] ICTJ and Kontras, *op.cit.*, p. 66.

payment of between $200 and $300 for limited years and transferred directly to recipients' bank account.[56]

What can be underlined from the explanation above is that, since the Helsinki MoU, the voices of the victims have not been heard before a TRC and the perpetrators have not been brought to the court for prosecution and, if found guilty, punishment. It shows that after the signature of the agreement, not all provisions have been implemented. Interestingly enough, there is no public complaint from former GAM leaders since they prefer to maintain good relationship with Jakarta. Also no massive complaint from the victims and civil societies which seems as if they are enjoying the peaceful condition after the agreement and unwilling their complaint would be manipulated for political purposes.[57] Indeed, the current situation of Aceh, in terms of infrastructure and security, seems better than ten years ago. Perhaps, this is a reason why Acehnese prefer to look forward for better future rather than to look backward for the past story.

2. Transitional Justice in Papua

As other parts of Indonesia enjoyed political liberalization after the fall of President Soeharto in 1998, Papuans have also a chance to express their long-suppressed feelings and aspiration through public protests regarding their future. They raised sensitive issues such as the responsibility of human rights abuses, the equal distribution of Papua's natural resources revenue, self-government or self-determination, and even independence. To address the grievances as well as to weaken the support for independence, the central government agreed to grant a special autonomy which allows Papuans to have greater political, economic, and cultural power as long as Papua remains the part of Indonesia. In 2000, the People's Consultative Assembly, the upper chamber of parliament, issued a resolution (TAP MPR No. IV of 2000) stating its approval to granting a special autonomy law to respond to Papuan demands and aspirations. On 21 November 2001, the parliament

[56] *Ibid.*.
[57] Scott Cunliffe, *et. al.*, *op.cit.*, p. 22.

enacted the Law Number 21 of 2001 on Special Autonomy for the Province of Papua giving Papua self-government and special autonomy.

The Law is also a legal foundation for the implementation of transitional justice in Papua. Pursuant Article 46, entitled "Human Rights", there are three mechanisms provided by the Law to address transitional justice in Papua:

1) A Human Rights Court, which would make a contribution to judicial accountability for past violations of human rights.
2) A Papua Truth and Reconciliation Commission to clarify and establish the history of Papua and formulate and determine reconciliation measures.
3) A Papua branch of the National Human Rights Commission, a body that has both a truth-seeking and a judicial accountability function.[58]

Like the Helsinki MoU of Aceh, the Law accommodates the establishment of a TRC and a human rights court for Papua. Interestingly enough, the idea of a TRC was not supported by some activists "because of the fear that it will create conflict between the various groups fighting for independence and weaken the movement".[59] As a matter of fact, as in Aceh, a TRC was never established for Papua since the legal foundation for its establishment had been annulled by the Constitutional Court. The annulment of the Law "became a convenient justification for not establishing local truth commissions for Papua or Aceh, even though they were specified in the Special Autonomy Laws for both regions".[60]

With respect to the establishment of a human rights court in Papua, the government has also failed to comply with the mandate of the Special Autonomy Law. In the absence of a human rights court for Papua, it is difficult to seek judicial accountability for past violations of human rights in Papua. The only good news for Papuans was the creation a regional Human Rights Court in Makassar, South Sulawesi, located outside Papua, under the Law Number 26 of 1999 which allowed to bringing very limited human rights case before the Court. The only case heard in this permanent human

[58] ICTJ and ELSHAM, *op.cit.*, p. 9.
[59] Hilmar Farid and Rikardo Simarmatra, *op.cit.*, p. viii.
[60] ICTJ and ELSHAM, *op.cit.*, p. 11.

rights court was the alleged violations in Abepura, Papua. However, only two suspects were indicted, even though the National Commission of Human Rights (hereafter referred Komnas HAM) found many more. Unfortunately, both suspects were acquitted.[61]

In fact, it is difficult for Papuans to enforce a judicial approach of past human rights violations. At least there are two reasons for this. First, there are no serious efforts among Papuans themselves to bring human rights violations as collective initiatives. They tend to work separately and as a consequence it is difficult to work together for a long term. Second, "Papua's justice system lacks capacity" and "judges and prosecutors do not have an adequate understanding of human rights norms".[62] Thus, there is a reasonable doubt to conduct legitimate human rights trials.[63] Whatever the reasons, the fact is, as in Aceh, transitional justice mechanism for Papua has not been established appropriately. Besides, in contrast to Aceh, separatist issue in Papua is not resolved completely yet. It remains a sensitive issue until today.

3. Transitional Justice in East Timor

Similar to Aceh and Papua, an opportunity to demand the responsibility of human rights violations in East Timor emerged only after Indonesia taking a path to democratic transition in 1998. Transitional justice mechanism to deal with past human rights abuses was provided as a response to international pressure to prosecute serious crimes committed in the area soon after the result of the referendum released in 1999. Initially, a UN Commission of Inquiry recommended an international criminal tribunal to prosecute the perpetrators of mass violations. But, the representatives of the Indonesian government were able to convince the UN Security Council to skip the recommendation and replacing it with national trial. Accordingly, the government quickly issued a regulation in-lieu-of-Law (known as *Peraturan Pemerintah Pengganti Undang-Undang* or *Perppu*) Number 1 of 1999 on Human Rights Court, which later replaced by the Law Number 26 of 2000, to establish a mechanism

[61] ICTJ and ELSHAM, *loc.cit.*; ICTJ and Kontras, *op.cit.*, p. 4.
[62] Hilmar Farid and Rikardo Simarmatra, *op.cit.*, p. viii.
[63] *Ibid.*.

investigating and prosecuting gross human rights abuses in terms of crime against humanity and genocide, excluding war crimes.[64] However, "[l]ike all other judicial mechanisms in Indonesia, the Human Rights Courts are strictly domestic enterprises—there is no international participation in the investigation process, the prosecution, the defence or on the bench."[65] With regard to the mechanism of investigation and prosecution under the Law Number 26 of 2000, it is stated that:

> Komnas HAM may form a pro justicia team to undertake inquiries and make findings on whether gross human rights violations have been committed. If the team finds "sufficient preliminary evidence that a gross violation of human rights has occurred," it has seven days to pass the results to the AGO, the only body with the power to conduct a formal investigation and prosecution. If the AGO receives the Komnas HAM report and declares it to be complete, prosecutors must then complete an investigation within 90 days. However, the AGO may delay the investigation and return the file to Komnas HAM if it finds the evidence insufficient.[66]

An investigation was conducted in September 1999 by Human Rights Violations Investigations Commission (*Komisi Penyelidik Pelanggaran Hak Asasi Manusia*: KPP HAM) for East Timor under direction of Komnas HAM to human rights abuses committed in East Timor between January and October 1999. After conducting rigorous cross-examination of high-level officials and exhuming of the victim's bodies, KPP HAM sent the final report to the AGO in January 2000. The report found that crimes against humanity had taken places committed by the members of military, police, militia and civilian. In response to the report and increasing international pressure, the Indonesian President issued a decree to create an ad hoc court for East Timor in accordance with the mandate of the Law Number 26 of 2000.[67] There were 18 mid- and senior-level officials, mostly security forces members, charged by the prosecutor and six of them were convicted at trial.

[64] ICTJ and Kontras, *op.cit.*, p. 38.
[65] Suzannah Linton, *op.cit.*, p. 10.
[66] ICTJ and Kontras, *loc.cit.*
[67] ICTJ and Kontras, *ibid.*, p. 46.

But, they were acquitted on appeal, meaning no one had been convicted.[68] In contrast, there were 84 convictions and three acquittals decided by the UN-sponsored trials in Timor-Leste during the same period for similar cases.[69]

Another transitional justice mechanism provided for East Timor is the establishment of truth commissions. In August 2005, following the pressure of the UN Commission of Experts, the Indonesian and Timorese governments agreed to establish jointly a truth commission namely the Commission of Truth and Friendship (CTF). It was consisted of ten commissioners who were appointed proportionally of five representatives from each country. This unique commission was the first example of a TRC established bilaterally by two countries. The CTF reviewed what have been found by four previous mechanisms: the Special Panels for Serious Crimes in Dili, the Ad Hoc Human Rights Court trials in Jakarta, the Komnas HAM inquiry, and the report of Timor-Leste's Truth and Reconciliation Commission (known by its Portuguese acronym CAVR: *Comissão de Acolhimento, Verdade e Reconciliação de Timor Leste*). The final report of the conclusive truth and recommendation of the CTF was based on this review. The CTF did not have an authority to investigate and prosecute, but allowed to recommend amnesties and rehabilitation for cooperative people in revealing the truth.[70]

Although the establishment of the CTF was criticized and doubted at the very beginning, its final report surprised the opponents. The report was accepted by both President Indonesia and Timor-Leste, but it was not released for public.[71] The findings of the CTF courageously stated that:

- Crimes against humanity, including murder, torture, rape, and forced transfer or deportation, were committed throughout East Timor in 1999.
- These crimes were not spontaneous or random, and were not the result of retaliatory actions.

[68] *Ibid.*, p. 47.
[69] Megan Hirst, *Too Much Friendship, Too Little Truth: Monitoring report on the Commission of Truth and Friendship in Indonesia and Timor-Leste*, Occasional Paper Series, January 2008, p. 8. Available at [http://ictj.org/].
[70] ICTJ and Kontras, *op.cit.*, p. 26; Suzannah Linton, *op.cit.*, p. 25-26.
[71] ICTJ and Kontras, *ibid.*, p. 27.

- The main perpetrators were pro-autonomy militia groups that targeted supporters of independence and acted with the involvement and support of the Indonesian military, police, and civilian authorities.
- Indonesian support for pro-autonomy militia groups included money, food, and weapons.[72]

In light of this, the establishment of the CTF and its results demonstrated the will of both parties (Indonesia and East Timor) to seek negotiation and compromise dealing with past human rights violations in East Timor. As Megan Hirst observed, "the new nation's leaders [of East Timor] prioritized good relations with its neighbor Indonesia over the pursuit of justice".[73] In this regard, Timorese leaders believed that the pressure of international and domestic for accountability regarding the 1999 violations as a threat to bilateral relations with Indonesia. In addition, they were aware that it was difficult to have a broad international support, especially from all permanent members of the UN Security Council, to establish an international tribunal given significant position and role of Indonesia for the interests of international communities.[74] Reasonably, "[f]aced with this reality and desiring friendly relations and economic cooperation with Indonesia, the Timorese leaders chose not to support the establishment of an international tribunal."[75] Moreover, the East Timor's top political leaders had pardoned the perpetrators of crime against humanity who had been sentenced by a Dili court. They were freed on parole which means that their terms in jail for crimes against humanity committed in 1999 were not served fully in accordance with the sentence of the court.[76] This proves that transitional

[72] *Ibid.*.
[73] Megan Hirst, *op.cit.*, p. 1.
[74] *Ibid.*, p. 1 & 11.
[75] *Ibid.*, p. 11.
[76] *The Sunday Age*, "Not diplomatic: was Ramos Horta a contender or a pretender?", June 29, 2008, p. 8.

justice in East Timor became more reconciliatory than judicially.[77] Even though there was a criticism to such transitional justice approach, in fact it worked.

III. CONCLUSION

As has been demonstrated throughout this article, the implementation of transitional justice in post-Soeharto Indonesia is a complex one. Transitional justice in Indonesia has been directed to the minimum level only. Unfortunately, it is implemented with half-baked. While there have been efforts in terms of both judicial and non-judicial achieved by the government of Indonesia to apply transitional justice, the final results are not satisfactory. There is no serious political will to address Indonesia's legacy of human rights abuses. The military, police, prosecutors, judges, parliament, and even the president supported the implementation of transitional justice only with half-hearted. The case of Indonesia shows that "the progress has been largely restricted to form, but not to action."[78] It is therefore not surprising that no single case has been prosecuted successfully during transitional period. As a matter of fact, "neither Suharto nor any of the high-ranking officials of the New Order era have ever been put on trial or held accountable for human rights abuses during 32 years of authoritarian rule".[79]

With regard to the implementation of Indonesian transitional justice, some analysts have come to the same pessimistic conclusions expressed in such terms: "de facto amnesty",[80] "intended to fail",[81] "has not had a coherent "transitional

[77] Such an approach was also applied by East Timorese political leaders in the implementation of transitional justice in Timor-Leste itself. The Timor-Leste's Truth and Reconciliation Commission (CAVR) including the Community Reconciliation Program (CRP) underlined the importance of reconciliatory measure. The application of transitional justice mechanism was highly contested by domestic political leaders. A charismatic leader like Xanana Gusmao once said that "the people would forgive former militia members if only they received an apology" and he agreed to grant amnesties. See Eva Ottendorfer, "Contesting International Norms of Transitional Justice: The Case of Timor Leste", *International Journal of Conflict and Violence*, Vol. 7 (1), 2013, p. 29. In addition, a report published by the UNDP Timor-Leste concluded that "[t]he CRP has reinforced the importance of local justice mechanism and the notion that justice in Timor Leste not always about punishment, but also compensation, contrition and other forms of reciprocity". See Piers Pigou, *The Community Reconciliation Process of the Commission for Reception, Truth and Reconciliation*, Report for UNDP Timor-Leste, April 2004, p. 102. Available at [http://www.cavr-timorleste.org].

[78] ICTJ and Kontras, *op.cit.*, p. 84.

[79] Ehito Kimura, *op.cit.*.

[80] Patrick Burgess, "De Facto Amnesty? The Example of Post-Soeharto Indonesia", in Francesca Lessa and Leigh A. Payne (ed.), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, Cambridge: Cambridge University Press, 2012.

[81] David Cohen, *Intended to Fail: The Trials Before the Ad Hoc Human Rights in Jakarta*, Occasional Paper Series, International Center for Transitional Justice, August 2003. Available at [http://ictj.org/].

justice" strategy",[82] "has largely failed",[83] "a defensive enforcement approach in promoting human rights",[84] "the culture of impunity and the lack of political will or courage to bring about justice",[85] and "the failure of international justice".[86] In short, a significant final result of Indonesian transitional justice has not been achieved and justice has not been done so far.

However, Indonesia is not the only case where the implementation of transitional justice has failed. As Duncan McCargo illustrates, such a failure has also occurred in the cases of Cambodia and Thailand. In Cambodia, a hybrid tribunal namely the Extraordinary Chambers in the Courts of Cambodia was created for the trial of mass killing during 1975-1979 committed by Khmer Rouge regime. But the result was not successful. In Thailand, the Truth for Reconciliation Commission was formed in order to investigate the deaths of 92 people during April and May 2010 demonstrations committed by the military officers. Similarly, the result has also failed. Surprisingly enough, the Commission blamed the demonstrators rather than the military officers. Previously, in order to examine the resurgence of separatist violence in the country's Muslim majority southern provinces, the Thai government created a National Reconciliation Commission in 2005. But the result was also not satisfactory.[87]

Indeed, it is difficult to implement transitional justice if old regime actors, both civilian and military, still have significant position in state institutions and political influence in policy making. In Indonesian case, lustration is not applied to prevent them from involving in new transitional regimes. Instead of this, the lack of broad and solid public support for transitional justice also made it more difficult to implement. Transitional justice is not viewed as the aspirations of the whole Indonesians, but rather limited to the victims and their family and

[82] Suzannah Linton, *op.cit.*, p. 20.
[83] Ehito Kimura, *op.cit*..
[84] Irene Istiningsih Hadiprayitno, "Defensive Enforcement: Human Rights in Indonesia", *Human Rights Review*, Vol. 11, 2010, p. 397.
[85] Priyambudi Sulistiyanto, "Politics of Justice and Reconciliation in Post-Suharto Indonesia", *Journal of Contemporary Asia*, Vol. 37, No. 1, February 2007, p. 90-91.
[86] Elizabeth F. Drexler, "The Failure of International Justice in East Timor and Indonesia", in Alexander Laban Hinton (ed.), *Transitional Justice: Global Mechanisms and Local Realities after Genocide and Mass Violence*, New Brunswick, New Jersey, and London: Rutgers University Press, 2010.
[87] Duncan McCargo, "Transitional Justice and Its Discontents", *Journal of Democracy*, Volume 25, Number 2, April 2015, p. 5 & 16.

human rights activists. Meanwhile, international pressures for transitional justice are understood by many as an unexpected foreign intervention.

The case of Indonesia suggests the lessons that the implementation of transitional justice is likely to be unsuccessful it there is no extensive support from nation-states actors, national institutions, the majority of citizens, and the victims themselves. Unless such obstacles are considered properly, the effort to resolve past human rights abuses will likely to lead to the same mistake and failure of justice. To overcome the obstacles, the current government have to convince them first so that they will support the effort to resolve past human rights violations. Furthermore, in order to resolve past human rights violations, it is necessary to firstly fulfil the minimum level of transitional justice (truth process, trial process, and reparation process) before suddenly jumping to reconciliation process. Arguably, justice cannot be brought to the victims unless such a minimum level of transitional justice has been fulfilled prior to reconciliation.

The lessons above should be considered wisely by the current government under President Joko Widodo and Vice-President M. Jusuf Kalla who intends to resolve past human rights abuses as has been promised in their presidential election campaign in 2014. Since transitional justice measures have not been resolved appropriately, past human rights abuses would remain a nightmare for the country and even for the generations. Ultimately, Indonesia cannot run away from its own history for better or worse.

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The Influence Of The Constitutional Court Decision Against Combating Money Laundering In The Context Of Criminal Law Reform

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Abstract

According to Moeljatno, Criminal Law is a part of a country's legal system that prohibits certain acts with the threat of sanction for those who break said laws, determines when and in what cases such punishments should be imposed upon those who commit said acts and determines precisely how punishments should be carried out in the event that a person is accused of such acts. This paper will analyse Constitutional Court Decision No. 77/PUU-XII/2014 and Decision No. 21/PUU-XII/2014 regarding Criminal Law reform. Looking to the theory of procedural criminal law, an indictment of cumulative charges of money laundering requires that the underlying predicate offences be proven. If, for example, the predicate offence is corruption, the corruption must be proven as multiple crimes have been committed by the same suspect, namely corruption leading to money laundering. the Decision of the Pretrial Judge of the Court of South Jakarta, Sarpin Rizaldi, and Constitution Court Decision No. 21/PUU-XII/2014 on the review of Article 77 of Act No. 8 Year 1981 concerning the Law of Criminal Procedure broadened the range of pretrial objects and greatly affected the principles of formal criminal law.

Key words: Criminal Law, Cumulative Charges, Pretrial, Money Laundering, Corruption

I. INTRODUCTION

The reform era criminalization of money laundering in Indonesia was conducted on March 25, 2002 with the enactment of Law No. 15 of 2002 on Money Laundering. The criminalization of money laundering are also relevant to the government's determination to tackle corruption and narcotics crime in Indonesia. In 1997 Indonesia has ratified the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Subtances 1988, in the Convention, among others, stated that the country that has ratified the need to criminalize money laundering.[1] According to Moeljatno, Criminal Law is a part of a country's legal system that prohibits certain acts with the threat of sanction for those who break said laws, determines when and in what cases such punishments should be imposed upon those who commit said acts and determines precisely how punishments should be carried out in the event that a person is accused of such acts.

To whom is addressed the criminal law or criminal law adresat Who? What was intended only for offenders rules of criminal law and hence they punished? Or is addressed to the law enforcement agencies to enforce the rules so that there is traffic on the social life of a country? In addition to the legal, human life in a morally guided human society itself, governed also by religion, by the rules of propriety, decency, customs and other social norms, said by Mochtar Kusumaatmadja.[2] The existence of such sanctions can not be separated from other areas of the law if people are to obey them. These sanctions give Criminal Law a unique place within the law as a whole, namely that, according to scholars, Criminal Law should be seen as an *ultimatum remedium,* the last effort in improving the actions of the people, and naturally its implementation should be with the tightest possible restrictions. In Indonesia, those acts which are considered criminal are subject to the Principle of Legality, namely, all criminal acts are determined by the legislation (Article 1 Paragraph (1) of the Criminal Code). For those who have committed a criminal act and are faced with sanctions,

[1] Yenti Garnasih, *Kriminalisasi Pencucian Uang*, Universitas Indonesia Fakultas Hukum Pascasarjana, 2003, p.169.
[2] Komariah Emong Sapardjaja, Ajaran Sifat Melawan Hukum Materiel Dalam Hukum Pidana Indonesia, Bandung: Alumni, 2008, p.1.

it is still not certain that all such individuals should receive punishment. Indeed, in the punishment of those accused of criminal conduct, there is the principle, "no punishment where there is no fault" (*Geen straf zonder schuld*) which reflects the principle in English Criminal Law, *Actus non facit reum, nisi mens sit rea*, an act does not make a person guilty unless the mind is guilty. According to Article 28I Paragraph (1) of the 1945 Constitution, the right not to be prosecuted based on a retroactive law is a basic human right and as such may not be reduced under any circumstances.

Simons defines a criminal act (*strafbaarfeit*) as any act which faces the threat of sanction, which is against the law, which is considered an offence and which is conducted by an individual who is competent to take responsibility. Van Hamel defines strafbaarfeit as an act conducted by a person that is against the law, that is liable for punishment and that is commited with intent. If seen in the light of these explanations, we can see the follow:

1. that '*feit*' in '*strafbaarfeit*' refers to behaviour or conduct;
2. that *strafbaarfeit* is related to wrongdoing by an individual.

The Criminal Act of Money Laundering is an effort to obscure the origins of the proceeds from criminal activity such that it appears to have been earned through legitimate efforts. The process of money laundering follows the stages of placement, incorporating the illegitimate gains into the financial system, layering, moving the money through a series of complex transactions in order that the funds are harder to trace, integration, returning the now seemingly legitimate funds back to the owner, who can now use the money safely. Constitutional Court Decision No. 77/PUU-XII/2014, which rejected the review of Article 2 Paragraph (2), Article 3, Article 4, Article 5 Paragraph (1), Article 69, Article 76 Paragraph (1), Article 77, Article 78 Paragraph (1) and Article 95 of Act No. 8 Year 2010 concerning the Prevention and Eradication of Money Laundering became a legal instrument that strengthened the foundation of the law for the Police, KPK (Commission for the Eradication of Corruption) and attorneys to uphold Criminal Law and combat money laundering, because according to Article 69 of Act No.8 2010, in order to conduct an investigation, prosecution and court

proceedings, it is not necessary to prove the predicate offences first. Thus the case of Money Laundering as criminal conduct has become quite the debate: does the act stand alone or is it connected to other acts? The Constitutional Court also issued Decision No. 21/PUU-XII/2014, which reviewed Article 77 of Act No. 8 Year 1981 concerning the Criminal Code, which generated some controversy in the area of formal criminal law when the Court determined that the naming of suspects should be a pretrial object. Following this decision, the district courts received many pretrial suits from those accused by the KPK in corruption and money laundering investigations. Thus, Decision No. 77/PUU-XII/2014 indeed strengthened the efforts of the Police, the KPK and attorneys in the war on Money Laundering, but Decision No. 21/PUU-XII/2014 offered an extra challenge to investigators whereby accusations must be reviewed by a pretrial judge against two items of evidence before moving trying the case.

II. DISCUSSION

Definition of Money Laundering

Money laundering, according to Jeffrey Robinson in The Laundryman, is "all about sleight of hand". It's a magic trick for wealth creation. It's perhaps the closest anyone has ever come to alchemy." Money Laundering is in fact a fairly recent term, first used in newspapers in connection with the Watergate scandal in the USA in 1973. The first use in a context of court proceedings or law came in 1982 when it appeared in relation to the case of the US vs. $4,255,625.39 (551 F Supp. 314 1982). Since then, the term has entered into common usage. According to Sarah N. Welling, money laundering begins with the possession of "dirty money", which can come from two sources. The first source of dirty money or illegitimate that Welling offers is tax evasion, whereby money is made through legitimate means, but the full amount is not reported to the Government for the purposes of calculating taxes, so that fewer taxes are paid than should be. The second source of dirty money is income from illegal means. Examples of illegal means are dealing in narcotics or trafficking narcotics, illicit gambling, bribery, terrorism, prostitution, arms trafficking, alcohol, tobacco or pornography

smuggling, illegal immigrant trafficking and white collar crime, which includes corruption. The KPK's investigations of suspects in alleged corruption cases often involve money laundering, where the monies received through corruption are moved around to hide their illegitimate origins.

Money laundering can be termed a money laundering or money laundering, panning money or also called the cleanup money from the illegal transactions (gross). Law No. 15 of 2002 and Law No. 8 of 2010 on money laundering, the term money laundering referred to money laundering. The word Money in Money Laundering variously termed, in the form of dirty money, tainted money, hot money or black money.[3] In Constitutional Court Decision No. 77/PUU-XII/2014, dated 15th December 2014, page 204, the Court stated its opinion on money laundering as follows: "Money laundering indeed does not stand alone but must been seen in connection with the predicate crime. For how can there be money laundering without a predicate crime?" Thus we can conclude that there are differences of opinions regarding Money Laundering amongst legal practitioners and experts, particularly where the proof, seizure and confiscation of illicit funds are concerned. In many ways, these problems are derived from the ambiguities in Act No. 8 Year 2010.

The Process of Money Laundering

It is not easy to prove an instance of money laundering due to the immense complexity inherent in the activity. However, experts have classified the stages of the process as follows:

1. *Placement*

   This is the act of taking funds earned through illegitimate means and incorporating them into the financial system of the relevant country so that they be combined with "clean" or legitimate funds. This can be done by smuggling the dirty money overseas and depositing it into a bank account with clean money. Other variations include depositing cash into a deposit

[3] N.H.T. Siahaan, *Money Laundering & Kejahatan Perbankan*, Jala Penerbit, 2008, p. 5-6.

account, into company shares or converting and transferring the money through foreign currency.

Once the money has been deposited into a bank account, it can be transferred to other accounts either in the same country or even overseas. Thus, the money does not just enter into the country's financial system but becomes combined with the global system.

2. *Layering*

The second stage involves removing the traces and obscuring the origins of the dirty money. This can be done by transferring funds from multiple accounts to different locations or from one country to another, and often multiple transactions are made, fragmenting the funds and making their origins much harder to trace. Layering often includes transferring money in foreign currencies, buying shares and making derivative transactions amongst other techniques. In fact, the depositor of layered funds is often not the initial owner, as the funds might have already gone through several stages of layering previously.

Through these transactions, the owner of the funds attempts to remove all connections between the funds and the initial illegitimate means through which they were acquired so that, after a complex series of movements and transactions, the monies can no longer be traced back to their origin by financial authorities or law enforcers.

Often, funds are transferred by or between dummy companies, relying on bank privacy policies and attorney client privileges to hide the individual's identity through complex transaction networks.

3. Integration

This is the consolidation of funds that have gone through the stages of placement and layering so that they can be used safely in legitimate activities without them having any traceable connection to the illegitimate activities through which the funds were first acquired. These funds can be

said to have been laundered and are now clean. This stage is sometimes called reparation or spin-drying. The launderer can now safely invest this money in real estate, luxury assets or business ventures.

The stages of money laundering can be geographically concentrated. For example, the placement stage is usually, though not always, conducted in the country of the funds' origin, i.e. the country in which the illicit activity that generated the dirty money was committed. Meanwhile, layering often involves offshore financial centres, regional business centres or world banking centres, places where the financial or business infrastructure is sufficient for the needs of the money launderer. At this stage, the money might simply be moved from account to account through increasingly complex transfers so that traces of the funds become harder to find. Finally, integration can happen in the country of origin or, if the investment opportunities in that country are limited, in another country.

Money Laundering and Corruption

Lately, money laundering is receiving increased global attention. This attention has been triggered by the growing frequency of cases, meanwhile many countries have not yet implemented systems to combat money laundering or even declared it a problem that needs to be combatted. Furthermore, the most conservative estimates of money laundered after being earned through such activities as narcotics trafficking, arms trafficking, bank fraud, counterfeiting and the like amount to US$600 billion per year. On 22nd June 2001, FATF (Financial Action Task Force), an organisation aiming to free banks from money laundering practices has placed Indonesia along with 19 other countries, on a black list as Non-Cooperative Countries or Territories (NCCTs) in the fight against money laundering. The other nineteen countries are Egypt, Russia, Hungary, Israel, Lebanon, The Philippines, Myanmar, Nauru, Nigeria, Niue, Cook Island, The Dominican Republic, Guatemala, St. Kitts and Nevis, St. Vincent and the Grenadines, and Ukraine. If Indonesia and the other countries on the list do not control money laundering, the FATF will continue to impose increasingly strict

punitive measures. It is not impossible that they will bring sanctions in the form of disallowing the said countries from performing such banking transactions as transfers, L/C, overseas lending and others.

In Constitutional Court Decision No. 77/PUU-XII/2014 of 15th December 2014, page 204–205, the Constitutional Court of the Republic of Indonesia stated, regarding the opinion that money laundering cases do not require the proof of predicate crimes, as follows:

> "Considering that, according to Article 69 of Act 8 2010, there is no necessity to prove predicate crimes, should the applicant request that predicate crimes be proven first, the Court supposes that in cases where the perpetrator of the predicate crime has died and as a result the case has been closed, then the recipient of the laundered money can never be tried pending the proof first of the predicate crime. There is a injustice when an individual who is known to have profited from money laundering cannot be tried only because the predicate crimes have not first been proved. The people of Indonesia will surely condemn that such an individual be allowed to escape justice thus. Nevertheless, the crime of money laundering does not stand alone but must be related to predicate crimes, for how can there be money laundering with no predicate crime? If the predicate crime cannot be proved first, it should not prevent the trial of the money laundering case. While it is not exactly the same, in the Criminal Code it has been recognised (Article 480 of the Criminal Code) that in the case of fencing, predicate crimes need not be proved first. Based on these considerations, the Court concludes that the applicant's argument a quo has no legal grounds."

This decision from the Constitutional Court was a breath of fresh air in the fight against money laundering. The aforementioned Act No. 8 of 2010 was not written to combat predicate crimes but is a formulation that can and should be used to maximise the imposition of predicate criminal acts articles because the usual modes and characteristics of money laundering are seen as multiple crimes in that they are a combination of the predicate crimes and the money laundering itself. Moeljatno states that in defining criminal acts, as it is a compound word, the basis of understanding is to be found in the second word, in this case "act". It is clear that the term Criminal Act refers to the act and not to any person

implicated in said act, even though there is an undeniably close relationship between the act and the actor that cannot be severed. Therefore, a Criminal Act can be defined as an act that is prohibited and has the threat of punishment for any person who breaks violates the prohibition. In principle, any criminal act must consist of a physical wrongdoing, as there must be a cause and effect inherent in the act. Aside from the cause and effect, the act must also consist of a condition that brings to rise some motivation for the act. Such motivating conditions can, according to van Hamel, be categorised either as intrinsic or extrinsic. Furthermore, acts can be subjectively criminal or objectively criminal.

According to Article 2 Paragraph (1) sub-paragraph (a) of Act No. 8 Year 2010, proceeds of criminal acts are those financial gains that are acquired from, amongst others, corruption. The origin of the word corruption, according to Fockema Andreae in Andi Hamzah, is the Latin corruptio or corruptus (Webster Student Dictionary; 1960), which is in turn derived from the Old Latin corrumpere. The word later came to Indonesian through the Dutch corruptie as Korupsi. According to Benveniste in Suyatno, one form of corruption is "mercenary corruption", that which is conducted with the intention of seeking personal profit through the abuse of power or authority. For example, in the case of a tender, a committee member has the authority to decide on the winner and either explicitly or implicitly states that participants must pay a bribe in order to win the tender. If a bribe is indeed given, the committee member's actions fall under the category of mercenary corruption. A bribe does not have to be in the form of money. Corruption when there is freedom of discretion in a particular decision but, although the decision seems legitimate, it is not acceptable practice in the eyes of the members of the organisation is called discretionary corruption.

From the perspective of the law, the definition of corruption is clearly defined in no less than 13 articles of Act No. 31 Year 1999, later amended by Act No. 20 Year 2001 concerning the Eradication of Corruption. Based on these articles, corruption can be described in 30 forms, which determine in detail the list of acts which can bring about sanctions for criminal acts of corruption. The 30 forms of corruption can be categorised in the following groups:

1. corruption of state finances
2. bribery
3. embezzlement within office
4. blackmail
5. deception
6. conflict of interest in procurement
7. gratification

The criminal act of money laundering can originate from the criminal act of corruption as the predicate offence. The main issue which has not yet been agreed upon amongst legal practitioners and experts is the importance of proof of the predicate offence (e.g. corruption) in implementing the provisions regarding money laundering. Experts form two main groups, those who believe that proof of the predicate offence is not necessary and those who believe that it is and that cumulative charges of the predicate offence and the money laundering should be brought in a single indictment. The first opinion is based primarily on Article 69 Act No. 8 Year 2010, which states that "in order to conduct an investigation, prosecution and court proceedings, it is not necessary to prove the predicate offences first." Meanwhile, the second view refers to provisions of Articles 3 and 4 and Article 5 Paragraph (1) of Act No. 8 Year 2010, which contains the phrase, "proceeds that are known to derive from criminal acts as referred to in Article 2 Paragraph (1)". Indeed, there are those who claim that the predicate crimes referred to in Article 2 Paragraph (1) Act. No 8 2010 is in fact the "causa" that gives rise to the very act of money laundering that is determined in Articles 3 and 4 and Article 5 Paragraph (1) of the Act. That is that to prove the criminal act of money laundering, as referred to in Articles 3 and 4 and Article 5 Paragraph (1), always requires proof of the predicate crime, as referred to in Article 2 Paragraph (1), the proceeds of which are the object of the money laundering offence itself.

The decision of the Constitutional Court that money laundering offences do not require proof of the predicate crimes introduced a new challenge in criminal

law enforcement. It is not easy to investigate a case of money laundering if the predicate offence (e.g. corruption) must precede and if the use or channelling of the proceeds of said predicate offence is a subsequent crime. That is, there cannot be a case of money laundering where there is no predicate offence. Elements of an offence can either be objective or subjective, whereby in a criminal trial these elements must be proven in accordance with the principle that an act does not make a person guilty unless the mind is guilty (*Actus non facit reum, nissi mens sit rea*). Taking as examples Article 3, Article 4 and Article 5 of Act No. 8 Year 2010, the *actus reus* and *mens rea* must be proven as they are the elements (*bestanddelen*) of the offence. In this case, the aforementioned elements are the proceeds of illegitimate conduct, for example corruption. As such, the corruption must take place first and foremost, and only at such a time as the proceeds are used or channelled does the subsequent crime of money laundering occur. Thus, the predicate crime must be proven, and according to criminal law theory, both crimes must be indicted at once and in a single trial in the form of cumulative charges. The bringing of cumulative charges in a single indictment in this manner is made possible by the provisions of Article 141 of the Criminal Code, which refers to combining cases in an indictment. In the case of such cumulative charges, each individual act must be proven, even though the offence is adapted to the provisions on concurrent offences (*samenloop*) in Article 63–71 of the Criminal Code.

Article 141 of the Criminal Code, which authorises the public prosecutor to combine cases in a single indictment if at the same time, or within a reasonable time frame, cases are received containing any of the following features:

a. several criminal acts committed by the same individual,
b. several criminal acts connected to one another, or
c. several criminal acts that are not directly connected to one another but have some indirect relationship between them.

The main objective of cumulating charges, with regard to sentencing, is the basis for determining the severity of the sentence to be handed down with

consideration to the severity of the sanctions imposed in the provisions of the indictment. That is why the matter of cumulative charges is a doctrine of *samenloop van strafbbar feiten,* meaning that the severity of the sentence handed down to the offender facing multiple charges, has committed several acts that face charges. Thus, according to Constitutional Court Decision No. 77/PUU-XII/2014 and Article 69 Act No. 8 2010, it is not necessary to prove predicate crimes when bringing charges of money laundering. However, according to criminal law theory, a cumulative indictment for money laundering requires proof if predicate crimes because multiple crimes have been committed by the same individual, one leading to the other, so that while they are not the same crime, they are related crimes. According to Prof. Dr. Romli Atmasasmita a Professor of Criminal Law who teaches across the Faculty of Law in Indonesia and in various agencies, one of them about the criminal justice system. In various writings often said that the investigation, prosecution, and court upfront examination is a series of one another can not be separated.[4] Therefore, money laundering can not be separated by the Crime of origin.

The inclusion of the crime of money laundering in the criteria, because it acts result in losses. Semakkin economic losses will increase when linked to globalization. Globalization has spurred not only a legitimate economic activity between countries but also fueled illegal activities. The crime of money laundering in international accounting concept also resulted in the current account deficit, leading to statistical error and possibly lead to secret money. Money laundering is a process to conceal the source of money derived from crime, so that criminals can freely use the money safely. In this case as well be used to finance certain as that of organized crime. Money laundering thus supporting the development of a crime, which means that will result in a huge loss to the community. Criminalization do not solely intended for revenge, it means that in looking at the problem is not only to provide a sanction alone but more than that, it should also think about the effectiveness of sanctions. Besides criminalization should have broader goals, such as maintaining financial

[4] Putusan MK No. 77/PUU-XII/2014, p. 142.

stability, confidence in the financial institutions. Given the nature of the follow-up crimes of criminalization is ultimately expected to tackle major crime (core crimes). For example, to catch the perpetrators laundering of proceeds of crime organized crime is expected to be the main perpetrator was arrested anyway.[5]

Furthermore, the Constitutional Court Decision in question was not unanimous; two justices gave dissenting opinions. Justice Aswanto and Justice Maria Farida Indrati held the following opinion:

> "the word "not" in Article 69 is inconsistent and could be interpreted as contrary to Article 3, Article 4, Article 5 Paragraph (1) of Act No. 8 2010, which in principle state that in order for an individual to be charged with money laundering, the monies involved must have originated from some predicate offence or offences; in other words, there can be no money laundering without a predicate offence. Thus, if an individual is charged with money laundering without proof of a predicate offence, it is contrary to the principle of presumption of innocence as defined in General Explanation of Criminal Procedure Point 3 Sub-paragraph c and Article 8 Paragraph (1) of the Regulations of Judicial Power and later reiterated by M. Yahya Harahap, S.H. in "Discussion on the Problem and Application of The Criminal Code in Investigation and Prosecution" (Pembahasan Permasalahan dan Penerapan KUHAP Penyidikan dan Penuntutan), which states, "the suspect should be given the position of a person who possesses basic human dignity. The suspect should be consider the subject, not the object. As such, that which is under investigation is not the suspect. It is the criminal act that is the object of investigation; the investigation is aimed at the acts that have been committed. The suspect must be considered innocent, in accordance with the principle of presumption of innocence, until such a time as the court passes a finalised decision." Thus, the principle of presumption of innocence must be upheld to the highest by a nation of Rule of Law and democracy as defined in Article 1 Paragraph (3) of the 1945 Constitution."

Pretrial in the Context of Money Laundering and Corruption

The ruling of Pretrial Justice of the South Jakarta Court, Sarpin Rizaldi with regard to several pretrial petitions from Komjen (Pol) Budi Gunawan invalidated any further decision or stipulation from the Respondent (KPK) related to the naming of suspects by the Respondent (KPK). This ruling was further strengthened

[5] Yenti Garnasih, *op.cit*, p.72-73.

by Constitutional Court Decision No. 21/PUU-XII/2014, which reviewed Article 77 Act No. 8/1981 concerning the Criminal Code. The use of the term pretrial in the Criminal Code differs from the literal meaning. "Pre" means before or preceding, such that pretrial means before the trial or preceding the investigation. According to Oemar Eno Adji, the organisation *Rechter Commissaris* (in charge of preliminary investigations) was established in Central Europe in response to the proposal of Judges and holds the important authority to deal with coercion (*dwang middelen*) detention, foreclosure, shakedown of legal bodies and houses and the inspection of documentation.

Pretrial is a new mechanism in Indonesia's law enforcement system. Every new item must have a particular mission and motivation. There must be some objective, something that is hoped to be achieved. Nothing is established without the drive of a particular purpose. Such is the case with the institutionalisation of the pretrial mechanism. It aims to uphold the law and to protect the rights of those accused at the level of investigation and prosecution. In the implementation of criminal investigation, the law authorises the public prosecutor to apply coercive measures in the form of arrest, detention, seizure and so on. Any coercive measure applied by the investigator or public prosecutor towards the suspect is, in essence, treatment of the following nature:

- a coercive measure taken against the suspect that is justified by the law in the implementation of criminal investigation,
- as a coercive measure justified by the law, any coercive act is a deprivation of liberty and freedom and a limitation of the rights of suspect.

Because coercive measures imposed in the enforcement of the law are limitations on freedom and the suspect's rights, such measures must be taken responsibly in accordance with due process of the law. Coercive measures taken contrary to the law are a violation of the suspect's rights and as such are illegitimate. However, how can we assess the legitimacy of coercive measures and identify those that are illegal? An authority must exist to determine the legitimacy of coercive measures taken against suspects. This authority belongs to the pretrial mechanism. Pretrial duties in Indonesia are limited. Article 78,

which is related to Article 77 of the Criminal Code, states that it is the authority of the district court to examine and decide on the following:

a. the legitimacy of arrests, detention, cessation of investigations or of prosecution.

d. The reparation or rehabilitation of an individual whose criminal trial has been ceased at the investigation or prosecution level is a pretrial object. Pretrail is conducted by a single judge appointed by the chief or chairman of the district court and assisted by a court clerk.

Constitutional Court Decision No. 21/PUU-XII/2014 broadened the pretrial authorities. In its decision, the court stated,

> "When the Criminal Code was established in 1981, the naming of suspects was not a crucial or problematic issue for the people of Indonesia. At that time, the meaning of coercive measures was conventionally limited to arrest, detention, investigation and prosecution. Today however, the meaning has been broadened or modified, one example of which is the definition, "the naming of a suspect by the investigator", which is conducted by the state as a means of attaching the label or status of "suspect" to an individual without any clear limitation of time, such that the individual is forced by the state to accept said status with no opportunity to implement any legal effort to assess the legality or purity of purpose of the naming. Meanwhile, the law should adopt the objectives of justice and practicality at once so that should the social environment become more complex, the law should be further clarified in a scientific manner through the use of better language (Shidarta, 2013: 207–214). In other words, the principle of caution should be maintained at all times by law enforcers in the naming of suspects. In order to fulfil the objectives of the law, it is essential that the rule of law and the protection of the rights of suspects during investigation and prosecution be upheld in the pretrial process (vide legal opinion of the Constitutional Court in Decision No. 65/PUU-IX/2011 dated 1 May 2012, juncto Decision No. 78/PUU-XI/2013 dated 20 February 2014) with due regard to the values of human rights contained within Act No. 39/1999 concerning Human Rights and the protection of human rights enshrined in Chapter XA of the 1945 Constitution. As such, any conduct of the investigator that does not observe the principle of caution and is seen to violate human rights are grounds for the suspect to seek the protection of pretrial institution, although this is limited by provisions of Article 1 Point 10 and Article 77 Point a of the Criminal Code. Meanwhile, the naming of suspects is a part

> of the investigation process, wherein lies the possibility of arbitrary actions by the investigator that amount to deprivation of human rights. Whereas Article 77 Point a of the Criminal Code is one regulator of the legitimacy of the cessation of investigations. Meanwhile, the investigation is in and of itself, according to Article 1 Point 2 of the Criminal Code an action of the investigator with the purpose of collecting evidence to shed light upon the events of the crime and with which suspects can be identified."

Constitutional Court Decision No. 21/PUU-XII/2014 received dissenting opinions from 3 justices, Justice I Dewa Gede Palguna, Justice Muhammad Alim and Justice Aswanto. The naming by the KPK of suspects of corruption is often related to money laundering cases. The decision from Pretrial Judge Sarpin Rizaldi along with Constitutional Court Decision No. 21/PUU-XII/2014 brought new hope for suspects named by KPK. They had the opportunity to challenge or review the statements made by KPK based on two items of evidence. On 6th April 2015, the KPK faced 5 pretrial hearings brought by suspects and witnesses investigated by the KPK. The 5 hearings were brought by former Head of Commission VII DPR RI Sutan Bhatoegana, former Mayor of Makassar Ilham Arief Sirajuddin, former Managing Director of Pertamina Suroso Atmo Martoyo. Other cases were brought by Siti Tarwiyah, who was referred to as the mistress of the Chief of DPRD Bangkalan Fuad Amin Imron, and former Minister for Religion Suryadharma Ali. Suroso Atmo Martoyo.

In Europe, we find institutions established specifically for the function of conducting the pretrial process, such as the *Rechter Commissaris* in the Netherlands and *judge d'instruction* in France, which, aside from determining the legitimacy of arrests, detentions, seizures, etc., they also have the authority to conduct examinations of cases. For example, the public prosecutor in the Netherlands can request the judge's opinion on a case, whether it is appropriate for the case to be ruled out with reparations or not. Although there is a similarity with the *Hakim Komisaris* (Judicial Commissioner), the authority of the pretrial institute is limited. The *Judge d'Instruction* in France has a broad authority in preliminary investigations, including the investigation of defendants, witnesses and items of evidence. The *Judge d'Instruction* also makes official reports, conducts

house searches, arrests, detentions and closures of certain locations. Following the preliminary investigations, the *Judge d'Instruction* determines whether there is good enough reason for the case to be taken to court. If reason is found, the *Judge d'Instruction* sends the case with an accompanying letter called an *ordonance de Renvoi*; on the other hand, if reason enough is not found, the defendant is released with an *ordonance de non lieu*. In the Criminal Code, there is no provision for the pretrial judge to conduct preliminary investigations. The pretrial judge does not conduct preliminary investigations, searches, seizures or other activities that come under preliminary investigation nor determine whether a case has reason enough to make it to trial.

Pretrial Judge Sarpin Rizaldi's decision regarding the illegitimacy of KPK's naming of suspects and Constitutional Court Decision No. 21/PUU-XII/2014 reviewing Article 77 of Law No. 8/1981 concerning the Criminal Code together broadened the objects of the pretrial process and thus played an important role in formal criminal law in the context of criminal law reform. With *Staasblad* No. 44/1941 of the *Herziene Indische Reglement*, the term *Regter-commissaris* became disused until Prof. Oemar Seno Adjie, Minister for Justice, brought the term back in 1974 in reference to draft criminal procedure laws submitted to the DPR. Ultimately though, the *hakim komisaris* was annulled by the State Secretariat and later replaced by the pretrial institution.

Nevertheless, the notion of the Judicial Commissioner is still discussed in limited terms amongst academics. The discussion has gathered interest since the ratification by the International Covenant for Civil and Political Rights (ICCPR) through Act No. 12/2005. One of the provisions of the covenant suggested that any coercive measures taken by the law enforcement apparatus must immediately be brought for hearing. The Justice Commissioner is necessary to prevent arbitrary actions from the law enforcers in the application of coercion. This concept was further strengthened government's revision of the Criminal Code (*KUHAP 2011*), wherein Chapter IX and X of the bill referred to the Judicial Commissioner as having the authorities that far exceeded those of the pretrial institutions as

found in the existing Criminal Code. The Judicial Commissioner was brought into being with the intention of giving a greater guarantee of protection of the rights of suspects in criminal proceedings. The Judicial Commissioner exists to avoid differences in opinion regarding the validity of legal conduct in preliminary investigations, i.e. arrests, detentions, searches and seizures, as these actions are related to the rights of suspects, such as freedom, liberty, ownership of wealth and the protection of peace and security. With reference to the ruling from Judge Sarpin Rizaldi and Constitutional Court Decision No. 21/PUU-XII/2014 the Judicial Commissioner should be institutionalised immediately through the revision of the Criminal Code with the goal of guaranteeing the protection of the rights of suspects in criminal trial proceedings.

III. CONCLUSION

Based on criminal law theory, money laundering is, in essence, a subsequent crime that requires a predicate crime, such as corruption, making it profoundly difficult to prove without first proving the predicate crimes. This view is upheld by criminal law theory, which authorises the cumulation of charges where there are multiple offences that are either directly or indirectly related, such as a predicate offence of corruption leading to the subsequent offence of money laundering, and by the dissenting opinions relevant to Constitutional Court Decision No. No. 77/PUU-XII/2014, which referred to the principle that, since money laundering requires proceeds from illegitimate means, there could be no money laundering where there was no predicate offence. Decisions of the Constitutional Court, with regard to judicial review, take the form of *Declaratoir Constitutief*, meaning that they create or abolish new laws. As such, Hans Kelsen referred to these decisions as Negative Legislators. As a *declaratoir* no particular apparatus is needed to implement the decisions of the Constitutional Court. Constitutional Court Decisions often create new norms, such as Decision No. 21/PUU-XII/2014, which greatly impacted the criminal law reform with regard to the eradication of money laundering by broadening the scope of the pretrial institution.

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

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Abstract

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

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

I. INTRODUCTION

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

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

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

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

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

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

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

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

II. DISCUSSION

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

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

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

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

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

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

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

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

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

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

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

b. Decision Number 055/PUU-II/2004

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

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

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

c. Decision Number 006/PUU-III/2005

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

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

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

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

d. Decision Number 006/PUU-IV/2006

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

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

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

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

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

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

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

f. Decision Number 12/PUU-V/2007

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

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

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

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

g. Decision Number 16/PUU-V/2007

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

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

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

h. Decision Number 11/PUU-VI/2008

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

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

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

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

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

i. Decision Number 12/PUU-VI/2008

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

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

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

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

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

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

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

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

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

k. Decision Number 56/PUU-VI/2008

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

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

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

l. Decision Number 3/PUU-VII/2009

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

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

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

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

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

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

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

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

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

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

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

3. Indonesia's Commitment on International Human Rights

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

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

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

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

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

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

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

III. CONCLUSION

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

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Biography

Jimly Asshiddiqie is Professor of Constitutional Law at the University of Indonesia, the Founding Chief Justice of the Constitutional Court of the Republic of Indonesia (2003-2008), as one of expert advisory team to the Amendment of Constitution 1945 by the People Consultative Assembly on 1999-2002, former member of the Presidential Advisory Council, now Chairman of the Honorary Council of Indonesian Elections, Chairman of the Advisory Council of National Commission of Human Rights, Vice Chairman of the National Council of Honor and Titles of the Republic of Indonesia. In services to the legal profession, he is the initial founder and patron of the Indonesian Association of Lawyers, (both scholars and practitioners), initial founder and the patron of the Indonesian Association of Legal Auditors, Advisor to the Indonesian Association of Constitutional Law and Administrative Law. As an academician, he has written and published more than 45 books and hundreds of scientific papers widely spread, read, and used as teaching materials by universities all over Indonesia. One of his books written in English on The Constitutional Law of Indonesia: A Comprehensive Overview was also published by Maxwell Asia and used as the only text book on Indonesian law written by an Indonesian scholar being used by various universities abroad.

Eugenie Taribo is The head of the Division of Constitutional Foundations of Public Law Constitutional Court of the Russian Federation, Candidate of Legal Sciences, specialisation "Legal doctrine in the field of taxation" and **Dmitry Kuznetsov** is Senior officer of Constitutional Court of the Russian Federation LL.M. in comparative constitutional law, Central European University (Budapest).

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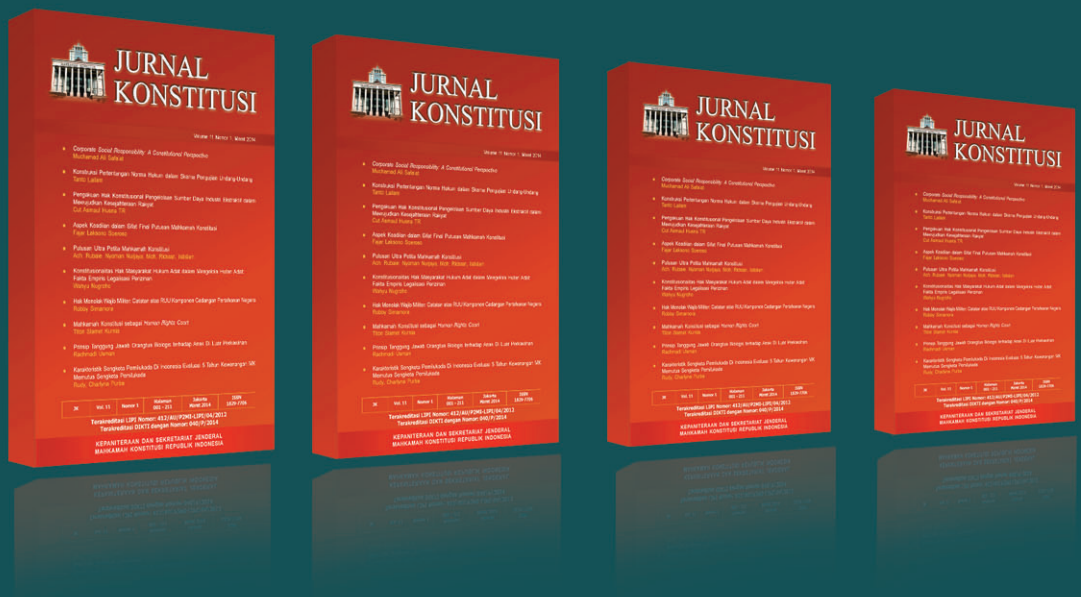

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