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Constitutional Review is a law journal published by the Constitutional Court of the Republic of Indonesia twice a year. The primary purpose of this journal is to disseminate research, conceptual analysis and other writings of scientific nature on constitutional issues. Articles published cover various topics on constitutions, constitutional courts, constitutional court decisions and issues on constitutional law either in Indonesia or other countries all over the world. This journal is designed to be an international law journal and intended as a forum for legal scholarship which discusses ideas and insights from law professors, legal scholars, judges and practitioners.

In this first edition, *Constitutional Review* publishes six articles written by Indonesian legal scholars from various institutions in Indonesia and abroad. The first article is written by Fritz Edward Siregar. The author tries to identify the methodology of constitutional interpretation applied by the first bench of justices of the Constitutional Court of the Republic of Indonesia during 2003-2008 term. In his writing, the author identifies some interpretation methodologies and the cases in which those methods of interpretation are applied.

The second article written by Stefanus Hendrianto discusses the doctrine of standing applied by the Constitutional Court of the Republic of Indonesia. In the author's view, Indonesia has invented its own doctrinal standing, generalized

grievance standing, in order to expand the access of citizens to challenge the constitutionality of a law.

The third article is written by Tundjung Herning Sitabuana and deals with citizenship issues of Indonesian diaspora. The author presents some probems faced by Indonesian Chinese Diaspora which is, among others, inadmissibility in filing petitions to the Constitutional Court of the Republic of Indonesia because of their citizenship. The author argued that in order to solve such a problem, Indonesia should embrace the principle of dual citizenship which is currently not recognized in the Indonesian law on citizenship.

The fourth article of this first edition is written by Heribertus Jaka Triyana. In its analysis the author establishes the role of Indonesian Constitutional Court in protecting human rights especially economic, social and cultural rights. In the view of the author's, the court has enhanced in its decisions that protections of ecosoc rights is a constitutional mandate which require the state to abide by the threshold set by the Court.

The fifth article is co-authored by Iwan Satriawan and Khairil Azmin Mokhtar while the sixth or the last one is written by Herlambang P. Wiratraman. In the fifth article, the authors provide analysis on the role of Constitutional Court of the Republic of Indonesia in the process of consolidating local democracy especially in relation to local election cases settled by the Court. The authors come to a conclusion that despites the success achieved by the Court in resolving those cases, the authors also identified some factors that need to be improved to enhance the efficiency and effectiveness of the Court in performing its functions. The last article presents issues on how to strengthen human rights constitutionalism in Indonesia and use this issue of human rights to build stronger foreign and international relation policy.

Finally, the editors expect that this first edition of *Constitutional Review* might bring some new insights and ideas on constitutions, constitutional court decisions and constitutional issues in broader nature to our readers.

Editors

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Fritz Edward S.

Indonesia Constitutional Court Constitutional Interpretation Methodology (2003-2008)

Constitutional Review Vol. I No. 1 pp. 001-027

Nine Indonesia Constitutional Justices have the authority to annul a law drafted by 550 Parliament members and the President. The Constitutional Court of the Republic of Indonesia ("the Court"), particularly in deciding cases of judicial review, has the capability to declare words, sentences, paragraphs, articles or the law unconstitutional. Consequently, it is essential for the Court to take into account legal arguments. The fundamental element of these legal arguments is the constitutional interpretation, which serves as a parameter in determining constitutionality of the laws. However, in exercising its authority, the Court needs to interpret the Constitution as a basis for deciding a case. The standards for determining the constitutionality of a law must be the text of the Constitution, not what the judges would prefer the Constitution to mean. Constitutional supremacy necessarily assumes that a superior rule is what the Constitution says it is, not what the judges prefer it to be. [Craig R. Ducat: E3]. The Court period 2003 – 2008 is in the formative years and is important to understand the methodology and interpretative approaches adopted by the Court. Many observers of the Court's early decisions are still unsure of the overarching approach and methodology adopted by the Court. Thus, there is a need for a close analysis and criticism of the Court's early decisions to determine which methods and approaches it has adopted and whether these are appropriate in the Indonesian context. The Court has openly referred to the experiences of foreign jurisdiction in constitutional law and therefore it would be appropriate to analyze the court's decisions in a broader comparative context of constitutional interpretative approaches from around the world.

Key words: Constitutional Interpretation, Judicial Review, Constitutional Court, Constitution

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Stefanus Hendrianto,

Convergence or Borrowing: Standing in The Indonesian Constitutional Court

Constitutional Review Vol. I No. pp. 028-049

This Article addresses the constitutional convergence theory by examining the standing rule in the Indonesian Constitutional Court. The central investigation of this paper is whether the application of standing doctrine in the Indonesian Constitutional Court is an evidence of constitutional convergence or borrowing? This paper argues that the Constitutional Court jurisprudence on standing indicates that constitutional convergence has never taken place but rather the Court has engaged in constitutional borrowing. Legal borrowing on standing is limited to the carbon copy of the five prong standing tests of the U.S. model, but in reality standing doctrine in the Indonesian Constitutional Court is not based on private rights model of adjudication. Although the Court allow individual to bring cases before the Court, it is rather a quasi-public model of standing, in which claimants no longer has standing only to vindicate their own private rights but also could sue to vindicate public interests. For the judges, standing requirements also allow them to review many highly sensitive political cases and to some extent it enables the Court to second guess the decisions of the different branches of government.

Key words: Constitutional Convergence, Constitutional Borrowing, Doctrin of Standing, Constitutional Court.

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Tundjung Herning Sitabuana

Indonesian Chinese Diaspora, Dual Citizenship And Indonesian Development

Constitutional Review Vol. I No. pp. 050-071

Indonesian Citizenship Law Policy – based on Article 26 Paragraph (1) of the 1945 Constitution and Act Nr. 12/2006 – is closed in nature and do not recognize dual citizenship. Indonesian Chinese Diaspora with foreign nationals do not have the legal standing to file an application to the Constitutional Court in order to conduct a constitutional review on Act Nr. 12/2006 as an effort to obtain Indonesian citizenship, because they are not Indonesian citizens. In order to be able to obtain Indonesian citizenship without losing their foreign nationals, then the principle of dual citizenship should be applied in the Indonesian Citizenship Law Policy. This can happen if a legislative review or an amendment of the act (in this case is Act Nr. 12/2006 regarding the Citizenship of the Republic of Indonesia) is conducted by the Parliament. Thus the Government of the Republic of Indonesia must be absolutely sure and can assure the Parliament that Indonesia really needs Indonesian Chinese Diaspora, because they have great potentials and can play an important role in Indonesia's development, both in terms of the quality of human resources that have been proven and tested abroad, as well as the capital that can be invested in Indonesia.

Key words:Indonesian Chinese diaspora, dual citizenship, constitutional review, legislative review, Indonesian development.

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Heribertus Jaka Triyana,

The Role of the Indonesian Constitutional Court for An Effective Economic, Social and Cultural Rights Adjudication

Constitutional Review Vol. I No. 1 pp. 072-102

The Indonesian Constitutional Court has played important roles and functions to protect and fulfill human rights in the Indonesian legal system including the economic, social and cultural rights through its legal power of judicial review. It affirms that the ecosoc rights are legal justiciable rights and they are parts of constitutional mandates. It means that decision on judicial reviews require State to behave in accordance to legal thresholds decided by the Court. Undoubtedly, compliance to the decisions will reveal undeniable facts for fulfilment of state conduct. However, it seems that there are still many considerations, emphasis and excuse to somehow reduce or ignore threshold of application of the Court decisions. Complexity of actors, institutions, authorities, level of implementation, and orientation of particular policies, programs, actions and funds reduces the thresholds.

Key words: justiciable rights, constitutional rights, constitutional mandates, and ecosoc rights

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Iwan Satriawan and Khairil Azmin Mokhtar

The Constitutional Court's Role in Consolidating Democracy and Reforming Local Election

Constitutional Review Vol. I No. 1 pp. 103-129

Within the same group as the USA and India Indonesia is one of the largest democracies in the world. After experiencing authoritarian rule for a few decades since its independence the country finally at the beginning of the twenty first century managed to chart along its new direction along democratic course and values. More than a decade has passed since the democratic transition begun yet the country still faces various constitutional dilemmas and enigmas. One of organs of the government which has been entrusted to transform the country into a democratic nation is the Constitutional Court. The objective of this paper is to provide critical analyses of the role of the Constitutional Court of Indonesia in the process of consolidating local democracy. The scope of analysis is confined to a number of important cases heard by the court on local election disputes from the year 2008 to 2013. The rationale to focus on local election is because local government provides the second layer of government for this unitary country making the governance more democratic and more in touch with local population. The result of the study is the Constitutional Court through its decisions has created conducive political situation and has provided significant contributions in the process of consolidating local democracy. In spite of limited number of judges and short period of settlement to disputes brought before it the Court have settled all disputes regarding local elections without much delay and complaint. Nevertheless there are some areas that need to be addressed by the court to enhance its efficiency and effectiveness. A few factors have been identified to be the cause of the problems namely problem of design of structure of the Court, extension of the scope of authority, period of settlement, over-dosis of authority and the breach of code of ethics of the judges.Thus it is recommended that in order to perpetuate the excellent achievements of the court the institution need to be strengthened by addressing the problems.

Key words: consolidation of local democracy, Local Election Dispute, Constitutional Court

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Herlambang P. Wiratraman

Human Rights Constitutionalism in Indonesia's Foreign Policy

Constitutional Review Vol. I No. 1 pp. 130-158

This article examines conceptual discourse of human rights constitutionalism as fundamental part of making policies in international relations. There are two key questions, first, to what extent human rights constitutionalism has been brought into discourse of its foreign policies, and second, how such human rights constitutionalism has been shaped by various actors, state and non state's relations.The politics of 'image' has been developed from regime to regime. However, such politics does not reflect substantially in progressing of human rights development. As part of democratic governance, and in the context of a more globalized society, Indonesia should rethink of its foreign policy foundations, especially in terms of transnational issues such as human rights, environment, and poverty. Therefore, central discussion in this regards is how to strengthen human rights constitutionalism is not merely internal and/or domestic affairs, but also this should build stronger and brave policies to develop and prioritize humanity values throughout international relations.

Key words: human rights, constitutionalism, foreign policy, Indonesia.

Indonesia Constitutional Court Constitutional Interpretation Methodology (2003-2008)

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Abstract

Nine Indonesian Constitutional Justices have the authority to annul a law drafted by 550 Parliament members and the President. The Constitutional Court of the Republic of Indonesia ("the Court"), particularly in deciding *cases of judicial review*, has the capability to declare words, sentences, paragraphs, articles or the law unconstitutional. Consequently, it is essential for the Court to take into account legal arguments. The fundamental element of these legal arguments is constitutional interpretation, which serves as a parameter in determining constitutionality of the laws. However, in exercising its authority, the Court needs to interpret the Constitution as a basis for deciding a case. The standards for determining the constitutionality of a law must be the text of the Constitution, not what the judges would prefer the Constitution to mean. Constitutional supremacy necessarily assumes that a superior rule is what the Constitution says it is, not what the judges prefer it to be. [Craig R. Ducat: E3]. The Court period 2003–2008 were the Court's the formative years, and as such are important to understand the methodology and interpretative approaches adopted by the Court. Many observers of the Court's early decisions are still unsure of the overarching approach and methodology adopted by the Court. Thus, there is a need for a close analysis and criticism of the Court's early decisions to determine which methods and approaches it has adopted and whether these are appropriate in the Indonesian context. The Court has openly referred to the experiences of foreign jurisdiction in constitutional law, and therefore it would be appropriate to analyze the court's decisions in a broader comparative context of constitutional interpretative approaches from around the world.

Key words: Constitutional Interpretation, Judicial Review, Constitutional Court, Constitution

I. INTRODUCTION

The idea for this paper arose during my engagement with the Indonesian Constitutional Court. I worked for Constitutional Court of Indonesia from April 2004 to April 2009 as an Associate to Justice Maruarar Siahaan. I recall that in the early months of working at the Court, no one really knew where the Constitutional Court building was located. I had to direct my taxi driver to reach the Court. When I left the Court in 2009, the 16-floor gothic building remained standing firm close to the Presidential State Palace in central Jakarta.

During my time working at the Court, I was required to attend court hearings, provide legal opinions and do research for the Justices. Somehow, during that time, I could sense the importance of the cases faced by the Court. At times, the government and parliament objected to the Court as a newly established institution and to the role of the Court to protect the fulfilment of the 1945 Indonesian Constitution. There were moments when the Court had to temper and slow down their activism to avoid negative reaction from the Government and Parliament to the Court's performance.

This paper explains the approach to constitutional interpretation exercised by the Court in interpreting the Indonesian Constitution against the cases brought before it. It should be kept in mind that the tradition of judicial review did not exist before the establishment of the Court. Thus, the Court needed to learn how to interpret the Constitution with the resources available and a lack of existing constitutional law precedent. The Court is not a political machine, but through its decisions, it has shaped the democratization and democratic process in Indonesia, acted as a protector of human rights and enhanced the rule of law in Indonesia.

It is worth noting that this paper limits its scope to the first bench of the Indonesian Constitutional Court in the period from 2003 to 2008 only. Upon the end of the first bench period, Chief Justice Mahfud MD brought substantive justice and a responsive approach to the Court. This approach was continued by subsequent Chief Justices Akil Mochtar, Hamdan Zoelva and Arief Hidayat.

Examining the entire court approach in constitutional interpretation is not feasible for the scope of this paper.

This paper is based on four themes. The first is the idea to create a constitutional court in Indonesia, second, the tenure and profile of the first Constitutional Court justices, third, defining constitutional interpretation methodology in Indonesia, and fourth analysis of cases heard by the Constitutional Court in the given period. Finally, observations are given as to the progressiveness of the Court's decisions.

II. DISCUSSION

Constitutional Court and Constitutional Interpretation

Constitutional Interpretation

Jeffrey Goldsworthy argued that written constitutions are not self-actualizing.- If they are to be maintained over time, they require interpretation and adaption to changing circumstances. The Constitutional Court is responsible for analysing and developing reliable approaches to interpretation that successfully keep faith with the principles and underlying values of the constitutional text.- The standards for assessing the constitutionality of a law must be the text of the Constitution, not what the judges would prefer the Constitution to mean.-

This controversy centered around a set of questions as to what the constitution 'means' and how it should be interpreted. Is the meaning of a particular text equivalent to a statement of its author's belief and intention, or does the meaning of this text change over time and vary with the changing perspective and interest of its interpreter? Central to any theory of constitutional interpretation is an understanding of the role of a court in a democracy, and if judicial review is authorized, what role, if any, does judicial deference to political actors play? What weight should be accorded the constitutional views of legislative majorities? How majoritarian should interpretive theory be; should judicial understandings be open to normative influence from social movement as reflected either in legislation or in changing public opinion, or should interpretive theory emphasize

more the role of independent judicial judgment on legal values in securing the constitutional bases for a democratic government, under law, to function?-

Constitutional interpretation is an extraordinarily difficult enterprise, which requires striking an appropriate balance between competing, weighty considerations. The distinction between legitimate and illegitimate changes depends on a number of other difficult distinctions, such as between determinacy and indeterminacy, purpose used to clarify meaning and purpose used to change it, genuine implications and spurious ones, evidence of intention or understanding that illuminates original meaning and that which does not, changes in the application of a provision and changes in its meaning, and so on.-

Modern legal scholars recognize six main methods of constitutional interpretation namely textual, historical, functional, doctrinal, prudential, equitable, and natural interpretation.- Prof. Jimly Asshiddiqie, the first Chief Justice of the Constitutional Court stated the options to interpret constitution namely textual, grammatical, history, sociology, sociologies, philosophy, teleology, holistic, thematic.-

Vicki Jackson offers a simplified three category approach for constitutional interpretation , namely (1) historical interpretation by reference to past decisions (by relevant public decision makers) embodied in positive law, whether written or unwritten, (2) purposive interpretation by reasoning about constitutional purposes, (3) multi-valences approaches that draw on original understanding, purposes, structure, history, values, and consequences to arrive at constitutional judgment.- Multi-valence interpretative theories embrace textualism and purposivism, precedent and history, as well as concern for constitutional values and pragmatic concern for consequences. Multi-valence interpretation does not incorporate confidence in the existence of single right answer, and may in some cases view a range of answers as constitutionality tolerable or plausible.

Constitutional Interpretation Methodology

An important divide among interpretive approaches across national courts is between those who argue that constitutional meaning is fixed at a particular

moment in the past, known as originalism, and those who believe constitutional meaning is legitimately subject to evolving understanding, known as non-originalism-. With an originalist approach, to enforce the Constitution is to enforce it as originally understood by the framers.- Thus, for originalism the interpretation of a constitutional provision comprises two interpretive moments, the moment at which the original meaning / understanding of the provision is ascertained and a second moment when when that meaning becomes significant to the case being presided over.-

Originalists look to the intent of the framers proposes and treat the Constitution as if it were the product of a single author. However, often texts are in fact the result of quarrelsome collaboration and endless series of compromises among the many framers.[1] Goldsworthy introduces the definition of originalism as 'the thesis that the content of a constitution is determined partly by the intentions or purpose of its founders, of the understandings of the founding generation'.[2]

For non-originalists, the constitutional text is meaningful but it is not singular. The one meaning of the constitutional text, to the originalist, is the original meaning. To a non-originalist, the original meaning is not the only meaning of the constitutional text.[3] Some provisions of the constitutional text have a meaning *in addition* to the original meaning, where those provisions reflect fundamental aspirations of the framer. There is more complexity than just the original meaning.[4] A non-originalist judge is interested in the original meaning of the Constitution but to them, this is only one meaning of the text.

Justification of Constitutional Interpretation Methodology

In reviewing judicial review cases of the Indonesian Constitutional Court from 2003 to 2008, I have used five types of constitutional interpretation. The reason for choosing each of these approaches is elaborated in the following discussion on each method.

[1] Ball, above n **Error! Bookmark not defined.**, 138.
[2] Goldsworthy, above n 40, 322.
[3] Perry, above n 52, 246.
[4] Ibid 247.

Textual Interpretation

According to this approach, a judge has to decide what the meaning of the constitutional provision is for current existing circumstances. Sotiros adds that a textualist defines what the Constitution means by consulting the *plain words* of the constitutional document.[5]

In understanding the constitution through textual interpretation, judges should decide for themselves what these provisions mean for the case they have to review.[6]

Original Intent Interpretation

Original intent is almost the same as purposive interpretation. This is a methodology defined by trying to find out what was the intention of the constitutional framers when they drafted the constitution text. Bork emphasizes that intentionalism would be mandatory for judges even if the framers had not intended intentionalism for judges.[7] Scalia, as a great supporter for original meaning approach, argues that indeed judges should be limited to determining what the constitutional text meant when it was adopted.[8]

Pragmatic Interpretation

Pragmatic interpretation is an approach whereby the Justice looks to the effect of the applicability of the Constitution provision. Another name for this approach is consensualist. After a Justice considers a number of potential effects, the Justice will decide one effect that is suited to current conditions, and decide that as the meaning of that constitutional provision. Scholars who use the term "pragmatism" in discussions of constitutional matters agree that it is an "umbrella term" covering different views about law. It is also considered legal instrumentalism, a condition where law is instituted to serve social purposes and should be interpreted in that way.[9] One understanding of this general idea

[5] Sotirios A. Barber and James E. Fleming, *Constitutional Interpretation : The Basic Question* (Oxford Universtiy Press, Inc. , 2007) 67.
[6] Ronald Dworkin, 'Taking Rights Seriously ' (1977) *Harvard Universty Press*136.
[7] Barber and Fleming, above n 81.
[8] Jackson, above n 61, 602.
[9] Richard A Posner, 'What Has the Pragmatism to Offer Law' (1990) (63) *Southern Law California Law Review*1656.

is that the Constitution is what it says it is, an instrument of ends like justice, the general welfare, and national security, and should be interpreted to facilitate these ends.[10]

Proportionality Interpretation

The proportionality approach has little to do with how a judge reads constitutional provisions. Instead it is applied when justifying limits on democratic rights and fundamental rights. Kommers claimed proportionality interpretation is at the heart of the judicial process on basic rights in Germany, Canada, South Africa and India.[11] Robert Alexy defends the proportionality approach as an essential tool for constitutional interpretation.[12]

Structural Interpretation

In the narrow sense, structural interpretation focuses not on the meaning of specific, isolated clauses, but rather on the location of the clause and its relation to the whole text. In a broader sense, it seeks unity and coherence not only in the text, but in the larger political order that the text signifies.[13] An example of structural interpretation is defined by the German Constitutional Court. In *Southwest State (1951),* the German Constitutional Court drew a line for the critical importance of the Constitution's unity, stating, "no single constitutional provision may be taken out if its context and interpreted by itself. "Every constitutional provision," it continued, "must always be interpreted in such a way as to render it compatible with the fundamental principles of the Constitution as a whole. [14]

Cases on Constitutional Interpretation Methodology

Original Intent Interpretation

Electricity Case[15]

The Petitioners were made up of the Association of Indonesian Counselors of Law and Human Rights and some individuals. The petitioners claimed that

[10] Barber and Fleming, above n 59, 171.
[11] Kommers, above n 41, 202
[12] Jackson, above n 61, 604.
[13] Kommers, above n 41,199.
[14] 1 BVerfGE 14,32 (1951)
[15] Case Number 001-021/PUU-I/2003.

Article 33 of the 1945 Constitution had been violated by a Law on Electricity that granted privatization to electrical power plants, which they asserted, as one of the most essential production branches dominating many people's interests, should be controlled by the State. The process of privatization meant that, as a result of unbundling a system that leads to the pricing being determined by fair and normal competition, the public as consumers of electricity had to pay for electricity at higher prices. Article 33 (2) of 1945 Constitution states: "Essential services which are important for the state and which affect the livelihood of the public shall be c*ontrolled by the state*."

The Court argued that the interpretation of "*controlled by the state*" must cover the broad meaning of state domination, which originated from the concept of Indonesian sovereignty over all sources of wealth and water, all domestic natural prosperity.

The Court referred to founding father's intention in drafting Article 33 in 1945, as stated by Mohammad Hatta. The Court stated that,

> "the interpretation of control by the state is that the state has to strengthen the essential services that it owns so that gradually it will be able to independently provide for the needs which concern the livelihood of many people and replace the positions of the national and foreign private companies."[16]

However, the Court further argued if electricity as the essential service is still considered important to the state and/or to dominate many people's interests, the Government must still dominate this essential service by ruling, caring for, managing, and supervising it to be utilized to the greatest people's welfare as an objective of the Preamble of 1945 Constitution.

Capital Punishment is Constitutional[17]

The Petitioner consisted of Indonesian and foreign individuals. The Petitioners were convicted and sentenced to death under the Narcotics Law. The Petitioners argued that capital punishment is contrary to and in violation of the 1945 Constitution. The Petitioners argued that capital punishment under the Narcotics

[16] Case Number 001-002/PUU-I/2003, 348.
[17] Case Number 002-3/PUU-V/2007.

Law violated Article 28A and Article 28I (1) of the 1945 Constitution. Article 28A stated that: "Every person shall have the right to live and to defend his/her life and living". The Petitioners claimed that the phrase, *which cannot be reduced under any circumstances whatsoever,* clearly prohibits capital punishment.

However, according to the framers of human right articles in the 1945 Constitution, those articles should not be read the way Petitioners claimed. Lukman Hakim Saifuddin and Patrialis Akbar, members of an ad hoc committee responsible for drafting the human rights articles in the 1945 Constitution, stated that it was not the intention of the framers that human rights could be enforced absolute.[18] The spirit is to regulate the protection of human rights, but this has limitations, as long as the limitations are conducted by way of law. Therefore, the chapter of human rights articles in the 1945 Constitution ended in the adoption of Article 28J (2), which states:

> "in exercising his/her rights and freedom, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society."

By referring to the framers' intention, the Court declared that capital punishment under the Narcotics Law is constitutionally valid.

Textual Interpretation

Bali Bombing Case[19]

In this case the Court decided that human rights are limited as long as the limitation is conducted through law by referring to the framers' intention, and further in the *Bali Bombing Case,* the Court adopted a strict approach to what the 1945 Constitution said, specifically, "*right shall not be prosecuted with retroactive clause*".

The Petitioner Masykur Abdul Kadir, had been convicted under the Eradication of the Criminal Acts of Terrorism Law Number 16 Year 2003 *(Terrorism Law)*

[18] Case Number 002-003/PUU-V/2007.
[19] Case Number 013/PUU-I/2003.

with respect to his participation in the *Bali Bombing*. As background, the *Bali Bombing* happened on 12 October 2002. On 18 October 2002, the Government issued Government Regulation in Lieu of Law No. 1 Year 2002 on Eradication of the Criminal Acts of Terrorism. At the same time, the Government also issued Government Regulation in Lieu of Law No. 2 Year 2002 on Eradication of the Criminal Acts of Terrorism for the Bali Bombing Incident on 12 October 2002. The latter, Government Regulation in Lieu of Law No. 2 Year 2002 was adopted by the DPR into Law Number 16 Year 2003.[20]

The Petitioner considered his rights to have been impaired by Law Number 16 Year 2003, namely the rights regulated under Article 28I (1) of the 1945 Constitution which reads: "..... the right to be recognized as a person before the law, and *the right not to be prosecuted under retroactive law* shall constitute a human right which cannot be reduced under any circumstances whatsoever". The Petitioner claimed that in fact, a retroactive law had been applied to the petitioner.

In deciding this case, the Court was of the opinion that basically, law must be applicable prospectively. The application of the retroactivity principle in criminal law has an exception, namely that it may only be applied on gross violation of human rights as an extraordinary crime. Terrorism is not categorized as a gross violation of human rights as intended in the 1998 Rome Statute.[21] The Court further opined that:

> "Though the legislator has the authority to create law, but the prosecution against every form of committed crime should be implemented through just and certain law enforcement, not by new law making through the formulation of new laws."

The Court declared Law Number 16 Year 2003 as constitutionally invalid because it contradicts Article 28I(1) of the 1945 Constitution.

[20] Article 22 of the 1945 Constitution allows the President to enact this type of law in compelling circumstances as an interim regulatory measure. A *Peraturan Pemerintah PenggantiUndang-Undang / Perppu* (Government Regulation in Lieu of Law) lapses unless the DPR confirms it in its first sitting following the issuance of the law.

[21] Case Number 013/PUU-I/2003, 44.

Provision on 20% for Education Budget

The constitutional provision on the Education Budget is a classic example of the application of textual interpretation. In this case, the Petitioners were teachers and the Indonesian Teachers Association. The Petitioner argued that the provision of section 31 (4) of the Indonesia, which states, "*The state shall prioritise the budget for education to a minimum of 20% of the State Budget and of the Regional Budgets to fulfil the needs of implementation of national education,"* is imperative..

From 2005, the Petitioners annually filed a judicial review case against the State Revenues and Expenditure Budget Law. In 2005, *Education 1st Budget case* [22], the Court dismissed the petitioner's petition. In 2006 and 2007, *Education 2nd Budget case*[23] and *Education 3rd Budget Case*[24], even though the Court granted the petition, considering the legal effects caused if that State Revenue and Expenditure Budget Law was declared constitutionally invalid, the Court only declared the existing percentage of the education budget in 2006 State Revenues and Expenditure Budget as violating the Constitution.

In 2008, *Education 4th Budget Case,* [25]the educational budget in the Revised 2008 State Revenues and Expenditures Budget Law was only 15.6%. Considering those three previous decisions, the Court held that:

> "There are sufficient reasons for the Court to assess that there is intention of the regulator to violate the 1945 Constitution. As a consequence, the Court declared the entire Revised 2008 State Revenues and Expenditures Budget Law as constitutionally invalid"[26]

The Court rejected the Government's argument that the Government had to allocate budget for energy subsidies and to pay foreign debt on the groudns that if the budget for energy subsidies and foreign debt is set aside from the State budget, the educational budget would be at the 20% required by the Constitution.[27] Despite the rise of oil prices and Indonesia's obligation to pay

[22] Case Number 012/PUU-III/2005, Judicial review of Law Number 36 Year 2004 regarding the 2005 State Revenue and Expenditure Budget.
[23] Case Number 026/PUU-III/2006, Judicial review of Law Number 13 Year 2005 regarding the 2006 State Revenues and Expenditures Budget.
[24] Case Number 0026/PUU-IV/2006, Judicial review of Law Number 18 Year 2006 regarding the 2007 State Revenues and Expenditures Budget.
[25] Case Number 013/PUU-VI/2008.
[26] Case Number 013/PUU-VI/2008, 100.
[27] Case Number 013/PUU-VI/2008, 101.

national foreign debt and economy security to handle turbulence in the economy crisis resulting from the global financial crisis in 2008, the Court was firm with Government and Parliament to allocate education 20% of State Budget and Expenditure Budget as required by article 31(4) of 1945 Constitution.

Education requirement for Indonesian Migrant Workers[28]

The Petitioner was an organization working for the interests of Indonesian migrant workers overseas. The Petitioner argued that article 35 (d) on Placement and Protection of Indonesian Workers Abroad Law contradicts the 1945 Constitution. Article 35(d) read as follows:

> "Recruitment of Indonesian worker candidates by private organizers must be conducted for candidates having complied with the requirements of... d) having at least graduated from Junior High School or equivalent."

The Petitioner claimed that article 35(d) violated the Petitioner's right as provided by Article 28D (2) of 1945 Constitution, which provides that "every person shall have the right to work and to receive fair and proper recompense and treatment in employment."

The Court argued that an adult requires a job to be able to fulfill the necessities of life both for himself and his family without discriminating whether that person is a graduate of Junior High School or not. If he/she cannot gain employment, the Court further argued it can be assured that such a person will not be able to provide for himself of his family, and therefore his right to survival will be compromised, moreover his right to a prosperous life.

In this case, the Court explained that the requirement to access for a job as stated by Article 28D (2) shall not be limited by introduction of a law. If that person cannot get a job because the qualification required is not suitable to his/her circumstance, that person may apply for another job, however, the law shall not prohibit people from getting access to a job because of his/her educational background. In this case, the Court focused on the implementation of access to occupancy as required by Article 28D (2) of 1945 Constitution.

[28] Case Number 019-020/PUU-III/2005.

Pragmatic Interpretation

Supervision on Advocate Case[29]

This case was related to the conflict between two different laws on the supervisory authority over private legal practitioners. The Petitioners were individual lawyers who tried to challenge the constitutionality of article 36 (and its elucidation) of Law No. 5 Year 2004 that Amended Law No. 14 Year 1985 on Supreme Court, which provides that, "the Supreme Court and Government shall supervise private legal practitioners and notaries."[30]

The Petitioner argued that Law No. 5 Year 2004 was in conflict with Law No. 18 Year 2003 on Advocates, which provides that it is the Bar Association that has the authority to supervise private legal practitioners. The Petitioner then tried to argue that the Supreme Court Law provision regulating the supervision of legal practitioners should be declared unconstitutional because it is in conflict with the Advocate Law.

The first issue that the Court dealt with was whether or not the Court in fact had authority to review conflicts between two different statutes. The Court decided that it should intervene because the conflict between the Advocate Law and the Supreme Court Law would generate legal uncertainty. Moreover, the Court believed that it should intervene because the lawmakers could not exercise their authority in the proper way. Thus, the Court held:

> The Court did not find any violation of constitutional rights as the Petitioner has claimed... however, it is obvious that the legislature did not exercise its authority with prudence and it has produced inconsistency between one statute and another. This inconsistency might have ended up with legal uncertainty, that can potentially violate the constitutional provision of article 28D(1) which states that, 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..[31]

[29] Case Number 067/PUU-II/2004.

[30] The elucidation of article 36 states that, "in general, the supervision and stewardship upon private legal practitioner and notary is responsibility of government. With regards to their tasks that relate to judiciary, private legal practitioner and notary are under the supervision of the Supreme Court. In supervising, the Supreme Court and government should respect and guard the independence of private legal practitioner and notary in the performance of their tasks. Whenever disciplinary action should be necessarily taken against private practitioner and notary such as dismissal and removal, including temporary suspension, respective professional organization should be heard in advance."

[31] Case Number 067/PUU-II/2004, 31.

Furthermore, the Court held that:

> Regardless of the Petitioner's inability to prove his claim, the Court has concluded that the error in the law-making process (inconsistency between two statutes) has created legal uncertainty. therefore article 36 of the Supreme Court law is inconsistent with article 28D (1) of the 1945 Constitution (equal protection clause) and the Petitioner's petition should be granted.[32]

Through a unanimous decision, the Court struck down article 36 of the Supreme Court Law and expanded its jurisdiction by asserting that the Court can resolve inconsistencies between two different statutes. Even though the constitutional injury had not arisen, the inconsistency between the Supreme Court Law and the Advocate Law led to uncertainty for the Petitioner.

I categorized this case as a pragmatic approach because the Court clearly stated that there is no constitutional injury concerning the enactment of Supreme Court Law. However, due to the application of two overlapping laws that conflicted in their regulation of the same thing, the result was legal uncertainty for the Petitioners.

The Judicial Commission Case [33]

This case is an example where the Court rejected the originalist interpretation and opted instead for a textual interpretation. The Petitioners were 31 Supreme Court Justices who asked the Constitutional Court to annul the authority of *Komisi Yudisial* (Judicial Commission) to investigate them. The Judicial Commission was a newly established institution with authority to nominate Supreme Court Justices and to uphold the dignity of judges[34], under which authority the Commission may recommend sanctions against poorly performing judges to the Supreme Court or Constitutional Court.[35] Not long after its establishment, the Judicial Commission was engaged in a conflict with the Supreme Court. The conflict escalated when the Commission later made public the names of 13 justices it

[32] Case Number 067/PUU-II/2004, 32-33.
[33] Case Number 005/PUU-IV/2006.
[34] Judicial Commission Law art 13.
[35] Judicial Commission Law art 21.

called "problematic" and the Commission decided to summon those 13 Supreme Court Justices.[36]

In their petition for constitutional review, the Petitioners argued that article 24B(1) 1945 Constitution only gives authority to the Judicial Commission to supervise judges. Article 24B(1) states:

> "there shall be an independent Judicial Commission which shall posses the authority to propose candidates for Supreme Court Justices and shall posses authority to maintain the honor, dignity and behavior of judges."

According to the Petitioners, the scope of the Commission's authority was only to overview lower court judges and not those of the Supreme Court and the Constitutional Court. Moreover, the Petitioners argued that Commission was essentially a partner to the Supreme Court in supervising lower court judges.

The Court held that the supervisory role of the Judicial Commission could not be constructed in the context of the separation of powers because the Judicial Commission was simply a supporting organ of the Supreme Court.[37] The Judicial Commission held no judicial power. Second, the Court ruled that the supervisory role of the Judicial Commission was vague, on which the Court held,

> The Commission's authority according to article 24B(1) of the Constitution is under the scope of implementation of the code of ethics and code of conduct of judges. Therefore, in the first place there should be a norm that governs the meaning and scope of judge's behavior... that includes who has authority to make codes of ethic. The Judicial Commission Law does not cover those issues at all. It has created much uncertainty because the law assigns a supervisory role, but the judge's behavior that becomes the subject of supervision became unclear.[38]

The Court further held that:

> Lack of clarity and detail of statutory rules of the supervisory authority and judge's behavior has created the unintended consequences that the Judicial Commission and the Supreme Court came out with their own interpretations, which ended with legal uncertainty. Therefore, the lawmakers should clarify the Judicial Commission supervisory rule in more detail.[39]

[36] *The Jakarta Post,* Commission to Grill 13 Justices, 20 February 2006.
[37] Case Number 005/PUU-IV/2006, 182.
[38] Case Number 005/PUU-IV/2006, 187.
[39] Case Number 005/PUU-IV/2006, 193.

Finally, the Court concluded that all provisions in the Judicial Commission Law that relate to its supervisory role should be declared inconsistent with the Constitution and void on the grounds that they created legal uncertainty.[40] The Court refused to interpret this case using the original intent methodology because the framers that provided testimony in the Court came to opinions as to what was meant by "judges".[41] It is interesting to observe the opinion of Butt, who felt that, despite public criticism towards this decision, appreciation should be given to the Court. He stated that 'the court emphasized the importance of judicial independence to a functioning state, legal system and judiciary.[42]

Structuralist Interpretation

Regional Election Commission is not responsible to DPRD.[43]

The Petitioners were private legal entities having concerns and interests in democratic and honest administration of General Elections for Regional Heads and Deputy Heads (Head of Regency Election) and Chairpersons of the Provincial General Election Commission. The Petitioners argued that article 57 (1) and article 66(3) of Law Number 32 Year 2004 on Regional Government contradicts Article 22E of the 1945 Constitution. Article 57 (1) of Law Number 32 Year 2004 on Regional Government Law states that the Regional General Election Commission *"...is responsible to the Regional People's Representative Council,"* as well as Article 66 (3) that reads *"...request for the accountability on the performance of the Provincial General Election Commission".*

In the Petitioner's argument, the requirement for the Provincial General Election Commission to be responsible and report to the Provincial General Election was argued to breach the principle of an election being fair and independent as required by Article 22E of the 1945 Constitution, of Article 22E (5) which provides that, (5) General elections shall be organized by national, permanent and independent commissions for general elections.

[40] Case Number 005/PUU-IV/2006, 201.
[41] Case Number 005/PUU-IV/2006, 177.
[42] Simon Butt, 'The Constitutional Court's Decision in the Dispute between the Supreme Court and the Judicial Commission : Banishing Judicial Accountability?' (2009) 09(31) *Legal Studies Research Paper*.
[43] Case Number 072-073/PUU-II/2004.

The Government in its reply stated that a local election is not under the regime of governed elections. Head of Regency elections are governed by Article 18(4) of 1945 Constitution, which provides: (4) Governors, Regents and Mayors as the respective heads of provincial, regency, and municipal governments shall be elected democratically.

The Court was of the view that arranging a direct election for the head of the region must be based on general election principles, i.e., direct, public, free, confidential, fair and carried out by an independent organizer as required by Article 22E of the 1945 Constitution. Such objectives could not be achieved if the Regional General Election Commission as the organizer of the election for the head of the region was accountable to the DPRD, which consists of political parties who compete in such direct elections. The Regional General Election Commission must be accountable to the public instead of to the DPRD.[44] The Court declared article 57 (1) and article 66(3) of Law Number 32 Year 2004 on Regional Government Law as constitutionally invalid. In this case, the Court settled the confusion between the meaning of "general election" as stated in Article 22E and its relation to Article 18(4) of the 1945 Constitution. The Court was also able to decide that principles applicable to elections should apply to all types of election.

Proportionality Interpretation

***Film Censorship*[45]**

The Petitioners argued that film censorship violates the 1945 Constitution. The Petitioners included an actress, a film maker, a film producer, a film festival organizer and a film lecturer. The Petitioners' argument was that the existence of censorship and a censorship institution violates Article 28C(1) of the Constitution.

Even though Article 28C(1) the 1945 Constitution provided the right to enjoyment of art and culture and film is one product of art, however, the Court determined that preemptive steps must be taken to restrict certain types of art

[44] Case Number 072-073/PUU-II/2004, 114.
[45] Case Number 029/PUU-V/2007.

before they are made available in the public domain.[46] A film that is not first censored may do damage that cannot be undone. To further these goals, an institution should be created to evaluate films and prevent films from circulating that may harm or injure another person's human rights. Nevertheless, the Court suggested that the implementation of film censorship must be in compliance with current standards not the original rationale under which the law was drafted. The Court decided that the Law on Film Censorship was constitutional.

In this case, the Court acknowledged that the enjoyment of art is protected by the Constitution. The Court also acknowledge that art should be enjoyed in "a complete" way without any 'scratch' that may reduce the quality of the art. However, the Court tried to put in the perspective that censorship is still needed in order that the public not suffer because of the art. The Court pointed out that enjoyment of art should be put in balance with the protection of society. Film Censorship is required to protect the public from imbalances or unnecessary values.

Truth and Reconciliation Commission is unconstitutional.[47]

The Petitioners were individuals who had been victims of forceful disappearances by the military in 1998 and groups of people who had a common interest in human rights. The Petitioners argued that article 27 of Truth and Reconciliation Commission Law is constitutionally invalid. Article 27 of Truth and Reconciliation Commission Law has made the victims right to compensation and rehabilitation dependent on the granting of amnesty. Amnesty as required by article 27 requires the existence of the perpetrator. Consequently, without the existence of the perpetrator, it is impossible to grant amnesty, thus the victims do not obtain the guarantee for rehabilitation.[48]

The Court recalled that the Government has an obligation to the fulfillment of human rights as ordered by Article 28I(4) of the 1945 Constitution:(4) The protection, promotion, enforcement and fulfillment of human rights shall be the responsibility of the state, particularly the Government.

[46] Case Number 029/PUU-V/2007, 227.
[47] Case Number 006/PUU-IV/2006.
[48] Case Number 006/PUU-IV/2006, 21.

The Court accepted the Government's argument that one of the objectives of Truth and Reconciliation Commission was to provide compensation for victims. However, the applicability of article 27 was flawed in its emphasis on individual perpetrators' criminal responsibility as it is difficult to identify the individual perpetrators, victims, and witnesses of human rights violations. This situation led to article 27 of Truth and Reconciliation Commission Law to contradict with Article 28D of 1945 Constitution which provides, (1) 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.

Due the fact that article 27 is the spirit of the Truth and Reconciliation Commission Law, the Court declared the whole law as constitutionally invalid. In this case, the Court considered the right for victims to get compensation for past violations and the difficulty to obtain such compensation.

Why the Court Moves Further than Framer Intention

The first generation of the Justices of the Constitutional Court ended their term on 18 August 2008. In their era as the first generation of Indonesian Constitutional Justices, the Constitutional Court rendered important decisions and was recognized as the most respectful judiciary in Indonesia. The Court received 169 judicial review cases, 274 general election result dispute case for 2004 general election result disputes, one Presidential and Vice President Election Result dispute, and 10 cases on disputes between State institutions. At the time of the writing of this paper, the Constitutional Court has never received a case on the impeachment of the President or the Vice President.[49] The Court also struck out two laws, as wholly constitutionally invalid and revised numerous other laws. What is the reason for that action? Are there any specific forces that drove the Constitutional Court to act so progressively? In order to answer that question, I propose three possible possibilities. First is lack of constitutional law support, second, the nature of the 1945 Constitution, and third, the role of Chief Justice Jimly Asshiddiqie.

[49] Mahfud MD, 'The Role of the Constitutional Court in the Development of Democracy in Indonesia ' (Paper presented at the World Conference on Constitutional Justice Cape Town 2009).

Lack of Constitutional Law Support

For many years, the New Order military regime, under President Suharto that ruled Indonesia for more than 30 years, relied on political repression to maintain the regime's authoritarian ideology. The use of intimidation also applied to academic institutions. Any voice of opposition from a scholar would automatically be suppressed by the regime.[50] In such circumstances, scholars who seriously studied constitutional law would be subjected to political pressure whenever they produced critical writing on government structures and practices. Consequently, the study of constitutional law is not well developed because there were not many scholars willing to risk challenging the authoritarian government through critical writing.[51]

Moreover, there was a lack of interest in the study of constitutional law, caused by great skepticism from Indonesia law students over the job prospects of being a constitutional lawyer in Indonesia.[52] Indeed, without a constitutional court as a forum for constitutional lawyers to appear, the jobs for constitutional lawyers were severely limited. As a result, most Indonesian law students tended to focus on private law instead of public law, which includes constitutional law.

Existing constitutional theories affect how justices will decide certain kinds of controversial cases.[53] In Indonesia's experience, constitutional court practice probably often dominates constitutional law theory. Judges may often move to theories that support what they want, i.e. to theories that support the interpretive style they want to engage in. The existence of constitutional theories is justification for particular constitutional interpretations that are brought into question.[54] In making their arguments, Justices may be influenced by their own ideology, biases and references.[55] Constitutional law consists of methodological principles, doctrines and interpretation of specific provisions either in the bare text of the constitution or what is reliably known of its founders' intentions and

[50] Ariel Heryanto, *State Terorism and Political Identity in Indonesia: Fatally Belonging* (Routledge, 2006).
[51] Jimly Asshidiqqie, *Pokok-Pokok Hukum Tata Negara Indonesia Pasca Reformasi (the Principle of Indonesian Constitutional Law in Post Reformation)* (Bhuana Ilmu Populer, 2007) 38.
[52] Ibid.
[53] Mark V Tushnet, 'Does Constitutional Theory Matter?: A Comment' (1986 - 1987) 65(4) *Texas Law Review* 777 778.
[54] Perry, above n 1 257.
[55] Robert A Dahl, *How Democratic is the American Constitution?* (2001) 55.

purposes.[56] Interpreting the Constitution calls for a combination of constitutional law and moral philosophy from the Justices.[57] The existing constitutional law is needed to maintain a connection between constitutional adjudication in the constitutional court with the society in which it functions.[58]

Consequently, even though I have argued this in gross simplicity, this condition leads constitutional Justices to decide constitutional cases on the strength of their personal political preferences, not their answers to such philosophic questions as the nature of the Constitution and the best approach to finding constitutional meaning.[59] This condition will lead the Court to move to find rationalization in "judicial philosophies", "constitutional principles" and after-the-fact window dressing for decisions reached on personal political grounds.[60]

On the other hand, the lack of previous practice of judicial review and the lack of constitutional law development in Indonesia created a "freedom environment" for the Constitutional Court. The Constitutional Court could adopt other constitutional court practices in deciding their cases. The Court used practices from the South Korean Constitutional Court and German Constitutional Court, such as the principle of erga omnes / ultra petita,[61] and conditional constitutionality.[62]

The Nature of The 1945 Constitution

Another argument that I would like to present to support the assertion is the nature of the 1945 Constitution and its defects. As mentioned earlier, the amendment to the constitution was conducted in four phases, and the framers decided from the beginning that the amendments were to be conducted in this way. Once an area had been settled, the framers did not revisit the related articles.[63] As Indrayana resumed, the amendment process was conducted through "accident not design."[64]

[56] Goldsworthy, above n 40, 321.
[57] Dworkin, above n 60, 189.
[58] Jackson, above n 61, 606.
[59] Barber and Fleming, above n 43, 8.
[60] Ibid.
[61] Case Number 001-021.PUU-I/2003, Electricity Case.
[62] Case Number 058-059-060-063/PUU-II/2004 and 008/PUU-III/2005, the Management of Water Resources.
[63] Indrayana, above n 335.
[64] Ibid 332.

The framers were also hesitant to grant 'full' human rights protection in Article 28 of 1945 Constitution. However, the framers 'locked' the implementation of human rights with Article 28J as follows,

> (1) Every person shall be obligated to respect the human rights of another person in the orderly life of community, nation and State;
> (2) In exercising his/her rights and freedoms, every person must submit to the restrictions stipulated in laws and regulations with the sole purpose to guarantee recognition of and respect for other people's rights and freedoms and fulfill fair demand in accordance with the considerations of morality, religious values, security, and public order in a democratic society.

Chief Justice Jimly Asshiddiqie

I believe the strongest driving force in the Court's approach was the role of Chief Justice Jimly Asshiddiqie in orchestrating and managing his brethren. When the Constitutional Court officially opened on 19 August 2003, it had no funding, no office and no support staff. Chief Justice Jimly frequently stated that he started the Court with only three pieces of paper: the Constitution, the Constitutional Court Law and the Presidential Decree that appointed the Constitutional Court Justice.[65] With no office and no infrastructure, the Court had to use the Chief Justice's personal mobile phone as its first contact number.[66] Chief Justice Jimly, as he was commonly referred to, was the only constitutional law scholar from a prominent university among the initial Justices and the only Justice with a strong constitutional law background.

As someone who closely followed the constitutional reform process, Chief Justice Jimly was aware that the Government tried in several ways to limit the authority of the newly-established Constitutional Court. Moreover, as a constitutional scholar, Chief Justice Jimly also understood that the purpose of a constitutional court is to evaluate legislation and if the Court remains compliant to the government, the whole existence of Constitutional Court will be meaningless.[67]

[65] Jimly Asshidiqqie, '*Bermodal Tiga Lembar Kertas* (With Three Pieces of Paper)', *Republika* 11 January 2004
[66] Chief Justice Jimly's mobile phone is kept at Constitutional Court Museum.
[67] Hendrianto, above n 16, 106.

Therefore, Chief Justice Jimly immediately moved to declare that the Constitutional Court had the authority to invalidate statutes whenever they violate the Constitution. Chief Justice Jimly argued that the Court's decision to invalidate a Law is part of the democratic process, in other terms protecting what he called the voice of the general populace.[68] The Chief Justice explained that:

> "A Law that is passed by Parliament and the Government is a reflection of majority voice. However, majority voice may not equal the voice of the general (populace), because there is a constitution that reflects the voice of the general (populace). So, whenever a Law does not comply with the Constitution it breaks the voice of the general (populace). Whenever a Law violates one constitutional right, it has violated the voice of the general (populace) and the Court should invalidate such statute."[69]

Scholars of the early years of the Indonesian Constitutional Court conclude that the Court tried to position itself as the guardian of the Constitution by upholding the principle of the rule of law (*negara hukum).*[70] It was Chief Justice Jimly who fought for the recognition of judicial status for the Constitutional, Court and it was also he who devised the strategy to raise the profile of the Court in its early years of operation.[71]

From the beginning, Chief Justice Jimly believed that the Court should win the hearts of constitutional stakeholders and that the Court should become an alternative forum for the public to defend their rights.[72] Chief Justice Jimly was fully aware that the Court would not be able to exercise its authority if nobody appeared before it. Therefore, Chief Justice Jimly tried to employ a generous strategy.[73] One example of this is his generous treatment of standing. In the Electricity Case,[74] the Petitioners were pubic interest advocacy groups. The Court held that Every citizen as a taxpayer had the constitutional right to question every law closely connected with economic policy having implications for their welfare.[75]

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[68] Personal communication with Chief Justice Jimly, 18 August 2004.
[69] Hendrianto, above n 16, 106.
[70] Butt, above n ; Petra Stockmann, *The New Indonesian Constitutional Court: A Study into its Beginnings and First Years of Work* (Hans Seidel Foundation, 2007)
[71] Hendrianto dissertation explained further the role of Chief Justice JimlyAsshiddiqie in driving Indonesia Constitutional Court (2003-2008).
[72] Personal communication with Chief Justice, 18 August 2004.
[73] JimlyAsshiddiqie, interview by Hendrianto, 31 July 2006.
[74] Case Number 001-021-022/PUU-I/2003.
[75] Ibid.

His constitutional law training made Chief Justice Jimly realize the importance of judicial institutions. Chief Justice Jimly was fully aware that the whole point of establishing a constitutional court was to scrutinize legislation, but if the government circumscribed the Court's authority, then there would be no point in establishing a Constitutional Court. Therefore, Jimly believe that the Court should invalidate a Law whenever it violated the Constitution.[76]

III. CONCLUSION

There is no exact constitutional interpretation in my view. Each citizen may view the constitution according to his or her beliefs, understandings, values and expectations as to what the constitution means. Constitutional scholars, judges and Justices also have their own views and opinions as to which approaches to constitutional interpretation best reflect the true meaning of a constitution. In exercising their authority, a Constitutional Court Justice sees constitutional interpretation as a tool to find the truth or the best understanding of the Constitution as an instrument to claim justice and to protect the general welfare, and the other goods listed in the constitution.

Why does constitutional interpretation methodology matter? If a court decision cannot be expressed in terms of the nature of what the Constitution prescribes and what its words mean, then it is hard to see how society and scholars discern the authority of a judicial decision. It is undeniable that the Constitutional Court's presence in the Indonesian constitutional system has contributed greatly to the development of democracy and the enforcement of law in Indonesia. Since the Constitutional Court was established, legislative institutions are no longer able to formulate laws based on political strength alone, because despite having been produced democratically, the entire law or part of its substance can be annulled by the Court if its making or substance is contradictory to the Constitution. The discussion and date presented above shows how the Indonesian Constitutional Court has played an important role in

[76] Personal communication with Chief Justice Jimly, 18 August 2004.

the development of democracy in Indonesia. Similarly, after the Constitutional Court was established, the President can no longer be threatened by impeachment merely because of a political decision he or she makes.

Through its methodology, the Court has placed itself as the guardian if the constitution and the protector of human rights. Although the Court does not have a political mandate, all the actions of the Court and its decisions must be in line with political realities. This is not because it is the Court's preference to do so but because the Court's decisions will impact upon the political machinations. There is acceptance in Indonesia that the Court has a role in policing the democratic systems.

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Convergence or Borrowing: Standing in The Indonesian Constitutional Court

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Abstract

This Article addresses the constitutional convergence theory by examining the standing rule in the Indonesian Constitutional Court. The central investigation of this paper is whether the application of standing doctrine in the Indonesian Constitutional Court is evidence of constitutional convergence or of borrowing? This paper argues that the Constitutional Court jurisprudence on standing indicates that constitutional convergence has never taken place but rather the Court has engaged in constitutional borrowing. Legal borrowing on standing is limited to the carbon copy of the five-prong standing tests of the U.S. model, but in reality standing doctrine in the Indonesian Constitutional Court is not based on the private rights model of adjudication. Although the Court allows individuals to bring cases before the Court, it is rather a quasi-public model of standing, in which claimants no longer have standing only to vindicate their own private rights but can also sue to vindicate public interests. Standing requirements also allow the judges to review many highly sensitive political cases, and to some extent it enables the Court to second guess the decisions of the different branches of government.

Key words: Constitutional Convergence, Constitutional Borrowing, Doctrine of Standing, Constitutional Court.

I. INTRODUCTION

This Article addresses the constitutional convergence theory by examining the standing rule in the Indonesian Constitutional Court. In a nutshell, the theory of constitutional convergence claims that the content of constitutional law is becoming increasingly similar across the globe. But, having realized the complexities of constitutional convergence, a few caveats and clarifications are in order. First, this article focuses on rights based convergence instead of structural based convergence. David Law, with his theory of a global race to the top, focuses on constitutional convergence in terms of the protection of individual rights.[1] Rights based convergence must be distinguished from structural constitutional convergence, which focuses on the structural form of government, such as separation of powers and democratic elections for the legislature and the head of executive. Mark Tushnet suggests convergence among national constitutional systems can take place in their protection of fundamental rights and their structures, such as the creation of an independent court.[2] As important as the constitutional structure is, this paper will not focus on whether structural convergence occurs in Indonesia, but rather on rights based convergence.

Second, much of the scholarship on rights based convergence focuses on the adoption of rights in the written constitution. Elkins, Ginsburg and Simmons posit that there has been substantial convergence with regard to human rights in national constitutions across the globe.[3] Their studies focus on the incorporation of the Universal Declaration of Human Rights (UDHR) and its complementary treaty, the International Covenant on Civil and Political Rights (ICCPR) in various national constitutions.[4] David Law and Mila Versteeg collected data on rights provision from 188 different constitutions that were adopted from 1946 to 2006, and they conclude that national constitutions, on average, grow similar over time with the inclusion of a relatively high number of rights in the first place.[5] It is beyond the scope of this article to examine the content of the Indonesian

[1] David Law, *Globalization and the Future of Constitutional Rights*, 102 Nw. U.L. Rev, 2008, p. 1277.
[2] Mark Tushent, *The Inevitable Globalization of Constitutional Law*, 49 Va. J. Int'l L., 2009, 985.
[3] Zachary Elkins, Tom Ginsburg, and Beth Simmons, *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 Harv. Int'l L.J., 2013, p. 61.
[4] Id.
[5] David Law, *The Evolution and Ideology of Global Constitutionalism*, 99 Calif. L. Rev. 2011, p. 1163.

Constitution and see whether it is characterized by imitation or convergence of rights. The object of investigation of this article is on judicial opinions instead of written constitutions. Thus, in order to analyze rights based convergence in Indonesia, I will consult the Constitutional Court cases of the last decade.

Third, some scholars posit the judges as driving forces behind constitutional convergence. Anne Marie Slaughter postulates the concept of a "global community of judges," arguing that high court judges frequently talk across jurisdiction.[6] The global community of judges then tries to influence domestic courts to take particular approaches.[7] Mark Tushnet also argues for judge-led-convergence, noting the spread of proportionality review, judicial balancing and the language of margins of appreciation as examples of judge-led-convergence towards adopting common constitutional formula.[8] On some level, this article is about judge-led-convergence; nonetheless, it will not focus on the participation of Indonesian judges in a global community of judges. This article will not examine to what extent Indonesian Constitutional Court Justices are influenced by their fellow international judges, but rather, how the judges are influenced by ideas from different jurisdictions.

Fourth, in his critical analysis to Law's "race to the top" theory, Mark Tushnet argues that it is difficult to define what the "top" of constitutional rights protection might be.[9] Tushnet believes that there is no general reason to think that U.S. constitutional law is at the "top" with respect to every specific constitutional guarantee.[10] Shall this paper compare the Indonesian Constitution and the U.S. Constitution? This paper does not aim to compare the Indonesian Constitution with the U.S. constitution. David Law and Mila Verstegg, in their study of the influence of the U.S. Constitution abroad, placed the Indonesian Constitution in the top five constitutions least similar to the U.S. Constitution.[11] Nonetheless, some constitutional practices in the United States will be taken

[6] Anne Marie Slaughter, *A Global Community of Courts*, 44 Harv. Int'l L. J., 2003, p. 191.
[7] For a recent scholarship on the court on court encounters as the basis of convergence, please see Paul B. Stephan, *Courts on Courts: Contracting For Engagement and Indifference in International Judicial Encounters*, 100 Va. L. Rev, 2014, p. 17.
[8] Mark Tushnet,*The Inevitable Globalization of Constitutional Law*, 49 Va. J. Int'l L., 2009, p. 985.
[9] Tushnet, id, at 1003.
[10] Id.
[11] David Law and Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U.L. Rev. 762, 781.

into consideration, especially on the rule of standing.

The central investigation of this paper is whether the application of standing doctrine in the Indonesian Constitutional Court is evidence of constitutional convergence or evidence of constitutional borrowing. Rosalind Dixon and Eric Posner argue that many scholars make very general claims about constitutional convergence and thus neglect the complexities of the convergence theory.[12] Dixon and Posner alleged that there are various pathways of convergence and that sometimes the actual convergence is limited or even does not take place at all.[13] For example, the adoption of a bill of rights might only be constitutional borrowing instead of constitutional convergence. Constitutional borrowing does not always result in convergence and sometimes divergence occurs instead.

This paper argues that the Constitutional Court jurisprudence on standing indicates that constitutional convergence has never taken place but rather the Court has engaged in constitutional borrowing. Legal borrowing on standing is limited to the carbon copy of the five-prong standing test of the U.S. model, but in reality standing doctrine in the Indonesian Constitutional Court is not based on a private rights model of adjudication. Although the Court allows individuals to bring cases before the Court, it is rather a quasi-public model of standing, in which claimants no longer have standing only to vindicate their own private rights but also to vindicate public interests.

II. DISCUSSION

The Strange Birth of Standing

Standing is an important issue to review because it helps us to understand the nature of constitutional litigation in Indonesia. Steven Winter says that the question of standing is a question of the nature of our relationship in society and our ability to sustain community.[14] For Winter, standing divides members of the community from one another by reinforcing our individual and conflicting

[12] Rosalind Dixon and Eric Posner, The Limits of Constitutional Convergence, 11 Chi. J. Int'l L, 2011, p. 399.
[13] Id. at p. 405.
[14] Steven Winter, *The Metaphor of Standing and the Problem of Self Governance*, 40 Stan. L. Rev, 1393, p. 1371.

self-interests and by submerging our common stake in the fate of the community. Former Chief Justice Aharon Barak of the Israel Supreme Court shares the view that the way a judge applies the rules of standing is determined by his approach to his judicial role.[15]

In the last ten years, especially under the leadership of the first Chief Justice Jimly Asshiddiqie, the Court has crafted a peculiar doctrine of standing that expanded the access of people to bring cases before the Court. On the surface, the Indonesian Constitutional Court has employed a similar doctrine of standing to the United States, which requires a three-prong standing test.[16] The Court requires the petitioner to demonstrate injury in order to establish standing. The Court defined this injury-based standing in the *Biem Benjamin* case.[17] The petitioner was a politician who intended to run for Governor of the Special Capital Territory of Jakarta. He wanted to run as an independent candidate, but the Law only permitted candidates that were nominated by a political party.[18] He asked the Court to declare the law unconstitutional, thus allowing him to run for Governor as an independent candidate.

The Court ruled that in order to establish constitutional injury (*kerugian konstitusional*), the claimant must fulfill five requirements: 1) the claimant has a constitutional right that is guaranteed by the Constitution; 2) the claimant considers that his or her constitutional rights have been violated by the challenged statute; 3) the constitutional injury should be specific and actual or at least potential in character, that is, according to normal logic, the injury is likely to occur; 4) there should be a causal relationship (*causal verband*) between the

[15] According to Justice Ahron Barak, a judge who regards his role as deciding a dispute between persons with rights will tend to emphasize the need for strict standing. By contrast, a judge who regards his judicial role as bridging the gap between law and society and protecting (formal and substantive) democracy will tend to expand the rules of standing, because liberal rules of standing enable courts to hear matters that ordinarily would not find their way before a court. If the Court restricts its standing rule, then many potentially impactful cases would not be reviewed. See Aharon Barak, "A Judge on Judging: *The Role of A Supreme Court In A Democracy*," 116 Harv. L. Rev. 16 (November, 2002), 107 – 108; See also AharonBarak, The Judge In A Democracy, Princeton, New Jersey: Princeton University Press, 2006, p. 190.

[16] The U.S. law of standing has its roots in Article III's case and controversy requirement The U.S. Supreme Court has established a three-part test for standing. The constitutional minimum of standing" requires the plaintiff to establish: first, an injury in fact. Second, there must be a causal connection between the injury and the complained, in which the injury has to be traceable to the challenged action of the defendant. Third, the injury will be "redressed by a favorable decision.

[5ee] Erwin Chemerinksy, Constitutional Law: Principles and Policies (2006).

[17] The Constitutional Court decision no. 006/PUU-III/2005, reviewing the Law No. 32 of 2004 on the Regional Government [*Pemerintahan Daerah – Pemda*) (hereinafter the *Pemda Law III* case).

[18] Law Number 32 of 2004 on the Regional Governance, article 59 (2).

enactment of the challenged statute and the injury; and 5) there should be the possibility that with the issuance of a favorable decision, the constitutional injury would not occur or would not be repeated.[19]

Although these requirements are relatively similar to the five-prong standing test in the U.S. Constitutional system, the Indonesian Constitutional Court, has provided a completely different interpretation on standing requirements. In the *Biem Benjamin* case, the Court held, "although the claimant could not show injury in fact (because he never ran for the position of Governor), it can be predicted that the claimant's candidacy would be turned down by the General Election Commission, and therefore the claimant has fulfilled the standing requirement." In other words, the Court held that potential injury is sufficient to establish standing before the Court.

Although the *Biem Benjamin* case signifies that the standing requirements arise from individual claims of private rights, it opens the way for constitutional claims invoked by third parties or large groups of people. In the U.S. constitutional realm, this type of standing is known as generalized grievance.[20] The U.S. Supreme Court has adopted a principle preventing individuals from suing if their only injury is as taxpayer[21] or citizen[22] concerned with having the government follow the Constitution. Unlike the U.S Supreme Court, the Indonesian Constitutional Court allows individuals to have standing as taxpayer or citizen.

Most of the Indonesian Constitutional Court decisions related to social economic issues were framed within the context of generalized grievance standing. The first Court decision that established generalized grievance standing was the *Electricity Law* case, which dealt with the privatization of the electricity industry.[23] The claimants were human rights NGOs who argued that as non-profit organizations, they had standing to represent the public.[24] The Court

[19] The Constitutional Court decision no. 006/PUU-III/2005, reviewing the Law No. 32 of 2004 on the Regional Government [Pemerintahan Daerah – Pemda) (hereinafter the Pemda Law III case), at 16.
[20] See *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).
[21] See *Frothingham v. Mellon*, 262 U.S. 447 (1923); *United States v. Richardson*, 418 U.S. 166 (1974); *Schlesinger v. Reservist Committee to Stop the War*, 418 U.S. 208 (1974); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982).
[22] *Ex Parte Levitt*, 302 U.S. 633 (1937); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).
[23] The Constitutional Court decision no. 001-021-022/PUU-I/2003, reviewing Law No. 20 of 2000 on the Electricity (hereinafter the *Electricity Law* case).
[24] Id, at 13 -14.

held, "considering the claimants are electricity consumers, and taxpayers, they have the right to question any statute on economic policy that involved public welfare."[25] Thus, the Court allowed individuals and organizations to file petitions for judicial review as consumers and taxpayers.

Later, in the *Oil & Gas Law I* case,[26] the Court reinforced the generalized grievance standing approach. The claimants were four human rights NGOs who argued that as non-profit organizations they had standing to represent the public in challenging the privatization of the state owned oil company, PERTAMINA.[27] The Court held, "the objective of those NGOs is to fight for public interest advocacy...therefore the Court is of the opinion that the petitioners have standing to raise constitutional issues."[28] In other words, the Court permitted public interest NGOs to come before the Court as defenders of the people at large.

In the *Water Resources Law* case,[29] the Court moved even further, issuing a ruling that every citizen has standing to challenge the Water Resources Law. The claimants were two prominent NGOs in Indonesia, the Indonesian Legal Aid Institute and Friends of the Earth Indonesia (*Wahana Lingkungan Hidup Indonesia* – WALHI) and some individuals. They challenged the Water Resources Law that grants control over Indonesia's water resources to private entities.[30] The Court held that every citizen may act on his or her own as a defender of the people, and the Court does not require that the claimants assert an injury that is shared by a large number of people.[31]

This article posits that the generalized grievance standing is basically the Court's doctrinal invention. The period from 2003 to 2008 was characterized by the rise of generalized grievance standing in the Constitutional Court. [32] The invention was actually a strategy that was employed by the then Chief Justice,

[25] Id. at 327.
[26] The Constitutional Court decision no. 002/PUU-I/2003, reviewing Law No. 22 of 2001 on the Oil and Gas (hereinafter the *Oil and Gas Law I* case).
[27] Id., at 10.
[28] Id. at 200.
[29] The *Water Resources Law* case, the Constitutional Court decision no. 058-059-060-063/PUU-II/2004.
[30] Law Number 7 of 2004 on Water Resources.
[31] The *Water Resources Law* case, supra note 29, at 78.
[32] My data reveal there were at least fifteen cases that were initiated by NGOs during the period 2003 – 2008.

Jimmly Asshiddiqie to enhance the Court's authority.[33] On the one hand, Chief Justice Asshiddiqie knew that the Court would not be able to review governmental policies if nobody challenged the governmental policies before the Court. On the other hand, there were many NGOs whose agenda was to challenge governmental policies. Asshiddiqie saw the potential for collaboration between the Court and NGOs because both shared a similar vision for political and economic reform.[34] Therefore, he led the Court to apply generalized grievance standing, which permits NGOs to challenge governmental policies with minimal barriers in terms of standing.

Although generalized grievance standing has become one of the benchmarks of the Constitutional Court doctrine, it does not mean that the Court is always unanimous on the subject. An apt example is the Court's decision with regards to taxpayer standing; two justices filed dissenting opinions and argued against the application of generalized grievance standing.[35] Chief Justice Asshiddiqie himself was fully aware that he did not have absolute control over the Court's decision, and, thus, he tried to build consensus among his colleagues that the Court needed to apply a more lenient standing test in the early years of the Court's operation. One of the associate justices confirmed that the Chief Justice managed to convince his brethren to apply a lenient standing test lest no one come before the Court.[36]

The departure of Chief Justice Jimly Asshiddiqie from the Court in 2008, however, did not lead to the abandonment of standing doctrine. Under the leadership of his successor Chief Justice Mohammad Mahfud, the Court continued to employ generalized grievance standing. For instance, the Mahfud Court allowed an NGO to challenge the authority of the Ministry of Forestry to grant large concessions to private mining companies for mining exploration

[33] See Hendrianto, From Humble Beginnings to a Functioning Court: The Indonesian Constitutional Court, 2003 – 2008 (Unpublished PhD Dissertation, University of Washington, 2008) (on file with author).

[34] Private conversation with JimlyAsshiddiqie, Chief Justice of the Indonesian Constitutional Court, in Jakarta, Indonesia (July 31, 2006).

[35] The Constitutional Court decision no. 003/PUU-I/2003, reviewing Law No. 24 of 2002 on the Government Securities Law (hereinafter the *Government Securities Law* case).

[36] Private conversation with MaruararSiahaan, Associate Justice of the Constitutional Court, in Jakarta, Indonesia (July 4, 2006).

in "State Forest Areas".[37] The case was significant because Indonesia's central government has control over the country's vast forest area and thus the Ministry of Forestry had the right to grant large concessions to private companies for logging, plantations, and mining exploration even if the area has been managed for generations by indigenous people. The case was initiated by an NGO, The Alliance of Indigenous People's Organization (*Aliansi Masyarakat Adat Nusantara* - AMAN), which claimed to represent 2,240 indigenous communities and a total of 15 million people across the archipelago.[38] The Court ruled that the petitioner had standing to challenge the Forestry Law because the petitioner is an NGO who has concern over indigenous issues.[39]

Another apt example of the doctrine of generalized grievance standing under the Mahfud Court is the Court decision in the *Deputy Minister* case.[40] The State Ministry Law allows the President to appoint a deputy minister to assist with the minister's responsibilities. In his second administration, President Yudhoyono appointed 20 Deputy Ministers. An NGO called the National Movement to Eradicate Corruption (GNPK) challenged the appointment of those deputy minister and argued that the position was unnecessary and a waste of state funds.[41]The Court ruled that the GNPK had standing because its members were taxpayers whose interest had been harmed by the government's decision to appoint deputy ministers.

Standing and Abstract Review

While it is easy to conclude that the Indonesian Constitutional Court has invented its own standing doctrine, I would like also to consider a structural design that facilitated the rise of generalized grievance standing. By design, the Indonesian Constitutional Court only has authority to pronounce consistency of statute. In other words, the Court only has authority to review a constitutional

[37] The Constitutional Court decision no. 35/PUU-X/2012, reviewing Law No. 41 of 1999 (hereinafter the *Alliance of Indigenous People* case).
[38] See Mina Susana Setra, *Indigenous Peoples in Indonesia: The Struggle for "Legal" Recognition*, presentation at International Conference on Scaling-Up Strategies to Secure Community Land and Resource, Interlaken, Switzerland, September 19-20, 2013.
[39] See *The Alliance of Indigenous People* case, supra note 37 at 161.
[40] The Constitutional Court decision no. 79/PUU-IX/2011, reviewing Law No. 39 of 2008 on the Cabinet Minister (hereinafter the Deputy Minister case).
[41] Id. at 80.

question in an abstract manner and not to solve a concrete constitutional case. Abstract review is basically compatible with inquiry standing instead of injury standing.[42] The Court's decision in an abstract review does not aim to resolve the injury suffered by the claimant but rather, to simply pronounce the constitutionality of the challenged statute. Consequently, the Court will only provide some type of advisory remedy.

A telling example of such advisory remedy is the Court's decision in the *Electricity Law* case, in which the Court invalidated the entire statute because it was proven to be inconsistent with economic clauses in the Constitution.[43] The Court held that all agreements or contracts and business permits in the electricity industry that had been signed and issued based on the nullified Law should remain valid until the expiration date of the contracts or agreements and business permits in question.[44] Obviously, the Court's decision only pronounces the consistency of the statute with the Constitution, and it has no effect to create any remedy. In the very recent decision of the Constitutional Court on *General Election schedule*, the Court ruled that the current election mechanism contradicted the Constitution.[45] It held that the presidential election and legislation election should be held concurrently; however, the Court's decision will not apply until the 2019 General Election instead of the recent General Election in 2014.[46]

Basically, the Court's decision is merely a declaratory judgment, in which the Court has authority to issue interpretation on the constitutionality of law but, it is simply an advisory opinion. Therefore, the type of remedy that the Court can render is merely declaratory relief. The effect of the Court's decision rests on its moral authority and the willingness of the other political branches to follow that decision. The *Oil and Gas Law I* case is an obvious example of this kind of declaratory relief. In this case, the Court held that fuel prices should be regulated

[42] See Richard S. Kay, "Standing to Raise Constitutional Issues: A Comparative Analysis," in Richard S. Kay (ed.), *Standing to Raise Constitutional Issues: Comparative Perspectives* (2005).
[43] See the *Electricity Law* case, supra note 23.
[44] Id at 350.
[45] The Constitutional Court decision no 14/PUU-XI/2013 reviewing Law No. 42 of 2008 on the Presidential Election (hereinafter the *Presidential Election Law* case).
[46] Id. at 88. See also The Jakarta Post, "Court rules one voting day in 2019," January 24, 2014.

by the Government, and consequently, it invalidated the provision that ruled that fuel prices should be regulated by the market mechanism.[47] Not long after the Court issued its decision, the Government issued a Presidential Regulation which set up fuel prices based on the market mechanism.[48] In response to the Presidential Decree, the Court wrote a letter and reminded the President that the market price clause in the Oil and Gas Law had been invalidated and the Government should not consider it a source of law any longer.[49] The President, in his formal reply to the Constitutional Court, stated that that the government's decision corresponded with the Court's holding[50] and that The Government was in fact regulating the fuel price as mandated by the Court through the Presidential Regulation.[51] Then, the President reminded the Court not to trespass beyond its jurisdiction and authority.

There are several instances where the Executive decided to comply with the Court's decision. One telling example is the *Attorney General* case.[52] The central dispute in this case was whether an Attorney General is a cabinet official, and, whether he serves in accordance with the length of term of a cabinet. The Court majority ruled that the Attorney General should be subjected to term limits as a Cabinet Minister.[53] Following the Court's decision, Chief Justice Muhammad Mahfud urged the President to dismiss the Attorney General Hendarman Supandji, who had previously not been subjected to the term limit.[54] President Yudhoyono decided to uphold the Court ruling by removing Hendarman Supandji from his post. Despite the President's compliance, the Court basically has no command over its decision and depends entirely on the willingness of the Executive to comply with the Court decision.

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[47] See The Constitutional Court decision no. 002/PUU-I/2003, reviewing Law No. 22 of 2001 on the Oil and Gas (hereinafter the *Oil and Gas Law I* case).
[48] The Presidential Regulation No. 55 of 2005.
[49] Letter from Chief Justice of the Indonesian Constitutional Court to the President of Republic of Indonesia, October 6, 2005 (copy on file with the author).
[50] The President of Republic of Indonesia to the Chief Justice of Constitutional Court, October 14, 2005 (copy on file with the author).
[51] Id.
[52] The Constitutional Court decision no. 49/PUU-VIII/2010, reviewing Law No. 16/2004 on the Attorney General Office (hereinafter the *Attorney General* case).
[53] Id. at 133.
[54] *Court says Hendarman no longer attorney general*, The Jakarta Post (Jakarta), September 22, 2010.

Standing and Private Rights

Before I move to evaluate whether the Court's standing doctrine is evidence of constitutional convergence or just of constitutional borrowing, it is necessary to explain the standing doctrine within the context of liberal constitution. In this article, I will use the standing doctrine in the U.S. constitutional system as the point of comparison. Although, the Indonesian Constitution has little resemblance to the U.S. Constitution, the five-prong standing test in the Indonesian Constitutional Court is reminiscent of the five-prong test in the U.S. constitutional system. For that reason, it is important to briefly review the standing doctrine as it is found in the U.S. constitutional system.

Arthur Ripstein has provided a subtle analysis of the Kantian understanding of private rights and standing.[55] In Kant's understanding of rights, one might have a right also to enforce his or her rights. The right to enforce is remedial because it addresses private wrongs. Ripstein gives an illustration whereby if I carelessly bump you and injure your body or damage your property, and then I have interfered with your right to be the one who determines how your body and property will be used. A remedy then is supposed to give you back what you were entitled. The right of enforcement is your right to make me restore you to the position you would have held had I never wronged you. Nevertheless, you have no standing as a matter of private right to complaint if a hailstone injures you or damages your property, because there is nobody against whom you can direct your complaint.

Kant's insight on private rights can form a basis to understand the origin of standing doctrine in the U.S. constitutional realm. The modern U.S. standing doctrine invokes two important arguments about the judicial role. First, standing requirements ensure that adjudication addresses concrete issues brought by people who have interest.[56] This argument has roots in the common law notion of private rights, and it contends that litigants should have a stake in a genuine dispute

[55] Arthur Ripstein, *Private Order and Public Justice: Kant and Rawls*, 92 Va. L. Rev. 1391 (2006), 1416.

[56] See John F. Muller, *The Constitutional Incompleteness Theorem*, 15 U. Pa. J. Const. L. 1373 (May 2013) Muller uses the notion of justiciability in his analysis on the relationship on the judicial role. Nevertheless, standing is part of the justiciability doctrine, so I will simply use standing in my reference to Muller's argument.

capable of judicial redress. Second, standing requirements ensure that the courts do not overstep their boundaries against the other branches of government.[57]

The modern U.S. principles of standing grew out of the distinction between public and private rights. In its original form, standing enforced the rule that the judiciary had the power only to vindicate private rights in suits by private litigants. Law was the body of rules that defined the rights of citizens and provided a remedy to the injured party. Based upon these principles, Chief Justice Marshall in *Marbury v. Madison* drew the conclusion that, "the very essence of civil liberty certainly consists in the light of every individual to claim the protection of the laws, whenever he receives an injury."[58]Under the 18th century common law, rights were synonymous with remedies, remedies were synonymous with the forms of action and the forms of action were synonymous with the concept of redressable injuries.[59] One might infer from this line of reasoning that in its original form, standing was based on the private rights model of litigation.

Standing flourished as an independent doctrine in the early of the 20th century. Standing was developed principally at the hands of Justice Brandeis and later Justice Frankfurter to achieve the goal of protecting legislation from judicial attack.[60]Justice Frankfurter began to develop a new doctrine, that the violation of public right is insufficient to establish standing. If no private right was involved then the litigant's only recourse was through the elected branches of government. In other words, standing required the invasion of a "legal right".

During the mid-twentieth century, however, the Court expanded standing by abandoning the private rights requirement. One option for the Court to expand standing was to adopt a public rights model, permitting a private individual to bring suits against any violation of the public interest. Thus, the Court created a quasi-public model of standing, in which litigants no longer had standing only to vindicate their own private rights but also to vindicate public interests. The only requirement for standing was that the challenged actions affect the litigant.

[57] See Antonin Scalia, *A matter of interpretation: federal courts and the law : an essay* (1997).
[58] Marbury v. Madison, 5 U.S. (1 Crach) 87, 102 (1803).
[59] Steven L. Winter, *The metaphor of standing and the problem of self-governance*, Stanford Law Review (1988): 1371-1516.
[60] Maxwell L. Stearns, *Constitutional Process: A Social Choice Analysis of Supreme Court Decision Making* (2000), 218.

But the litigants were not required to demonstrate the violation of private rights in order to prevail on the merits.

In the last forty years—starting with the Burger Court—the Court has again restricted standing. The belief that liberal access to the courts by private litigants seeking to enforce public rights endangers the separation of powers has driven the Court again to revert to what is essentially a private rights model for standing. But in returning to the private rights model, the Court did not abandon the injury in fact test; instead the Court stated that injury must be "actual", "distinct," "palpable," and "concrete." Abstract injuries such as the injury caused by the government's failure to obey the law were insufficient. In general, the Court has denied standing to taxpayers and held that generalized grievance regarding government misconduct could not support standing, stating that standing required the plaintiff to allege that he was in danger of suffering any particular concrete injury as a result of the government misconduct.[61]

Evaluating Standing

Having explained the development of standing doctrine in the United States, this paper will move to evaluate the evolution of standing doctrine in the Indonesian Constitutional Court. First and foremost, this paper argues that the standing doctrine in the Indonesian Constitutional Court is the product of constitutional borrowing rather than constitutional convergence; i.e., when the Court crafted the five prong standing test in the *Biem Benjamin* case, some Justices consciously copied what they saw in the United States.

One plausible driving force behind the borrowing of the U.S. standing doctrine is former associate Justice Achmad Natabaya, who is the proponent of strict standing doctrine. While he was in the Court, Justice Achmad Natabaya preferred the Court to have a limited role and limited access for citizens. Justice Natabaya believed that the Constitutional Court had a limited role in reviewing statutes. Based on his view of the limited role of the Court, Natabaya believed that the Court should apply a strict standing rule because only through strict would the

[61] In the *EPA v. Massachusetts*, however, the Court held as a state, Massachusetts had standing to sue the EPA over potential damage caused to its territory by global warming.

Court avoid trespassing on the jurisdictions of the other governmental branches. Natabaya believed that standing rules should require the claimant to assert a personalized and factual injury.[62] According to Natabaya, there was a fundamental flaw within the standing mechanism in the Indonesian Constitutional Court because it allowed individual citizens to challenge a statute.[63] Natabaya believed that the ideal standing mechanism was like that of the France Constitutional Council, in which only a designated institution—President, Prime Minister, Upper House, Lower House and Parliamentary minority —can challenge consistency of the statute with the Constitution.[64]

Nevertheless, Natabaya argued that if the Law allowed individual citizens to challenge a statute, then claimants must fulfil certain requirements in order to establish standing. Natabaya said that the U.S. five-prong standing test became a reference for him in believing that there should be personalized and factual injury.[65] As a scholar who studied in a U.S. Law School (Natabaya earned his LL.M degree from Indiana University School of Law, Bloomington) Natabaya was familiar with the U.S. style of standing and decided to copy the U.S. principle of injury standing. Moreover, Natabaya himself claimed that he was the only Justice who was educated in the American law school and with real knowledge of the US constitutional system.[66]

Dixon and Posner warn that constitutional borrowing will often go in only one direction, that is from more successful or older countries to less successful or newer countries, or else from countries with a great deal of experience with an issue to countries that must address that issue for the first time.[67] In the case of the Indonesian Constitutional Court, the constitutional borrowing on standing, indeed, has gone into a different direction. Clearly the standing doctrine in the Indonesian Constitutional Court is not based on a private rights model of adjudication. Although the Court allows individuals to bring cases before

[62] Private conversation with Achmad Natabaya, May 28, 2008.
[63] Id.
[64] Id.
[65] Id.
[66] Id.
[67] Dixon and Posner, supra note12.

the Court, it is rather a quasi-public model of standing, in which claimants no longer have standing only to vindicate their own private rights but also to vindicate public interests.

One of the obvious examples of the quasi-public rights model is the recent Court decision in the *General Election schedule* case. The claimant, Effendi Ghazali, was a political activist who challenged the Presidential Election Law no. 42 of 2008, which prescribed two separate election schedules for legislative and presidential elections. First, Ghazali argued that the current election mechanism has subverted the presidential system. His concern was that a coalition of political parties that nominates a president will have too much leverage over the president elect. In other words, Ghazali argued that a president elect could be held hostage by the interest of a coalition of political parties that support his nomination.

Obviously, Ghazali invoked the public interest argument in his petition. Nonetheless, he also argued that the Law had infringed upon his voting rights. Ghazali referred to his personal experience in the 2004 General Election. At that time, he was doing his doctoral research in the city of Nijmegen, Netherlands. Ghazali returned to Indonesia to cast his vote for the legislative election on April 5, 2004. Ghazali, however, could not cast his vote for the Presidential Election on July 5, 2004 because he had to travel back to Netherlands before that date. Ghazali posited that his voting rights had been deprived by the Law that set two separate election schedules.[68]

Apart from the application of quasi-public right model, the Court has consistently applied generalized grievance standing, which arises out of a public rights model of adjudication. The Court's application of the public rights model obviously deviates from the private rights model in the U.S. Constitutional doctrine. There have been many examples of the public rights model of adjudications in the last ten years, but I would like to cite one more

[68] If one reviews the case closely, there is a mismatch between the challenged statute and the injury claimed. On the one hand, Ghazali invoked an injury that was caused by the 2004 presidential election process, which was based on Law no. 23 of 2003 on the Presidential Election. On the other hand, he challenged the Law no. 42 of 2008 on the Presidential Election, which was enacted by the House in 2008. Thus, the challenged statute did not cause any immediate harm to Ghazali's voting rights.

case as evidence of the prevailing of the public rights model of litigation in the Indonesian Constitutional Court. In 2012, the Court issued a decision in the *BP Migas* case.[69] The petitioners challenged some of the key statutory provisions which mandated the Government to establish a Regulatory Agency to supervise the oil and gas upstream sector.[70] The petition was initiated by twelve Islamic based organizations and 30 individuals, chiefly led by Muhammadiyah, one of the largest Islamic non-governmental organizations in Indonesia. Muhammadiyah as the chief petitioner asserted that it came before the Court as an organization with the objective of establishing an Islamic civil society, and, thus, it had standing to represent public interest.[71]

The Court majority did not provide any specific ruling on standing; it simply held that the plaintiffs had standing to bring the case. Nevertheless, there was a dissenting opinion, in which Justice Harjono argued that the plaintiffs have no standing to bring the case.[72] Justice HarJono did not write a lengthy dissent; he simply criticized the Court majority for their lack of consideration with regard to the issue of standing. He believed that the Court did not provide sufficient legal reasoning in reaching the conclusion that the plaintiffs had standing to file the case before the Court.[73]

The *BP Migas* case is not only an exemplar of the public rights model of litigation but also evidence that the public rights model of litigation in Indonesia is not remedial because it does not aim to address private wrongs and any remedy provided by the Court will not give you back that to which you were entitled. In the *BP Migas* case, the Court held that the establishment of the Regulatory Agency of Oil and Gas Upstream Sector had reduced state control over petroleum resources. After the Court announced its decision, The Minister of Energy then established a Special Task Force for Upstream Oil and Gas Activities, which had the responsibility to take over all duties, functions, and employees of the

[69] The Constitutional Court decision no. 36/PUU-X/2012, reviewing Law No. 22 of 2001 on the Oil and Gas (hereinafter the *Oil and Gas III case* / *BP Migas* case). The Court finished the deliberation meeting on November 5th 2012 and it announced the decision on November 13, 2012

[70] Article 1 section 23 & article 4 section 3.

[71] Indonesian Constitution, article 28C (2).

[72] See the *BP Migas* case, supra note 69, at 118.

[73] Id.

Regulatory Agency of Oil and Gas Upstream Sector, actually carrying out similar tasks to the disbanded Regulatory Agency.[74]

A few days after the Court issued the decision, Muhammadiyah celebrated its 100th anniversary. The Chairman of Muhammadiyah, Din Syamsuddin expressed his gratitude and praised the Court's decision as the finest anniversary gift for Muhammadiyah.[75] Nonetheless, he raised a concern that "there is no difference before and after the decision issued by the Court. It only changes name and address." [76] Mr. Syamsuddin clearly did not have deep knowledge of the workings of the Court, otherwise, he would not have been surprised to find that the Executive might simply ignore the Court's decision. Obviously, the Court has no judicial command to enforce its decision. Simon Butt, a professor at the University of Sydney in his analysis of the Court decision on the *Electricity Law* case,[77] has criticized the Court for its lack of judicial command. Butt explained that around two months after the Court invalidated the Electricity Law, the Government issued a regulation which appears to have countered the Court's decision.[78] This regulation was described as being very similar to the Law that was invalidated by the Court in the first place. Butt lamented the fact that the Court can do nothing to remedy the unconstitutionality of the new regulation.[79]*The BP Migas* case is basically another chapter in the history of the Indonesian Constitutional Court, in which it is made clear that their decision is merely a declaration judgment and the Court can do nothing to enforce its decision.

Private claimants who bring cases under the quasi-public right models are also not immune to the problem of the lack of remedy to give back that to which they were entitled. A telling example is the *Mohammad Sholeh* case.[80] Mohammad Sholeh was a legislative candidate from the Indonesian Democratic

[74] See the Regulation of Ministry of Energy and Mineral Resources no. 9 of 2013.
[75] *Muhammadiyah celebrates 100 years*, The Jakarta Post (Jakarta), November 19, 2012.
[76] *PerpresPengganti BP Migas 'Sami Mawon'* (The Presidential Decree in lieu of the Regulatory Agency is Same Old Same Old), Republika (Jakarta), November 15, 2012.
[77] The *Electricity Law* case, supra note 23.
[78] See Simon Butt & Tim Lindsey, *Economic Reform When the Constitution Matters: Indonesia's Constitutional Court and Article 33 of the Constitution* (The University of Sydney, Sydney Law School, Legal Studies Research Paper No. 09/29), May 2009.
[79] Id. at 21.
[80] The Constitutional Court Decision No. 22-24/PUU-VI/2008, reviewing the Law No. 10 of 2008 on the Election of National and Regional Parliament (hereinafter *Mohammad Sholeh* case).

Party of Struggle (PDI-P). He challenged the constitutionality of the Legislative Election Law, which ruled that the candidate with the highest-ranking position in the candidate list shall be elected as legislator.[81] Sholeh was ranked seventh in the candidate list, and he was unlikely to win the legislative seat based on that ranking. He asked the Court to nullify these statutory rules. The Court accepted his argument and declared the rules unconstitutional. But Sholeh's petition never aimed to address any private wrong against him because his petition was based on speculative injury. He filed the petition long before the legislative election and he never won any legislative seats.[82]

III. CONCLUSION

The Indonesian Constitutional Court has engaged in constitutional borrowing with regards to the doctrine of standing. But clearly constitutional convergence has not occurred. Indeed, divergence has in fact occurred. The Indonesian standing doctrine never arises out of the vindication of private rights. Standing requirements never intend to set the bar for the Court to address concrete issues, but rather they are an instrument for the Court to gain access to review many abstract cases. Standing requirements also allow the judges to review many highly sensitive political cases, and, to some extent, they enable the Court to second guess the decisions of the different branches of government. Moreover, the standing doctrine in Indonesia signifies that the Court's treatment of standing has the potential to be governed by the political preference or the pragmatic choices of its members rather than by the doctrinal authority.

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[81] Law no. 10 of 2008 on the Election of National and Regional Parliament.
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The Constitutional Court decision no. 002/PUU-I/2003, reviewing Law No. 22 of 2001 on the Oil and Gas (hereinafter the *Oil and Gas Law I* case).

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Indonesian Chinese Diaspora, Dual Citizenship And Indonesian Development

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Abstract

Indonesian Citizenship Law Policy, in accordance with Article 26 Paragraph (1) of the 1945 Constitution and Act Nr. 12/2006, is closed in nature and does not recognize dual citizenship. Community members of the Indonesian Chinese Diaspora who hold foreign nationalities do not have the legal standing to file applications to the Constitutional Court for constitutional review of Act Nr. 12/2006 in an effort to obtain Indonesian citizenship, because they are not Indonesian citizens. In order for an individual to be able to obtain Indonesian citizenship without losing his or her foreign nationality, the principle of dual citizenship must be applied within the Indonesian Citizenship Law Policy. This can happen if a legislative review on or an amendment to the act (in this case Act Nr. 12/2006 regarding the Citizenship of the Republic of Indonesia) is conducted by Parliament. Thus the Government of the Republic of Indonesia must be absolutely sure and able to fully assure Parliament that Indonesia has a genuine need for the Indonesian Chinese Diaspora, because they have great potentials and can play an important role in Indonesia's development, both in terms of the quality of human resources that have been proven and tested abroad, as well as the capital that can be invested in Indonesia.

Key words: Indonesian diaspora, dual citizenship, constitutional review, legislative review, Indonesian development.

I. INTRODUCTION

Currently there are approximately 8–10 million Indonesians (regardless of their ethnicity and legal and citizenship status) living overseas[1]. Almost 2% of the over 250 million Indonesian citizens worldwide have diaspora status in 167 countries.[2] According to the Chairman of the Indonesian Association of Professionals for Science, Technology and Enterprise (AIPSE), after moving to other countries, many Indonesian expatriates are forced to give up their Indonesian nationality for various reasons, including visas and education. For example, an Indonesian citizen living in Germany must spend weeks arranging visas whenever he or she wishes to travel internationally for business, while, if he or she becomes a German citizen, he or she is allowed to visit 172 countries without any visa at all. Regarding education for children, a child is financially supported by the state if his or her parents hold German citizenship[3].

The Indonesian diaspora comprises four groups, namely (1) Indonesian citizens residing in other countries (Indonesians holding Indonesian passports), (2) Indonesian citizens who have become foreign citizens (Indonesians having changed their citizenship), (3) those born to at least one Indonesian parent outside of Indonesia and (4) foreigners having affinity or sympathy toward Indonesia (diplomats, students, and workers who once lived in Indonesia but they have returned to their respective countries).[4]

The Indonesian diaspora exists in three generations. The first generation is made up of Indonesian people who moved overseas as a result of government policy under Suharto's New Order. They have very limited skill in foreign language but became guardians of Indonesian culture. The second generation is the product of the first generation. They have better English and succeed in business. The third generation is a second migration resulting from the increase in choice from the newly democratic state; these individuals have an opportunity to return to Indonesia[5].

[1] 'Diaspora Berharap Izin Tinggal', *Media Indonesia,* Jakarta, Februari 28, 2013, p. 14.
[2] 'Potensi Besar Diaspora Indonesia', *Koran Tempo*, Jakarta, May 28, 2013, p. A15.
[3] 'Potensi Besar ...', *ibid.*
[4] Dubes Indonesia Untuk AS Dino Patti Djalal Gaungkan Kewarganegaraan Ganda', *Rakyat Merdeka*, Jakarta, February 28, 2013, p. 10.
[5] 'Diaspora, Pelopor Diplomasi Indonesia', *Republika,* Jakarta, August 20, 2013, pp. 1 & 9.

A subcategory of the Indonesian diaspora is the Indonesian Chinese diaspora. Instances can be found in almost all countries. It is characterized by the presence of Chinatowns, where Chinese expatriates live in groups while maintaining the culture and traditions of their country of origin and ancestry.

Following the initiative of the Indonesian Ambassador to the United States, Dino Patti Djalal, a Congress on Indonesian Diaspora (CID I) was held, at Los Angeles Convention Center, Los Angeles, California, USA on July 6-8, 2012[6].

The Congress was attended by more than 5,000 Indonesian expatriates from all over the world and resulted in the Declaration of Indonesian Diaspora containing efforts, among others, to foster and develop a sense of brotherhood and cooperation among Indonesian expatriates worldwide; to build relationships with Indonesian citizens living in Indonesia; to become agents of relationship for ideas, solutions, resources, and networks to build the common good, and to be a force for peace and progress. The idea of the Declaration, which was read by 18 Indonesians living in a number of countries and in several languages , will be realized through an institution named Indonesian Diaspora Network/ IDN[7], and thus far there have been 55 IDN centres established in 26 countries covering the United States of America, Europe, Middle East, Asia, and Australia (the United States has the largest population of Indonesian expatriates followed by Malaysia and several countries in the Middle East)[8].

The participants of the Congress on Indonesian Diaspora signed a petition expecting the Indonesian government to allow Indonesian expatirates to hold permanent residence permits and dual citizenship[9]. On February 26, 2013, Indonesian Diaspora Business Council (IDBC), one of the outcomes of CID I, held a seminar entitled "The Rising Impact of Diasporas on Indonesia" in Jakarta. In the seminar, representatives of the worldwide Indonesian diaspora

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[6] 'Diaspora: Ribuan WNI Di AS Usul Kewarganegaraan Ganda', *Kompas*, Jakarta, July 10, 2012, p. 8; "Diaspora Indonesia: Kami Rindu Kembali ...", *Kompas*, Jakarta, July 24, 2012, p. 38; Editorial, '*Congress of Indonesia Diaspora'*, *Indonesia Media* (online), July 15, 2012, <www.indonesiamedia.com/2012/06/30/congress-of-indonesia-diaspora/>; & Diaspora Indonesia, *Declaration – Congress of Indonesian Diaspora* (2012) <www.diasporaindonesia.org/results/declaration_cid2012.php>.

[7] *Ibid.*

[8] Editorial, 'Kongres Diaspora Indonesia II: Jembatani Investasi WNI di Luar Negeri, BNI Gandeng Diaspora', (2013), 02 *MURI Jurnal Museum Rekor-Dunia Indonesia* September-October 2013, pp. 28-31.

[9] *Ibid*.

made some recommendations on, among others, immigration affairs, specifically permanent residence permits; economic affairs and constitutional rights, such as rights pertaining to elections. In line with the will of Indonesian expatriates to hold dual citizenship as raised in CID I, the Indonesian Ambassador to the USA, Dino Patti Djalal, said that if Indonesia allows dual citizenship, the potential of the diaspora will be more effective[10]. CID II was held on August 19, 2013, at Jakarta Convention Center and was attended by 7,000 Indonesian expatriates[11].

This article discusses the will of Indonesian Chinese expatriates who retain foreigner status in their host countries in order to maintain permanent residence and offers dual citizenship as the best solution to their problem. Solving this problem is necessary because the Indonesian Chinese diaspora has great potential and could play an important role in Indonesian development considering the qualified human resources comprising the diaspora; for example, Iwan Sunito and Nisin Sunito from Borneo, who managed respectively to become "king of property" in Sidney and "king of ranch" in Perth, and Sehat Sutardja from Pasar Baru, Jakarta, who, with just an electrical engineering degree, successfully gained his doctoral degree from UCLA, Berkeley and now runs the information technology enterprise Marvell Technology Group in Silicon Valley, which has controlled two thirds of the world's semi-conductor industries since 1995. The financial contribution from such individuals the country's economy would be significant considering their large remittances (funds brought in by migrant workers to their home country)[12]. World Bank data shows that remittances from the Indonesian diaspora from 2012 to April 2013 amounted to US $ 7.2 billion[13]. The problem is whether Indonesian citizenship policy and regulations allow members of the Indonesian Chinese Diaspora to obtain permanent residence and dual citizenship.

This article begins with the definition of diaspora and the causes of its occurrence. It also discusses the terms citizen and citizenship, some of the

[10] "Diaspora Berharap Izin Tinggal", *op. cit.*, & "Dubes Indonesia Untuk AS: Gaungkan Kewarganegaraan Ganda", *op. cit.*
[11] "Kongres Diaspora Indonesia II ...; *op. cit.*
[12] "Diaspora Aset Bangsa", Jurnal Nasional (Jakarta)(August 20, 2013), p. 3.
[13] "Potensi Besar ..., *op. cit.*; & "Diaspora Tuntut Dwi Warga Negara", Harian Kompas, Jakarta, August 19, 2013, p. 9.

universally applied basic principles in the field of citizenship, and also discusses dual citizenship. It is expected to assist in analyzing the data in order to find the best solution to the problem of citizenship for the Indonesian Chinese diaspora, particularly those with foreigner status. Furthermore, a new approach in the field of citizenship, namely Flexible Citizenship, which is currently practiced by a number of countries in order to encourage the diaspora to take part in and give their contribution to development programs implemented by the countries, either in the form of human resources or investments. The final section discusses Citizenship Laws of the Republic of Indonesia, Constitutional Review and the possibility of allowing permanent residence and dual citizenship for the Indonesian Chinese diaspora.

II. DISCUSSION

Diaspora: Definition and Causes

Diaspora is defined by *Kamus Besar Bahasa Indonesia,* the official dictionary of the Indonesian language, as "a diffused nation or people scattering to various corners of the world and subsequently losing their nationality"; in other words, they have no citizenship[14]. Generally diaspora is defined as nomads or "a group of people scattering to new places that are not their places of origin" or "a nation or population forced or compelled to leave their countries or regions and move to other countries,[15]". Lavie and Swedenburg refer to "a massive migration of groups of colored people (non-white/non-European) to the heart of Central Europe during and after Western colonialism"[16].

According to Gabriel Sheffer, diaspora is "social political formations, created as a result of either voluntary or forced migration, whose members regard

[14] Departemen Pendidikan Nasional, *Kamus Besar Bahasa Indonesia, Pusat Bahasa, Edisi Keempat,* Jakarta: PT Gramedia Pustaka Utama, 2008, p. 325.

[15] "Potensi Diaspora", Koran Sindo, Jakarta, August 21, 2013, p. 6; "Pulang Kampung", Harian Kompas (Jakarta), (Nov. 23, 2013), p. 7; & "Memaksimalkan Potensi Diaspora", Harian Suara Karya (Jakarta), (August 27, 2013), p. 11.

[16] Smadar Lavie dan Ted Swedenburg, "*Introduction: Displacement, Diaspora, and Geographies of Identity*", in Smadar Lavie dan Ted Swedenburg (*Ed.*), *Displacement, Diaspora, and Geographies of Identity*, Durkam: Duke University Press, 1991, *p.* 1-25, as cited by Arie Setyaningrum, "Globalisasi dan Diaspora Cina dalam Perspektif Kolonial: Dinamika Strategi Ekonomi dan Identitas Budaya", Jurnal *JSP*, Fakultas Ilmu Sosial dan Ilmu Politik, Universitas Gadjah Mada, Yogyakarta, Volume 8, No. 2, November 2004, p. 182.

themselves as of the same ethno-national origin and who permanently reside as minorities in one or several host countries"[17].

There are a lot of reasons for people leaving their country and migrating to other countries, even becoming citizens of those destination countries. The move might be voluntary, e.g., to look for a new life, to study, or to work or do business, or else there might be external causes, perhaps political, e.g., escaping a political upheaval or war or government policies that harm or endanger their lives and livelihoods—these people are referred to as "political refugees"—or socio-economic, e.g., overcrowding, famine, natural disasters or poverty. So it is with the Indonesian diaspora, who have been forced or otherwise compelled to leave their country or homeland and move to other countries[18].

According to Carment and Bercuson, "today's diaspora differ from previous generations of ethnic migrants because late 20th Century telecommunications advances and cheap travel allow for 'a new type of hyper-connectivity' between diasporas and their home communities"[19].

Citizen and Citizenship, and Some Basic Principles in the Field of Citizenship

1. Citizen and Citizenship

A state establishment, according to JJ Rousseau's theory of State Sovereignty, happens because of a social contract or agreement within the society[20]—there must be three elements to such a circumstance, namely the state must have a certain area (*staatsgebied*), a particular organization, and it must have citizens (*personengebied*)[21]. Citizens are collectively to be one element[22] or to be one of the essential elements[23] or an important element in the process of establishing of a state. Thus, a country might not

[17] Gabriel Sheffer, *Diaspora Politics: At Home Abroad,* Cambridge: Cambridge University Press, 2003, p. 9.
[18] "Dubes Indonesia Untuk AS ...", *op. cit.*; dan "Potensi ...", *op. cit.*
[19] Carment and Bercuson as cited by Rima Berns-McGown, "*Redefining "diaspora", The Challenge of Connection and Inclusion*", 63 *International Journal* 3 2007-2008, available at HEINONLINE (http://heinonline.org) (last updated Feb 5, 2014, 21:38:59).
[20] See F. Isjwara, *Pengantar Ilmu Politik*, Bandung: Penerbit Dhiwantara, 1964, p.109-113
[21] Sudargo Gautama, *Warga Negara dan Orang Asing*, Bandung: Alumni, 1987, p. 4.
[22] RG Kartasapoetra, *Sistematika Hukum Tata Negara,* Jakarta: Bina Aksara, 1987, p. 211.
[23] B. Hestu Cipto Handoyo, *Hukum Tata Negara, Kewarganegaraan dan Hak Asasi Manusia (Memahami Proses Konsolidasi Sistem Demokrasi di Indonesia)*, Yogyakarta: Universitas Atma Jaya Yogyakarta, 2003, p. 235.

be established without people to become its citizens. It is expressly stated in Article 1 of The Montevideo Convention 1933: On the Rights and Duties of States that "the State as a person of International Law should possess the following qualifications: a permanent population, a defined territory, a government, and a capacity to enter into relations with other states".

Based on the quotation above it is clear that citizens are considered one of the pillars of a state beside territory and government.

A citizen is a full member of a state. As a member of a state, a citizen has an important and special position towards his country; he or she has a relationship or legal ties with his or her country. This is called citizenship, nationality or membership of a state. In such a relationship or bond, there are reciprocal rights and obligations between the citizens and their state. On one hand, every citizen has the right to obtain protection from the state in any form and anywhere, but on the other hand the citizen must remain loyal to the state and obey the laws of that state. Meanwhile, the state is obliged to provide welfare and protection to its citizens as an implementation of human rights. Thus, the function of the citizenship status is to provide a connection between a state and its citizens through various rights and obligations possessed by both the state and its citizens[24].

By having a the status of citizenship to a certain state, an individual will be subject to "juridical consequences", which include the fields of Private International Law, Law of Kinship, and Public Law.

In International Private Law, the *nationaliteit principle* (nationality principle) states that the legal status of a citizen in terms of rights and obligations will always be attached wherever he is. Therefore, he will always get protection from his state by invoking National Law wherever he is[25]. In Legal Kinship, citizenship status will have juridical consequences in the form

[24] See Koerniatmanto Soetoprawiro, "Asas-Asas Hukum Kewarganegaraan", in Koerniatmanto Soetoprawiro (*Ed.*: A. Mustika W), *Hukum Kewarganegaraan dan Keimigrasian Indonesia*, Jakarta: PT Gramedia Pustaka Utama, 1994, p. 9.

[25] Nationality Principle is difficult to implement to the citizen facing legal problems because in International Law there is also "domicile principle" stating that legal status, rights and obligations of a citizen is determined by the law where he lives. See B. Hestu Cipto Handoyo, *Hukum Tata Negara Indonesia*, *Menuju Konsolidasi Sistem* Demokrasi, Yogyakarta: Penerbit Universitas Atma Jaya Yogyakarta, 2009, p. 357-360; & Winarno, *Kewarganegaraan Indonesia Dari Sosiologis Menuju Yuridis*, Bandung: Penerbit Alfabeta, 2009, pp. 64-66.

of an affirmation of the citizenship status of children, which will result in a legal certainty particularly in relation to rights and obligations between parents and their children, such as inheritance, custody and guardianship. Meanwhile, in Public Law, citizenship status provides proof of citizenship to a state. Therefore, the state has an obligation to protect the citizen, but, in return, he should be faithful, submissive, and obedient to his state[26].

2. Some Basic Principles in the Field of Citizenship

According to Article 1 of the Hague Convention of 1930, every state has the absolute right to determine who may be members or citizens, but this absolute right is limited by some general principles:

1. must not be contrary to international conventions;
2. must not be contrary to international practices, and
3. must not be contrary to the common law principles internationally applied in determining citizenship[27].

Based on these provisions, each state has freedom and sovereignty to pass various regulations governing citizenship; in this case every state has freedom to determine an individual's citizenship. No country has the rights to regulate the citizenship matters of other countries[28].

With regards to determining the citizenship of children, there are two principles, namely *ius sanguinis*, the principle of descent, and *jus soli*, the principle of place of birth.

In practice there are states that apply only one of the two principles and states that simultaneously apply both principles with priority to one of them. This is done to avoid a-patride, the occurence of a person with no citizenship).

On the other hand, as a result of applying the principle of place-of-birth differently in different states when determining citizenship, *bi-patride*, the

[26] See B. Hestu Cipto Handoyo, *Hukum ...* , 2009, *loc.cit.*; & Winarno, *Kewarganegaraan ...* , *loc.cit.*
[27] B. Hestu Cipto Handoyo, *ibid.*, p. 356; & Sudargo Gautama, *op.cit.*, p. 7.
[28] See BP Paulus, *Kewarganegaraan RI Ditinjau Dari UUD 1945, Khususnya Kewarganegaraan Peranakan Tionghoa*, Jakarta: Pradnya Paramita, 1983, p. 48.

occurrence of a person with dual citizenship, or even *multi-patride,* where there are more than two citizenships, are possible.

Every state should consider Article 5 of the Universal Declaration of Human Rights, which states, "Everyone has the right to citizenship, and no one shall be arbitrarily deprived of his citizenship nor denied the right to replace his citizenship".

In a state there are generally "two kinds of citizens". The first is a citizen by operation of law, citizens who acquire their citizenship through passive *stelsel,* i.e. by a regulation enactment or due to the occurrence of certain legal event. In this case, the individual is automatically made a citizen of a certain state without taking any action at all. Such citizens do not require proof of citizenship, such as a letter stating citizenship to a certain state. The second is a citizen by registration, citizens who acquire their citizenship through active *stelsel* meaning that they undergo a registration procedure that has been determined by the state in question. These citizens require a letter of proof of citizenship[29].

There are "two types of rights associated with both stelsels", namely, (a) the right to accept citizenship offered by a certain state (in active *stelsel*), and (b) the right to refuse citizenship offered by a certain state (in passive *stelsel*)[30].

In practice, there are currently five ways to earn citizenship status:[31] (a) citizenship by birth; (b) citizenship by descent; (c) citizenship by naturalization, whereby a foreign wilfully applies to become a citizen of a state by fulfilling given requirements; (d) citizenship by registration (naturalization of foreigners who have been deemed to fulfil certain conditions through simpler registration administrative procedure rather than complicated naturalization procedures; and (e) citizenship by incorporation of territory.

[29] See CST Kansil, *Hukum Kewarganegaraan Republik Indonesia*, Jakarta: Sinar Grafika, 1992, p. 95; & BP Paulus, *op. cit.*, p. 53.
[30] See CST Kansil, *ibid.*, p. 11-12; & Koerniatmanto Soetoprawiro, *op.cit*, p. 11.
[31] Jimly Assiddiqie, *Pengantar Ilmu Hukum Tata Negara Jilid II*, Jakarta: Konstitusi Press, 2006, p. 146-149.

Meanwhile, there are three ways to lose citizenship[32], namely: (1) renunciation, whereby an individual holding dual citizenship chooses to give up the status of citizen to one of the two countries, (2) termination, which is a legal action conducted by a State to terminate the citizenship of an individual who has gained citizenship to another country, and (3) deprivation, the enforced revocation, termination, or dismissal of citizenship status pursuant to an order from the appropriate authority because there is an error or violation proven in the acquisition of citizenship or because the citizen in question is proven unfaithful or traitorous to the state and its constitution.

Dual Citizenship and Flexible Citizenship

Citizenship defines a person's legal status as a member of a nation-state. In recent years, globalization has caused the international community to adopt a more accommodating attitude towards dual citizenship[33].

Globalization has changed the meaning and significance of citizenship. Traditionally, it signified identification with and allegiance to a nation state. Yet, changes over the past two decades mean that recognizing dual citizenship has become a practical reality. Thus, as people increasingly identify with and become members of more than one nation-state, there has been growing acceptance of multi-citizenship[34].

Theoretically, dual citizenship (*bi-patride*) could occur as a result of the aforementioned principle of place-of-birth (*jus soli)* being differently implemented in different states. For example, a child of an Indonesian couple born in a country that adheres to *ius soli* will have dual citizenship because the parents' state of origin, Indonesia, adheres to *ius sanguinis,* the principle of decent.

In line with the potential magnitude of the various diaspora expanding worldwide, a flexible approach to citizenship is developing.

[32] Jimly Assiddiqie, *ibid.*, pp. 150-151.
[33] Stephanie Wang, "Does The Nationality Law, And Its Prohibition of Dual Nationality, Need Reform ..., available at HEINONLINE (http://heinonline.org)(last updated Feb 5 21:42:34 2014).
[34] *Ibid.*, p. 327.

Flexible citizenship is a form of citizenship that redefines the traditional view of citizenship based on political rights and participation within a nation state. Flexible citizenship, which is arguably a response to economic concerns of globalization, has made the major contributing factor to citizenship people's choice, whereby individuals have the power to choose their citizenship as opposed to citizenship being based on an allegiance to a country's government. In light of this, it is reasonable to assume that people will choose their citizenship based on economic reasoning rather than political rights or participation within the nation states in which they reside. Thus, flexible citizenship is an ideology that asserts that economic reasons are the primary reason people choose their citizenship as opposed to identifying with a community based on shared political rights[35].

In accordance with the economic successes achieved by diaspora, governments in some countries offer open citizenship (flexible citizenship) to individuals who are considered to provide economic benefits to those states. For those expatriates occupying positions of managers, technocrats, and professionals, flexible citizenship could provide a strategy for investing in overseas companies[36].

India provides a strong example. India's Citizenship Act of 1955 prohibited dual nationality or citizenship. In 2003, this law was reformed to recognize the category "Overseas Citizen of India", which covered expatriates in 16 developed countries, and in 2005, eligibility was expanded to cover instances of the Indian diaspora in all countries. The overseas citizen is entitled to unlimited entry and stay in India, as well as the same economic rights and access to education as Indian citizens. This was done because the Indian government wanted to utilize the expertise and capital of the Indian diaspora in the country's own development. The Indian diaspora comprises approximately 25 million Indian expatriates, spread across 130 countries with a combined income of USD 160 billion, equal to one third of India's GDP[37].

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[35] Aihwa Ong, "Flexible Citizenship among Chinese Cosmopolitans" (http://books.google.co.uk/books?id=4EmqLCWUFvEC&jpg=PA134&ots=rRnwH3i4U3&dq=a) in Pheng Cheah & Bruce Robbins, *Cosmopolitics: Thinking and Feeling Beyond The Nation*, (Minneapolis: University of Minnesota Press, 2011), p. 137-139, in Cntras *et. al.*, "Flexible Citizenship", available at http://en.wikipedia.org/w/index.php?oldid=539481010 (last updated Feb 1, 2014).

[36] Aihwa Ong, *Flexible Citizenship: The Cultural Logics of Transnationality*, London: Duke University Press, 1999, as cited by Ari Setyanigrum, *op. cit.*, p. 190-191.

[37] Stephanie Wang, *op. cit.*; & "Diaspora Tuntut Dwi Warga Negara: Perubahan Disarankan Diperjuangkan Lewat UU", Harian Kompas (Jakarta), (August 19, 2013), p. 9.

Law on Citizenship of the Republic of Indonesia

1. The Act Nr. 12/2006 on Citizenship of the Republic of Indonesia

To regulate citizens as desired by Article 26 of the 1945 Constitution, Act Nr. 12/2006 on Citizenship of the Republic of Indonesia was published. This Act repealed Act Nr. 62/1958 on Citizenship of the Republic of Indonesia.

According to Article 26 paragraph (1) of the 1945 Constitution and Article 2 of Act Nr. 12/2006, "those becoming Indonesian citizens are the indigenous Indonesians and people of other nations who are legally determined as citizens".

Based on the provisions within it can be seen that Act Nr. 12/2006 adheres to the following principles:

a. The principle of *ius sanguinis*. The implementation of this principle can be seen from the provision of Article 4 (b–h) of Act Nr.12/2006.
b. The principle of *ius soli* on a limited basis; by Indonesian citizenship law, *jus soli* applies only to children who are born in Indonesian territory and whose parents' citizenship status is not clear, newborn children found in Indonesia whose parents are unknown, or children born in Indonesia whose parents do not have citizenship or their existence is unknown as stipulated in Article 1 (i-k).
c. Single citizenship principle, which limits individuals to only one citizenship, and
d. Limited dual citizenship principle, which allows dual citizenship for children in accordance with the provisions stipulated in the Act Nr. 12/2006. According to Article 6 paragraph (1) of Act Nr. 12/2006, "when the Indonesian citizenship status for a child as referred to Article 4 c, d, h, i, and Article 5 of the Act Nr. 12/2006 makes the child have dual citizenship, then after the age of 18 years or else upon marriage, the child must declare to choose one citizenship".

The principles of limited *ius soli* and limited dual citizenship, as stipulated in Act Nr. 12/2006, define who can be a citizen of the Republic of Indonesia in accordance with the Pancasila and the 1945 Constitution do not only

exercise the state's absolute right to determine its citizens, as specified in Article 1 of the Hague Convention of 1930, but also respect the right of every person with regard to his or her citizenship status, as regulated in Article 5 of the Universal Declaration of Human Rights (UDHR)[38]. Everyone's right to citizenship status and everyone's right to choose citizenship are recognized by Article 28D paragraph (4) and Article 28E (1) of the 1945 Constitution of the Republic of Indonesia, and Article 26 and 53 of the Act Nr. 39/1999 on Human Rights.

2. The Citizenship Status of Ethnic Chinese in Indonesia

One of the important, fundamental, and revolutionary changes of the 1945 Constitution is the elimination of the term "indigenous Indonesian" for the candidates of President and Vice President. According to Article 6 paragraph (1) of the 1945 Constitution, "the candidate of *President* and Vice President shall be Indonesian citizens since their birth and never receive other citizenships by their own will.....".

The provision is then used as a reference or guidance in interpreting the term "indigenous" found in Article 26 paragraph (1) of the 1945 Constitution and Article 2 of Act Nr. 12/2006 regulating anyone who is to be an Indonesian citizen. Thus, "anyone who is born in Indonesia and never acquires another citizenship by his own will is an Indonesian citizen". This solves problem of citizenship for individuals of Chinese ethnicity in Indonesia as a person of Chinese decent born in Indonesia who never acquires another citizenship by his or her own will is recognised as an Indonesian citizen.

Based on the interpretation of the term "indigenous", the existence of Chinese ethnicity in Indonesia and their citizenship status based on the Act Nr. 3/1946 saying that they were citizens by operation of law and then got a confirmation by Act Nr. 62/1958 became more obvious and strong. In addition, there was no longer any obligation for the Indonesian Chinese to possess proof of citizenship, which is known by the name of a Letter

[38] B. Hestu Cipto Handoyo, "Kewarganegaraan", in B. Hestu Cipto Handoyo, *Hukum Tata Negara, ..., op. cit.*, p. 239-240; & Bagir Manan, "Pendahuluan", in Bagir Manan (*Ed.*: Ni'matul Huda), *Hukum Kewarganegaraan Indonesia Dalam UU No. 12 Tahun 2006*, Yogyakarta: FH UII Press, 2009, p. 1.

of Proof of Indonesian Citizenship (*Surat Bukti Kewarganegaraan Republik Indonesia*/SBKRI). In accordance with the provision of Article 18 paragraph (1) of Act Nr. 12/2006, valid evidence of Indonesian citizenship is only given to those who acquire citizenship through naturalization.

3. Ways to Obtain Indonesian Citizenship

In accordance with the provision of Article 26 paragraph (1) of the 1945 Constitution and Article 2 of Act Nr. 12/2006, Article 4 point a-m, and Article 5 of Act Nr. 12/2006, an Indonesian Citizen is defined as follows:

a. Any person who, by regulation and/or based on agreement between the Government of the Republic of Indonesia and other countries before this Act applies, has become a citizen of Indonesia;
b. Any child born from a legitimate marriage of a father and mother who are both Indonesian citizens;
c. Any child born from a legitimate marriage of a father who is an Indonesian citizen and a mother who is a foreign national;
d. Any child born from a legitimate marriage of a father who is a foreign national and a mother who is an Indonesian citizen;
e. Any child born from a legitimate marriage of a mother who is an Indonesian citizen and a father who does not hold any citizenship or whose country of origin does not by law grant citizenship to the child;
f. Any child from a legitimate marriage who is born within a period of 300 days after the death of the child's father;
g. Any child born outside a legitimate marriage to a mother who is an Indonesian citizen;
h. Any child born outside a legitimate marriage to a mother who is a foreign national and recognized by a father who is an Indonesian citizen father, where such recognition is given before the child reaches 18 years of age or marries;
i. Any child born in the territory of the Republic of Indonesia to a father and mother of unclear citizenship at the time of birth;
j. Any newborn child found in the territory of the Republic of Indonesia whose father and mother are unknown;

k. Any child born in the territory of the Republic of Indonesia whose father and mother do not have citizenship or whose father's and mother's whereabouts is unknown;
l. Any child born outside the territory of the Republic of Indonesia who has been granted citizenship because of the provisions of the country where the child was born;
m. Any child of a father or mother who has been granted Indonesian citizenship and who has then died before the oath or declaration of allegiance;
n. Any child of an Indonesian citizen born outside a legitimate marriage, have not aged 18 years or unmarried which legally recognized by a foreign citizen father; and
o. Any child with Indonesian citizenship who is, before the age of 5 years, legally adopted by a foreign citizen based on a court warrant.

In addition to citizenship by operation of law or citizen obtained through passive stelsel as described above, in accordance with the provision of Article 26 paragraph (1) of the 1945 Constitution and Article 2 of Act Nr. 12/2006, "people of other nations"/ foreign people / foreigners who meet the specified requirements can obtain Indonesian citizenship (1) through naturalization by written application to the President through the Minister of Law and Human Rights (Articles 8–18 of Act Nr. 12/2006, and Article 2, 3, 6-10, and 12 of Government Regulation Nr. 2/2007 regarding the Procedures for Acquiring, Losing, Cancellation of, and Regaining of Indonesian Citizenship); (2) by being legally married to an Indonesian citizen and having lived in Indonesia for at least 5 consecutive years or 10 unconsecutive years (Article 19 of Act Nr. 12/2006 and Article 67 Government Regulation Nr. 2/ 2007); and (3) directly form the President after obtaining the consideration of the Indonesian Parliament as an award for contribution to the Republic of Indonesia or other reasons of state interest (Article 20 of Act Nr. 12/2006 and Government Regulation Nr. 2/2007).

According to the Explanation of Article 20 of Act Nr. 12/2006, (1) what is meant by "foreigners who have rendered to the Republic of

Indonesia" are foreigners who through exceptional achievement in the field of humanitarianism, science and technology, culture, environment and/or sports have provided progress and glory for Indonesia; and (2) What is meant by "foreigners who are given citizenship for the reason of state interest" are foreigners who have given an outstanding contribution to the sovereignty of the country and thus increased progress, particularly in the field of Indonesian economy.

From the previous explanation, it can be seen that Indonesia is implementing a closed citizenship law policy, because anyone who can be an Indonesian citizen has already clearly defined in Article 26 paragraph (1) of the 1945 Constituion, and Article 2 and Article 4 of Act Nr. 12/2006. In addition, although "people of other nations" / foreign nationals / foreigners can obtain Indonesian citizenship based on the procedures and requirements specified in Articles 8–22 of Act Nr. 12/2006 and Government Regulation Nr. 2/2007, it is stated ephatically that "granting Indonesian citizenship should not result in dual citizenship". Thus Indonesia clearly does not adhere to the principle of dual citizenship.

Constitutional Review

In accordance with the provisions of Article 1 paragraph (2) and paragraph (3) of the 1945 Constitution, Indonesia is a state of law (negara hukum) that embraces the supremacy of the land.[39] Thus all actions of state officials and citizens must comply with and must not be contradictory to the constitution including the making of regulations.

Related to the making of regulations, such as acts, Constitutional Law provides two mechanisms for acts made by Parliament and the President and approved by Parliament, signed by the President, and published in the state gazette (Article 5 and Article 20 of the 1945 Constitution) vertically consistent with (not contradictory to) the 1945 Constitution, namely: (1) National Legislation

[39] The term "negara hukum" is usually used as the Indonesian translation of the terms rule of law or rechsstaat or etat de droit. But in the context of the sentence "..., Indonesia adalah negara hukum yang menganut supremasi konstitusi", it will be unappropriate if using those terms. Therefore the term used in this context is "state law".

Program (Program Legislasi Nasional / PROLEGNAS); and (2) Constitutional Review by the Constitutional Court.

According to Act Nr. 12/2011 on the Establishment of Legislations, planning for the preparation of the Act is done in PROLEGNAS, which contains the program of legislation making with the name of the Act Draft, subject matters, and its links with other regulations.

Where a certain Act is contradictory to the 1945 Constitution, the Constitutional Court can conduct a constitutional review. For that, there must be a written application—in Indonesian accompanied by evidence supporting the application—by the applicant or their proxies to the Constitutional Court. The applicant is a party that concludes that rights and/or constitutional rights have been harmed by the enactment of an Act, namely: (1) an individual Indonesian citizen; (2) the unity of indigenous communities, if still existing, and in accordance with the development of the society and the principles of the Unitary State of the Republic of Indonesia regulated in the Act; (3) public or private legal entities; or (4) state organs (Article 29, 31, and 51 Act Nr. 24/2003 regarding the Constitutional Court as amended by Act Nr. 8/2011 on the Amendment of Act Nr. 24/2003 regarding the Constitutional Court).

From the description above, it is clear that parties who can apply individually to the Constitutional Court are Indonesian citizens whose constitutional rights have been harmed by the enactment of an Act.

Permanent Residence

Permanent Residence is a permit granted to foreign nationals retaining their own national passports to reside and settle in the region of Indonesia as Indonesian people. Everything related to Permanent Residence in the Indonesian region is regulated by Article 48, Article 54, Article 55, Article 56 and Articles 59–65 of Act Nr. 6/2011 on Immigration (replacing Act Nr. 9/1992 on Immigration) and Articles 152–157 of Government Regulation Nr. 31/2011 on the Implementation of Act Nr. 6/2011 on Immigration.

These two regulations state that Permanent Residence can be granted to any individual who once held dual citizenship but who, at the time he or she turned 18 years of age, chose foreign nationality and to any Indonesian citizen who has lost his or her Indonesian citizenship, subject to the relevant laws.

Furthermore, Permanent Residence can also be granted to foreign nationals holding limited residence permits, such as clergy, workers, investors, and the elderly, after they have stayed in Indonesia for three consecutive years and have signed an Integration Statement addressed to the Indonesian government; families of mixed marriage after two years of marriage who have signed an Integration Statement addressed to the Indonesian government; husbands, wives, and/or children of foreign nationals holding Permanent Residence, as well as ex-Indonesian citizens and individuals who held dual citizenship before choosing foreign nationality upon turning 18.

Permanent Residence is valid for five years and can be extended for an indefinite period as long as the permit is not canceled. Foreign nationals staying in Indonesia should have guarantors of their existence, though foreign nationals who are legally married to Indonesian citizens do not need a guarantor.

Foreign nationals holding Permanent Residence are permitted seek employment to meet their needs of life. In accordance with Article 42 paragraph (4) of Act Nr. 13/2003 on Labor, foreign nationals holding Permanent Residence are allowed to work in Indonesia and to occupy certain positions for a determined period of time, and are therein named foreign workers (foreign nationals holding visas and permitted to work in Indonesia)[40].

To obtain Permanent Residence, a foreigner or guarantor can apply to the Chief of Immigration Office or appointed immigration officers whose jurisdiction covers the foreign national's residence, by filling out an application and attaching

[40] This is regulated by the Decree of Indonesian Minister of Labor and Transmigration Nr. KEP. 247/MEN/X/2011, the Decree of Indonesian Minister of Labor and Transmigration Nr. 462/2012, the Decree of Indonesian Minister of Labor and Transmigration Nr. 463/2012, the Decree of Indonesian Minister of Labor and Transmigration Nr. 464/2012, the Decree of Indonesian Minister of Labor and Transmigration Nr. 707/2012, the Decree of Indonesian Minister of Labor and Transmigration Nr. 708/2012, the Decree of Indonesian Minister of Labor and Transmigration Nr. 354/2013, the Decree of Indonesian Minister of Labor and Transmigration Nr. 355/2013, the Decree of Indonesian Minister of Labor and Transmigration Nr. 356/2013, the Decree of Indonesian Minister of Labor and Transmigration No. 357/2013, the Decree of Indonesian Minister of Labor and Transmigration Nr. 358/2013, and the Decree of Indonesian Minister of Labor and Transmigration Nr. 359/2013.

the required articles as specified in Article 153 of Governmental Regulation Nr. 31/2013.

III. CONCLUSION

Based on the description of Permanent Residence above, it can be seen that Indonesian Chinese expatriates who wish to obtain Permanent Residence in Indonesia will not face any trouble as long as they apply, providing the required articles and attachments, to the relevant officer .

From the above description of how to obtain Indonesian citizenship, it is clear that Indonesia implements a closed citizenship law policy, because anyone who can be an Indonesian citizen has already been clearly defined in Article 26 paragraph (1) of the 1945 Constitution, and Article 2 and Article 4 of Act Nr. 12/2006. In addition, although "people of other nations" / foreign citizens / foreign nationals can obtain Indonesian citizenship based on the procedures and requirements specified in Articles 8–22 of Act Nr. 12/2006 and Government Regulation Nr. 2/2007, it is stated ephatically that "granting Indonesian citizenship should not result in dual citizenship". Thus the desire of Indonesian Chinese expatriates holding foreign status to obtain Indonesian citizenship without losing their foreign nationalities can not be fulfilled due to the policy of citizenship law adopted by Indonesia that does not recognize dual citizenship.

With regard to the desire of Indonesian Chinese expatriates holding foreign citizenship to obtain Indonesian citizenship that results in dual citizenship, these individuals also can not apply to the Constitutional Court for constitutional review of Act Nr. 12/2006 on Citizenship of the Republic of Indonesia, because they have no legal standing, as defined by Article 51 of Act Nr. 24/2003 regarding the Constitutional Court, amended by Act Nr. 8/2011 on the Amendment of the Act Nr. 24/2003 regarding the Constitutional Court.

The only way that Indonesian Chinese expatriates holding foreign citizenship can obtain Indonesian citizenship without losing the foreign citizenship is by the recognition of the Principle of Dual Citizenship in the Indonesian citizenship law

policy through a legislative review, such as amendment of the relevant Act (in this case, Act Nr. 12/2006 regarding the Citizenship of the Republic of Indonesia) by Parliament. Therefore the Government of the Republic of Indonesia must be absolutely sure and can assure the Parliament that Indonesia really needs the Indonesian Chinese Diaspora, because they have great potential and can play an important role in Indonesia's development, both in terms of the quality of the human resources that have been proven and tested abroad, and the capital that can be invested in Indonesia, or because of the outstanding achievement in the field of humanity, science and technology, cultural, environment, and sports that provides progress and glory for Indonesia, or because he has been assessed by the country and who have been given an outstanding contribution to the sovereignty of the country and to increase progress, particularly in the field of Indonesian economy.

Nevertheless, it should be seriously and deeply considered how the implementation of dual citizenship might impact national interests (from social, political, legal, and economic points of view). The consequence of citizenship status is loyalty to the country in question, and this means that dual citizenship would lead to division of loyalty, which is certainly loaded with conflict of interest. It should be remembered that Pancasila, the foundation of Indonesia's state identity, is a very specific ideology.

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2013.

The Role of the Indonesian Constitutional Court for An Effective Economic, Social and Cultural Rights Adjudication

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Abstract

The Indonesian Constitutional Court has played important roles and functions to protect and fulfill human rights in the Indonesian legal system including the economic, social and cultural rights through its legal power of judicial review. It affirms that the ecosoc rights are legal justiciable rights and they are parts of constitutional mandates. It means that decision on judicial reviews require State to behave in accordance to legal thresholds decided by the Court. Undoubtedly, compliance to the decisions will reveal undeniable facts for fulfilment of state conduct. However, it seems that there are still many considerations, emphasis and excuse to somehow reduce or ignore threshold of application of the Court decisions. Complexity of actors, institutions, authorities, level of implementation, and orientation of particular policies, programs, actions and funds reduces the thresholds.

Key words: justiciable rights, constitutional rights, constitutional mandates, and ecosoc rights

I. INTRODUCTION

It is valuable to note and to deeply review pattern of human rights protection and ejoyment in Indonesia since Indonesia has been actively and progresively committing to human rights standards with specific emphasis on the economic, social and cultural rights (the ecosoc rights) performed by the Indonesian

Constitutional Court (hereinafter the Court).[1] Human rights standards articulate that achievement on the ecosoc rights shall be achieved in accordance with constitutional mandates stipulated by Article 28. Meanwhile, use of power in terms of management of all available resources shall be directed to achieve results determined by that Article *per se*.

Thus, transparent asssessment of the progress and obligation to fulfill of the ecosoc rights can be revealed by means of monitoring state compliance toward the Court decisions through judicial review. State compliance indicates positive endeavour justifying value of state conduct. Novelty lies on fact that realization of the ecosoc rights through judicial reviews delivering another complex problems, challanges and opportunities on how State as the main duty bearer complies with decisions for their effective implementation guaranteeing right holders' justiciability in that sense.

In broader legal scenario, it is also important to note that Indonesia obliges to fulfill and to realize the ecosoc rights under scrutiny of international community. It is caused by the fact that Indonesia has committed to be bound by the International Covenent on Economic, Social and Cultural Rights since it was ratified by the Law Number 11 of 2005. Furthermore, in accordance to Article 7 (2) of the Law Number 39 of 1999 regarding Human Rights, it is crucial to argue that "all international law regarding human rights that have been accepted by Indonesia becoming the law of the land". Consequently, Indonesia has to implement the effectiveness principle. It requires that all provisions of human rights treaties or conventions 'be interpreted and applied so as to make [their] safeguards *practical and effective*'.[2] In this matter, the Court decisions on certain judicial reviews related to laws on the ecosoc rights, such as law on water resources, law on national education system and law on public health have their

[1] *The 1945 Indonesian Constitution* (Undang-Undang Dasar 1945) has been amended fourth times in the following sequences: first Amendment on 19 October 1999; second amendment on 18 August 2000; third Amendment on 10 November 2001 and the fourth amendment on 10 August 2002.

[2] See several legal jurisprudences for examples *Loizidou v Turkey* (Preliminary Objections), European Court of Human Rights (1995) Series A.No.310, 23 February 1995, para. 72; see also *Velasquez-Rodriquez* (Judgment), 29 July 1988, Inter American Court of Human Rights (1988) Series C. No.4, para 167; *Artico v Italy*, European Court of Human Rights (1980) Series A.No. 37, 16; A v UK (Application) No. 15599/1994, Report of 18 September 1997, para 48; see generally Human Rights Committee, General Comment No. 16; ICESCR, Committee, General Comment, No. 5, para 11 (1994).

legal relevance to monitor pattern of state compliance to international standards and principles on realization of the ecosoc rights in Indonesia.

A. Background

There has been many analyses of the role of the Court for economic, social and cultural rights approach and/or for advocacy and adjucitation strategies. Phillipa Venning, for example presents remarkable finding that the Court has been succesfully introduced "a strong judicially enforceable rights" for economic, social and cultural rights in Indonesia.[3] International references quoted by Diana Phillip for instance affirms this stance by stating that "right to water is an implicit but enforceable constitutional rights" within the Indonesian legal system.[4] In her view, enforceable constitutional rights specifically mean that in time of normal as well as in time of humanitarian crisis, State has the obligation to respect, protect and fulfill the human rights to water and held the responsibility of the Government as laid down in the Law on Water Resources must be interpreted in the light of the right to water.[5]

As a legal ratio, in international law, right to water constitute as a basic rights to which enjoyment of human rights depends on the fulfilment of this need. The 1989 Convention on the Right of the Child (CRC) under Article 24 (2) made it obligatory for 'state parties to take appropriate measures to combat disease and malnutrition through the provision of adequate and nutritious food and clean drinking water'.[6] In simple terms, the Court has contributed to safeguard justiciability through judicial review mechanism for a more effective ecosoc rights in Indonesia in the existing laws that may breach or may be inconsistant with the Constitution.[7]

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[3] Phillipa Venning, "Determination of Economic, Social and Cultural Rights by the Indonesian Contitutional Court", *Australia Journal of Asian Law, Vol. 10, No. 1*, 2008 as excerted by Konsitusi, Number 88, June 2014, p. 74-77.

[4] Diana Phillip, "Humanitarian Assistance and the Right to Water: An ASEAN Region Perspective", in Anderj Zwitter, Chirstopher K. Lamont, Hans Joachim Heitze and Joost Herman, *Humanitarian Action: Global, Regional and Domestic Legal Responses*, Cambridge: Cambridge University Press, 2015, pp. 323-324.

[5] *Ibid*. See also the ICC decision on 19 July 2005, Putusan PUU/II/2004 tentang Uji Materi Undang-undnag Nomor 7 Tahun 2004 Tentang Sumber Daya Air.

[6] Markus Burgstaller, *Theories of Compliance with International Law*, Martinus Nijhoff Publisher, 2005, p. 85 and Andrew Guzman, *How International Law Works, A Rational Choice Theory*, Oxford University Press, 2008, p. 22.

[7] Lufthfi Widagdo Eddyono and Mardian Wibowo, "The Fist Ten Year of the Constitutional Court of Indonesia: The Establishment of the Principle of Equality and the Prohibition of Discrimination", *The 1st Summer School of the Association of Asian Constitutional Court and Equivalent Institutions*, Ankara, 6-13 October 2013 , p. 3-4.

In line with the aforementioned analysis, the Court to some extent has developed certain objectively verified indicators (OVIs);[8] orientation of the economic, social and cultural rights fulfilment and/or transparent assessment of the progress;[9] and last but not least certain role and function of the duty bearer *vs.* rights holders (individual and group of individual) within the Indonesian context and perspective for better fulfilment of the ecosoc rights. It thus has positive outcomes in terms of the determination of availibility, acceesibility, acceptability and adaptability indicators for existence of available recources.[10] Nevertheless, it has also widened gaps between normativity and empirical facts; increased legal biases; sharpened overlapping institutions and emerging conflict of norms for the enjoyment and fulfilment of the ecosoc rights.[11] They are most common paradigms reducing effective implementation of the ecosoc' policies, programs, actions and funds in their respective areas, scopes, and functions within the Indonesian legal system.[12]

Needless to say that as the sole gurdian of the Constitution, the Court plays functions as the guardian of the democracy, the protector of the citizen's constitutional rights, and the protector of the human rights.[13] Consequently, the Court guarantees right holders' legal expectation for better enjoyment for the constitutional economic, social and cultural rights. In this scheme, the Court has paved a way to determine thresholds for the ecosoc realization or fulfilment that sholud be fulfilled by the Government when it introduces law, policies, programs, actions and funds. This thresholds represent Constitutional mandates that require Government to behave in certain way to achieve them

[8] Katarina Tomasevski, "Indicators", in Asbjorn Eide (et.all), *Economic, Social and Cultural Rights, A Textbook*, 1995, p. 390.

[9] UNICEF, *A Human Rights Approach to UNICEF Programming for Children and Women: What It is, And Some Changes It Will Bring*, 17 April 1998 and compare with The World Conference on Human Rights: Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, Part I, para 5.

[10] Preamble of the Declaration on the Right to Development, General Assembly Resolution 41/128 of 4 December 1986, http://www.unhchr.ch/html.menu3/b/74.htm; Manfred Nowak, "The Right to Education" in Asbjorn Eide (et.all), *Economic, Social and Cultural Rights, A Textbook*, 1995, p. 196; and The Committee on Economic, Social and Cultural Rights General Comment 13, *The Right to Education (Art. 13)*, 08/12/99, E/C.12/1999/10, CESCR, 8 December 1999, para 1.

[11] Heribertus Jaka Triyana, "The Implementation of the International Norms on Disaster Response in Indonesia", *KLRI Journal of Law and Legislation, Volume 3, Number 1, Korean Legislative Research Institute*, 2013, p. 210-222.

[12] Human Rights Committee, General Comment 3, Article 2, para 1, *Implementation at the national level* (Thirteenth session, 1981), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HR1/GEN/1/Rev.1 at 4 (1994), and General Comment, Human Rights Committee, General comment 13, Article 14, para 3 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 14 (1994), University of Minnesota Human Rights Library, http://www1.umn.edu/humanrts-/gencomm/hrcom13.htm, visited on 15 April 2003.

[13] Jimly Asshiddigie, *Menuju Negara Hukum yang Demokratis*, Jakarta: Setjen Kepaniteraan MK RI, 2008, p.39-40.

and they have no other implied means to interpret. Compliance in terms of state behaviour reveals a fact that ecosoc rights are really justiciable rights under the Constitustion. Consequently, legal expectation of the rights holders may be advocated and adjudicated, so mechanism of checks and balances reduce possible abuse of power, increase public participation and guarantee enjoyment of development results to all citizens.

B. Questions

Based on the aforementioned analysis, this article formulates problem as follows: "to what extent can the Court decisions be affectively implemented in order to fulfill state conduct as required by the effective implementation of the ecosoc rights within the Indonesian legal system?'

II. DISCUSSION

In order to answer the aforementioned problem, this article will be arranged as follows. First, it will discuss judicial mechanism of the court toward adjudication of the ecosoc rights. This section draws legal rationals on the constitutional mandates and functions of the Court as the guardian of the Constitution as well as protector of human rights. Secondly, it will focuses on State compliance toward the Court decisions on the ecosoc rights. This section will analyse State conduct in terms of changes of particular policies, programs, actions and funds enforcing the Court decisions on certain ecosoc rights. It will focuses on water, education and health issues as forms of the ecosoc rights. Increasing quality and quantity of availibility, accessibility, adaptability and acceptability will be concluded to justify elemen of state compliance to the Court decision. Finally, it will propose means of legal advocacy to effectively implement the Court decisions on the ecosoc rights as a legal justiciable rights under the Indonesian Constitution in the future.

A. The Court's Authority to Adjudicate the Ecosoc Rights In the Indonesian Legal System

Under Articles 56 and 57 of the Law Number 24 of 2003 regarding the Constitutional Court ammended by the Law Number 8 of 2011 regarding the

Amendment of the Law Number 24 of 2003 regarding the Constitutional Court, the Court may dismiss, grant and reject judicial reviews lodged before it. Until now, it has received individual as well as groups of individual (legal entities) who claims that their ecosoc rights might have been violated by existing laws. To lodge a judicial review, *ratio personae* and *ratio matriae* shall be cummulatively fulfilled. They may determine different results for human rights advocacy as well as human rights adjudication particularly for fulfilment of the ecosoc rights as determined in the Constitution. These forms of decisions are in line with authority of the Court to examine at the fisrt and final level to judicial review the law against the Constitution; to decide dispute over the authority of state institution whose authority is granted by the Constitution, to decide dissolution of political party; and to decide dispute over result of general election. Furthermore, it has obligation to decide over opinion by the House of Representatives regarding Constitutional allegation committed by the President and/or by the Vice President.

Eventhough they have different effects in nature of human rights advocacy, they complement each other since they can be used to increase accessibility and availibility of resources and to improve acceptability and adaptability of certain duty bearers and rights holders of the ecosoc rights in Indonesia.[14] Public awareness and care have become daily discussion regarding result on certain judicial review decision. Judicial reviews possessed by the Court, as Phillipa Venning argues, could be perceived in two modalities, i.e. as reductionist and as substance approaches.[15] The former qualifies that any efforts for new ecosoc advocacy will have their relevance for improvement and enjoyment of the ecosoc rights in their complexity of performance carried out by states in its simplest means directed to certain targeted groups or results.[16] Meanwhile, the latter touches its relevance on a fact that judicial review decision may have different effects for complex inter relationships among actors, stakeholders, resource

[14] Bennedotto Conforti, "National Court and the International Law of Human Rights", in Bennedotto Conforti and Francesco Francioni (eds), *Enforcing International Human Rights in Domestic Court*, 1997, p. 3; and Henry J Steiner and Phillip Alston, *International Human Rights in Context Law Politics Morals*, Oxford 2nd ed, 2000, pp. 592-920.

[15] Mohamed M. El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice*, Martinus Nijhoff Publishers, 2008, pp. 3-5.

[16] John Tobin, "Seeking Clarity in Relation to the Principle of Complementarity: Reflection on The Recent Contributions of Some International Bodies," *Melbourne Jounal of International Law, Volume 8*, 2007.

providers and their roles and functions for the ecosoc rights enjoyment since the Court decision strenghtens concepts of invisibility and interdependence of rights.[17] Viewing the Court decisions to any Laws relevant to the ecosoc rights will give fruitful framework of legal analysis based on those two modalities in Indonesia.

As a basic legal concept, judicial review performs as legal tool to reflect will of people for their active participation in the decision making process as well as in its implementation regarding certain acts, policies, programs, actions and funds related to the fulfilment of the ecosoc rights. Judicial reviews is one of the ultimate means to sustain right to development as part of human rights in the Indonesian context and perspective.[18] Thus, it can be understood that judicial review higlights relevance of the human right based approach for better enjoyment of the ecosoc rights in its practical way. In this context, the United Nations High Commissioner on Human Rights (UNHCHR) defines the human rights-based approach as "a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promote and protect human rights".[19] It means that judicial review opens greater chance and more constructive engagement for justiciability of the ecosoc rights possessed by individual and groups of individuals. They are such as minority, vulnerable and marginalised groups, disabled and lesbian, gay, biseksual and transgenders.[20]

Viewed from the legal point of view, the right to development is accepted as part of human rights to which Indonesia is also obliged to, from which the human rights based-approach is developed to empower certain ecosoc rights

[17] Jann K. Kleffner, 2003, "The Impact of Complementarity on National Implementation of Substantive International Criminal Law, *Journal of International Criminal Justice, Vol. 1,* pp. 88-89; and K.L. Doherty and Timothy L.H. McCormack, "Complementarity as a Catalyst for Comprehensive Domestic Penal Legislation', *5 U.C Davis Journal of International Law and Policy*, 1999, pp. 147-180.

[18] Asshiddiqqi, J. "*Otonomi Daerah dan Peluang Investasi*, Paper on Government Conference on Peluang Investasi dan Otonomi Daerah", September 30th 2000, Jakarta, pp. 1-24; and Samhadi. "Pemberantasan Flu Burung Terganjal Koordinasi', Kompas Cyber Media, <http://www.kompas.com/kompas-cetak/0510/01/Fokus/2092258.htm>; Susiloadi, P. "Konsep dan Isu Desentralisasi Dalam Manajemen Pemerintahan di Indonesia", *Spirit Publik* , Volume 3, Number 2 October 2007, p. 7-8; and Christanto, J. "Otonomi Daerah dan Skenario Indonesia 2010 Dalam Konteks Pembangunan Daerah Pendekatan Kewilayahan", Paper (unpublished), 2006, p. 11

[19] United Nations High Commissioner for Human Rights, *Frequently Asked Questions on A Human Rights Based Approach to Development Cooperation*, UN Publisher, 2006, pp. 15-17.

[20] Biro Hukum dan Organisasi Setjen Kemdikbud, *Kajian Pelaksanaan Pemenuhan HAM Bidang Pendidikan di Sekolah*, 2011, pp. 11-17.

holders in the sustainable development process.[21] Consequently, the corpus of the right to development, such as true participation and equality principles[22] play their significance to achieve essential mean of justiciability itself. It is resulted from judicial review decisions of the Court. It emerges as two basic indicators of the human rights-based approach relevant for achievement of transparent assessment of the progress of the ecosoc rights in Indonesia, i.e. quantitative and qualitative indicators. They are enlarged from positive obligation of state toward the ICESCR that "State undertakes to take steps,...to the maximum of its available resourses, with a view to achieving progressively the full realization of the rights recognized in the present covenant".[23] Quantitative and qualitative indicators enforced by the Court through judicial review to certain Laws are substantially relied on this rationals while the Court has to strictly rely on the Constitutional mandates.

As resources for basic elements forming the ecosoc rights, their management is directed to all existing laws, policies, programs, actions and funds exercised by Governments and its delegated partners, such as non state actors, trans national corporations and multinational corporations to their communities. Their interaction are subjected to the application of the corpus of the rights to development effectively. It reveals indicators of the obligation of conduct and of the obligation of result for progressive realization of the ecosoc rights values. Fulfillment of the indicators of availability, accessibility, acceptability and adaptability is used to verify these two obligations for the compliance of State conduct in accordance to the Court decisions in this respective areas.These four indicators are developed by the Committee of the Economic, Social and Cultural Rights in its general comments directed to specific rights contained therein such as the right to development, the right to work, the right to housing, the right to health and the right to education.[24]

[21] Allan Rosas, "Right to Development" in Absjorn Eide in Eide, *op.cit*, no. 9, p. 247.

[22] See all works of Ulrich Petersman, "Human Rights and International Economic Law in the 21st Century: The Need to Clarify Their Interrelationship", *4 Journal of International Economic Law*, 2001, p. 398; Ulrich Petersman, "Constitutionalism and International Organization", *17 Northwestern Journal of International Business*, 1996, p. 145; Ulrich Petersman, , "How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?", *20 Michigan Journal of International Law*, 1999, p. 3; and Ulrich Petersman, "Legal, Economic and Political Objectives of National and International Competition Policies: Constitutional Functions of WTO "Linking Principles" for Trade and Competition", *34 New England Law Review,* (1999).

[23] Article 2 (1) of the International Covenant on Economi., Social and Cultural Rights 1966.

[24] Eide, in *op.cit*, no. 9, p. 89-93.

In line with aforementioned analysis, Indonesia's ratification toward the ICESCR makes Government bound to those obligations.[25] They indeed require the government to take "a commitment to act in accordance with the object and purpose of the ICESCR achieving a visible and meaningful result for its community and creating conducive context where the ecosoc rights can be respected and experienced by its community". The Committee develops further emphasis on these notions as applied for minimum indicators measuring States' compliance to realize progressively the full realization of theses rights.[26] According to Rehman, the examinations to those four indicators have tended to be assessed in a less attention manner by States Parties to the ICESCR.[27] In Indonesia, reluctance to apply supports his argument related to the fact that these examinations are full with political issues for the fulfillment of the Indonesia's obligations toward the ICESCR.[28] In this regard, Katarina Tomasevski designates willingness and capacity as 'indicators of a government to protect and to promote human rights to dissociate unwillingness (lack of commitment) and incapacity.'[29] Therefore, it can be assumed that, in general, through the Court decisions on judicial review Indonesia to some extent has fulfilled its obligations to implement international human rights law from the viewpoint of its constitutional obligation (willingness and capacity).

According to the Committee's point of view, the human rights-based approach conceptual framework can be examined by these four indicators. They are related to two intrinsic values differentiated between the external and internal objective conditions. They are then valued by elements of the true participation from community and by element of equality for enjoyment of the rights to which judicial reviews are relied on for effective ecosoc rights fulfilment. *First*, they place the roles of the government as an active actor for assessment of the accessibility and availability indicators. *Lastly*, requirement of active involvement

[25] Ratified by Act Number 11 of 2005 regarding the Indonesian Ratification to the International Covenant on Economic, Social and Cultural Rights.
[26] Javaid Rehman, *International Human Rights Law, A Practical Approach*, Longman: Pearson Education, 2003, p. 107-108.
[27] *Ibid.*
[28] Heribertus Jaka Triyana, "Pemenuhan Hak Atas Pendidikan dan Kesahatan dalam Kerangka Desentralisasi Daerah di Indonesia", Penelitian FH UGM didanai oleh Unit Penelitian dan Pengabdian Masyarakat FH UGM, 2007, hlm. 27.
[29] Katarina Tomasevski, "Indicators", in ", in Asbjorn Eide, *op.cit*, no. 9,p. 390.

from community for assessment of the adaptability and acceptability indicators is paramount to the first assessment for the implementation of the principle of the fulfilment of the ecosoc rights. They shall be prudently taken into account in essence of all laws, policies, programs, action and funds for the ecosoc rights fulfilment. To sum up, the human rights-based approach for the achievement of the ecosoc rights by means of judicial review from the Court not only places it as "the logical framework of analysis" but also places it as "the objectively verified indicators" for changing existing revealing the equal distributions of rights and duties among stakeholders based upon the true participation and the equality principle in the development process in Indonesia.

Commonly speaking under auspice of preamble of the Constitution, the Court shall render its decision from national goals and national interests, e.g. sustaining sustainable development process in Indonesia and keeping up national resilience. Sustainable development is a common phrase related to the meaning of the right to development in the human rights legal frameworks. Although the right to development is still debatable in terms of its legal rights and its legal duties,[30] it is widely accepted and it is repeatedly voiced by developing and least developing countries when they were negotiating international law instruments affecting their right of self determination for their own development process.[31] Viewed from the legal point of view, the right to development is accepted as part of human rights from which the human rights based-approach is developed to empower local communities in the local sustainable development process.[32] Construed in many Laws, such as Law Number 24 of 2007 regarding the Disaster Management, Law Number 25 of 2007 regarding the Investment, Law Number 13 of 2003 regarding Labour, Law Number 20 of 2003 regarding National Education System, the principle of human rights-based approach is construed extensively

[30] D. Hunter.,*International Environmental Law and Policy*, Foundation Press, New York, 2002, p. 383.

[31] The relationship between foreign investment and human rights can be outlined as follow: *first*, foreign investment as part of economic liberalization enhances human rights because it leads to economic benefits resulting from trade and financial liberalization; *second*, liberalization threatens human rights, and *finally* human rights discourse facilitates economic liberalization. See Orford., A. 'The Subject of Globalization: Economics, Identity and Human Rights" in *Proceedings of the 94th Annual Meeting of the American Society of International Law*, 2000, p. 146-148 compared with US Department of State, *Country Reports on Human Rights Practices*, 25 February 2000 at <http://state.gov/www/global/human_rights/1999_hrp_report/overview.html>, downloaded in July 2002.

[32] Rosas., A. "The Right to Development' in Eide, *op.cit*, no. 9, p. 247.

in almost their sections especially in their preambles and in their explanatory sections to empower community access to development in Indonesia.

According to preamble of the Law Number 24 of 2007 for example, it has its significance for three following rationales. First of all, communities' involvement makes them sustainable from possible social, natural and man-made vulnerabilities. Secondly, the role from vulnerable groups and persons is central in the local development process since it is about their life. Lastly, nobody can understand local opportunities and constraints better than the local communities themselves. These rationales are believed to be deductively relevant with the changing patterns of imminent threat of environemtal degradation, massive flow of capitals ended with privatization, and global investment trends in Asian countries since 1997. Impliedly, they have been inductively perceived as the key strategies for poverty alleviation in the Law No. 25 of 2007.[33] In fact, this Law was lodged to the Court and the Court granted partially for judicial reviews submitted by several non governmental organizations, such as WALHI, API and PBHI[34] and the decision essentially affirms the aforementioned rationales. In its decisions, the Court highlights and keeps national interests and sustainable development by interpreting equal access to land ownership between individual and legal entities to safeguard Indonesian sustainable development through investment.

Developed from the previous section, it can be concluded that judicial review decision by the Court essentially pave a way for better mechanisms to adjudicate the ecosoc rights in a very appropriate, transparent and practical way. Judicial review decisions requires governments to behave under obligations to impose the principle of the human rights-based approach when they decide their development policies particularly for the involvement of private sectors either domestic or foreign investors in terms of market share of management of natural resources and the distribution of benefits. Consequently, it endorses

[33] Triatmodjo., M. "Anatomi Hukum Lingkungan Internasional, Sistem Generik Penyangga Kehidupan Umat Manusia", *Jurnal Mimbar Hukum*, No. 34/II/2000, p. 24; Triyana, H.J. "Legal Aspects of the Maritime Delineation in the Archipelagic Riau Province", Draft of the Maritime Spatial Planning, the Center of Regional Development, Gadjah Mada University, 2008, p. 23; and Triyana, H.J. "Legal Aspects of the Current Spatial Planning", Review Presented on the Workshop with the People Assembly Working Group, Bandung, on November 23rd 2006.

[34] Ecoline Situmorang, "Judicial Review Undang Nomor 25 Tahun 2007 Tentang Penanaman Modal", Workshop Memperkuat Justiciabilitas Hak Ekonomi, Sosial dan Budaya, Yogyakarta, 13-17 November 2007.

communities' active involvement in this process continuously. Substantively, it shall be placed as the main paradigm in a sustainable development achieving the ecosoc rights. Thus, judicial review is understood as a process in which at-risk individual, group of individual or community are actively engaged in the identification, analysis, treatment, monitoring and evaluation of certain laws, policies, programs, actions and funds on the ecosoc rights. It is directed in order to reduce their vulnerabilities and enhance their capacities in the development process regulated by certain law that may breach constitutional thresholds.[35]

B. State Compliance Toward Judicial Review Decision for the Ecosoc Rights Fulfilment

Compliance has different legal meanings. It also contains different legal consequences viwed either from international law or from national law. In international law, compliance relates to fulfilment of certain international obligations in domestic level. Mean of compliance is determined by two mechanisms, i.e. domestication process[36] and its effective implementation.[37] Legally speaking, a domestication process is defined as a national legal process giving legal effect to international law into national legal system by approval, signatory, ratification or by mutually agreed means applying either transformation or incorporation systems.[38] Although this terminology is still debatable,[39] it is commonly understood as "a change of State conduct or behavior in accordance with international law in its domestic affairs."[40] Internal consideration for this change is mainly caused by its own survival, values, economic position and domestic politics.[41] At least, this article freely defines compliance in terms of fulfilement of the ecosoc rights derived from several international conventionsas "national legal process giving binding legal effects to a set of comprehensive international rules,

[35] Imelda Abarquez and Murshed, *Community-based Disaster Risk Management: Field Practitioners' Handbook*, 2005, ADPC, p. 14.
[36] Burgstaller, *op.cit*, no. 7, p.85.
[37] Otley, David, *Management Accounting Research*, "*Performance Management: a Framework for Management Control System Research"*, 1999, pp. 10: 363-382; and Flamholtz, E.G, Das, T.K., & A.S. Tsui, *Toward an Integrative Framework of Organizational Control, Accounting, Organization and Society*, 1985, pp. 35-50.
[38] Article 11 of the Indonesian Constitution 1945; and compared with the *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 244f in Australia.
[39] Guzman, *op.cit*, no. 7. 22.
[40] *Ibid*.
[41] Wetherall, Anthony, *Normative Rule Making at the IAEA: Codes of Conduct*, Paper, Unpublished, 2005, p. 75.

actions, procedures or legal determination applicable to the ecosoc rights, and how they shall be implemented by Indonesia in changing certain behaviors and conduct in fulfilment of obligation of transparent assessment of the progress to its maximum available resources". It emphasise that judicial decision at national level forms this mechanism including decision of the Court on judicial review.

In the national law context, compliance means obedience to follow rules and regulations without any attribution to motives and reasons for compliance from those who are obliged to. Thus, it requires actual conducts for those who bear rights and obligations to behave in certain ways in accordance to these rules and regulations. Obedience to Constitution is a constitutional mandate (*erga omnes*) for all. It can be concluded that actual behavior imposing rights and obligations came from the Court decision is also a mean of compliance obliged by legislative, executive and judicative bodies. Most importantly, legal effect from the Court decision has binding legal character upholding application of the effectiveness principle recognised by the international human rights law. Within the Indonesian legal system, Article 72 of the Law Number 39 of 1999 regarding Human Rights imposes this principle. It requires that "rights and obligations carried out by Government includes effective implementation of human rights in law, politics, economy, social, culture, and defence and other means". Consequently, compliance to Court decision forms peremptory norms in human rights fields that should be practically and effectively enforced.

As a legal framework, the aforementioned facts higlights present Indonesian State structure. Indonesia is a 'representative government under the rule of law principle', in which human rights are recognized, guaranteed and enforced by the Constitution.[42] The skeleton of the Constitution highlights the supremacy of the law, equality before the law,[43] and human rights.[44] They are so fundamentals of the Indonesian judicial system, which consists of impartial, independent

[42] *The 1945 Indonesian Constitution* which has been amended four times; First Amendment on 19 October 1999, Second Amendment on 18 August 2000, Third Amendment on 10 November 2001 and the Fourth Amendment on 10 August 2002.
[43] Chapter IX of the 45 Indonesian Constitution, *ibid*.
[44] Chapter XA, *ibid*.

and competent bodies.[45] Human Rights, i.e. the right to life[46], the right to form family and to have children,[47]the right to education,[48]right to work, right to health, the right to equality,[49] the right to freedom,[50]the right to communication[51] and the right to protection[52] are exhaustively guaranteed by the Constitution. Furthermore, pursuant to Article 28I, the right to life, the right to freedom, the right not to be tortured, and equality before the law are fundamental human rights from which no derogations are permitted. From the constitutional viewpoint mentioned above, Indonesia fulfills its international obligation to implement international human rights obligations in terms of national legislations and of national judiciary systems. Act 39 of 1999 relating to Human Rights[53] supports this legal stance marking a new era of human rights protection in Indonesia, especially to the ecosoc rights. Its contents enlarge area, scope and determination of rights enshrined in the Constitution.

As a legal framework to the ecosoc rights compliance, the Court decisions may result several legal possibilities, i.e. (1). legally null and void; (2). conditionally constitutional; (3). conditionally inconstitutional; and (4). limited constitutional decisions.[54]They determine legal effects for their implementation as a way of measuring compliance to the ecosoc standards from the Constitution. In line with these models, there are two ways of implementing the Court decision on judicial reviews, i.e. self executing and non self executing mechanisms for implementation. The fomer affirms the Court legal personality as the negative legislator since its binding character of its decisions is "equivalent to Law". Equivanlent to law phrase has legal implication because the decision should be announced in the state gazette. Annoucement in the state gazette is one of

[45] Chapter IX. Article 24 determines that Indonesian legal system comprises Indonesian Supreme Court (Mahkamah Agung), Constitutional Court (Mahkamah Konstitusi) and other judicial organs created by law, i.e. ordinary court, religion court, court of martial and administrative court.
[46] Article 28A, *ibid*.
[47] Article 28B, *ibid*.
[48] Article 28C, *ibid*.
[49] Article 28D, *ibid*.
[50] Article 28E, *ibid*.
[51] Article 28F, *ibid*.
[52] Article 28G, *ibid*.
[53] Came into force September 23, 1999, State Gazette 165 of 1999 and in Additional State Gazette Number 3886.
[54] Kepaniteraan dan Sekretaris Jenderal MK, *Model dan Implementai Keputusan Mahkamah Konstitui Dalam Pengujian Undang-Undang: Studi Putusan Tahun 2003-2012*, Pusat Penelitian dan Pengkajian Perkara, Setjen Mahkamah Konstitusi RI, 2013, p. 2.

requirements for public to know its existance to be legally binding. The later requires implementing legislation in order to make them legally binding by means of passing new laws by the House of Representatives and Government. There has been more than 190 Laws that have been lodged before the Court and the Court has granted more than 130 Laws breaching the Constitution while at the same time there are more than 160 judicial reviews have been rejected.[55]

One of important finding confirms that there has been tendency to ignore or to deny the Court decisions since the implementation of the Court decisions require other authoritative bodies. Within the decentralization policy, it is affirmed that local government conduct toward Court decision is far away from effective implementation character. Furthermore, it seems that Court decisions relating to the ecosoc rights refers to non self executing implementation and they need further implementing legislations in order to comply with the Constitution. It needs a long run to measure and consistent efforts in order to reach this threshold for better enjoyment and fulfilment. This pattern may result from the character of the ecosoc rights themselves as positive rights that require positive efforts from the State to its people.[56] Qualification of the frase "right to" to the ecosoc rights stipulates spirit of positive and continue efforts to fulfill them carried out by many state apparatus and state entities.

With regard to critically examine the Court decisions on the ecosoc rights implementation, the cases will be analysed comprehensively. Legal analysis will be drown to draw patterns, orientation and roles and function of the rights holders and duty bearers' rights and obligations under the effectiveness principle in the human rights obligation of conduct and transparent assessment of the progress. Issues of right to education and education funds; electricity and water resource management as parts of basic needs and health will be analysed to reach in-depth analysis to that matters. Factors that may hinder the implementation as well as considerations for implementation will be outlined to reveal element of compliance to the Court decisions. Non self executing implementation will be

[55] *Ibid.* Data was obtained secondarily. The terms more than means that there are more judicial reviews decided by the Court between 2012 and 2015 that have not been calculated because there is no exact number of cases decided by the Court as a primary information.

[56] Ifdal Kasim and Johanes Masenus Aus, *Hak Ekonomi, Sosial dan Budaya, Essay-Esay Pilihan*, Buku 2, ELSAM, 2001, pp. xiv-xv

the most consideration while emphasis to those who have to implement will also be outlined to map possible gap between normativity and empirical facts, legal bias, legal overlapping, legal vacuum and legal conflicts.

B.1. Right to Education and Education Funds

In its decision, the Court has extensively ruled and decided upon right to education and education funds in line with the Constitution thresholds. Decision Number 011/PUU-III/2005 regarding the Judicial Review on Law on National Education System and decision Number 012/PUU-III/2005 regarding the Judicial review on the 2005 State Expenditure Law mark a significant effort toward fulfilment of the ecosoc rights, e.g. right to eduction. Future laws, policies, programs, actions and funds are developed based on these decisions. For example, the promulgation of the Law Number 12 of 2012 regarding the Higher Education System affirms the Court decisons proving that the Law is constitutionally drafted and it has spirits on the strict constitutional thresholds. Based on these decisions, the new law is promulgated in accordance to areas, scopes and spirits of the contitutional thresholds as decided by the Court.

Many comments and analysis have been brought to discuss relevance of these decisions given by NGOs, scholars and legal practitioners.[57] Both decisions highlight national issues and interests in terms of economic resilience and right to regulate of the State to rights to education as one of the public services under the Constitustion. Further, the decisions highlight latest political and economic results, legal considerations and statistical reports shape the contents used for the philosophical determination of the national policy on availibility and accessibility of education.[58] Those are, among others, the constitutional obligations arising from the fourth amendment of the Constitution. It mandates the Government to allocate

[57] Pan Mohamad Faiz, "*Quo Vadis Sistem Pendidikan Nasional, Analisis Kritis Putusan Jilid I, Judicial Review Undang-Undang Sisdiknas*", 2007, paper unpublished; and Heribertus Jaka Triyana, "Komentar Hukum Mengenai Putusan Mahkamah Konstitusi Perkara Nomor 012/PUU-III/2005 Menganai Pengujian UU No. 36 Tahun 2004 Tentang APBN Dalam Kaitannya Dengan Hak Asasi Manusia", *Warta Pendidikan, Setjen Kemdikbud, Vol. 2, No. 1, Tahun 2006*, p. 23.

[58] The preamble draws extensively of the influences of the Indonesian reform, autonomy and globalization as trilogy under which education must follow these legal, economical and political objectives and tendencies.

at least 20% of the national and regional budget to right to education,[59] spirit of autonomy/decentralization of power of the Regional Government, impact of the economic crisis, legal status of the ratification of the CRC in the Indonesian legal system, and fact that more than 6 million children aged between 6 and 15 do not have the right to education.[60]

Furthermore, both decisions affirm pathways of national interests for manpowering human resources for future Indonesian development. The Court granted the judicial review over the Law on National Education partially, especially for the explanation of the article 49 of the Law that breaches the Constitution. It breaches the Constitution because education funds should be covered by a result based orientation rather than covered by step-by step policy. This decision gives rise to a fact that the Contitution is in line with international commitments "to act in accordance with the objects and purposes of the CRC achieving a visible and meaningful results for children and creating a cultural and social context where their rights can be respected and experienced,[61] through available funds. While, at the same time, the Court decided not to accept judicial review to the Law of the 2005 State Expenditure in decision Number 012/PUU-III/2005. This decision made complex substance debate with regard to certain interpretation of duty of state to fulfill the ecosoc rights and determination of phrase of "to maximum available resources". The Court decided in the midle legal stance to determine state obligation of transparent assessment of the progress in order to allocate 20% of funds to education under the Constitution.

For examples, the obligation of the State to implement the CRC by means of its maximum available resources does not apply in this decision. Certain articles in the Law on National Educational System, in essence, stipulate that 'the Government and the State provide *support* for the resources to implement child protection' (emphasis added).[62] The inclusion of the word

[59] Article 31 (4) of *the 1945 Indonesian Constitution*.
[60] See for examples Kompas Cyber Media, *Tiga Juta lebih Anak Usia SLTP Tidak Sekolah*, http://www.kompas.com/kompas-cetak/0104/17/dikbud/tiga10.htm, 17 April 2001, and Kompas Cyber Media, *1,4 Juta Anak Perlu Program Terobosan Pendidikan*, http://www.kompas.com/kompas-cetak/0106/06/dikbud/juta09.htm, 6 June 2001.
[61] *Ibid*.
[62] Articles 22 and 23, *ibid*.

of 'support' can be interpreted to mean that the Government and the State do not want to allocate maximum resources to protect children's rights. Thus, whether the Government is unable or unwilling to fulfil its obligation to protect the rights of the child in this Act may be questioned. Article 9 (1) of the Law supports this conclusion as it omits the obligation of the State and the Government to fulfil the rights of the child to education.[63]

Enshrined in Article 26 (1) of the Universal Declaration of Human Rights (UDHR)[64] and Article 13 (1) of the ICESCR, everyone is entitled to have, receive and exercise the right to education. Right to education is, according to legal interpretation from both human rights instruments, regarded as 'so fundamental that is a non-derogable right.'[65] The Court decision affirms this legal stance. Many statements, declarations and comments support this proposition by revealing the significance and nature of education. Nowak in this regard argues that 'education is regarded as one of the basic means needed by a human being to develop his or her personality.'[66] Next, the Declaration on the Right to Development highlights the role of education as a condition in achieving a comprehensive economic, social, cultural and political process aimed to improve human beings as individuals, and aimed to develop a population based on their active, free and meaningful participation with fair distribution of benefits.[67] This significant fact has become a universal concern stated at the Rio de Janiero Conference to the World Summit on Sustainable Development, Johannesburg 2002.[68]

Further, the Committee on Economic, Social and Cultural Rights also emphasizes that 'education is the primary vehicle to lift or to empower adults and children from poverty, mean to participate fully in development in their communities, and as an effective way to develop human existence.'[69]

[63] It determines that "every child has the right to education for their development based on their talents and interests".
[64] UNGA, 10 December 1948, GA Res. 217A, UNGAOR, 3rd Sess, UN Doc. A/810 (1948).
[65] Geraldine Van Bueren, *The International law on the Rights of Child,* 1995, p.233; and Article 1 of the World Declaration on Education for All (Jomtien Declaration 1990, Thailand).
[66] Manfred Nowak, "The Right to Education", in Eide, *op.cit*, no. 9, p. 196.
[67] Preamble of the Declaration on the Right to Development, General Assembly Resolution 41/128 of 4 December 1986, http://www.unhchr.ch/html.menu3/b/74.htm.
[68] The Office of the High Commissioner for Human Rights, *Human Rights, Poverty Reduction and Sustainable Development: Health, Food and Water*, A Background Paper World Summit on Sustainable Development, Johannesburg, 26 August-4 September, 2002.
[69] Committee on Economic, Social and Cultural Rights General Comment 13, *The Right to Education (Art. 13)*, 08/12/99, E/C.12/1999/10,

Consequently, the assumption that expenditure on education ought to be regarded as an "investment in human capital" which is more beneficial rather than an "investment in physical capital" to sustain development is accepted widely.[70] In line with human rights, education is a 'precondition for the exercise of human rights and aims at strengthening them.'[71] Referring to the Court decision, it seems that the Court to some extent fail to reach these international standards. Substantially, this decision is so camplicated to be implemented factually. Until now, this legal stance has been levelled off to allocate national as well as regional education funds between 6-7,5%.

Articles 28 and 29 of the CRC derived from the ICESCR are devoted to the right of the child to education. Their most significant aim is to complete the description of the objectives and the nature of the child's education enshrined generally in the UDHR and the ICESCR, e.g. education helps the child to realize his/her full potential,[72] including the development of respect for human rights, an enhanced sense of identity and affiliation, an enhanced sense of her/his socialization and interaction with others and with the environment. In legal terms, education involves three main actors who 'may derive different claims from their rights to education: who provides (the teacher, the owner and the parents), who receives (the child, the pupil and the students) and who is legally responsible for the one who receives education (the state, society and the parents).'[73] In this matter, international law mainly imposes duties (obligations) on states to provide, and on children (the pupil and the student) to exercise the right to education. Viewing comprehensively from the Court decisions, they do not give certain patterns to determine their applications so many doubts and biases for their practical implemention untill now.

CESCR, 8 December 1999, para 1; and supported by the World Bank in *Crying Out for Change*, World Bank in three volumes (2002), 235.

[70] See for examples, Walter W. McMahon, Boediono and Abas Gazali, "A New View of Manpower Supplies and Demand in Indonesia: The Need to Use Market Signals and Labor Analysis", *BP3K Departemen Pendidikan Dan Kebudayaan Indonesia* (1991); Van Beuren, above n 67, 232; and Committee on Economic, Social and Cultural Rights General Comment 13, *ibid*.

[71] Nowak, *op.cit*, no. 9, p. 189; and *the Vienna Declaration and Programme of Action*, UN Doc. A/CONF.157/23, part II, para 79.

[72] Van Beuren, *op.cit*, no. 66, p. 232; See also Article 29 of the CRC.

[73] Nowak, *op.cit*, no. 9, p. 190.

States are obliged to provide education to everybody, to ensure that everybody without discrimination has access to education,[74] and to 'combat existing inequalities in the access to and enjoyment of education by legislative and other means.'[75] In these matters, Nowak proposes that 'states are under the obligation to fulfil the right to education by means of positive action, i.e. the obligation of result and the obligation of conduct.'[76] In fact, the fulfillment of these obligations does not meet any ideological or constitutional opposition since the nature and significance of education in major International Human Rights Conventions (the ICESCR and the CRC) are widely accepted. Obligation of results, according to the Committee on Economic, Social and Cultural Rights, exhibits interrelated and essential features when State parties are fulfilling the right to provide education, namely availability, accessibility, acceptability and adaptability of their prevailing conditions. In this regard, States Parties oblige to take steps to the maximum of their available resources, and a lack of resources is never an excuse for not taking such actions.The Court decisions do not reach to these minimum requirements contributing to ignorance and skepticism for fulfilment of right to education.

The preamble of the Indonesian Constitution has an ultimate aim of advancing the intellectual life of the people. This is a core objective of the national education system. Pursuant to the Indonesian Constitution, there are certain legal relationships among who receives, who provides and who is responsible for the fulfillment of the right to education. Or, in other words, the Indonesian Constitution regulates the obligation of State (Government) to its citizens to provide education, and it obliges the Indonesian citizens to exercise their right to education. The Government is obliged to bear the cost of primary education,[77] to develop and maintain a national system of education that increases faith, God-consciousness and noble conduct,[78] to

[74] Convention Against Discrimination in Education 1960, in Geraldine Van Bueren, *International Documents on Children*, (2nd, eds), 1998, pp. 317-322.
[75] Nowak, *loc.cit*, p. 196.
[76] *Ibid*, p. 199.
[77] Article 31 (2) of the Indonesian Constitution.
[78] Article 31 (3), ibid.

prioritize expenditure on education to at least 20% of the State Budget and Regional Budget[79] and to advance science and technology by respecting religious values, for the progress of human civilization and the welfare of the human race.[80] Meanwhile, each citizen has the right to education, and all are obliged to undertake primary education.[81]

With regard to the right of the child to education, the Indonesian Constitution does not explicitly mention this right and viewed from the Decision, there are no certain interpretation to these thresholds. However, the legal notions of 'each citizen' and 'primary education' implicitly express the child's right to education. This interpretation is supported by the legal interpretation and application of Article 28 B (2) which states that "each child has the right to viable life, *growth and development*, and to protection from violence and *discrimination*". Although, to some extent, the Indonesian Constitution is still in "a central based-approach" regarding the right to education, normatively, it conforms to international laws which regulate the right to education (the UDHR and the ICESCR) in particular the CRC. This conformity is in terms of the fulfillment of certain obligations, such as the obligation of result and the obligation of conduct. Consequently, this conformity creates constitutional obligations which have to be realized in factual situation, especially in the factual conditions of education in Indonesia.

A 'cost benefit analysis' states that 'all expenditure on education will be beneficial in the long run as it will create benefits in terms of employment, job training and development.'[82] Therefore, this analysis can be used for measuring the quality of education in Indonesia. Inappropriate expenditure which levels off at 6% until now realizes an inadequate rate of return. Because of a lack of financial resources, the Human Development Index (HDI) and the quality of education valued by the rate of return in Indonesia are still low.[83] This condition is very different from other developing countries such

[79] Article 31 (4), ibid.
[80] Article 31 (5), ibid.
[81] Article 31 (1,2), ibid.
[82] McMahon, Boediono and Gazali, op.cit, no. 71, p.72.
[83] UNDP, *Human Development Report 2002*, UNDP (2002) which reveals that the Indonesian Human Development Index is only 0,684.

as Malaysia, Vietnam[84] and/or even from Latin American Countries.[85] Thus, whilst there is a constitutional framework which incorporates international law regarding the rights of the child to education in Indonesia, this constitutional framework has been hardly match with reality even after the Court decided judicial reviews on the Law on education and law on State expenditure.

Because this constitutional obligation should be implemented in such a way, commitments need to be raised and advocated continously. Efforts to progressively fulfill right to eduction has its constituational interpretation delivered by the Court decisions in that respective judicial reviews. It means that responsible state apparatus shall be reminded to act in certain ways in accordance to constitutional requirements and international obligations. International obligations impose another rationales and reasons to interpret certain constitutional thresholds. It means that every time individual and group of individuals may lodge judicial review before the Court in order to remind government to behave in such a way in accordance to these requirements.

B.2. Right to Water and Electicity

On February, 18, 2015 the Court decided to grant null and void of the Law Number 7 of 2004 regarding Water Resources. Similar to this decision is in the Court decision Number 001/PUU-I/2003 regarding the Judicial Decision over Law Number 20 of 2002 regarding Electricity. The main rationales to lodge judicial review is that water and electicity are "*res commune*" to which Constitution upholds this principle.[86] As Diana Phillip argues, right to water is a contitutional and justiciable rights, so all individuals as well as group of individual has priority to this need while government shall have right to regulate to manage water and electricity as public services to the community.[87] In this decision, viewed from substance approach, the Court

[84] The *Convention of the Rights of Child Periodic Report-Indonesia*, 1993-June 2000, p. 9; see also UNDP, *ibid*, Indonesian Human Development Index is only 0,684 under Vietnam which is 0,688.

[85] Anne Greene, "Sistem Pendidikan Di Amerika Latin dan Indonesia: Suatu Perbandingan", in Murwatie B. Rahardjo, "Aspek Pembiayaan Dalam Memperoleh Kesempatan Pendidikan", F.S. Swantoro, "Peningkatan Kualitas Pendidikan Dasar dan Menengah", all in CSIS, *Refleksi Setengah Abad Kemerdekaan Indonesia*, 1996, pp. 162-222.

[86] Konstitusi, "Swastanisasi Pengelolaan Air", No. 83, 2014, pp. 14-19.

[87] Phillip, *op.cit*, no. 5, p. 323.

emphasise the importance of the right to regulate in the development process that somehow defeating market mechanism guided by maxim of "the least government is the best government". Based on this maxim, dominancy of economic motives driven by market mechanism championed by foreign investors has reduced the autonomy of local communities based on their active, free and meaningful participation, and fair distribution of benefits in the sustainable development process regulated in the Laws.

At the lowest level, communities' self resilience and their self independence of management of their life in terms of increasing availability, accessibility, acceptability and adaptability to all available water and electricity resources have been limited by foreign investors who have capitals. Phenomena of emerging gap between rich and poor local governments, lacking of bargaining position between local authorities and foreign private sectors, and social conflicts have become a turning point for the implementation of the Law Number 7 of 2004 and of the political decentralization's objectives.[88] This gap of management of common resources in essence emerged *vis a vis* between local communities and foreign private sectors directly. As a result, it disrupted communities' everyday life for more than two years[89] causing human lost,[90] infrastructure collateral damages, deterioration of investments in this area and environmental degradation.[91]

The application of the theory of breakdown of natural resources management proposed by Jacqueline[92] and Ribot[93] is truly adopted as the main logical framework for the implementation of the Court decisions relevant to current political decentralization policy and for accepted rationales for regulating foreign investment in Indonesia particularly by local governments.

[88] Dixon, H. "Environmental Scarcities and Violent Conflict Evidence from Cases", *International Security*, Volume 19, Number 1, 1994.
[89] Ballentine, K., and Nitzschke, H., (Eds), *Profiting from Peace: Managing Resource Dimension of Civil Wars*, Lynne Publisher, 2005; and Baiquni, M. and Rijanta, R.. *Konflik Pengelolaan Lingkungan dan Sumber Daya Dalam Era Otonomi dan Transisi Masyarakat*, Paper, 2007, p. 17-19.
[90] Sakai, M. "Konflik Sekitar Devolusi Kekuasaan Ekonomi dan Politik: Suatu Pengantar", *Antropologi Indonesia*, Volume 68, 2002, pp. 5-6; and George. *A Fate Worse Than Debt*, Penguin, Harmondswoth, 1998.
[91] APHI, "Tuntutan Masyarakat Adat dan Alternatif Solusi Konflik Sosial", available at <http://www.rimbawan.com>, last visited on November 25th, 2008.
[92] A. Jacqueline, "Alternative Approaches to Managing Conflict in the Use of Natural Resources", *Presentation Material on International Workshop on Natural resources Management*, Washington D.C., May 2008.
[93] J.C. Ribot, J.C. "Accountable Representation and Power Participation and Decentralized Environmental Management", Unasylva 1999, Volume 50, (1990), p. 56.

This theory opens the chance that "decentralized resources management system by smaller units or local stakeholders (local governments, investors and communities) will increase opportunity of participation from multi stakeholders, increase roles of civil society and open up intensive interaction among stakeholders for resources management at local levels."[94] In simple terms, it reveals that those who have biggest interests will have the biggest access to the management and to the enjoyment of all available resources viewed from the human rights-based principle of the Indonesian political decentralization policy.[95]

However, the application of the above theory has been replaced by the adoption of this economic-driven motive explained by the greedy theory for management of natural resources proposed by Billon.[96] It reveals that "inappropriate management of natural resources driven by economic motives will result scarcities of them in very short period of time benefiting only for few who have the biggest access causing a systemic environmental deterioration that contributes to increasing community's vulnerability toward the natural hazards and lessens communities' capacities as their coping mechanisms." Within the Indonesian political decentralization perspective and the foreign investment law point of view for water and electicity, it has worsened since it was amalgamated with the deprivation and scarcity theory proposed by Ohlsson and by Homer Dixon causing a firm identity to this motivation. Furthermore, the coordination scheme on foreign investment policies between central government and local governments, and among local governments has not been established yet since the Law Number 25 of 2007 with regard to the Law on Water Resources and Electricity only determines it at the strategic and at the operational levels. The application of the "not in my back yard" syndrome and the "profit taking" policy enacted by local governments has caused administrative defects for the coordination scheme

[94] Jacqueline, *loc. cit*.
[95] Ribot, *loc.cit*, p. 56.
[96] Porto, J.G. "Contemporary Conflict Analysis in Perspective" (Chapter One), in Lind, J., et all, Scarcity and Survive: The Ecology of Africa's Conflict, ACTS, Kenya, 1998;.

of foreign investment especially on the common pool resources (CPR) in Indonesia, especially for water.[97]

Analysis from both decisions reveal that they have something in common that they are peremptory and have their status of negative regulations to such matter. It means that they became self executing decision which have direct legal effects. State behavior to some extent prolong for actual changes since they have to rebuild policies, program, actions and funds to that matters. Meanwhile, changes on infrastructures to comply with Court decisions need huge efforts in time and in financial back up. Endurance is the ultimate key success to monitor state complince toward self executing decision of the Court.

C. Means of Effective Advocacy for the Implementation of the Ecosoc Rights

After analysing those facts and decisions, this article submits means and/or approaches that would be valuable for future means of legal advocacy of the ecosoc rights. It proposes nine rationales as the derivatives from the principle of human rights based approach to be taken in all their decision making process concerning their policies on better ecosoc adjudication in Indonesia in relation to the Court decision in terms of reductionist as well as substance approaches.[98] They are oulined below.

First, locals shall have capability of initiating and sustaining their own community developments in terms of substance of human rights. *Second,* the primary requirement for grassroots development lies on local leadership irrespective of role government, private sector and NGO since the Indonesian development process is conducted by way of decentralization policy. *Third,* successful bottom-up strategy include broad-based local participation in comprehensive planning and decision-making activities that promote motivation has been paramount to increase adaptability and acceptability. *Fourth*, educational

[97] Bello. *Dark Victory: The United States Structural Adjustment and Global Poverty*, Pluto Press, London, 2004.

[98] Hodgson., R.L.P. "Community Participation in Emergency Technical Assistance Programmes: Technical Support for Refugees, 1993, WEDC; Grafton, et all. *The Economics of the Environment and Natural Resources*, Blackwell Publishing, 2004; HIVOS, *Disaster Management: Planning and Paradigm in Indonesia*, 11 June 2007.

opportunities should correspond to identify local needs as best practice when local authorities promulgate certain rules and regulation on ecosoc rights in respective areas. *Fifth,* emphasis is directed to improve the utilization and management of local natural resources available there upholding true participation of rights holders of the ecosoc rights either in the formulation as well as in the implementation. *Sixth,* responsible utilization of outside financial assistance is required as long as in accordance with national interests construed in the Constitution. *Seventh,* replication of a community's success is a powerful factor in continuing local initiatives. *Eighth,* responsibility for change rests with those who live in the community for easier justiciability of the ecosoc rights. *Lastly,* various community members and groups in the community may have different perceptions of risk and varying vulnerabilities so that their coping strategies shall be taken into account when government initiates certain law on ecocosoc rights. These normative strategies are based on the belief that rapid local development will support the implementation of the political decentralization policy and can promote a participatory development process from all rights holders of the ecosoc rights.

III. CONCLUSION

Once a blind man is asked to describe an elephant then he touches it. Maybe he states that 'an elephant is a sharp, small long substance and tough'. This was correct because he hold the elephant's tusks. This illustration can be compared with the the role and function of the Indonesian Constitutional Court for its legacy for better and practical ecosoc fulfilment in Indonesia. Ideally, this role should be supported by strong bearers in their specific functions in legislative, judicative and executive bodies to implement the Court decisions respectively. Consequently, greater access to information is a must to open chance for public to know and to receive proper and correct legal bases on the ecosoc rights that still exist and those which breached the Constitution.

When we are discussing the relationship among Constitution, governments behavior, human rights and the implementation of the ecosoc rights in Indonesia,

Anthony Giddens' theory of the Third Way of Social Democracy helps conclude their relationships since it is still at the phase of administrative decentralization.[99] The battle of identity between participatory versus primordial characters of it is one of undeniable empirical facts. Consequently, the Court decisions on judicial reviews has not been implemented as it is expected and actual changes are so difficult to be measured since it needs times and huge efforts on bureucracy in Indonesia.

Giddens' theory reflects this relevance for implementation of the ecosoc rights with regard to dominancy of capitals and markets shares in Indonesia vs. ecosoc rights as public services upholding right to regulate of the government. In simple terms, the third way of politics looks for a new relationship between the individual and the community, a redefinition of rights and obligations between government and its people in time of political transition from centralized government into democratic governmental system. In this situation, local governments as well as the central government have to redefine and to reflect their policies, programs, actions and funds in accordance to the Court rulings which to some extent are not supportive for the achievement of the long terms development policy aims. Do the central as well as local governments of Indonesia realize and have this willingness?

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The Constitutional Court's Role in Consolidating Democracy and Reforming Local Election

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Abstract

Within the same group as the USA and India Indonesia is one of the largest democracies in the world. After experiencing authoritarian rule for a few decades since its independence the country finally at the beginning of the twenty first century managed to chart along its new direction along democratic course and values. More than a decade has passed since the democratic transition begun yet the country still faces various constitutional dilemmas and enigmas. One of organs of the government which has been entrusted to transform the country into a democratic nation is the Constitutional Court. The objective of this paper is to provide critical analyses of the role of the Constitutional Court of Indonesia in the process of consolidating local democracy. The scope of analysis is confined to a number of important cases heard by the court on local election disputes from the year 2008 to 2013. The rationale to focus on local election is because local government provides the second layer of government for this unitary country making the governance more democratic and more in touch with local population. The result of the study is the Constitutional Court through its decisions has created conducive political situation and has provided significant contributions in the process of consolidating local democracy. In spite of limited number of judges and short period of settlement to disputes brought before it the Court have settled all disputes regarding local elections without much delay

and complaint. Nevertheless there are some areas that need to be addressed by the court to enhance its efficiency and effectiveness. A few factors have been identified to be the cause of the problems namely problem of design of structure of the Court, extension of the scope of authority, period of settlement, over-dosis of authority and the breach of code of ethics of the judges.Thus it is recommended that in order to perpetuate the excellent achievements of the court the institution need to be strengthened by addressing the problems.

Key words: consolidation of local democracy, Local Election Dispute, Constitutional Court

I. INTRODUCTION

Based on the experiences of countries referred "new emerging democracies", it transpired that there are so many obstacles in the countries that are hampering efforts to develop an effective "rule of law". One of the problems is the "*anomia* syndrome." It refers to the situation in which the integrity, the impartiality, and the independence of the judiciary are seriously influenced. Under the authoritarian regimes, courts are usually politically intervened by the ruling elite.[1] In other words, in authoritarian regimes, courts are more considered as the attributes of the authority rather than as the attributes of justice which has happened in Indonesia during the era of Suharto regime.[2] Authoritarian regimes also produce legal professionals without integrity which resulted in judicial corruption. Amidst the impossibilities the constitutional court managed to overcome the cumbersome obstacles of corruption and despotism to be the true savior of justice and democracy.

Before the enactment of Election Act 2007, the Constitutional Court has only the authority to settle disputes over the result of election limited to election disputes regarding the result of election of president and vice-president, members of DPR (House of Representative), DPRD (Regional House of Representative)

[1] See Jimly Asshiddiqie,"Access to Justice in Emerging Democracies: The Experiences of Indonesia", In Fort, Bertrand (Ed),*Proceeding of Workshop on "Comparing Access to Justice in Asian and European Transitional Countries, Democratizing Access to Justice in Transitional Countries*, Indonesia, 27-28 June 2005, p. 10.

[2] Many political experts and constitutional law experts describe the era of Suharto regime as "bureaucratic-authoritarian regime which controlled every single aspect of the nation, including judicial power.

and DPD (Regional Representaive Council). After the enactment of the Election Act 2007, the Constitutional Court also has authority to settle disputes of local election.[3] Since the authority of local election disputes settlement was moved from the Supreme Court to the Constitutional Court, 477 cases have been registered with the Constitutional Court.[4] The huge number of cases is an indicator that the people have belief in the court to deal with local election disputes. The effectiveness and efficiency of the courts, which able within 14 days with only 9 justices to deliver results and judgments, is also a factor that make the court is favored by the people. The facts point to the conclusion that the court does have a role in consolidating local democracy in Indonesia through its decisions regarding local election disputes. Besides resolving the general election disputes[5], the Constitutional Court has also authority to settle local election disputes.

Settlement of local election disputes is an important aspect of local election. The quality of local election disputes settlement represents the quality of the local election itself. The quality of local election will influence the quality of local democracy. Its commitment to justice and fairness is manifested by the Court's extension of authority from only trying and deciding disputes on mathematical count of the result of local election to more extensive meaning of result of local election including the administrative disputes and criminal violations. The justices of the Constitutional Court strongly believe that they have to uphold justice and democracy in the process of local election, therefore if there are violations against democracy which influence the result of local election, the Constitutional Court can try and decide the cases. Based on the scenario above it is pertinent and timely to evaluate the role of the Indonesian Constitutional Court in consolidating local democracy through its decisions of settlement disputes on local elections from 2008 to 2013.

[3] Based on the Election Act 2007, the term "pilkada"(pemilihan kepala daerah or election for head of region) changed into "pemilukada"(pemiliha umum kepala daerah or general election for head of region). Since the term used is "pemilukada", therefore "pemilukada" is part of the general election which the Constitutional Court has the authority to settle the disputes.

[4] www.mahkamahkonstitusi.go.id, retrieved on 24 November 2012. It may be compared to judicial review cases, from 2008 to 2012, there were only 341 cases. This shows that the number of local election disputes registered to the Constitutional Court is much more than judicial review cases.

[5] Article 22E (2) of the 1945 Constitution states that "General elections shall be conducted to elect the members of the House of Representatives, the Regional Representative Council, the President and the Vice-President, and the Regional House of Representatives".

II. DISCUSSION

Brief History of the Constitutional Court of Indonesia

The idea to establish the Constitutional Court emerged during the era of reform.[6] The reasons underpinning the consensus to set up the Constitutional Court could be summarized into two, namely political and legal reasons.[7] Politically the Constitutional Court is one of the checks and balances mechanisms established to control the state organs. Legally the Constitutional Court have two crucial power, first is the power to examine the constitutionality of acts or legislations and the second power is to settle disputes relating to the authority of state organs.

The idea to review acts as a mechanism of constitutional adjudication actually had been debated among the founding fathers of the nation in the preparation of the independence of Indonesia in 1945. Muhammad Yamin was the first founding father who proposed that the Supreme Court had authority to review acts.[8] The proposal however was not accepted by the member of Independent Committee.[9] After President Soeharto's resignation in May 1998, Indonesia began to take comprehensive reform measures by putting sovereignty back to the hands of the people. The peak of such efforts was a series of amendments to the 1945 Constitution, made during four consecutive years, namely the First Amendment in 1999, the Second Amendment in 2000, the Third Amendment in 2001, and the Fourth Amendment in 2002. The amendments produced a blueprint for a system of state administration which was totally different from the previous one. Two of the fundamental principles adopted and reinforced in the new formulation of the 1945 Constitution were:

(1) the principle of constitutional democracy, and

(2) the principle of democratic rule of law or "*democratische rechtsstaat*".[10]

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[6] Bambang Sutiyoso, Pembentukan Mahkamah Konstitusi sebagai Pelaku Kekuasaan Kehakiman di Indonesia, *Jurnal Konstitusi* MK RI, Volume 7 No 6,2010, p. 27

[7] Muchamad Ali Safa'at, "Peran MK Mewujudkan Prinsip Checks and Balances", *Majalah Konstitusi*, 2011, p. 2.

[8] See Jimly Asshiddiqie, *Pokok-Pokok Hukum Tata Negara Indonesia*, Jakarta:PT. Bhuana Ilmu Populer, 2007, p. 581-582.

[9] *Ibid, 582.*

[10] See Jimly Asshiddiqie, "Creating A Constitutional Court for A New Democracy", *Paper presented at Seminar held by Melbourne Law School*, March 11 th, 2009, p. 2.

The democratic system was reinforced by the adoption of various fundamental principles to ensure that sovereignty had its sources in the people and was administered by the people, together with the people, and for the sake of the people. Among those important principles is the establishment of a constitutional court which was adopted in the Third and Fourth Amendments made in 2001-2002.[11] Among the considerations in the establishment of the Constitutional Court are as follow:[12]

a. The state of Indonesia shall be a rule of law state which is based on *Pancasila*[13] and the 1945 Constitution, aims at achieving a peaceful, order, clean, prosperous and just country;

b. The Constitutional Court as one of the pillar of the judiciary has an important role in upholding the Constitution, principle of rule of law based on its authority as has been stated in the 1945 Constitution;

c. Based on article 24C (6) of the 1945 Constitution, it is needed to arrange the appointment and retirement of justices, court procedure and other regulations regarding the Constitutional Court;

d. Based on the consideration stated in point a, b, c and to conduct article III of Transitional Provision of the 1945 Constitution, it is needed to enact law regarding Constitutional Court.

The role of the Constitutional Court in Indonesia highlights the importance of separation of powers which has been described as "[replacing] the executive-heavy sharing of powers" put in place by the Pre-amendment Constitution. The Constitutional Court's judicial review power provides a check on the Legislature, its impeachment power provides a check on the Executive; and its decisions on electoral results help ensure the integrity of the democratic process.[14]

Undoubtedly Indonesians were influenced by the advance of 'new Asian constitutionalism' as in the cases of Taiwan, Thailand and South Korea, which

[11] *Ibid*.
[12] See further Contitutional Court Act 2003 and the Amendment of the Constitutional Court Act 2011.
[13] Pancasila means five pillars. Pancasila is the five pillars of Indonesian state.
[14] Simon Butt, *The Constitutional Courts Decision in the dispute between the Supreme Court and the Judicial Commission: Banishing Judicial Accountability?* in McLeod and MacIntyre (ed) *Indonesia: Democracy and the Promise of Governance,*Institute of South East Asian Studies, 2007,p. 178-182.

impelled close consideration of South Korea's Constitutional Court in particular as a model.[15] Intense debates took place about judicial review, disenchantment was expressed with the judiciary in general, and Indonesian society addressed concertedly the problems of how to advance the reform process.[16] In particular there was an intense debate concerning how, following the impeachment of President Abdurrahman Wahid in 2001, to lay down a satisfactory legal as opposed to political process for presidential impeachment. Commentators have indeed stressed the last of these issues as particularly crucial, even though in practice the exercise of constitutional jurisdiction has in the event been directed more towards the enforcement of constitutional rights than towards other, ancillary, powers.[17]

Undoubtedly the collapse of Suharto's *Orde Baru* ('New Order') in 1998, together with its oppressive 'integralist state' ideology, had hastened the victory of arguments in favor of judicial control over government that had continued at some level almost since the creation of the Republic in 1945. Butt refers to this factor as 'the fading of barriers to judicial review' – increasingly judicial review proponents found themselves pushing at an opening door. Some voices, as in Thailand, were skeptical about constitutional reform in times of economic hardship, arguing, as popular discourse had it, that 'democracy and the rule of law cannot be eaten'. The prevailing view was, however, as in Thailand, that good governance reforms would provide the basis for stable economic recovery and social justice. These factors did not of course determine what model of court or judicial review should be adopted. Some preferred an independent constitutional court, some preferred a constitutional chamber of the Supreme Court, and others opposed to judicial review preferred review by the MPR (People's Consultative Assembly) itself.[18]

[15] Hendrianto, 2009, *Institutional Choice and the New Indonesian Constitutional Court*, in Andrew Harding and Penelope (Pip) Nicholson (eds), *New Court in Asia*, Madison: New York Routledge, 2010,p. 8.

[16] Timothy Lindseyand Mas Achmad Santosa, "The Trajectory of Law Reform in Indonesia: a Short Overview of Legal Systems and Change in Indonesia", 2008,p. 32.

[17] See Timothy Lindsey and Simon Butt, "Economic Reform when the Constitution Matters: Indonesia's Constitutional Court and Article 33", *Bulletin of Indonesian Economic Studies,* 2008, p. 239.

[18] Simon Butt, "Judicial Review in Indonesia: Between Civil Law and Accountability? A Study of Constitutional Court Decisions", *University of Melbourne PhD thesis*, 2006 (unpublished); Fenwick, S (2008), 'Administrative Law and Judicial Review in Indonesia: the Search for Accountability', in Ginsburg, T and Chen, Albert HY (Ed), *Administrative Law and Governance in Asia,* Routledge, 2008,p. 153.

Consolidation of Democracy

The working definitions of a consolidated democracy are as follows:[19]

1. Behaviorally, a democratic regime in a territory is consolidated when no significant national, social, economic, political, or institutional actors spend significant resources attempting to achieve their objectives by creating a non-democratic regime or turning to violence or foreign intervention to secede from the state.
2. Attitudinally, a democratic regime is consolidated when a strong majority of public opinion holds the belief that democratic procedures and institutions are the most appropriate way to govern collective life in a society such as theirs and when the support for anti-system alternatives is quite small or more or less isolated from the pro-democratic forces.
3. Constitutionally, a democratic regime is consolidated when governmental and non-governmental forces alike, throughout the territory of the state, become subjected to, and habituated to, the resolution of conflict within the specific laws, procedures, and institutions sanctioned by the new democratic process.[20]

Morlino defines democratic consolidation as the process of establishing and adapting democratic structures and norms that come to be accepted as legitimate by the civil society, in part or in full. He further adds that it is variegated and composite process which unfolds in various directions and ends by strengthening those institutions and norms so as to ensure their persistence.[21] Ethier formulates two conditions for the emergence and consolidation of democracy, namely, *first*, there should be compromise between the dominant actors and social groups. This compromises centers on the definition of collective objectives of power and the modalities of participation in the decision-making process. *Second*, there should be development of social consensus.[22] Important elements of democratic

[19] Juan Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South Africa and Post-Communist Europe*, Johns Hopkins University Press, 1996, p. 6.
[20] *Ibid*.
[21] Leonardo Morlino, *Democratic Consolidation: Definition and Models*, in Geoffrey Pridham (ed), *Transition to Democracy,* Dartmouth Publishing, 1995, p. 574-575.
[22] See Diane Ethier, *Democratic Transition and Consolidation in Southern Europe, Latin America and Southeast Asia*, The Macmillan Press LTD, 1990, at 13. Ethier proposes these conditions based on the experience of Southern Europe and Latin America. He explains in his article that the prospects for consolidation of the new democratic regimes appear rather gloomy due to the fragility and the limits of the social consensus. See further Ibid, p. 17.

consolidation as described by various scholars have been summarized in the table below.

Table1

Elements of Democratic Transition and Democratic Consolidation

Steps of Democracy	Elements of Each Step
Democratic Transition Linz and Stepan	A sufficient agreement has been reached about political procedures to produce an elected government
	The government comes to power that is the direct result of a free and popular vote
	The government de facto has the authority to generate new policies,
	The executive, legislative and judicial power generated by the new democracy does not have to share power with other bodies de jure
Democratic Consolidation Linz and Stepan, Schneider and Schmitter	No significant national, social, economic, political, or institutional actors spend significant resources attempting to achieve their objectives by creating a non-democratic regime or turning to violence or foreign intervention to secede from the state.
	A strong majority of public opinion holds the belief that democratic procedures and institutions are the most appropriate way to govern collective life in a society
Linz and Stepan, Stephen Hanson, Schneider and Schmitter	The governmental and non-governmental forces alike, throughout the territory of the state, become subjected to, and habituated to, the resolution of conflict within the specific laws, procedures, and institutions sanctioned by the new democratic process
Samuel Huntington	It has achieved what is called as "two turnover tests". In other words, the process of democratic power transition has happened twice transition peacefully and sustainably

Morlino	The process of establishing and adapting democratic structures and norms comes to be accepted as legitimate by the civil society, in part or in full
Schneider and Schmitter	Access to mass media
Schneider and Schmitter	Whether electoral volatility has diminished significantly
Ethier	Compromise between the dominant actors and social groups and development of a social consensus

The Constitutional Court, Local Election and Consolidation of Democracy

The Constitutional Court had been mandated to settle local election disputes. The decision to grant the court with such power was influenced by some landmark of local election disputes which had been settled by the Supreme Court i.e local election dispute in Depok, Sulawesi Selatan dan Maluku Utara. These cases have been prompted by controversies caused by unclear decision of the Supreme Court in settling disputes of local election. Public untrust to the record of the general court under supervision of the Supreme Court also influenced negative response of political parties and intellectual to the quality of decision made by the Supreme Court. By the enactment of Election Act 2007, the authority of local election disputes settlement was moved from the Supreme Court to the Constitutional Court. In article 1 paragraph 4 of Election Act 2007, it is stated that local election for the head of regions is part of direct general election for electing the head of the regions in unitary state of Indonesia which is based on Pancasila and 1945 Constitution. In other words, since the local election had been considered as part of the general election, therefore the authority of disputes settlement becomes the duty of the Constitutional Court.

The Constitutional Court has been perceived as holding the beacon for democracy and has become a new hope of citizens in Indonesia due to its reputable decisions. The court is regarded as one of true reformist state organs

in Indonesia. In a relatively very short period of time the Constitutional Court has started giving full and serious attention to the plight and complaints of the citizen and simultaneously gained public trust at a very high pace. As result, many parties summoned for moving the authority of local election disputes settlement from the Supreme Court to the Constitutional Court.

Selected Landmark Cases on Local Election Dispute by the Constitutional Court

Since 2008, the Constitutional Court has received, tried and decided 452 cases on local election disputes. Among the cases, 46 cases were accepted wholly or partly, 293 rejected, 99 could not be accepted, and 14 cases were withdrawn by the applicant. There are some landmarks of the decision on local election disputes that are important to be noted in this discussion. They are as follows:[23]

a. Dispute over the Result of Local Election in East Java Province: Decision No. 41/PHPU.D-VI/2008

It is considered as the first landmark decision as well as the milestone case of local election disputes. The Constitutional Court has shifted the meaning of local election disputes from formal justice approach to substantive justice approach. Through this decision, the Constitutional Court extended a new definition of local election disputes stating that the Constitutional Court does not merely try and decide the disputes based on 'mathematical count' or the result of local election in term of vote recapitulation, but more than that also try and decide whether there is violations of law in the process of local election. Hence, the Constitutional Court formulates a new standard of local disputes that the violation of local election has to be systematic, structured, and massive.[24] The Constitutional Court argues that to arrive at conclusion which convinces the justices that there are violations of law in a very extensive scope as well as in a very serious degree, the Court will decide the disputes based on evidence in the trial.

[23] See Data on Research conducted by researchers of the Constitutional Court (Helmi Kasim, Syukri Asy'ari, Meyrinda R. Hilipito dan Rio Tri Juli Putranto) with title"Kompatibilitas Metode Pembuktian dan Penafsiran Hakim Konstitusi dalam Putusan-Putusan tentang Perselisihan Hasil Pemilihan Umum Kepala Daerah dan Wakil Kepala Daerah".

[24] Widodo Ekatjahjana, "Telaah Kritik atas Putusan Mahkamah Konstitusi dalam Perkara Perselisihan Hasil Pemilukada Provinsi Jawa Timur", Vol. 8, No.1, Februari 2011, *Jurnal Konstitusi,* p. 54.

Based on the all evidence in the trial, the Constitutional Court believed that there were serious violations of laws which influenced the result of local election for every candidate. However, the Constitutionl Court had a constraint that they had limitation of authority in handling local election disputes since the laws give mandate only for the dispute settlement on the result of recapitulation of votes.[25] In fact, the settlement of disputes in the process of local election, either administrative or criminal violations, could not work effectively. Therefore, the parties applied the disputes to the Constitutional Court.

In line with that, the Constitutional Court argues they would not tolerate the violations which are against article 18 (4) and article 22E (1) of the 1945 Constitution. Using extensive interpretation method relating to its authority to settle the local election disputes, the Constitutional Court decided that the Court did not merely try and decide the disputes on the basis of mathematical count, but also on the basis of any systematic, structured and massive violations in the process of local elections which influenced the result of the local election.

In East Java local election, the Constitutional Court then nullified the result of local election and asked for re-election in particular regions.[26] In this decision, the Constitutional Court used purposive interpretation in analyzing and deciding the case. The Constitutional Court argues that local election was one of the implementation of principle of democracy in accordance with the 1945 Constitution. The violations of law in the process of local election could threaten the values of democracy as well as the principle of rule of law. Therefore, the Constitutional Court asked for re-election in three regions, namely Bangkalan, Sampang and Pamekasan.

In short, through its decision, the Constitutional Court has interpreted its authority while at the same time ignoring procedural law applied in the Constitutional Court. This can be accepted in the light of seeking for the fair election disputes settlement. The procedural law is set out for perceiving

[25] Article 106 (2) of Local Government Act 2004, as amended by Law No. 12 of 2008.
[26] Article 77 (3) of the Constitutional Court Act 2008, and Article 15 (3) of the Constitutional Court Regulation 2008.

justice, not for defeating justice.[27] In other words, the judges argue that the Court may interpret extensively the meaning of violations of local election disputes in the light of securing the working of local democracy in the regions. The Court is the guardian of the Constitution and democracy.

b. Local Election in South Bengkulu District: Decision no 57/PHPU.D-VII/2008

The Constitutional Court decided that winner in the second round of local election, Dirwan Mahmud, did not fulfill the administrative requirements of being candidate of the region since he had been in jail for murder case. Article 58 of Regional Government Act 2004 clearly states that one of the requirements of being a candidate is the candidate for local election has to be a person who was never sentenced by the court for any crimes with minimum punishment 5 years or more.[28] Since the candidate Dirwan Mahmud did not fulfill the administrative requirement as a candidate the local election in South Bengkulu was not legally valid. The Constitutional Court further stated that the local election in South Bengkulu had violated the law and the principles of election.

Even though it was administrative dispute, the Constitutional Court, as previous decision in East Java, argued that the violation of law and the principle of election could not be tolerated because it threatened the principles of fair election. Again, the Constitutional Court uses the extensive interpretation of its authority in this case. The Constitutional Court might try and decide any cases which were considered as the violation of law and principle of election in the process as well as the result of local election.

The decision of the Constitutional Court has caused several critical responses since the decision of the Constitutional Court was only based on administrative reason and hypothetical assumption on the result of the local election.[29] The decision was considered as the broadening of the authority

[27] YM. Lady Justice Constance K. Byamugisha, *Justice of the Court of Appeal of Uganda*,*Administering Justice without Undue Regard to the Technicalities,* Greenwatch, 2003, p. 6.
[28] As amended by Local Government Act 2008.
[29] Taufiqurrohman Syahuri, "Putusan Mahkamah Konstitusi Tentang Perselisihan Hasil Penghitungan Suara Pemilihan Umum Berdasarkan Undang-Undang No. 24 Tahun 2003",*Jurnal Konstitusi PKK-FH Universitas Bengkulu*, Vol. II No. 1, 2009, p. 17.

of the Constitutional Court in guarding the working of democracy in the local election. Quoting Van Vollenhoven statement," the Constitutional Court chose to fly freely without paying attention to the administrative law". The Constitutional Court had extensively covered all types of violation of local election although the violations of election are categorized into three types which subject to different regime of law. It is generally understood that the criminal violation is the authority of general court[30], administrative disputes are the authority of KPU (Election Committee) and Bawaslu (Election Supervisory Board)[31], and disputes over the result of election is the domain of the Constitutional Court[32]. In other words, the Constitutional Court has ignored the regulation of the election in the name of preserving democracy.[33] In fact, through its decision, the Court may settle the dispute on local election in Bengkulu Selatan.

c. Intermediate Decision on Local Election of District of Bangli

The impact of the decision on the local election in East Java is that there was a broader interpretation of local election disputes. The disputes are not only the disputes over the result of local election, but also the disputes on administrative issues as well as the criminal violations in the process of local election. The Constitutional Court emphasizes that the violations should be systematic, structured and massive which were considered influence the result of local election.

If compared to the decision of local election in East Java which decided to ask re-voting without any intermediate decision, the Constitutional Court decided the local election dispute in District of Bangli with intermediate decision. Intermediate decision is an interval decision (*tussenvonnis*) which has many functions before the final decision for the main dispute. The intermediate decision can be any actions for preparation of final decision. The decision can be also the judges asking the parties to provide particular evidence, shifting burden of proof, re-voting and re-recapitulation of votes and

[30] Article 252 of Law No. 10 of 2008.
[31] Article 248-249 of Law No. 10 of 2008.
[32] Article 259 (1) of Law No. 10 of 2008.
[33] *Ibid*, p. 18.

any valid evidence which determine the result of election related parties.[34] In Bangli District case, it was proven in the trial that in 12 Vote Counters, the voters did not directly vote, but they were represented by others. Therefore, the Constitutional Court had no choice than it has to enforce the law in a democratic event for upholding the principles of state based on rule of law by asking re-voting.

The lesson learnt from the experience of the local election in East Java is that the Constitutional Court does not want to decide directly final decison, but they ask for re-voting through intermediate decision. The Constitutional Court uses interpretation stare decisis and doctrinal analysis to argue that they have authority to try and decide any cases related to not only the result of election in term of mathematical count, but also may have authority to settle any cases dealings with the process of local election in Bangli District.

In addition, the nomenclature of intermediate decision is not only meant re-recapitulation, but also can be re-voting.[35] In other words, the Constitutional Court has used an extensive interpretation and free interpretation at the same time.

Intermediate decision is explicitly recognized in case of disputes on authority among state organs.[36] Therefore there is no regulation on the intermediate decision in local election disputes settlement. However, the Constitutional Court as the interpreter of the Constitution may interpret any issues relating to the Constitution. In addition, the independence and impartiality of the judiciary may lead the judiciary to have authority to interpret based on their own interpretation in responding the existing case.[37] Accordingly, based on the previous reasons, the Constitutional Court introduces re-voting through nomenclature of intermediate decision in the light of guaranteeing the principles of democracy as well as fair election.

[34] Maruarar Siahaan, "Implementasi Putusan No.27/PHPU.D-VII/2010 Tentang Perselisihan Hasil Pemilihan Umum Kepala Daerah Kabupaten Lamongan Provinsi Jawa Timur Tahun 2010", *Jurnal Konstitusi,* Volume 8 No 1, 2011, at 9.

[35] Article 8 ayat (4) PMK 15/2008 states that, "for the need of investigation, the Constitutional Court may decide an intermediate decision with re-voting.

[36] Article 63 of the Constitutional Court Act also states that, "the Constitutional Court could issue a decree which commands the parties to stop the practice of the dispute authority temporarily until the Constitutional Court finally decides".

[37] Rahayu Prasetianingsih, "Penafsiran Konstitusi oleh Mahkamah Konstitusi Menuju Keadilan Substantif",*Jurnal Konstitusi PKK Universitas Padjajaran*, Volume III No 1, 2011, p. 8.

d. Decision on Disqualification and Decree on One of the Candidate of the Local Election in District of Kotawaringin Barat

The lesson learnt from the decision of local election in East Java also influenced the local election disputes decision in Kotawaringin Barat where the Constitutional Court has produced a new norm of violations of the local election. In this decision, the Constitutional Court formulated the violations should be systematic, structured and massive.

In this decision, the Constitutional Court disqualified one of the candidates in the local election in Kotawaringin Barat and decided the winner of the local election. The reason of the Constitutional Court was the evidence showed that there were serious violations of election law in the process of local election in Kotawaringin Barat. The Constitutional Court argued that they have authority to disqualify the candidate since the candidate had violated the laws and therefore also threatened the quality of democracy.

However, some experts questioned on decision of the Constitutional Court since the Constitutional Court had extended their own authority in relation to the settlement of the local election. They proposed to revise the local election acts in order to guarantee the certainty of law.[38]

On the other hand, other experts have different comments that the decision of the Constitutional Court on local election dispute in Kotawaringin Barat is a proper decision since there are serious violations of principles of fair local election. The violation of local election acts will create a negative impact of democracy.[39]

The Constitutional Court uses a more philosophical approach of law as practiced in the Constitutional Court of Germany as well as the Supreme Court of the United State of America. They state that if there are two options whether we have to choose the rule of positive law or justice, they emphasize:

[38] MK Merampas Kewenangan KPU dan PTUN, <http://www.mediaindonesia.com/2010/08/06/160511/16/1/> , See also Noorwahidah, "Sengketa Pemilukada Kotawaringin Barat (Analisis Terhadap Putusan MK No. 45/PHPU.D-VII/2010 dari Perspektif Hukum Negara dan Hukum Islam)", Vol. 8 No.1, (2011), Jurnal Konstitusi at 27. See MK Buat Tafsir Sepihak Dugaan Pidana Pemilukada,*Media Indonesia*, 19 July 2010, p. 2, kolom1-4.

[39] "Saksi Ahli Dukung Putusan MK Kasus Kobar", <http://www.jpnn.com/index.php?mib=berita.detail&id=68858>, viewed on 27 July 2010.

"Preference should be given to the rule of positive law, supported as it is by due enactment and state power, even when the rule is unjust and contrary to the general welfare, unless, the violation of justice reaches so intolerable a degree that the rule becomes in effect "lawless law" and must therefore yield to justice."[40] Again, through its decision, the Court has secured the quality of local democracy in Kotawaringin.

e. Decision on Re-Voting with Additional Candidate of Local Election in Jayapura

In this decision, the Constitutional Court extended the qualification of the parties who might have legal standing in local election disputes. The Constitutional Court gave opportunity to the candidates who had registered but they were not determined as the candidate by the Election Commission. The extension of legal standing is formulated by the Constitutional Court on the basis of reasons which may violate the norm of the constitution, legal sovereignty (*nomocracy*), people sovereignty (democracy), any violation of preventing someone from being the candidate (right to be candidate), ignorance of the general court and impartiality of persons relating to a particular candidate and there it prevent other right of candidate.

The Constitutional Court considered that there were modus conducted by the Regional Election Commission which prevented particular candidate. Therefore, the Constitutional Court has to create "a break through" to protect the right of someone to be candidate.

The decision of the Constitutional Court might be a warning for commissioners of the KPUD to be more professional and work in line with the regulation.[41] The Constitutional Court also argued that the action taken by the Election Commission which prevents a person to be candidate in the local election is part of violations on the constitutional rights of the candidate. This decision also secures the process of the local election in Jayapura and therefore it saves the practice of local democracy.

[40] See Maruarar Siahaan, n. 35,p. 1.

[41] Daniel B. Ratu, "Pemilukada Lembata Pasca Putusan PTUN Kupang", <http://danyratu.blogspot.com/2011/04/mk-berkan-legal-standing-bagi-bakal.html>viewed on March, 4th, 2014.

f. Decision on Re-Voting with Order to the Election Commission to Verify the Candidate in District of Pati.

The decision of the Constitutional Court No. 82/PHPU.D-IX/2011 has nullified some decisions of the KPUD Pati such as decision of candidate, proceedings of recapitulation of votes and decision on the second round of local election in District of Pati. The decision, a quo, the Constitutional Court also disqualified the candidate Sunarwi-Tejo Pramono and at the same time asked the KPUD to verify the candidate Imam Suroso-Sujoko to replace the position of Sunarwo-Tejo Pramono and asked the KPUD to re-announce the candidates.

In the decision a quo, the Constitutional Court also asked the KPUD Pati to hold re-voting in the local election of District of Pati in 2011 and asked also the KPU, Bawaslu (Election Supervisory Board), KPU Central Java and Panwaslu (Election Supervisory Committee) of Pati to supervise the re-voting program in accordance with their authority. Through its decision, the Court has protect the right of the candidate in the local election of Pati in 2011. This also improved the quality of the local democracy.

g. Decision on the Administrative and Factual Verification of the Candidate and Re-Voting in District of Buton

On 21 September 2011,the Constitutional Court had decided some decisions on the local election disputes in District of Buton.[42] Based on these decisions, the Constitutional Court asked the KPUD to hold administrative and factual verification and also re-voting in the local election of District of Buton. This is one of the phenomenal decisions since the decision has given an opportunity for the candidate to join the administrative and factual verification.

The Constitutional Court hold again the trial for the local election disputes settlement in Buton since there was a report that Regent of the District of Buton tries to prevent the re-voting as ordered by the Constitutional Court. The Regent did not want to provide budget for the re-voting of the local election in District of Buton in 2011.

[42] See Decision No. 91/PHPU.D-IX/2011, Decision No. 92/PHPU.D-IX/2011 and Decision No. 93/PHPU.D-IX/2011.

The decision of the Constitutional Court has protected the right of the candidate in the local election. The decision has also given a significant contribution to the consolidation of local democracy in Buton.

h. Decision on the Local Election of the Mayor and Vice-Mayor in the Municipality of Pekanbaru

The Constitutional Court had decided the local election in Pekanbaru has violated the principle of fair election since in the process of election one of the candidates has conducted violations of laws which were in fact systematic, structured and massive. In the evident session, it was proved that there was mobilization of voters from outside of Pekanbaru, mass mutation of officers in a particular public office which related to the political support in the local election. In addition, there was decision of the mayor which gave advantage for one of the candidate.

According to the Constitutional Court, public officers at particular offices had been involved systematically, structurally and massively in the campaign program of one of the candidate. This was obviously against the principle of election which should be direct, general, honest and fair.

The Constitutional Court argued that the candidate, Firdaus, did not violate the election regulation due to incompletion of his document regarding his wives. It was because the form of application from the KPUD which provides only for one wife. Therefore, the Constitutional Court further argued that it was not a legal issue.

The Local election in Pekanbaru was one of dramatic local election since there were a long competition among the candidates through re-voting of the election based on the Constitutional Court decision. The Court has finally settled the disputes and secured the practice of the local democracy in Pekanbaru.

From the above landmark of decisions of the Constitutional Court, it is obvious that the violations of laws in the local election related to the violations of law in the process of the local elections, not the result of

the local election. In short, by extending the object of authority of the Constitutional Court in the local election disputes, the Constitutional Court is not only as "the calculator court", but also try and decide any violations in the process of local elections. However, this extensive authority in the local election dispute settlement has led the Constitutional Court to have very long and heavy trials.

From 2008 to 2013, the Constitutional Court has also settled many local election disputes. Eventhough some petitioners may be dissappointed on the decision, they accept the decisions of the Constitutional Court. By having these achievements, the Constitutional Court has created a more conducive political situation in the process of local election and after the local elections. This is believed to be a part of significant contribution of the Constitutional Court in consolidating democracy at local level. Despite having some significant achievements, the Constitutional Court also faced problems in settling disputes concerning the result of local elections as elaborated below.

Critical Assessment of the Court and Suggestions for Improvement

1. Design/ Structure

The first issue relates to the design or structure**.**The Constitutional Court of Indonesia is a centralized model based on the Kelsenian model which is mostly applied in European countries. The Constitutional Court is located at Jakarta, the capital city of Indonesia. The Constitutional Court consists of nine justices, three justices are appointed by the President, three justices are appointed by the Supreme Court and three justices are proposed by the DPR. This kind of appointment of justices in the Constitutional Court is a part of the checks and balances mechanism in order to prevent the Constitutional Court from being dominated by one organ in the Indonesian constitutional system.

The effectiveness of the local election disputes settlement also uses two approaches namely first, the position of the Constitutional Court as the judicial organ which has main function as "the guardian of the constitution" through

judicial review mechanism". Second, the effectiveness can also be assessed from the opportunity of the citizen to access the court and also access to justice.[43]

Centralized model of the Constitutional Court may not be problem with continental European countries which are not huge countries like Austria, Germany, Spain or other Asian countries like South Korea and Thailand.[44] In those countries, the parties do not need to go far away and spend a lot of money for bringing the cases to the Constitutional Court in the capital city of the countries.

However, the centralized model of the Constitutional Court can create problems with countries with huge territory and moreover Icelandic countries like Indonesia. In term of the access to justice, the furthest island and provinces in Indonesia will face a problem of time and cost needed to apply local election disputes in the Constitutional Court in Jakarta. Aceh and North Sumatera in the western Indonesia and Papua and Papua Barat in the eastern Indonesia can be some examples. Of course, it will spend a lot of money to cover the expenses needed in the Constitutional Court. Furthermore, the parties have to bring many witnesses to testify for the case before the Constitutional Court.[45]

2. Scope of Authority

Second issue is regarding the scope of authority of the Court. As a new state organ, the Constitutional Court has strived to the extent possible to implement the authorities and obligation mandated by the 1945 Constitution and stipulated in the Law Number 24 of the Year 2003 regarding the Constitutional Court (amended by the Law Number 8 of 2011). The Constitutional Court has four authorities and one obligation in accordance with those mandated by article 24C paragraphs (1) and (2) of the 1945 Constitution. Four authorities of the Constitutional Court are examining at the first and the final level whose decision is final materially review the law against the Constitution, decide disputes over

[43] See further Jimly Asshiddiqie, *The Constitutional Law of Indonesia*, Sweet and Maxwell Asia, 2009, at 610. In this book, Jimly explains that there are four goals of the general election, namely; first, to facilitate the possibility of regular, peaceful rotation of leader in the country. Second, to elect representatives of the people who represent the interest of people in the House of Representatives. Third, to implement the principle of people's sovereignty, and fourth, to guarantee the protection of human rights.

[44] As comparison, it can be seen that the width of Austria 83,871 km2 with 8,4 million of population and with continent geography. Germany: width 357.021 km2, population 82 million, and characteristic of geography: continent. Spain: width 504.782 km2, population 45 and characteristic of geography: continent. South Korea: width 99.274 km2, population 49 and characteristic of geography: continent. Thailand: width 514,000 km2, population 65 million and characteristic of geography: continent. Indonesia: width 5.193.250 km2, population 230 million and characteristic of geography: archipelago.

[45] Based on data at the Constitutional Court, the applicant, on average, proposed many witnesses.

the authority of state institution whose authority is granted by the Constitution, decide the dissolution of political party, and decide dispute over the result of general election. Whereas the obligation of the Constitutional Court is providing decision over the opinion of the House of People's Representative regarding the assumption of violation by the President and/or the Vice President according the Constitution. The extension of scope of authority of the Constitutional Court may also create problems because the justices have faced heavier processes of trial and longer duration of trial.[46] Moreover, there was no integrated schedule of local election with other election institutions.[47]

Based on the historical background of the establishment of the Constitutional Court, handling the local election disputes is not a part of the authority of the Constitutional Court. In Article 22E of the 1945 Constitution states that general election shall be conducted to elect the members of DPR, the Regional Representative Council, the President and the Vice-President, and the Regional House of Representatives. The article states clearly that the local election in term of electing the Governor, Mayor and Regent are not the part of the authority of the Constitutional Court. In other words, the historical background shows that the Constitutional Court was designed to be the guardian of the Constitution which focuses on four authorities and one obligation as discussed in the previous chapter.

However lack of public trust on one hand to the Supreme Court and having strong public trust to the new Constitutional Court has encouraged the House of Representatives to enact law which gives mandate to the Constitutional Court to handle the local election disputes by extending the meaning of the local election as a part of the general election regime.[48] Adding the authority with the local election disputes has made the Constitutional Court become an organ with too much too exaggerated.

[46] Refly Harun argues that the root of problems of ineffectiveness of the Constitutional Court in settling disputes over the result of local election started from the extension of authority of the Constitutional Court on the objects of the disputes. If the Constitutional Court did not extend the objects of disputes, the Constitutional Court would be able to settle the disputes over the result of local election fast and effectively since it focuses on whether the recapitulation of votes is right or not and the applicant has to prove their claims.

[47] See further Achmad Sodiki, "Demokrasi Lokal: Evaluasi Pemilukada di Indonesia", at 44. In this article, Achmad Sodiki argues that the problem of local election has to be analyzed with holistic dan integrated approaches.

[48] See General Election Act 2007. In Article 1 (4), it is stated that "General election for Head of Local Government is general election for electing directly the Head of the local government in the unitary system of Indonesia based on Pancasila and the 1945 Constitution".

On contrary, I Gede Dewa Palguna, a constitutional law expert from Udayana University, Bali, argues that the Constitutional Court is better free from the authority to handle local election disputes. He adds that the Constitutional Court is better focuses on its main function in constitutional review. The Constitutional Court is better to have the authority to handle constitutional complaint as the closest and direct derivation of constitutional review.[49] On the other hand, Ni'matul Huda, a constitutional law expert from Indonesian Islamic University, Yogyakarta and Aidul Fitriciada, a constitutional law expert from Universitas Muhammadiyah Surakarta argue that it will be better if the local election disputes are part of the authority of the Supreme Court through the High Court because it will be more effective, efficient and cheap[50].

3. Procedures

The third is procedural matters. Trial of the local election disputes is a speedy trial because the Constitutional Court has to decide the disputes within 14 days from registration. This is one of the fastest trials of local election disputes compared to other countries such as Nigeria, Mexico, Brazil and Thailand.[51] This is one of the main problems that create high tension of working at the Constitutional Court. A centralized model of the Constitutional Court with only 9 justices is not appropriate for settling huge number of local election disputes in Indonesia.

In addition, the short period of settlement of local election disputes is a weakness in the procedure. Fourteen days are not enough for the Constitutional Court in settling disputes of local elections since the Constitutional Court also tries and decides disputes on administrative disputes and criminal violations of election. Furthermore, data of local election shows that almost 85 percent of the local election brought to the Constitutional Court.

Data at the Constitutional Court shows that on August 2010, in particular days, the Justices had to finish the sessions from morning until evening (09.00 am-23 pm). This data is the sessions at the Constitutional Court without local

[49] From Interview with Dr. I Dewa Gede Palguna on 18 November 2012.
[50] From interview with Dr. Ni'matul Huda and Dr. Aidul Fitriciada on 12 November 2012.
[51] In Nigeria and Mexico, the Election Tribunal has 180 days for local election disputes settlement at region level and 90 day for appeal. In Brazil, the Election Commission has 90 days for local election disputes settlement at region level and 90 days for appeal. Thailand allocates 30 days for local election disputes settlement.

elections which are conducted at the same time. It is predicted that if the sessions were conducted from morning until evening, it will influence the quality of the session since the justices might be tired already. As the result, it will also influence the quality of decisions of the Justices.[52]

It is worthy to note that duration of 14 days for finishing a local election dispute is actually design of duration for the general election whereby the local election is not a part of the general election regime. Obviously, the drafter of Act and Regulation do not adapt this duration of time even after the local elections inserted as the part of the general election.[53]

4. Code of Ethics.

With the spirit as the guardian of the Constitution and vision of upholding Constitution in order to realize the rule of law state and democracy in the light of creating a civilized national life, the Constitutional Court has emerged as a new hope in the practice of constitutional system. This vision is becoming a guideline for the Constitutional Court in performing its duty as judiciary organ which is independent and responsible in accordance with the 1945 Constitution.[54]

Many comments have appreciated the Constitutional Court as a new state organ which inspires the milieu of the practice of the state into a new tradition of checks and balances. As it has been recorded in the previous chapter, the Constitutional Court has been considered as the rising star in the life of the country since it has shown its reputable achievements in keeping the balance of powers between state and the citizens. One of the strengths of the Constitutional Court lies in its strong management and leadership and the integrity of the justices and the staffs who should be hand in hand in building the Constitutional Court to become a modern and trustable court. This very good achievement and reputable institution could be maintained smoothly by the Constitutional Court until October 2013.

[52] Interview with Dr. I Dewa Gede Palguna from Udayana University, Bali on 12 November 2012.

[53] Compare to some countries such as Nigeria and Mexico, the Election Tribunal has 180 days for local election disputes settlement at region level and 90 day for appeal. In Brazil, the Election Commission has 90 days for local election disputes settlement at region level and 90 days for appeal. Thailand allocates 30 days for local election disputes settlement. Those countries have more time to finish their local election disputes. In the case of Indonesia with huge number of population as well as the character of geography which long and consists of many islands, the duration of time for local election disputes settlement should be longer.

[54] Prakata dalam *homepage* Mahkamah Konstitusi Republik Indonesia, http://www.mahkamahkonstitusi.go.id/ viewed on March, 4th, 2014

On 2 October 2013, it was surprisingly news made by media when the chairman of the Constitutional Court, Akil Mochtar, was caught red-handed in his official house in his involvement in a bribery case. This is really a disaster for the Indonesian legal system at all since the Constitutional Court is expected as the agent of change in the very dark image of the court and the legal apparatus in Indonesia. The authority of the Constitutional Court is suddenly deteriorating and public trust started disappearing.

One of the loopholes that lead the Constitutional Court to a dangerous situation since the system as well as public placed too much reliance on integrity of the justices in the Constitutional Court. Even though, the Constitutional Court has set out a code of ethics in 2004, however this internal supervision is nothing when the justices or the chairman of the Constitutional Court are a part of the problem. Human beings are sometimes weak to supervise themselves. Therefore, in many areas, it is developed two kinds of supervision; internal and external supervision.

In 2006, the Judicial Commission was the external supervision which had authority to supervise the justices of the Constitutional Court. However, the Constitutional Court nullified the authority of the Judicial Commission in supervising the justices of the Constitutional Court through its decision in 2006. Hence, as a new state organs, the Constitutional Court tends to be a super body institution without strong supervision either internally or externally. Without having strong supervision, the code of ethics of the judges may not be enforced well. Internal supervision becomes weak when the problems lies in the hands of judges of the Constitutional Court. One of the result of this situation was in 2014, Akil Mochtar, the chairman of the Constitutional Court was arrested by the Anti-Corruption Commission on bribery case relating to local election in Borneo.

In short, the individual piety is not enough without having strong supervision and broader contribution of social control. Code of ethics is nothing without having strong supervision of both internal and external supervision. In addition, in relating to the Constitutional Court, social control is also needed.

III. CONCLUSION

The Constitutional Court, through its decisions, has created a more conducive political situation and has given significant contributions in the process of consolidating local democracy in Indonesia. The Court managed to settle all disputes regarding local elections disputes assigned to them so far although it has limited number of judges and short period of settlement of the disputes. However, from managerial aspect and litigant interest, the local election disputes settlement worked ineffectively. Ineffectiveness of the settlement are caused by factors such as problem of design of structure of the Court, extension of the scope of authority, short period of settlement of disputes, and the breach of code of ethics of the judges.The assignment of jurisdiction to the constitutional court to deal with local election disputes unfortunately has negative impact on the function of the Court as the guardian of the Constitutional Court through judicial review mechanism due to logistic and lack of manpower. Therefore, re-design of structure as well as the authority of the Constitutional Court are necessarily needed. In addition, the Constitutional Court needs to have a more effective supervisory organ which may enforce the code of ethics of judges.

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Human Rights Constitutionalism in Indonesia's Foreign Policy

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Abstract

This article examines conceptual discourse of human rights constitutionalism as fundamental part of making policies in international relations. There are two key questions, first, to what extent human rights constitutionalism has been brought into discourse of its foreign policies, and second, how such human rights constitutionalism has been shaped by various actors, state and non state's relations. The politics of 'image' has been developed from regime to regime. However, such politics does not reflect substantially in progressing of human rights development. As part of democratic governance, and in the context of a more globalized society, Indonesia should rethink of its foreign policy foundations, especially in terms of transnational issues such as human rights, environment, and poverty. Therefore, central discussion in this regards is how to strengthen human rights constitutionalism is not merely internal and/or domestic affairs, but also this should build stronger and brave policies to develop and prioritize humanity values throughout international relations.

Key words: human rights, constitutionalism, foreign policy, Indonesia.

I. INTRODUCTION

Foreign policy is an important thing perceived in international relations. Foreign policy is defined as 'ideas or actions designed by policy makers to solve a problem or promote some change in the policies, attitudes or actions of another state or states, in non-state actors, in the international economy, or in

the physical environment of the world'.[1] In terms of human rights foreign policy, it can be defined as 'activities by policy makers to influence another state or group of states so that they may improve the respects for human rights.[2]

As similar to other, Indonesia's foreign policy has been influenced by international politics and economic context. From internal point of view, such foreign policy has been influenced by regime character and domestic economic-politic situation, not only between state's relations, but also non-state's relation. Here, analysis of foreign policy configuration is necessarily scrutinized, especially in the sense of human rights responses since independence till present.

However, this article examines conceptual discourse of human rights constitutionalism as fundamental part of making policies in international relations. Hence, key questions are two, first, to what extent human rights constitutionalism has been brought into discourse of its foreign policies. Second, how such human rights constitutionalism has been shaped by various actors, state and non state relations.

This analysis uses policy documents and reports, while also necessary to quote some scholars who has written this issue as their academic works.

II. ANALYZING INDONESIA'S FOREIGN POLICIES

The principles underlying Indonesia's foreign policy were expounded for the first time by Indonesian first Vice President, *Mohammad Hatta,* on September 2, 1948 at Yogyakarta in Central Java. During Cold War between West and East blocks, he has stated,

> "Do we, Indonesians, in the struggle for the freedom of our people and our country, only have to choose between Russia and America? Is not there any other stand that we can take in the pursuit of our ideals? ... The Government is of the firm opinion that the best policy to adopt is one which does not make us the object of an international conflict. On the contrary, we must remain the subject who reserves the right to decide our own destiny and fight for our own goal, which is independence for the whole of Indonesia."[3]

[1] Holsti, K.J. 1995., 7th Edition. Englewood Cliffs NJ: Prentice Hall International Editions, p. 83
[2] Baehr, Peter and Monique Castermans-Holleman. 2004. , 3rd Edition. New York: Palgrave Macmillan, p. 2
[3] Hatta, Muhammad. 1948. (Yogyakarta: unpublished paper).

These principles were inspiring the foundation of Indonesia's foreign policy, which was well known as independent and active. 'Independent' is due to Indonesia does not side with world powers. As a matter of principle, so doing war or involve into one side of party in war would be incompatible with the country's national philosophy and identity as implied in *Pancasila* (fundamental norm). The foreign policy is 'active', it means to the extent that Indonesia does not maintain a passive or reactive stand on international issues but seeks active participation in their settlement. In other words, Indonesia's independent and active policy is not a neutral policy, but it is one that does not align Indonesia with the super powers nor does it bind the country to any military pact. Essentially, it is a policy designed to serve the national interest while simultaneously allowing Indonesia to cooperate with other nations to abolish colonialism and imperialism in all their forms and manifestations for the sake of world peace and social justice. This explains why Indonesia was one of the founding members of the Non-Aligned Movement, which has been gathering the leader of Asian-African countries in 1955.

These foundations are perceived as manifestation of principles which are stated on Constitution Preamble, 'Whereas independence is the inalienable right of all nations, therefore, all colonialism must be abolished in this world as it is not in conformity with humanity and justice'. In here, the spirit of anti-colonialism has appeared to respond two blocks of power, and defended the idea of 'self determination' for countries in the south.

How does foreign policy foundation relate to 'self determination', especially in responding international pressure for independence of East Timor, Aceh, and West Papua? Three cases have appeared during Soeharto regime, when many human rights violations in the early 1970s. In 1975, Indonesia invaded and incorporated the former Portuguese colony of East Timor. The Indonesian Army also acted mercilessly against separatist movements in Aceh and West Papua. If there was international pressure coming, Indonesian government responded with non-interfere principles, and those cases were categorized as internal or

domestic affairs.[4] In this context, 'self determination' does not reflect in the real foreign policy of Indonesia, especially if it is dealt with human rights violations in domestic level. This could lead to greater assumption to sort of a hypocritical foreign policy which has been carried out during Soeharto regime.

Indonesian Foreign Policies in Responding Human Rights

Responding human rights issues in international relations might be discussed into three indicators. First, how Indonesian government responds to human rights violations in other countries, or 'self determination'. Second how Indonesian government respects to human rights instruments as a part of international agreements. Third, how Indonesian government explains to international community in regards human rights violations in internal or domestic level.

Since early independence, Indonesian government has been campaigning about 'self determination' and the spirit of anti-colonialism, as clearly mentioned in Constitution Preamble. It was an Asia-Africa conference held in April 1955 in Bandung, Indonesia. The main purpose was to use the conference as a platform for expressing the sentiment of solidarity among the member states, most of which are recently independent third world countries. The conference declared ten principles, which one of them was the first principle to respect for fundamental human rights and the purposes and principles of the Charter of the United Nations.[5] The conference was no further steps taken afterwards, and it has been only developing promotion and cooperation among countries of Asia-Africa in the short term without any tangible result.

During Soeharto's administration, the government has been developing relationship more regionalism cooperation, especially through ASEAN (Association of South East Asian) which was established in 1967. Actually, it has been developed under Soekarno through ASA (The Association of South East Asia, established in 1961) and Maphilindo (Malaysia, Philippines and Indonesia, established in 1963), but it had failed because conflict among ASA and Maphilindo countries. In responding to Kampuchea, where a lot of human rights violation because of

[4] Indonesian Government. 1992. , 25 March 1992.
[5] Asian African Summit. 2005. (http://asianafricansummit2005.org /history.htm, accessed on 26, October 2005).

massacre conducted by Khmer Rouge or under Pol Pot regime, and then Vietnam sent troops in order to prevent human rights violations, Indonesian government's position initiated with other ASEAN members, to recommend UN Security Council to take action for withdrawing Vietnamese troops from Kampuchea. This position was taken in regards to propose 'non-interfere principle', where Kampuchean people have right to chose their own government and cannot be driven by Vietnamese authority. On 15 January 1979, the Security Council voted in supporting this principle with a vote of thirteen to two, but Soviet Union, a permanent member, vetoed the resolution.[6]

Indonesian foreign policy in post Soeharto has rather shown more concerns to human rights violations in other countries. Especially during Megawati administration, she strictly stated to not recognize United States of America's invasion to Afghanistan as well as Iraq. And, she also supported the UN resolution for Palestine. In ASEAN communities, Indonesian government was the most active state to request Myanmar military junta for releasing democracy leader Aung San Suu Kyi. In addition, as Chairman of ASEAN, Indonesia also sent Foreign Minister to meet with General ThanSwee and General KhinNyunt, even failed to see Suu Kyi.[7]

But, in other side, she did not respond anything in regards to issue of illegal migrant workers who were expelled arbitrarily during Malaysian Prime Minister, *Mahathir Muhammad*, or she did not respond strongly in the case of human rights violation in Burma. In this context, geo-politic relationship with neighbour countries has an important factor to influence Indonesia's foreign policy, and mainly the relation among ASEAN members.

In responding to human rights in other countries, Indonesia's foreign policy has currently shown inconsistent matters. Inconsistent here is not related to whether the current policy following the previous one, but inconsistent because of consistency failure to promote and strengthen human rights values. It is also inconsistent with foreign policy foundation which states 'active' to participate in

[6] Sukrasep, Vinita. 1989. Bangkok: Institute of Security and International Studies-Faculty of Political Science Chulalongkorn University, p. 68-71.
[7] Kuntari, Rien. 2003. Jakarta: Kompas, 23 September 2003.

international relations. Ambiguity position also was shown in Indonesia's foreign policy when human rights violation happened in neighbour countries, simply due to maintain 'friendship relation'.

Ratifying International Human Rights Law

Indonesian government ratified several international human rights instruments, such as CEDAW (ratified in 1989), CRC (ratified on 5 October 1990), CAT (ratified on 27 November 1998), CERD (ratified on 25 July 1999) and ILO Convention. Under RANHAM 1999-2004 (National Action Plan for Human Rights), it stated that Indonesian government would ratify two important instruments, ICCPR and ICESCR. But up to the deadline on December 2004, both of instruments were not yet ratified. Under RANHAM 2004-2009, Indonesian Government under Yudhoyono regime ratified both of international covenants, ICCPR and ICESCR.

One of key instruments in international ethic says that whether or not the government violates treaty obligations or international human rights laws.[8] Through annexation in East Timor in 1976, or "integration" terms defined by Indonesian government, it was the first controversial globalized issue because of human rights questions. UN never recognize this "integration", and it was more critical when massacre in East Timor committed by Indonesian army after referendum in 1999. It was considered as gross violation of human rights because of crimes against humanity and genocide happened, and under Chapter VII UN Charter, UN can intervene in order to maintain or restore international peace and security.

Referendum for East Timor independence was held during Habibie regime, and in the same year Indonesian government at first time passed Act Number 39/1999 about Human Rights. Under Abdurrahman Wahid regime has also enacted Act Number 26/2000 about Human Rights Court. And under Megawati regime has enacted Act No. 27/2004 about Truth and Reconciliation Commission, and renewed National Action Plan for Human Rights 2004-2009. Unfortunately, the

[8] Cingranelli, David Louis. 1992. New York: St Martins Press.

Truth and Reconciliation Commission has been ended by Constitutional Court through its decision, while National Action Plan has been also not significantly changing the human rights situation.

Under Yudhoyono's administration ICCPR and ICESCR was ratified on 30 September 2005. Also, the Indonesian government has submitted a report of the Periodic Reviews of Indonesia's human rights compliance with international treaties (see: http://www.ohchr.org/EN/HRBodies/UPR/Pages/idsession1.aspx). In here, it has shown that after Soeharto, Indonesian government has been developing human rights reputation at international level through ratifying international instruments and passing human rights legislations.

Explaining Human Rights Violation In Own Country

Even though Indonesian government has ratified and enacted human rights instruments, it does not reflect stopping human rights violations. Improvement at legislation papers could not be said improvement at field level. So that is why government explanation to international community in regards human rights violations in internal or domestic level is important to be understood as part of human rights foreign policies.

During Soeharto regime, there was several serious human rights violation which was questioned by other countries. Beside East Timor case 1976-1999, there was mass killing over half a million people who were members of Indonesian Communist Party or ordinary people during 1965-1968, a number of mysterious murder took place between 1982-1984, killing Moslem people in Tanjung Priok case, Aceh and West Papua case, and the last period before he stepped down, killing student activist on May riot or Trisakti case in 1998.

When Netherlands was criticizing human rights condition in Indonesia regarding to political prisoner, violence in East Timor, and other human rights violations, by withdrawing 27 million guilders (about 13.5 million US dollar), it was causing serious tension between the Netherlands and Indonesia. At that time, Soeharto started a diplomatic offensive in order to prevent other donor countries from using the Dutch approach. A diplomatic offensive could be

referred to the statement "reckless use of development aid as an instrument of intimidation or as a tool of threatening Indonesia".[9] During this period, human rights problem was perceived as internal or domestic affairs, and other countries should respect non-interfere principle.

After Soeharto, human rights violation in those cases above still happened, or in other word, international attention and domestic requirements to solve the human rights problem are still questioned. During Abdurrahman Wahid and Megawati regime, human rights court was working to punish army for killing Teuku Bantaqiyah and his followers in Aceh case, and dozens army were punished for committing gross violation of human rights in East Timor in 1999. The government wanted to show that Indonesia was serious to punish human rights violator. Although judicial process was conducted, but it was not properly proceed according to international human rights standard in terms of finding the most responsible actor and judicial independence[10] In this context, UN Secretary General and also other countries are still questioning Indonesian government for ending impunity, but in the other hand the government felt this problem already solved by establishing and punishing human rights violator.

Under Yudhoyono regime, human rights problem was perceived with different approach, especially by using dialogue and more strengthening law enforcement. Intensive dialogue between Indonesian government and GAM (Liberation Aceh Movement) in Helsinki, Finland, and also agreement to establish Truth and Friendship Commission between Indonesian government and East Timor government for solving human rights violation during annexation 1976-1999. Indonesia has been developing human rights foreign policy through cooperation with the third parties or UN to involve solving human rights. Under Yudhoyono regime, human rights foreign policy is not using a diplomatic offensive, but developing non-violation approach and more openly cooperation for involving third parties.

[9] Baehr, Peter and Monique Castermans-Holleman. 2004. , 3rd Edition. New York: Palgrave Macmillan, 56-9.

[10] Cohen, David. 2003. (Jakarta: International Center for Transitional Justice) <www.ictj.org/downloads/Intended_to_Fail--FINAL.pdf> (accessed 20 August 2005); Commission of Expert. 2005. (Geneva: 26 May 2005); Cumaraswamy, Dato'Param. 2003. , July 15–24, 2002: As the Special Rapporteur on the Independence of Judges and Lawyers (E/CN.4/2003/65/Add.2, 13 January 2003).

The Role of Indonesian Human Rights Foreign Policies

After looking at foreign policies in responding to human rights, this part would analyse what factors are contributing to Indonesia foreign policy and how much human rights are quite striking reflected into foreign policy. After independence in 1945, 'independent' and 'active' principles were launched as foundation for Indonesian foreign policy to respond two blocks power between Soviet Union and United States during Cold War. In here, it was clear that global politics as main reason which has been influencing Indonesian foreign policy at that time. In order to respond global politics, Indonesian and other Asian-African countries developed solidarity among them which most of them currently just independence from colonialism, through non-alignment movement conference in 1955 as mentioned above. It was geo-politic strategy of Indonesian foreign policy.

Even though Indonesia developed non-alignment movement, but under Soekarno regime, he spoke a lot on *'Anti-Nekolim'* (Anti Neo-Colonialism and Imperialism) and brought left ideology into domestic level. At international politics, idea of 'Anti-Nekolim' has been seen clearly during Guided Democracy in 1959, and clearer when Soekarno developed NEFOS (or New Emerging Forces) which consist of the third world countries and linkage the 'Jakarta-Phnom Penh-Beijing-Pyongyang' to respond Cold War. This linkage actually was closer with communist bloc, and it could be critically said that the 'independent' and 'active' politic was left in Indonesian foreign policy. Foreign policy shifting in here was contributed by ideological and political dynamics at domestic level. In this context also, Soekarno was a key player in influencing international relations, especially for campaigning 'self determination' in Asian and African countries.

If Soekarno brought 'independent' and 'active' closer to Soviet Union and China, but during Soeharto, he developed 'independent' and 'active' diplomacy closer to United States and Japan. Under his authoritarian regime, 'national interest' was defined as national stability, included economic stability and political stability.

Economic stability was developed through borrowing debt from international financial institutions and countries such as United States and Japan, in order to

achieve certain level of economic growth. Development program by using foreign debt has been formed as economic development in the early 1970's. Regional economic cooperation through establishing ASEAN in 1967 was also considered as key factor to develop foreign policy. Soeharto also enacted Foreign Investment Act in 1967 and invited domestic and foreign investor to invest their capital in Indonesia. Political stability was strengthened in order to support economic stability, such as securing investment, facilitating industrial development, and guaranteeing capital safety. If any people or community against government's development program, they would be threatened because not supporting economic development.

During Soeharto's administration, 'developmentalism machine' has been influencing Indonesian foreign policy, where 'national interest' in terms of economic development as the most important factor to contribute in every policy. But on the other hand, 'developmentalism machine' has been also creating a number of serious human rights violations, and it could be easily seen during his authoritarian period. Soeharto believed that natural resources and geographical position as key factors to develop economic relationship with other countries to maintain 'national interest'. He defined political matters as 'internal or diplomatic affairs', included human rights issues, which other country should not pressure Indonesian policy.

Beside internal factors, the political and economic interest of external factors played role. For instance, the United States also influenced Indonesian foreign policy. United States was politically supporting Indonesia to against communist bloc and ideology including extremely supporting to Indonesian military defense. In this context, United States has contributed in hindering communist role in Indonesian foreign policy, but in responding to human rights violations which happened in Indonesia, United States kept quite only.

The most important factor in contributing Indonesia's foreign policy at regional level was also establishment of ASEAN. ASEAN is one of the pillars of Indonesian foreign policy. Soeharto has played actively to promote economic cooperation and developed regional security among ASEAN members. ASEAN

has seven aims, which three of them are (i) to accelerate the economic growth, social progress and cultural development in the region; (ii) to promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries of the region and adherence to the principles of the United Nations Charter; (iii) to promote active collaboration and mutual assistance on matters of common interest in the economic, social and cultural, technical, scientific and administrative fields.[11]

In terms of economic cooperation, there are two kinds of cooperation. First, cooperation in the government sector, such as establishment Committee of Finance and Banking (COFAB), Committee on Food, Agriculture and Forestry (COFAF), and Committee on Trade and Tourism (COTT). Second, cooperation in the private sector, such as establishment of ASEAN Industrial Complementation Scheme and ASEAN Industrial Joint Venture (AIVJ).[12] That cooperation has brought economic development into foreign policy, not only for Indonesia, but also other countries. In terms of political cooperation, through ASEAN, Indonesia became the most articulate advocate of a Southeast Asian Zone of Peace, Freedom, and Neutrality (ZOPFAN, 1971) and a Southeast Asian Nuclear Weapon Free Zone (SEANWFZ, 1995). The basic principles to maintain relations among ASEAN member were Treaty of Amity and Cooperation in Southeast Asia signed in First ASEAN Summit, February 1976 in Bali. Those principles covered: (i) Mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations; (ii) The right of every state to lead its national existence free from external interference, subversion or coercion; (iii) Non-interference in the internal affairs of one another; (iv) Settlement of differences or disputes by peaceful means; (vi) Renunciation of the threat or use of force; and (vii) Effective cooperation among themselves. The first case after this summit was when Vietnam invaded Cambodia, and interestingly, Indonesian Minister of Foreign Affairs, Mochtar Kusumaatmadja, was chairman of the ASEAN Standing Committee in December 1978. Vietnam invasion, known also as the

[11] Bangkok Declaration or the ASEAN Declaration, 8 August 1967.
[12] Sukrasep, Vinita. 1989. Bangkok: Institute of Security and International Studies-Faculty of Political Science Chulalongkorn University, p. 33-60.

Third Indochina War (1978-1991), was placed as crucial agenda for Indonesia and other ASEAN members, and they placed the issue on the agenda of the UN Security Council. After taking 'dual track' diplomacy, done by Soeharto on 12 November 1990 in Hanoi for the first meeting between ASEAN and Vietnam counterpart, and done by UNTAC in 1992, Indonesia foreign policy has shown commitment to bring peace in this region. At the peak deployment of foreign peacekeeping forces in late 1992, Indonesia had the largest force in Cambodia with nearly 2,000 military and police personnel (US Library of Congress).

In this context, Indonesian government through ASEAN has played key roles in international relations, especially in Southeast Asian region. The cooperation in economic and political development was greatly paid attention. Ironically, at the same time in 1976 Indonesia has also invaded East Timor and committed serious human rights violation during annexation. However, Indonesia defended that East Timor case was internal affairs and non-interference principle applied for this case. So, during Soeharto regime, we could see what attitude was applied for Vietnam invasion contradicted with what was applied in East Timor. Here, according to principle and theory in international ethics[13], Indonesian government foreign policy has actually been done in an inconsistent and hypocritical way.

Post Authoritarian Regime of Soeharto

Economic crisis and political turbulence in Southeast Asian has brought multidimensional crisis, included in Indonesia. Soeharto regime has been leading during 32 years in his president chair, stepped down after mass striking conducted by student activist in many Indonesia regions in 1998. After him, Indonesia has four presidents (1998-2005), namely Jusuf Habibie, Abdurrahman Wahid, Megawati Soekarnoputri, and Soesilo Bambang Yudhoyono.

During these periods, there have been foreign policies which importantly has marked economic and political dynamics at regionally and international level. In the early years after 1998, Indonesian has been facing international community pressure because the case of Jakarta riots which was causing hundreds Chinese

[13] Cingranelli, David Louis. 1992. New York: St Martins Press.

women were brutally raped, East Timor massacre, killing and kidnapping in Aceh and West Papua. Mainly, after referendum took place in East Timor 1999, Indonesian military committed on gross violation of human rights. International reactions happened to blame Indonesian government. At that time, United States government stopped military aid and cooperation to Indonesia in 1999 because of gross violations of human rights. UN and other European countries also condemned Indonesian military for carrying out serious violations. Those human rights as 'internal or domestic affairs' have been bringing Indonesia's foreign policy in regards to human rights changed.

On the other hand, changing situation in international relation which also is influencing and being faced by Indonesian foreign policy, pictured by fundamental global trend, including: (i) United States as politic-military superpower in the world which has economic-politic power in North America, Europe and East Asia; (ii) globalization and interdependence mainstream which are stronger; (iii) the stronger roles of non-state actors in international relation or 'multi-track diplomacy' in international relations; (iv) the raise of dominant transnational issues, such as human rights, democracy, good governance, environment in the international agendas.

To respond those changing situations, according to economic and political dynamics, the Foreign Affairs Department stated Political Policy and International Relation which was known as 'Ecumenical Diplomacy'. This policy is an idea to gather all countries to strengthen friendship and mutual cooperation with prioritizing.[14] First, Rehabilitation of Indonesian image in international community eyes; Second, Recovering national economic and social welfare; Third, Preserving national unity and national stability, and preventing nation disintegration; Fourth, Enlarging bilateral relationship with states who can assist recovery on economic, trade, investment and tourism project; Fifth, Supporting international cooperation in accordance to peace throughout the world. The government policy was in accordance with *Majelis Permusyawarakatan Rakyat* or People Assembly Decree Number IV/MPR/1999 concerning State Guidelines (GBHN), said that

[14] Shihab, Alwi. 2000. "Foreign Policy Guidelines and Indonesian Diplomacy in 21st Century", in Jakarta: Foreign Affairs Department.

Indonesia's foreign policy would be oriented to national interest, strengthen the developing countries solidarity, support the decolonization or independence, strengthen international cooperation for social welfare.

Here, during duet of Abdurahman Wahid and Megawati Soekarnoputri believed that 'image' in international community eyes was important, and this 'image' dealt with human rights. Prioritizing human rights could be clearly seen in domestic or internal policy as well as in foreign policy. During Abdurrahman Wahid's administration, Indonesian government has human rights act and *RANHAM* (National Action Plan for Human Rights) for the first time. During Megawati Soekarnoputri's administration, the human rights court started prosecuting gross human rights violators for the first time.

Soesilo Bambang Yudhoyono, a military background and former Minister of Defense during Megawati's cabinet, who was directly elected by people in democratic general election 2004, has also been campaigning human rights at the first priority. He has been trying to use peace conflict resolution or promoting a dialogue approach to respond Nangroe Aceh Darussalam and West Papua cases. Global politics context has been also influencing Indonesian foreign policy, especially in responding security issues or terrorism issues after bombing happened in Paddys Café Bali, Australian Embassy in Jakarta, and other places in Indonesia. In regional level, learning from East Timor case, Indonesian foreign policy now is trying to respond political dynamics and releasing concrete mechanism of 'enhanced interaction' or 'flexible engagement' in ASEAN context, to replace principle of 'non-interference'. Not only to develop cooperation with regional state, but also involving the role of non-state actors (non-government organizations), to strengthen human rights. Also, Indonesian government is preparing to make 'White Foreign Paper' for the rehabilitation of the name of Indonesian government at international level, especially in responding human rights tracking which is compatible with 'White Defense Paper'. Under Yudhoyono, 'independent' and 'active' foreign policy is being run by strengthening the role of diplomacy in regional and international region.[15] It is clearer in the campaign

[15] "Dinamika Diplomasi Luar Negeri", 2005. , Friday 12 Aug 2005. (http://www. suarapembaruan.com/News/2005/08/12/index.html, accessed 28 September 2005).

of human rights in international level when Hassan Wirayudha, Indonesian Minister of Foreign Affairs said that, "there are three challenges which should be answered by United Nations, development, security and human rights".[16]

International pressures for maintaining human rights better, global security against terrorism, and also democratic government transition at domestic level influenced Indonesia's foreign policy and human rights have been put at higher priority in order to develop better 'image'. As mentioned above, United States as politic-military superpower in the world which has a strong economic-politic power, has influenced human rights foreign policy, especially in responding to security or terrorism issues.

International Financial Institutions and Human Rights

Astonishingly, a senior International Monetary Fund (IMF) staff threw two Members of Parliament (MPs) out of the meeting of the Group of 24 Developing Country Ministers on 23 September 2005. Dradjad Wibowo MP from Indonesia and Hon. Mohammed Jagri MP from Ghana had been invited to attend the meeting by the G24 Secretariat to present a petition calling for democratic oversight of World Bank and IMF policies, and to question World Bank President Paul Wolfowitz and IMF Managing Director Rodrigo Rato. The International Parliamentarians Petition (IPP) has been signed by over 1100 MPs from 55 parliaments.[17]

This story has given a clear situation that international financial institutions (IFIs) have power to interfere and dictate states, economically. IFIs have played important roles in South countries, and significantly have driven policy in practical situation. Even driving South countries only in terms of economic, but the negative effect of policy given by IFIs would be unavoidable, especially in social, cultural and political situations. Hence, this part assesses to what extent the role of IFIs has been influencing human rights and Indonesia's foreign policy.

Two controversial IFIs in modern world today are IMF and World Bank. It is because both of them have had a significant impact on the world economy.

[16] SukarjaputraRakaryan. 2005."Menlu RI di PBB: Sampaikan Pelajaran dari Aceh"(Minister of Foreign Affairs in UN: Learning From Aceh), , 21 September 2005.
[17] IPP Info. 2005. http://www.ippinfo.org/ (accessed 25 September 2005).

Historically, they were set up at the Bretton Woods Conference in New Hampshire in 1944. It was attended by 43 countries and funded by themselves as member countries in proportion to their national incomes and received votes in proportion to their contributions. It meant that United States of America has always had dominant voice.[18]

The goal of World Bank was to encourage international investment particularly in poorer parts of the world. According to the article 1 of the World Bank Constitution, it says "to assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes." Ideally, the World Bank would help poorer countries by facilitating to build climate investment plans, sustainable growth, empowering poor people and providing capital for the projects. The important focus of World Bank work is reconstruction after natural disasters and post conflict rehabilitation needs that affect developing and transition economies. World Bank has portfolio's focus to include social sector lending projects, poverty alleviation, debt relief and good governance. World Bank work focuses on achievement of the Millennium Development Goals that call for the elimination of poverty and sustained development. The goals indicators are used for targeting yardsticks for measuring results.[19]

The World Bank is like a cooperative, where its 184 member countries are shareholders. The shareholders are represented by a Board of Governors, who are the ultimate policy makers at the World Bank. The five largest shareholders are France, Germany, Japan, the United Kingdom and the United States. By tradition, the bank president is national of and is nominated by the largest shareholder in the bank, the United States. The President is elected by the Board of Governors for a five-year, renewable term.[20]

IMF, or The International Monetary Fund was created in 1945 to help promote the health of the world economy. Headquartered in Washington D.C., it is governed by and accountable to the governments of the 184 countries

[18] Nicholson, Michael. 1998. London: Macmillan Press.
[19] World Bank Group. 2005. , http//:www.worldbank.org/ (accessed 11 October 2005).
[20] World Bank Group. 2005. , http//:www.worldbank.org/ (accessed 11 October 2005).

that make up its near-global membership. It is not far different from World Bank in addressing recovery of poor countries by financing them. It has seven purposes, included first, to promote international monetary cooperation through a permanent institution which provides the machinery for consultation and collaboration on international monetary problems; and second, to facilitate the expansion and balanced growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objectives of economic policy.[21]

Both of them have been closely cooperating with World Trade Organization (WTO) and sounding several programs which were seemed helping for poorer countries, and those roles could be easily seen from their promotion through various campaigns, papers, websites, and other sources of information, included outsider criticism to themselves which were put openly in their information. But, their roles have been still inviting serious debate into practical situation, and these were criticized by many scholars, non-governmental organizations, civil society organizations and many others.

Criticisms addressed to international financial institutions become much more severe in 1981. At that point, when Ronald Reagan-for whom extreme neo-liberal doctrines were gospel-come to power, the institutions became instant converts to these doctrines, as if it was necessary for them to follow every change of fashion inside the white house. It was crystallized as a universal program which was known as 'structural adjustment program', or SAP. This program imposed the South countries who were considered to be in crisis, to 'adjust' unilaterally to new conditions, especially to 'help' them through a swift reconversion to 'normal' capitalism.[22]

After applying SAP, the general consequences of SAPs have been a sharp increase in unemployment, a fall in the remuneration of work, an increase in food dependency, a grave deterioration of the environment, a deterioration in

[21] IMF. 2005. , http//:www.imf.org/glance (accessed 11 October 2005).
[22] Amin, Samir. 1997. Delhi: Madhyam Books, p. 13.

healthcare systems, a fall in admissions to educational institutions, a decline in the productive capacity of many nations, the sabotage of democratic systems and the continued growth of external debt.[23]

In this context, first, the roles of IFIs were not based on human rights perspective in order to improve progressively socio-economic rights. But their roles are more focusing on building climate market orientation which centered on capital investment, infrastructure development, and adjustment program. Second, adjustment program, as an idea was created in 'western desk thinkers', has been making universal assumption and believing that those adjustment programs can be applied universally. Referring to different situation in domestic level, for instance comparing African countries and South East Asian countries, or with Eastern Europe countries, would be having different and self characteristic of problems and economic resources. It meant that applying universal adjustment program would be resulting adverse situations, as mentioned above. In here, different situation at domestic level should be assisted by using specific programs in accordance with domestic needs.

Financial institutions are banks, dealing with this, general perspective says that banks aim to take benefit from their operation, and support for development. Not necessary to say that Banks should be responsible much on human rights issues, especially to intervene those issues in other countries. This perspective can be interpreted when the banks do not want to deal with human rights issues.

Clearer statement in dealing with this perspective above is, under World Bank Constitution says, "The Bank and its officers shall not interfere in the political affairs of any member, nor shall they be influenced in their decisions by political character of the member.....Only economic considerations shall be relevant to their decision" (article 4.10). World Bank does not take into consideration whatever poor human rights situation in countries given financial aid or technical assistance, because human rights are considered as internal political affairs. World Bank has given large number of financial assistance to regime who has poor human

[23] Amin, Samir. 1997. Delhi: Madhyam Books; Bello, Walden. 2003. London: Zed Books; Pieterse, Jan Nederveen Pieterse. 2004. New York: Routledge.

rights record, such as during Marcos regime in Philippines, Pinochet regime in Chile and Soeharto regime in Indonesia. World Bank policy is not different from IMF policy. Both of them do not care with internal affairs, because their bank constitution says that assistance should be given regardless any human rights violation in such countries.

Because human rights are not fully considered as important to be seen as factor contributing to the effectiveness of financial aid and technical assistance given by the World Bank and IMF, unsurprisingly if these money went to other use or misuse policy at domestic level, or it went to personal benefit for those who have position at bureaucracy level or dominant political parties. It meant that loan or grant assistance would be corrupted and useless.

For instance, case in the field found that a large number of loan projects in Madiun, East Java, Indonesia, World Bank assistance during 1985-1990 in water infrastructure programs especially to reconstruct irrigation for field crop were corrupted by local politician for supporting general election campaign. At that time, *Golongan Karya* Party, or Soeharto party was dominating and influencing political decision in almost all bureaucracy level, and the winning party since 1970s.[24] World Bank fully understood that their money went improperly, but the bank could not do anything to prevent or impose the government at domestic level. This case has shown whatever political reasons at domestic level could not be interfered. In here, many critical views say that how the bank will reach economic purposes without applying human rights which closely dealt with poverty issues, unemployment, right to development and other rights.

Beside policy problems which could not touch human rights issue, the bank was also questioned regarding to whom the decision making has been done. It is known as governance issues at internal of bank itself. Governance system in the international financial institutions, World Bank as well as IMF, is dominated by the largest shareholders. As mentioned before, members' vote always depends on the largest shareholders, and it automatically closed the opportunity of poor or

[24] Wiratraman, Herlambang P. 2004. "'Sambong'& Legal Conflict of Water Rights: Portrait the Clash Between State Law vs. Folk Law over Water Management in Madiun District", "", University of New Brunswick, Fredericton-NB. Canada, 25-29 August 2004.

developing countries to lead voting. Because of governance model in international financial institutions, the rich countries such as United States (especially the U.S. Treasury who has about 17 % of the total voting power) always drive policy program for debtor countries. This governance model does not give opportunity for debtor country to decide and develop how their government should do best for themselves.

All of those policies are developed under New Political Economy (NPE) of development that provides the theoretical underpinning to the structural adjustment program (SAP) of the World Bank, and this package sponsored by the IMF. Adjustment involves both some finance and a set of conditionality. This conditionality has provoked many controversies. Some see them as a perfectly normal banking practice to guarantee repayment, some others see, in these conditionalities, an attempt to retain the recipient countries as perpetually dependent client-states of the rich countries operating at a low level of development.[25] The role of World Bank and IMF directly play in evolving economic policy, and also external agencies, according to Little et al. say that USAID, the US Government play influential roles 'by holding out carrot and sticks', or through foreign experts, such as the Berkeley Mafia in Indonesia or the 'Chicago Boys' in post-Allende Chile.[26] The pursuit of the New World Order and the widespread adoption of SAP led to a new enabling policy framework for a global free trade regime and the constitution of a new imperial economy.[27]

After describing policies made by international financial institutions, the next question is what impact would be happening of their policies, especially in terms of human rights and impoverishment in the South. As mentioned before that IFIs have several roles which aim to develop market liberalization and climate investment plans. The core of this idea is economic policy should be left to the market, and the prices determined by the interaction of demand and supply forces. Any intervention by the state, such as the form of controls, subsidies, and selective protection, should be minimized. Under SAP, state

[25] Dasgupta, Biplap. 1998. New Delhi: Vistaar Publications.
[26] Little, I.M.D., Richard N Cooper, W. Max Corden and SarathRajapatirana. 1993. (New York: Oxford University Press, p. 386-87.
[27] Petras, James and Henry Veltmeyer. 2001. Delhi: Madhyam Books, p. 18.

should take a back seat in economic matters, even it is included public sector, in order to reduce inefficient economic policy and fiscal deficit. Here, the idea of liberalization, privatization and many other deregulations should be applied in order to support market efficiency or capitalism.

To give a clear example in this regard is related to water privatization. On water issues, Indonesia basically accepted privatization and commercialization policies, which have been involving several multinational corporations and financial institutions, including the World Bank. Privatization on Jakarta Water Utilities for instance, World Bank and Japan OECF involvement in water privatization in Jakarta was started in June 1991, when it extended a $92 million loan to improve the infrastructure of Jakarta PAM Jaya. The loan was used to establish a new water purification installation at Pulogadung, Jakarta. Both the World Bank and Japan OECF advised government to privatize Jakarta PAM Jaya water utilities.[28] The Bank also appointed consultants to give inputs to the water utilities management how the privatization should be carried out. The World Bank loan opened opportunities for private investment to penetrate the Jakarta water service. The privatization of Jakarta's water is the story of how powerful multinationals have deftly used the World Bank and a compliant dictatorship to grab control of a major city's waterworks. In alliance with the Suharto family and its cronies, water corporations like Thames and Suez won favorable concessions without public consultation or bidding. Thames and Suez offered to modernize and expand the system. PAM Jaya also agreed to force businesses and private homes to shut down private wells and buy their water from the consortia. At the time, about 70 percent of Jakarta's drinking water came from private wells. In exchange, the private companies agreed to pay PAM Jaya's foreign debts amounting to $231 million, from their revenues. World Bank official Alain Locussol, who has been involved in financing the water system and wrote the 1997 report, issued a second report the following year stating that the $190 million World Bank loan (of which $92 million was for water infrastructure improvements) had "facilitated"

[28] Harsono, Andreas. 2003. "Water and Politics in the Fall of Suharto"in (ICIJ), p. 1-2.

the privatization and would "further achieve development objectives". The report predicted that the two companies would be "more successful" in lobbying for more money for management of the waterworks.[29] In further program, in 1998, World Bank approved a US$ 300 million loan to the Indonesia Government. The proposed three-tranche loan would provide balance of payments assistance to the Republic of Indonesia to support a structural adjustment program of policy, institutional, regulatory, legal, and organizational reforms in the management of the water resources and irrigation sector. The first tranche of US$50 million was disbursed immediately upon the effectivity of the loan facility. In return, government agreed to issue a new irrigation policy, requiring the decentralization of irrigation management to the farmer organization. Decentralization means the farmers will bear the cost of management and maintenance. The second tranche of US$100 million was disbursed on December 31, 1999; and the third tranche of US$150 million upon completion of the sector reform program during the second or third quarter of 2000.[30] Beside foreign debt policy, Indonesia government was imposed to enact legislation to guarantee water privatization.

Consequently, as requirement of water infrastructure investment, the Government should provide or pass a new water management bill which is friendly with privatization, commercial treatment for supporting free market. Act Number 7/2004 is one of law produced by neo-liberalism thought. Although under article 33 of the Indonesian Constitution (mainly section 2-3), which clearly stated that "all sectors of production, the land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people". In this case, water privatization in Jakarta has impacted to poor communities who became more difficult to access clean water, and they could not spend money for education, food and other basic needs, because they should spend it more for buying water. In this situation, impoverishment would happen as direct effect of privatization.

[29] Harsono, Andreas. 2003. "Water and Politics in the Fall of Suharto"in (ICIJ).
[30] Siregar, P. Radja. 2003. ' http://www.jubileesouth.org/news/EpZyVyEyylgqGYKXRu.shtml (posted on 12 December 2003, accessed 5 October 2005).

IFIs and Indonesia's Foreign Policy

Today, human rights issues are becoming globalized issues, and universally being more accepted as fundamental values in various culture, nations, and state. In international relation, human rights have been placed in important roles, through developing international legal instruments, international institutions, and many others. It has principle of interdependency that mentions human rights concerns appear in all spheres of life, such as home, school, workplace, courts, markets and everywhere. Human rights violations are interconnected; loss of one right detracts from other rights. Similarly, promotion of human rights in one area supports other human rights.[31] And also it has principle of responsibilities, which not only bind government or individual, but also bind every organ of society including corporations, financial institutions, non-governmental organizations, foundations, and others. These principles of human rights are also important considered in defining ethical measurement in international relation.

World Bank and IMF, as stated earlier, under their constitution have policy of non-interfere, especially in responding to internal affairs in certain countries, or involving in human rights issues. It means that whatever regime has been done on human rights violations in such countries, adjustment program, loan, or many other projects could be applied regardless poor human rights situation. There is no responsibility of World Bank and IMF to develop measurement or requirement for improving human rights. In certain situation, their money or assistance has been impacting to larger human rights violation and influencing on impoverishment, especially in South countries.[32] World Bank and IMF, through financial assistance or adjustment programs always defend their purposes and acts for development in given countries, but development in their frame of thinking is not dealing with human rights improvement. Whereas, problem of poverty or impoverishment is a part of human rights problem, especially on economic, social and cultural rights. Separation between development policy and human

[31] Ravindran, D. J. 1998. Human Rights Praxis: A Resource Book for Study, Action and Reflection. Bangkok, Thailand: The Asia Forum for Human Rights and Development; Flowers, N. 2000. The Human Rights Education Handbook: Effective Practices For Learning, Action, And Change. Minneapolis, MN: University of Minnesota.

[32] Winters, Jeffrey A. 1996. Ithaca: Cornell University Press.

rights policy within World Bank and IMF policy, which can be seen from various adjustment programs or letter of intent in South countries, are clear evidence that human rights are not respected progressively.

Other criticism addressed to IFIs is also mechanism to impose World Bank and IMF responsibility in human rights. Mechanism in human rights could not reach IFIs responsibility, especially if their policy failed or intentionally caused poorer or worse situation. So far, only state and individual are covered under international human rights law, and they can be imposed or punished under this instrument. International human rights law has limits to reach and impose financial institutions, whatever they do and consequences in terms of bad human rights condition. In order to encourage better relationship and ethically accepted as humanization of policy, human rights policy should be applied in all sectors within financial institutions, both the World Bank and IMF which were extremely criticized because of it. Hence, the role of Indonesia's foreign policies are very limited in criticizing those institutions, since their capital roles have been really strong in influencing economic and investment climates. On the other side, it also shows a politic of image, which has been influencing the Indonesia's foreign policy in making a sustainable financial support from IFIs.

III. CONCLUSION

There are several points to make as concluding remarks. First, the 'independent' and 'active' principles as foundation of Indonesian foreign policy, which were created in 1948, should be revised accordance to different international context with currently situation. Clash ideology between communism and liberalism in the past has been much changing. Indonesia's foreign policy should respond how to explain 21st century situation which most of political-economic driven, especially in the age of technological market power. Indonesia's foreign policy should respond how Indonesia can exit from burden of debt and how it can participate to decide progressive economic for Indonesian and other poor or developing countries. Shortly, rethinking of foreign policy foundations is

fundamental matter, especially in terms of transnational issues such as human rights, environment, and poverty.

Second, if comparing among Soekarno, Soeharto and post Soeharto regime, they had different kinds of responding to human rights. Soekarno is more provocative to defend Asia Africa countries for independence, while Soeharto is more exclusive to respond human rights in internal affair, by using non-interfere principles. After the demise of Soeharto, indeed, a more progressive way has been shown to prioritize human rights into internal or foreign policies, even some cases showed that government does not really take it seriously to respond human rights problem in other countries, such as responding Burma case and trafficking or migrant workers in Southeast Asia. In this regard, I refer to what Friedman has written, in which he says that it is a type of 'Asian Authoritarianism' where actually Asia is only a geographical word, and shares nothing in common, especially in terms of human rights.[33] Today, Asia is a region that grows and influences the world, especially in facing North countries. Asian countries should be hand in hand as G-Asia to balance G-8 power, through participating in international systems and also focusing problems of poverty, as a dominant part of human rights situation in Asia.

The third, for understanding of Indonesia's foreign policies, it has been quite dynamics, changing from time to time. Soeharto has turned the 'globalist' Soekarno foreign policies into 'realist' one. It could be seen when Soeharto always construct and more accommodate 'national interest' than strengthen humanity values like previous government. Even Soekarno has been closer with communist bloc than liberalism of United States. Interestingly, the post Soeharto regime has been developing an 'image' at international level in responding to human rights. Human rights are strongly reflected into various policies, domestic as well as foreign policies. Unsurprisingly, MakarimWibisono, a former Indonesian Ambassador for UN was elected as chairman of Human Rights Commission. Rudi Rizki, an ad hoc human rights court judge was also chosen as Commission

[33] Friedman, Edward 1999."Asia as A Fount of Universal Human Rights", in Peter Van Ness (ed) Debating Human Rights: Critical Essays from the United States and Asia. London and New York: Routledge, p. 56-7.

of Human Rights Expert in UN. Both of them were elected in 2005. The big question for this context here is to what extent international politics on human rights has been orchestrated on during leading as chairman of UN Human Rights Commission.

The politics of 'image' is developed quite successfully by post Soeharto regime, but it does not reflect substantially in progressing of human rights development. Progressive human rights realization is more important than develop only 'image', and it is not easily conducted in regards to complexity of human rights violation around the world. Global issues such as terrorism, poverty, migration, freedom of hunger, trafficking/slavery, HIV/AIDS, privatization or commercialization, and war, are shadowing Indonesian foreign policy. These are factors contributing human rights foreign policy for Indonesia.

The fourth, Indonesia's foreign policy should address the World Bank and IMF, especially in reforming organizationally in accordance to support democratic governance and human rights improvement, which should be attracted within their policies, programs, and any kind of assistance in more meaningful ways.

Fifth, US domination within IFIs should be seen as failure of governance. The largest shareholder should give democratic ways in involving debtor or recipient countries to decide kinds of development for themselves which concerns human rights as an important part of measurement or requirement to develop programs. The roles of state, non-state actors, or others, become important and crucial to protect human rights and to fight inequality, through democratic governance in IFIs. Poverty reduction programs could not be a success if domination of the largest shareholders within IFIs still sustains inequality or gap between North and South, and "good governance" projects in the South could not be applied if World Bank and IMF have no democratic governance in their organization.

Those are challenges for Indonesia's foreign policy, which need to be necessarily considered by current Jokowi's administration. The main message in this paper is how to strengthen human rights constitutionalism which is not merely internal and/or domestic affairs, but this should build stronger and braver

policies to develop and prioritize humanity values throughout international relations.

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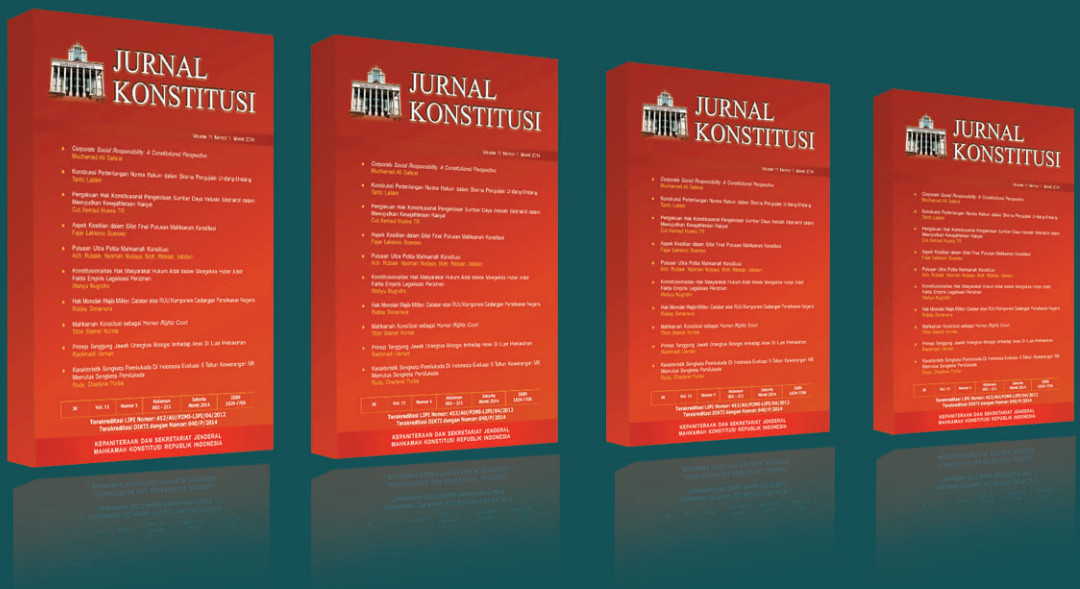

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