May 2016 ❑ Volume 2, Number 1

Constitutional Review

PUBLISHED BY **The Constitutional Court of The Republic of Indonesia**

CONSTITUTIONAL COURT OF
THE REPUBLIC OF INDONESIA

CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

Constitutional Review, May 2016, Volume 2, Number 1

Address
Constitutional Review

Constitutional Court of The Republic of Indonesia

Jl. Medan Merdeka Barat No. 6 Jakarta 10110
Telp. (021) 23529000 Faks. (021) 352177
E-mail: jurnal@mahkamahkonstitusi.go.id

This journal can be downloaded on www.mahkamahkonstitusi.go.id

Constitutional Review
Thank you very much to
Advisers
Prof. Dr. Arief Hidayat, S.H., M.S.
Dr. Anwar Usman, S.H., M.H.
Prof. Dr. Maria Farida Indrati, S.H., M.H.
Dr. Patrialis Akbar, S.H., M.H.
Dr. H. Wahiduddin Adams, S.H., MA.
Prof. Dr. Aswanto S.H., M.Si. DFM.
Dr. I Dewa Gede Palguna, S.H. , M. Hum
Dr. Suhartoyo, S. H. , M. H.
Dr. Manahan M. P. Sitompul, S.H., M. Hum

THE CONSTITUTIONAL COURT OF
THE REPUBLIC OF INDONESIA

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

May 2016, Volume 2, Number 1

CONTENTS

Contents

Note From Editors

Continuing our endeavours to provide legal scholarship within the field of law and constitution, we welcome our readers to the May edition 2016 of our journal *Constitutional Review*. As it has been our main concern to discuss constitutional issues and constitutional court decisions in broad perspective, this May edition continues to present interesting discussion on this matter.

The rights of indigenous people have been guaranteed by the 1945 Constitution of the Republic of Indonesia as stipulated in Article 18B paragraph (2) and Article 28 paragraph (3). In diverse Indonesia indigenous people strive to take part in the life of the society and the state. While being thought to be the largest structure in nation-state Indonesia, there is a danger that their existence has not been accomodated or even systematically excluded. Despite the recognition granted by the Constitution, much still needs to be done. Taking the sample of the cultural-rich Bali, the second article of this edition, written by I Gede Yusa of Udayana University, discusses the guarantee and challenges faced by indegenous people in an elaborate manner.

The second article of this edition deals with the importance of regulating the tenure of leadership of primary constitutional organs as an important issue which might affect the performance of the organs. Learning from the conflict

that happened within the Regional Representatives Council (DPD), Bayu Dwi Anggono, the author, suggests that the tenure arrangement shoud not be regulated in the internal regulation of the organs but should be regulated in the Constitution or the law. Regulating the leadership tenure in the Constitution or the law especially for primary constitutional organs will unite contradicting regulation and avoid prolonged conflict.

In the third article, I Gusti Ayu Ketut Rachmi Handayani discusses the importance of guaranteeing green development rights in creating the ideal maritime system for the improvement of public welfare. Supporting the idea, the author describes in the writing the global environmental chalange of world economic system which tends to be exploitative and damaging to nature. Considering that Indonesia is an archipelagic state with abundant natural resources and vast number of islands including frontline islands bordering Indonesia with other countries, the author argues that applying the green development rights will be beneficial to the country. The author also elaborates the interrelation between the developmental of environmental law and the constitutional guarantee of environment-related human rights.

The ford article of this edition discusses the institutionalization of local political parties in Indonesia. Drawing the idea of regional autonomy and political autonomy, Muhammad Rifqinizamy Karsayuda, the author, argues some perspectives on the possibility of institutionalizing local political parties in Indonesia. The author presents theoretical and normative basis for the establishment of political parties. Some precedents in Aceh and Papua, Indonesian constitutional history and comparative perspectives from countries with different constitutional system, United Kingdom as unitary state and Malaysia as federal state, enrich the insights presented in this writing.

The constitutional powers bestowed upon the Indonesian Constitutional Court do not include authority to adjudicate constitutional complaint and constitutional question. Two authorities which Pan Mohamad Faiz of TC Beirne School of Law, the University of Queensland, considers, in his writing, important to be conferred to the Constitutional Court. The author argues in his writing

that incorporation of these authorities into the jurisdiction of the Indonesian Constitutional Court is of paramount importance on the ground that there is still no mechanism to challenge decision or action made by public auhtorities which violate fundamental rights guaranteed by the Constitution. While emphasizing the importance of adopting these authorities, the author also suggests ways to improve the institutional structure of the Constitutional Court to cope with the challenges posed by adopting the authorities.

Article 33 of the Indonesian Constitution serves as the constitutional basis concerning the use of natural resources and the Indonesian economy. Faiq Thobrani and Izzatin Kumala discuss this basis in relation to the Constitutional Court decision concerning the Law on the Management of Coastal Areas and Small Islands. They note that common access is the approach taken by the Constitutional Court to grant people the right to Coastal Areas and Small Islands which is previously given to the private entity as concession rights. The writing tries to explore the pro people approach as the new concept in the management of natural resources and find its consistency with the Constitution and people empowerment.

Editors

I Gede Yusa

Identification and Analysis of the Rights of Indigenous Peoples in the Study of Constitutional Law (A Study of Balinese Traditional Community)

Constitutional Review Vol. 2 No. 1 pp. 001-028

The Resolution of the UN General Assembly in 2000 has mandated to discuss indigenous issues related to economic and social development, culture, environment, education, health and human rights. In national law, the recognition of the existence of traditional people with customary rights can be found in Article 18 B paragraph (2) and Article 28 paragraph (3) of the Constitution of the Republic of Indonesia of 1945. This study discusses the rights that grow and thrive in indigenous communities in Bali which are associated with the life of society and state. Also the responsiveness or recognition of Indonesia to the presence of the state constitution means the rights of indigenous peoples has grown and developed in Bali and empowerment efforts need to be done for the rights of indigenous peoples has grown and developed in Bali to be able to be a force in the life of society and state. Studies on the identification of the rights of the traditional lifestyle that are recognized in the community as well as prospective empowered in the state of life in Indonesia can be classified as a normative legal research conducted on the relevant legal materials. Legal materials and supporting information that has been gathered up with regard to research on the identification and analysis of the rights of traditional communities in Indonesian Studies State Laws (A Study of Traditional Balinese Community) Firstly the description and interpretation was carried out, or interpretation of the normative propositions found to be further systematized in accordance with discussion on the subject matter of this study. The results of this analysis are three techniques to evaluate and analyze its content according to the given arguments and conclusions of law to get a top issue in this study. States have an obligation to give recognition to indigenous peoples based on the constitution. Responsiveness or the constitutional recognition of the existence of the rights of indigenous peoples has grown and developed in Bali are envisaged in the constitution, namely Article 18B paragraph (2) and Article 28 paragraph (3) of the Constitution of the Republic of Indonesia of 1945. The constitutional mandate must be obeyed by state officials to regulate the recognition and respect for indigenous peoples in some form of legislation. While the empowerment of local people has been recognized by constitution, yet much remain to be done. The rights of indigenous peoples which has grown and developed in Bali should be legally enforced in the life of society and state.

Keywords: Rights, Indigenous People, Constitutional.

Bayu Dwi Anggono

The Tenure Arrangement of Primary Constitutional Organ Leaders in Indonesian Constitutional System

Constitutional Review Vol. 2 No. 1 pp. 029-056

The tenure arrangement of primary constitutional organ leaders is required as the implementation of power limitation principle and the manifestation of political equality principle as the characteristic of democratic state. The tenure arrangements of primary constitutional organ leaders in Indonesia have four models: tenure arrangement through the 1945 Constitution, tenure arrangement through Law, tenure arrangement which is not regulated by law but regulated in the constitutional organs' internal regulation, and tenure arrangement which is not regulated by law as well as internal regulation. The problem in this paper is: First, how is the arrangement of leadership tenure in the constitutional organs according to the Indonesian legislation system. Second, how to adjust the arrangement of constitutional organ leader in order to provide legal certainty and prevent conflict that can disrupt organs' performance. The arrangement through the Constitution is the most powerful model in term of legal certainty regarding that the Constitution is in the highest national legal order and materials related to the structure and organization of primary constitutional organs constitute the Constitution's substance. The model not regulated in law but regulated in internal regulation prone to cause conflict because every member of the constitutional organs which meets the requirements may change the internal regulation at any time. To avoid this conflict, this paper concludes that it requires the change of regulation regulating the tenure of constitutional organ leaders so that it is no longer regulated in the constitutional organs' internal regulations, but it is set in the 1945 Constitution or at least in the Law in order to have a better legal certainty.

Keywords: Arrangement, Tenure, Primary Constitutional Organ

I Gusti Ayu Ketut Rachmi Handayani

Green Development Rights for Optimizing Urban Area and Coastal Areas in Indonesia (Consitency of the State of the Doctrine of the Right to Control the State)

Constitutional Review Vol. 2 No. 1 pp. 057-076

The green development right paradigm will elaborate the ontology (nature), and the ways or methods in order to achieve the ultimate goal of the green development right. This ultimate goal will be focused on the creation of the ideal maritime systems that may guarantee all related parties, such as individual, society, or community, private sectors and the government, to convert their potentials to be functional towards public welfare. The core elements of the green development right will emphasizes the series of norms in managing the coastal and frontline island potentials. The normative framework covers Environmental Law, Fishery Law, and Coastal Law. The research methods use an empirical approach and normative approach. The study documents the analysis consists of constitutions, legislation and various policies relating to the subject matter studied in Indonesia area and the problems it faces and report the results of the various meetings, seminars, public hearings.

Keywords: Green Development Rights, Optimizing Urban Area, Coastal Areas, Doctrine of the right to control the state.

Muhammad Rifqinizamy Karsayuda

The Decentralization of Political Parties Through the Instituti-onalization of the Local Political Parties

Constitutional Review Vol. 2 No. 1 pp. 077-102

The implementation of regional autonomy through Acts Number 23/2014 on Regional Government formulates the authority that can be maintained by local governments. One of the authorities' is the political autonomy. The efforts to implement the political autonomy can be done through the institutionalization of local political parties. However, according to Indonesian Law, the institutionalization of local political parties is not regulated in the provisions of acts related to political parties. The legislation that regulates local political parties can be found only in Acts Number 11/2006 on Aceh Government and Acts Number 21/2001 on Special Autonomy for Papua Province. Therefore, this paper analyzes the theoretical, juridical and sociological reasons underpinned the idea of local political parties' institutionalization. This research is a normative legal research which uses legal matter and acts to analyse the problems. This research finds strategies that is relevant to make local political parties institutionalized.There are five reasons to deliver local political parties in Indonesia based from this research. First, the theoretical foundation describes Indonesia as a country with federalism autonomy. Second, the constitutional juridical basis consists of two principles of the Constitution, namely the principle of the autonomy of the unitary state and the principle of equality and freedom of every citizen in governing. Third, The platform of sociological based on the fact that the choice of pluralistic Indonesian society is still diverse in many elections. Fourth, the historical background in the form of historical experience that in 1955 General Election and Local Election, there were several local political parties. Fifth, the comparative study in United Kingdom as a unitary state and Malaysia as a Federal State, which both have local political parties. The concept of local political parties that are relevant to be applied in Indonesia in the constitutional juridical perspective related to the decentralization of political parties can be built through four strategies. First, the local political party whose presence was based on pluralist paradigm which provides the idea that in a pluralistic society should be built a decentralized party system in order to sustain the plurality of society. Second, the local political party which drafted is a separate legal entity which is dichotomous from the national political parties as a legal entity. Third, local political party's particzipation in elections only to the General Election and Local Elections for Legislative Elections candidates, the Provincial Representatives,

Regency / City. Fourth, the formation mechanism, supervision and dissolution of local political parties are designed similar to national political process for parties as applicable today.

Keywords: Decentralization, Election, Institutionalization, Local Political Parties, Regional Autonomy

Pan Mohamad Faiz

A Prospect and Challenges for Adopting Constitutional Complaint and Constitutional Question in the Indonesian Constitutional Court

Constitutional Review Vol. 2 No. 1 pp. 103-128

A jurisdiction of the Indonesian Constitutional Court concerning constitutional adjudication is only limited to review the constitutionality of national law. There is no mechanism for challenging any decision or action made by public authorities that violate fundamental rights enshrined in the Indonesian Constitution. This article argues that constitutional complaint and constitutional question might be adopted as new jurisdictions of the Indonesian Constitutional Court in order to strengthen the protection of fundamental rights of its citizen. It also identifies main problems that will be faced by the Constitutional Court in exercising constitutional complaint and constitutional question. For instance, the Court will be burdened with too many cases as experienced by other countries. A clear mechanism for filtering applications lodged to the Constitutional Court and the time limit for deciding cases are important elements that have to be regulated to overcome the problems. In addition, the institutional structure of the Constitutional Court has to be improved, particularly to support its decision-making process.

Keywords: Constitutional Complaint, Constitutional Court, Constitutional Question, Fundamental Rights, Individual Application.

Faiq Tobroni, Izzatin Kamala

The Common Access as Pro People Management of Natural Resources (An Analysis of Decision Number 3/PUU-VIII/2010 about Judicial Review of Law 27/2007)

Constitutional Review Vol. 2 No. 2 pp. 129-158

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

The revoke of CR-CW in Law 27/2007 is caused that the concept of concession is contrary to the norms of natural resources management in the 1945 Constitution and the spirit of people empowerment. The new concept offered in the Decision is the common access. In this concept of access, CA-SI is regarded as the common property with the rules from members of the community itself. The provisions to access CA-SI as the common property are also determined by agreements of the community itself. Management of CA-SI on the common access is in accordance with people empowerment. The consistency is shown by the relevancy of concept of common access to include three key issues of people empowerment (access, assets and collective capabilities).

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

Identification And Analysis Of The Rights Of Indigenous Peoples In The Study Of Constitutional Law

(A Study of Balinese Traditional Community)

I Gede Yusa
Faculty of Law Udayana University
Jl. Pulau Bali No.1, Denpasar-Bali, Indonesia
gedeyusa@rocketmail.com

Abstract

The Resolution of the UN General Assembly in 2000 has mandated to discuss indigenous issues related to economic and social development, culture, environment, education, health and human rights. In national law, the recognition of the existence of traditional people with customary rights can be found in Article 18 B paragraph (2) and Article 28 paragraph (3) of the Constitution of the Republic of Indonesia of 1945. This study discusses the rights that grow and thrive in indigenous communities in Bali which are associated with the life of society and state. Also the responsiveness or recognition of Indonesia to the presence of the state constitution means the rights of indigenous peoples has grown and developed in Bali and empowerment efforts need to be done for the rights of indigenous peoples has grown and developed in Bali to be able to be a force in the life of society and state. Studies on the identification of the rights of the traditional lifestyle that are recognized in the community as well as prospective empowered in the state of life in Indonesia can be classified as a normative legal research conducted on the relevant legal materials. Legal materials and supporting information that has been gathered up with regard to research on the identification and analysis of the rights of traditional communities in Indonesian Studies State Laws (A Study of Traditional Balinese Community) Firstly the description and interpretation was carried out, or interpretation of the normative propositions found to be further systematized in accordance with discussion on the subject matter of this study. The results of this analysis are three techniques to evaluate and analyze its content according to the given arguments and conclusions of law to get a top issue in this study. States have an

obligation to give recognition to indigenous peoples based on the constitution. Responsiveness or the constitutional recognition of the existence of the rights of indigenous peoples has grown and developed in Bali are envisaged in the constitution, namely Article 18B paragraph (2) and Article 28 paragraph (3) of the Constitution of the Republic of Indonesia of 1945. The constitutional mandate must be obeyed by state officials to regulate the recognition and respect for indigenous peoples in some form of legislation. While the empowerment of local people has been recognized by constitution, yet much remain to be done. The rights of indigenous peoples which has grown and developed in Bali should be legally enforced in the life of society and state.

Keywords: Rights, Indigenous People, Constitutional.

I. INTRODUCTION

A. Background

Indigenous peoples is a social fact that exists throughout Indonesia whose existence started long before the Republic of Indonesia was proclaimed in 1945. The reality of socio-cultural shows that the existence of indigenous peoples is very diverse. Such diversity shows various dynamic development. In general, indigenous peoples are often referred to as isolated communities, remote tribes, communities of indigenous, native people, shifting cultivators or wild cultivators. Institutional recognition of indigenous peoples' existence does not by it self guarantee them safety from the threat of violence and discrimination. Indigenous peoples face many challenges and their human rights are frequently violated: they are denied control over their own development based on their own values, needs and priorities; they are politically under-represented and lack access to social and other services. They are often marginalized when it comes to projects affecting their lands and have been the victims of forced displacement as a result of ventures such as the exploitation of natural resources.[1]

In the Constitution of the Republic of Indonesia of 1945 (the amendments), recognition and respect for indigenous peoples, among others, can be found

[1] Office of the United Nations High Commissioner for Human Rights, "Combating Discrimination against Indigenous Peoples", http://www.ohchr.org/EN/Issues/Discrimination/Pages/discrimination_indigenous.aspx, accessed 15th April 2016.

in Article 18B (2), which reads: "The State recognizes and respects units of customary law communities along with their traditional rights along still alive and in accordance with the development of society and the principles of the Unitary Republic of Indonesia, which is regulated by law". Another article relating to indigenous peoples is the first paragraph of Article 28 (3) of the Constitution of 1945 which states "The cultural identity and the rights of traditional communities be respected in line with the times and civilization".

The provision of Article 18B paragraph (2) above indicates the provision of the constitutional position of indigenous peoples in relation to the state and the indigenous peoples with other indigenous peoples. Institutionally, the constitutional recognition of indigenous people is part of the community's recognition of human rights, which was formally started in Indonesia in 1993 through the establishment of the National Commission on Human Rights. In the discourse on human rights, identified the importance of the recognition of the rights of indigenous people.[2] While on the other hand, this recognition is the result of a continuous struggle of the leaders of human rights in general, and fighting for the protection of indigenous peoples' rights in particular.

Indigenous peoples is thought to be the largest element in the structure of the nation-state of Indonesia, but its existence has not been accommodated, or has even been systematically excluded from the national political agenda. Past experience has shown that when dealing with the power of the state and the power of large employers, indigenous peoples are in a weak position, either, economically, socio-culturally or legally, let alone politically. In that regard, the identification and analysis of the rights of indigenous peoples or traditional communities in Bali in the state of life is interesting and needs to be done.

Historically, indigenous peoples have a long history of development of the territory, economic life, including culture and language with them. The Indonesian archipelago has a diversity of indigenous peoples with the character and distinctiveness of its own characteristics. The existence of groups of indigenous

[2] Saafroedin Bahar, "*Kebijakan Negara dalam Rangka Pengakuan, Penghormatan, dan Perlindungan Masyarakat (Hukum) Adat di Indonesia*", *Paper presented at "the Workshop on Research in Three Areas" Mendorong Pengakuan, Penghormatan dan Perlindungan Hak Masyarakat Adat di Indonesia*" in Lombok, 21st - 23th Oktober 2008.

peoples throughout the Indonesian archipelago and in each province should be appreciated, because it is the wealth of the nation of Indonesia. As the wealth of the nation, if they are empowered they will be able to generate income for the country as well as act as a source of knowledge for researchers from around the world.

While it is constitutional, Indonesia has declared itself as a state of law. This assertion can be found in the fourth paragraph of the Preamble of the Constitution of 1945. Article 1 paragraph (3) the Constitution of 1945, Third Amendment states that "Negara Indonesia adalah negara hukum." (Indonesia is a a state of law). The concept of a state of law that has historically grown and developed in the Western world experienced a modification in Indonesia to conform to the legal ideals and aspirations of Indonesia based on Pancasila, so it is also termed the "State of Law (*rechtsstaat*) by Pancasila".[3] Regarding the type of state of law adopted by Indonesia is not in a formal sense, but a state of law in the sense of material that is also termed the Welfare State.[4] The goals to be achieved by the Indonesian State of Law is to achieve a just and prosperous society both spiritually and materially based on Pancasila, so it "is also known as the State of Law which has the characteristics of an independent"[5].

In a state of law, the protection of human rights becomes a necessity, since it is one element of a state of law as stated by the HR Sri Soemantri Martosoewignjo and H. Bagir Manan. Adopted by Sri Soemantri Martosoewignjo as expressed in his writings, known as "*Bunga Rampai Hukum Tata Negara Indonesia*", on the elements mentioned what consists of state of law: [6]

a. The government in carrying out its duties and obligations should be based on law or regulations;
b. The guarantee of the rights of human (citizens);
c. The division of power in the state;
d. The supervision of the judicial (*recthsterlijke controle*).

[3] Sjachran Basah, *Eksistensi dan Tolok Ukur Badan Peradilan Administrasi di Indonesia* , Bandung: Alumni, Cet., 1985, p. 11; see also Padmo Wahjono, *Sistem Hukum Nasional Dalam Negara Hukum Pancasila*, Jakarta: Rajawali, 1983, p. 2.
[4] E. Utrecht, *Pengantar Hukum Administrasi Negara Indonesia*, Bandung: FHPM Universitas Padjajaran, 1960, p. 21-22.
[5] Rukmana Amanwinata, "Pengaturan dan Batas Implementasi Kemerdekaan Berserikat dan Berkumpul Dalam Pasal 28 UUD 1945", Dissertation, Post Graduate Padjadjaran University, Bandung, 1996, p. 109.
[6] R. Sri Soemantri M., *Bunga Rampai Hukum Tata Negara Indonesia*, Bandung: Alumni, 1992, p. 29.

With a slightly different arrangement, Bagir Manan suggests the minimal characteristics of the state based on law, namely:

a. All actions must be based on law;
b. There are provisions that guarantee basic rights and other rights;
c. No institutional freely to assess the actions of the public authorities (judicial bodies is free);
d. No division of power[7].

The instruments for protecting and realizing human rights is both written constitutional law and it's implementing regulations as well as unwritten law. This means that human rights become the ethical legitimacy of the existence of the law itself. Recognition and protection of basic human rights in a country's constitution in line with the results of the study by K. C Wheare[8] which shows that of the constitutions of the countries in the world, almost all of them load on the protection of "human rights" in its constitution. This means basic human rights should be regulated in the Constitution of 1945. Furthermore, the legislation that is lower than Constitution of 1945 merely regulates the implementation or enforcement mechanisms. In other words, in principle and rules, then basic rights should be regulated in the Constitution of 1945. Meanwhile, further guidance on enforcement agencies and the basic rights of the relevant legislation delegated to lower, such as the decree of Assembly of Republic of Indonesia, acts and government regulations. This assertion can be found in Article 28 I of the Constitution of 1945 Second Amendment which establishes the "In order to uphold and protect human rights in accordance with the principles of a democratic constitutional state, the implementation of human rights are guaranteed, regulated, and set forth in the legislation."

Based on the above, we can see that human rights are owned by a number of human rights, for the gift of God Almighty. This right is acquired and carried in the womb until its presence in the midst of society. By the nature of his humanity, then human rights should not be revoked or seized by anyone,

[7] Bagir Manan, "Dasar-Dasar Sistem Ketatanegaraan Republik Indonesia Menurut UUD 1945", Scientific Lecture Papers submitted to the Graduate Student, University of Padjadjaran 1994/1995, in Bandung on 3 September 1994, p.19.
[8] K.C. Wheare, *Modern Constitutional*, London: Oxford University Press, 1975, p. 33.

because if it is revoked or deprived human nature will be lost. Therefore, any person, including indigenous peoples in Bali is entitled to protection of their rights. In this regard, the research on the identification and analysis of the rights of Balinese traditional communities in Indonesia's Constitutional Law Study becomes important and the actual thing to do.

B. Research Questions

The problems that can be discussed from this study are:

(a) How is the mandate of the country's constitutional obligation to recognize and respect the existence of indigenous peoples?

(b) How is the constitutional mandate that must be obeyed by state officials to regulate the recognition and respect for indigenous peoples in some form of legislation?

C. Research Methods

a. Types of Research

A study of law, according to Soekanto Soerjono, can be done through normative legal research, empirical legal research or both. [9] Based on the classification of types of these studies, this research can be qualified as a normative legal research and intends to examine the legal materials related to the type of rights of Bali traditional communities who live in the community and prospective empowered the state of life in Indonesia. Therefore, the subject matter of this study will be based on the results of the research literature, namely the primary legal materials, secondary legal materials, and tertiary legal materials

b. Types of Approach

The approach that will be applied to discuss the subject matter of this research is the conceptual approach and the statute approach. Conceptual approaches are made to find definitions of the rights of traditional communities in Bali. Further statute approaches are applied to obtain legal

[9] Soerjono Soekanto, *Pengantar Penelitian Hukum*, Jakarta: UI Press, 1984, p. 201.

provisions that underlie the protection of the rights of traditional communities living in Bali and recognized in the community.

c. Source of Legal Materials

A source of law in this study is derived from the results of the research literature in the form of secondary law. Library research conducted on legislation as well as reading materials related to the subject matter which can essentially be classified into three (3) types of legal materials, i.e. primary legal materials, secondary legal materials, and tertiary legal materials (supporting primary legal materials and secondary legal materials).

As primary legal materials, including but not limited to the Constitution of 1945, the Act Number 23 of 2014 concerning Local Governmental as well as some lesser legal products. Secondary law studies, among others, are obtained from reading materials in the field of Constitutional Law, Human Rights, and Regional Government Law relating to the protection of the rights of traditional communities living in Bali and recognized in the Indonesian community. While the tertiary legal materials from which this research was obtained are from encyclopedias, set clippings relating to the case or matter type of the rights of traditional communities living in Bali and recognized in the Indonesian community, law dictionary, as well as other supporting documents that can support and clarify the primary and secondary legal materials. The primary legal materials derived from library research at the top, supported also from the interview with the Provincial Government officials and / or District / City Government, public figures of Balinese traditional living in each region. The interview was conducted to test the truth of the literature, so it will be helpful as supporting research literature.

d. Legal Materials Collection Techniques

Regarding the techniques applied in the collection of the necessary legal materials is through document study that supported interview techniques. Findings of the literature conducted with the card (Card system) which is a way to record and understand the contents of each of the information

obtained from the primary, secondary or tertiary legal materials with respect to the rights of traditional communities living in Bali and recognized in the community as well prospective empowered the state of life in Indonesia. Further interviews with informants to local government officials will be done in an unstructured manner with snowball technique. Snowball technique is done by starting from the information bit to continue to explore until they run out, so as to obtain as complete information about something that is examined in this study.

e. Legal Materials Analysis Techniques

Legal materials and supporting information that has been collected with regard to the rights of traditional communities living Bali and recognized in the community as well as prospective empowered the state of life in Indonesia first made the description with decomposition proportions of legal and non-legal interpretation or interpretation encountered and normative propositions to be found for further systematized in accordance discussion on the subject matter of this study. Results of the three analytical techniques are then evaluated and an analysis based on content (Content Analysis)[10] and given the argument to get a conclusion on the subject matter in this study.

II. RESULT AND DISCUSSION

A. Identify the Rights of Indigenous Peoples in Bali

The existence of customary law communities has long been recognized in the history of Indonesia. This can be seen in the Constitution of 1945 which gives recognition to indigenous peoples. The recognition followed in some other legislation products. Ian Brownlie stated that it is not true if the rights of groups in all matters considered or guaranteed through the protection of individual rights. There are certain demands that are not adequately covered such as the provisions applicable to individuals. These include demands for positive action in order to maintain the cultural identity and language of a

[10] Sumandi Suryabrata, *Metodologi Penelitian*, Jakarta: Rajawali, 1992, p. 85.

particular community, especially when members of the community concerned are territorially dispersed. Next are the demands for adequate protection of the rights over the land in traditional areas. The latter is related to the principle of self-determination which are political and legal implementation involves certain political models, including the ownership status of an independent country or a form of autonomy or the status of the union state.[11]

Indonesia has a noble purpose in giving recognition, protection and fulfillment of human rights to indigenous peoples. Social and cultural protection of customary law communities is an important concern for policy makers because this aspect is the pride and hallmark of Indonesia. Indigenous people in Indonesia have so much local knowledge which is admired both at regional and international levels. Hindus in Bali for example, have implemented Nyepi[12] every year. The ceremony is a source of inspiration for the world community to protect the environment and environmental activists have fought for it to become World Silent Day. This of course can answer the global problem of how to prevent global warming.

Various local wisdom is held by indigenous people in Indonesia and actually has been absorbed by the founding father of Indonesia in drafting the constitution, to put the concept of human rights both in the preamble and in the articles of the constitution. Constitutional rights can also be seen from the soul of Indonesia namely the Pancasila. The recognition and protection of customary law communities is implicitly enshrined in the principles of Pancasila.

Constitutional rights of customary law communities have actually possessed naturally, both in its position as individuals and as a community of indigenous environment. However, because of differences in background, interaction, characteristics and customs adopted by each customary laws community, we need a policy that is a reference in the law to give recognition and protection of customary law community in the absence of other forms of discrimination. So that customary law communities have an equal opportunity to enjoy development.

[11] Ian Brownlie, *Dokumen-dokumen Pokok Hak Asasi Manusia,* translated by Beriansyah, Jakarta: UI Press, 1993, p. 93, 94.
[12] Nyepi is the Hindu feast where Hindus (in Bali) shall run *Catur Bratha Penyepian*. *Catur Bratha Penyepian* consists of *amati karya* (no work), *amati geni* (not allowed to light a fire), *amati lelungan* (not to be traveling), and *amati lelanguan* (should not dissipate).

Violation of these customary law communities should be prevented by the spirit of the ruler in this country. To create a rule that can be a reference in providing legal protection for customary law communities, the government policy should be put in the form of law. Issued legal products can be identified as a product of substance law governing the recognition and protection of indigenous people and their legal products which have another substance but pay attention to the existence of indigenous peoples. In practice, legal products that had been made to give recognition and protection of customary law community instead marginalize the existence of indigenous peoples. In line with the views of MB Idjehar which states that perpetrators of human rights violations can be categorized into three (3) categories namely governments, groups and individuals[13], then the laws that marginalize indigenous and tribal communities constitute human rights violations committed by the government.

Some laws, especially in the level of legislation have the potential to violate the constitutional rights of customary law communities, especially constitutional rights of indigenous villages in Bali. Traditional villages are built on the basis of the Hindu philosophy *Tri Hita Karana* which consists of *Parahyangan* (human relationship with God), *Pawongan* (relation between human beings) and *Palemahan* (human relationship with the environment). As for the rights to grow and thrive in indigenous communities in Bali these can be identified as follows:

a. Constitutional Rights In the Realm of Parahyangan

Parahyangan in the realm of philosophy of *Tri Hita Karana* is regulating the relationship between man and God. The relationship between man and God cannot be separated from religion professed by members of the indigenous village who follow Hinduism. Religion has an important meaning in the context of the law as described by Antony Allot:

> *Religion is more than a system of norms. It purports to be an account of reality, of what it is why it is there, as well as being a set of rituals, practices and prescriptions which the adherent must adhere to if he is*

[13] M.B.Idjehar, *HAM Versus Kapitalisme*, Yogyakarta: Insist Press, 2003, p. 128.

to appease the supernatural power which are presumed to luck behind and inform the observable world.[14]

Constitutional rights in the realm of *parahyangan* in some provisions of the legislation are as follows:

1) The constitutional rights of Indigenous villages associated with the regulations in the land sector

Land is one of the essential elements in the life and livelihood of mankind primarily related to the existence of indigenous peoples. This is because the land has a spiritual and economic meaning for indigenous peoples. Spiritually, the customary law community has an obligation to the land and any object that is established on the land, to build a shrine on land and is one of the sacred elements of the universe. In the economic sense, the land is a place for fellowship following customary law which means a property is permanent and profitable.

All indigenous peoples yearn to be able to control their land. The concept of private land property rights is in fact very unfamiliar to many indigenous peoples.[15] Customary law communities cannot be separated from land ownership because they have a genuine right to mastery of the land. This right was the first to emerge compared with other rights settings. Rights issued by the government to indigenous peoples are a right that is recognition. Theoretically, this right cannot be requested back by the state. Close relationship and are religious magical, causing indigenous peoples to have the right to control the land. Given the importance of the position of land for indigenous peoples, then at a simple cultural level, every indigenous people, of course, has a way of setting about the land.[16]

As a totality, customary law community is a depiction of its citizens including the leaders / head of community (?). As a public unity, then

[14] Antony Allot, *The Limits Of Law*, London: Butterworths,1980, p. 126.
[15] IWGIA-Intitut Dayakologi, *Masyarakat Adat di Dunia Eksistensi dan Perjuangannya,* Jakarta: Gramedia, 2001, p. 33.
[16] Rizani Puspawidjaja, dalam Muladi (ed)., *Hak Asasi Manusia Hakekat Konsep dan Implikasinya dalam Perspektif Hukum dan Masyarakat*, Bandung: Refika Aditama, 2009, p. 242.

the customary law community is a ruling body that has the right to regulate public and take certain actions against citizens. As a legal entity, the people are represented by balancing the clan, the tribe, as the head of the customary and more engaged in the field of civil law. Thus, it means that the relationship between indigenous people and to the land is a public relations and civil relations, by customary law community and have mastered the land. Control and ownership of land by customary law community is termed the primordial rights, collective rights, or so-called "customary rights".

Customary rights include all existing land within the territory of the community, either already owned by someone or not. Generally, the boundaries of customary rights of indigenous communities cannot be determined with certainty.[17] According to Imam Sudiyat, there are some characteristics of customary rights namely:

a. Only the alliance itself and its legal citizens are entitled to free use of wild lands in the territory.
b. Outsiders can only use the land with the permission of the ruler alliance: without permission, he is considered a foul.
c. Residents of communion may take advantage of the region with the ancient rights restriction: only for the purposes of his own family: if utilized for the benefit of others, he is seen as a foreigner, so it must get permission first. While foreigners are only allowed to take advantage of the primordial right area with the permission of the head of the legal partnership as well as the payment of *upeti, mesi* (recognition, retribution), the legal partnership
d. Guild of law is responsible for everything that happens in its territory, particularly in the form of action against the law, which is an offense
e. Ancient rights cannot be released, transferred or exiled forever.
f. Ancient rights also includes land that has been cultivated already covered individuals.[18]

[17] Boedi Harsono, *Hukum Agraria Indonesia Sejarah Pembentukan Undang-undang Pokok Agraria, Isi dan Pelaksanaanya Jilid 1 Hukum Tanah Nasional Edisi Revisi*, Jakarta: Djambatan, 2005, p. 186.

[18] Rizani Puspawidaja, "Hak Sosial Budaya Masyarakat Tradisional Dalam Perspektif Kekinian; Memaknai Sengketa Hak Atas Tanah Sebagai Sebuah Hak yang Bersifat Asasi", in Muladi (ed), *op.cit.*, p. 245-246.

C. Van Vollenhoven in *Miskenningin in het Adatrecht and De Indonesier en zijn ground* mentions the six traits of customary rights that alliance and its members are entitled to use the land, picking up the results of everything that is there in the ground and grown and live on these communal lands, these characteristics include:

1. The rights of individuals are also covered by the right of association.
2. The Governing alliance may determine to declare and use certain areas of land designated for public purposes and against this land is not allowed to be placed individual rights.
3. Foreigners who want to draw the results of these communal lands must first request permission from the head of the alliance and have to pay admission, after the harvest have to pay rent,
4. Guild is responsible for everything that goes on top of the customary environment,
5. Prohibition to alienate land including communal land so that the alliance completely lost authority over the land.[19]

Individual rights are also covered by the right of association as mentioned in the first characteristic above, Ter Haar explains the theory called the theory of the ball. According to this theory, the relationship between individual rights and the right alliance is reciprocal, which means the stronger individual rights over a plot of land, then the weaker the right of association on the ground and conversely the weaker individual rights on the land plot.[20]

The Act of Republic of Indonesia Number 5 of 1960 recognizes the customary rights. Recognition was accompanied by two (2) terms, namely regarding its existence and as to its implementation. Based on the article The Act of Republic of Indonesia Number 5 of 1960, land rights are recognized "along by the fact still exist". Thus, communal land cannot be transferred to land ownership rights when the communal land is for example evidenced by the customary law community concerned or

[19] Hilman Hadikusuma, *Pengantar Ilmu Hukum Adat Indonesia*, Bandung: Mandar Maju, 1992, p. 75.
[20] Dewi Wulansari, *Hukum Adat Indonesia Suatu Pengantar,* Bandung: Refika Aditama, 2010, p. 81-82.

the head of the relevant customs. By contrast, communal land can be diverted into land ownership rights, when the communal land in reality does not exist or its status has changed to "former communal land". [21]

Communal land can be used as individual property rights when the communal land status has become "land state". The former communal land is land that is no longer owned by the customary law community, for this, based on the Act of Republic of Indonesia Number 5 of 1960, land is automatically controlled directly by the state. In practice the administration of state land uses designation. State land can be transferred into private ownership. Communal Land can be changed to the status of a private property if the land has become a state land as described previously. The procedure of transfer of rights on state land became the property as stipulated in the Regulation of the Minister of State for Agrarian Affairs / Head of National Land Agency Number 9 of 1999 (Permenag/ KBPN No. 9/1999). According to article 9, paragraph (1) jo. Article 11 Permenag / KBPN No. 9/1999.[22]

About the change of customary rights into new individual rights can occur when taken following ways:

a. Where an environmental customary leader declared himself as a supporter of indigenous rights and consequently, the leadership of communal environment which is usually king, declared himself because of his power as the owner of land under his control.
b. When members of the community search for people outside to cultivate forest land vacant by holding the payment in advance.
c. If members have drawn a customary fee if they wish to authorize the land.[23]

The possibilities provided in law (national law and customary law of land) on conversion of communal land into land owned can lead to the commercialization of the communal lands. As a result of customary law communities can lose the lands previously mastered. Related to

[21] Mutiara Putri Artha, "Tanah Ulayat", http://www.hukumonline.com/klinik/detail/cl6522, accessed 28 February 2016.
[22] *Ibid.*
[23] Dewi Wulansari, *op.cit.*, p. 86.

the previous discussion, that land tenure issues related to the spiritual members of indigenous communities, the loss of these lands will release a spiritual connection.

2) The constitutional right to religious and cultural implementation

In Article 28E paragraph (1) of the Constitution of 1945 states that "Everyone has freedom of religion and to worship according to their religion, to choose education and teaching, employment, to choose citizenship, to choose a place to stay in the territory of the country and left , as well as the right to return." Hereinafter Article 28E paragraph (2) of the Constitution of 1945 states that every person has the right to freedom of belief to believe. In addition Article 28 paragraph (1) of the Constitution of 1945 also recognized that the right to religion is a human right. Article 29 paragraph (2) of the Constitution of 1945 also states that the State guarantees the independence of each population to religion. More so in the traditional Hindu Balinese society still emphasizes harmony and harmonious relationship between man and God (Brahman), humans with god, and man's relationship to the holy spirits.

b. Constitutional Rights in the Realm of *Pawongan*

In the teachings of Hindu philosophy *Tri Hita Karana*, also includes the setting *pawongan*, namely the relationship between man and man. The relationship between human beings is conceived in some phrases such as *asah, asih, asuh* (equality, love, care). The constitutional right of indigenous people in Bali is the right to culture as forms of intellectual property rights. Intellectual property rights is the term born and developed in Indonesia as a result of the association of the Indonesian nation with the developed countries, especially in trade. According to David I Bainbridge, intellectual property rights are property rights derived from intellectual work of men, the rights stemming from the creative result is the ability of human thought expressed in various forms of work that are beneficial and useful to support human life and have economic value.[24]

[24] Muhamad Djumhana R. Djubaedah, *Hak Milik Intelektual (Sejarah Teori dan Prakteknya di Indonesia)*, Bandung: Citra Aditya Bakti, 1993, p. 16.

Indigenous people in Bali have a great potential in economic development. They have a high level of culture through their traditional skills and knowledge of art, including dance, carvings, sculptures, weavings, paintings, various culinary skills, architectural design, geographical indications, plant breeding knowledge and knowledge of plant medicines. These potentials are an attraction in tourism development in Bali and also become the intellectual property rights owned collectively by the Balinese people.

c. Constitutional Rights in the Realm of Palemahan

Palemahan in the concept of *Tri Hita Karana* means arrangements regarding man's relationship with the environment. Humans and the environment are integral and inseparable. Humans need to have a place in his environment. This provides a legal obligation for humans to maintain the environment. The constitutional rights in the realm of *palemahan* are as follows:

1) Constitutional Rights in Forestry

The forest is a unique ecosystem, which has potential significance in supporting life on this earth. The potential significance of the forest is related to three main functions, namely the function of conservation, protection and production as defined in Article 6 paragraph (1) the Act of Republic of Indonesia Number 41 of 1999 concerning Forestry. Forests as an ecosystem not only save natural resources such as timber, but also have a lot of potential for non-timber that can be taken by society through the cultivation of agricultural crops on forest land.

The Act Number 41 of 1999 concerning Forestry classifies indigenous forests as state forests. The explanation that accompanies the act explains that the state forest is forest land that was previously unencumbered rights to land, as defined in the Act Number 5 of 1960. Further details outlining that these qualifications are derived from the basic principle of the unitary state used the state as an organization with the power of

people. [25] A recognized indigenous forest in Bali is Tenganan customary forest. Thus Tenganan forest can only be used by local indigenous village, whereas, in the indigenous village in Buahan forests, the National Forest of West Bali and so on cannot take advantage of forest products. Indigenous peoples can only use the forest, once the forest status as "indigenous forests"

2) Constitutional Rights in Natural Resources

Natural resources are the raw materials for man to continue his life therefore the management of natural resources must be done properly and in an integrated way. In the provision of Article 33 paragraph (3) of the Constitution of 1945 reads that the "earth and water and natural resources contained therein shall be controlled by the state and used for the greatest prosperity of the people." Thus, the control and governance of natural resources are carried out by the state.

According to James Crawford as quoted by Rachmat Bowo Suharto the rights of the state as a community of people who are moderated by governments of these countries means that these rights are given to the human collectivity which organize themselves in the country. Rachmat bowo26 states that recognition of the people as subjects of rights, serves as collateral for the people to benefit natural resources and the right to deny him his own government when in managing natural resources to act contrary to the interests of the people.

This guarantees the recognition of customary law communities as described previously regulated in Article 18B paragraph (2) of the Constitution of 1945 and internationally in various international legal instruments like the International Covenant on Civil and Political Rights, Convention of Biodiversity, Convention on the Elimination of All Forms of Discrimination, the Convention on the Elimination of All Forms of Racial Discrimination, Indigenous and Tribal Peoples Convention, and others.

[25] Supriadi, *Hukum Kehutanan & Hukum Perkebunan di Indonesia*, Jakarta: Sinar Grafika, 2010, p. 466-467.
[26] Rachmat Bowo Suharto, *Perlindungan Hak Dunia Ketiga Atas Sumber Daya Alam*, Yogyakarta:Tiara Wacana, 2001, p. 51.

B. Legal Responsive Recognition of Indigenous Peoples

Construction of law requires law-making to be responsive to meet the needs of indigenous peoples. Responsive law proposed by Nonet and Selznick were split into three basic classifications of law in society, namely the repressive rule of law as a servant (repressive law), law as a separate institution that is able to tame the repression and to protect the integrity of his (autonomous law), and the law as a facilitator of various responses to the needs and aspirations of social (legal responsive).27

Responsive law believes that law designed to offer something better than procedural justice. Good laws must be competent and fair. Such laws should be able to recognize the public desire and commitment for the achievement of substantive justice.28 The concept of responsive law is a response to criticism that the law is often separated from social reality and the ideals of justice. This concept is also an attempt to integrate legal theory, political philosophy and social study.29 Responsive law relies on two major doctrines of law which should be functional, pragmatic, and rational purpose and competence as a standard evaluation of the implementation of the law.30 Legal order responsive emphasis is on:

a. Justice as the basis for the legitimacy of the substantive law.
b. The regulation is a sub-Ordinary of the principles and policies.
c. Consideration of the law should be goal-oriented and due to injustice in society.
d. The use of discretion is recommended in decision making permanent law with goal-oriented.
e. Cultivate liability system instead of the system of coercion.
f. Morality cooperation as moral principles in carrying out the law.
g. Power utilized to support the vitality of the law in serving the community.
h. Rejection of the law should be seen as a lawsuit against the rule of law.
i. Access opened wide public participation in the context of legal advocacy and social integration.31

[27] Philippe Nonet & Philip Selznick, *Hukum Responsif*, Bandung: Nusa Media, 2008, p.33.
[28] Bernard L. Tanya, Yoan N. Simanjuntak dan Markus Y. Hage., *Teori Hukum Strategi Tertib Manusia Lintas Ruang dan Generasi,* Yogyakarta: Genta Publishing, 2010, p. 84.
[29] A. Mukthie Fadjar, *Teori-teori Hukum Kontemporer,* Malang, Setara, 2013, p. 49.
[30] Bernard L. Tanya, et.al., *op.cit.*, p. 207.
[31] *Ibid.*

Historically, recognition and respect for customary law communities started from the enactment of the *Algemene Bepalingen van Wetgeving* (AB) in the Dutch colonial period. In Article 11 the AB confirmed that "the laws applied to indigenous people (and the Foreign East) is religious law, institutions and customs of the people, as long as not contrary to the principles of justice and common decency, unless they subject themselves voluntarily to the law European civil and commercial law". Recognition and respect of indigenous communities in the Dutch colonial period became the forerunner of the existence of the community until now.

In the development of national law, recognition and respect for customary law communities is set in the written constitution of the Indonesian nation. Article 18B paragraph (2) of the Constitution of the Republic of Indonesia in 1945 stated that "the State recognizes and respects units of traditional society where all the traditional rights are still alive and in accordance with the development of society and the principles of the Unitary Republic of Indonesia, which is set in Constitution."

The recognition of indigenous people in the constitution means that the state recognizes the diversity of the nation of Indonesia. It is also associated with the function of the constitution itself as proposed by William G. Andrews stating that "The constitution imposes restraints on government as a function constitutionalism; but it also legitimizes the power of the government. It is the documentary instrument for the transfer of authority from the residual holders-the people under democracy, the king under monarchy to the organ of state power."[32]

Recognition and respect for customary law communities as stipulated in the basic law of Indonesia provides the juridical consequences of the determination of the constitutional position of indigenous communities in relation to the state. This article is also a constitutional basis for state officials at the same time laying a moral obligation for state officials to take measures to protect the communities of indigenous peoples. Azmi Siradjudin A.R. in scientific publications, provides

[32] William G. Andrews, *Constitutions and Constituonalism* 3rd ed., New Jersey: Van Nostrand ,1968, p. 23.

opinions regarding the juridical consequences of the application of Article 18 paragraph (2) of the Constitution of 1945 which is as follows:

> Thus the article is a declaration about; (a) the constitutional obligation of the state to recognize and respect indigenous peoples, as well as (b) the constitutional rights of indigenous peoples to gain recognition and respect for traditional rights. What is contained in Article 18B paragraph (2) that, as well as a constitutional mandate that must be obeyed by state officials, to regulate the recognition and respect for indigenous peoples in some form of legislation.33

Another article in the Constitution of 1945 relating to indigenous peoples is Article 28I paragraph (3) which states "The cultural identity and the rights of traditional communities be respected in line with the times and civilization". Recognition and respect not only to cultural identity but also to the existence of traditional communities as legal subjects. Recognition of customary law communities, traditional rights and cultural identity which is owned, in accordance with the development of society is seen when the unity of the presence of indigenous communities is set in legislation, not contrary to *Pancasila* and human rights.

The Decree of Assembly of Republic of Indonesia Number XVII / MPR / 1998 on Human Rights affirmed that recognition and protection of indigenous people is part of the respect for human rights. It is seen in Article 32 which states:

> Every person has the right to have private property and property rights should not be taken arbitrarily, then the Article 41 stated that the cultural identity of traditional communities, including indigenous land rights are protected, in tune with the times.

Recognition and protection of indigenous communities is a concept that is absolutely in a state of law. Implicitly criteria of a society can be regarded as customary law communities can be explored from the elucidation of Article 67 the Act Number 41 of 1999. The aforementioned article stated that indigenous people be recognized, if in reality they meet the elements, among others:

---

[33] Azmi Siradjudin AR, "Pengakuan Masyarakat Adat dalam Instrumen Hukum Nasional", http://www.ymp.or.id/content/view/107/35/, accessed 28 February 2016.

a. People still in the form of association (*rechtsgemeenschap*);
b. No institution in the form of the customary authorities;
c. There is a clear area of customary law;
d. Existing institutions and legal instruments, in particular indigenous justice, which is still adhered to; and
e. Still conduct harvesting in the region surrounding forest to meet the needs of everyday life.

To determine whether indigenous villages become customary law communities who are then recognized or not, it should be analyzed through the above characteristics. *Paguyuban* is a form of common life in which members are bound by an inner relationship which is pure and natural and eternal. The basic relationship is love and a sense of inner unity which is predetermined. The life is also called real and organic.34 Tonnies identifies the characteristics of the community, among others:

a. Intimate, thorough intimate relationship.
b. Private, personal relationships, which is special for some people.
c. Exclusive, these relationships are for "us" only and not for others outside of "us".35

An indigenous village is a community. An indigenous village also has an institutional device in the form of customary rulers. This traditional rulers device is termed *"prajuru adat"*. In Article 1 paragraph 12 Bali Provincial Regulation No. 3 of 2001 concerning Customary Community mentioned that "*prajuru pakraman / banjar pakraman* is caretaker in Bali." An indigenous village is led by *Prajuru* that was elected by the members of the village and or set by Customary Community manners according to the rules set out in customary regulation respectively.

An indigenous village has clear jurisdiction. The territorial boundaries of the traditional village are normatively defined in the rules of the traditional village. It also has indigenous village institutions and legal instruments, in particular indigenous justice, which is still adhered to by indigenous peoples. Customary

[34] Ferdinand and Charles P Loomis dalam Soerjono Soekanto, *Sosiologis Suatu Pengantar*, Jakarta: RajaGrafindo Persada, 2005, p. 132.
[35] *Ibid.*, p. 134.

law provisions are written in the traditional village rules. Under the provisions of Article 5 of Bali Provincial Regulation Number 3 of 2001, *awig awig* is "the rules made by the member of customary village used as a guideline in the implementation of *Tri Hita Karana*"

Traditional authorities as the leader of the indigenous villages have judicial functions. This function can be seen from the village board duties as stipulated in Article 8c Bali Provincial Regulation Number 3 of 2001 which states that traditional authorities have the task to work for peace and the settlement of customary disputes. Traditional authorities' existence of indigenous customary dispute resolution is recognized and adhered to by the members. The members even tend to resolve disputes amicably before courts. For an indigenous village that still has a forest area, the surrounding communities still use the forest for their daily needs. Forest harvesting by customary law community is offset by forest security obligations as conceptualized jointly by the Forest Service through self-managed forest program.

Acknowledging the existence of indigenous villages where the juridical consequences indigenous villages has the legal capacity to own and control property, making your own rules or termed *awig awig*, implementing these rules, adjudicate and resolve conflicts in the village through the institutions "Kertha Village" as well as perform their own security through *pekemitan, pegebagan, and pecalangan.*

C. Empowerment Efforts Needs to do Public Rights for Bali

The existence of customary law communities has long been recognized in the history of the Indonesian state. This can be seen in the Act of 1945 (1945 Constitution) which gives recognition to indigenous peoples. The recognition followed in some other products of legislation. However, in reality a customary law community is still a part of vulnerable groups, when linked with the fulfillment of Human Rights. It cannot be separated from the problems often faced by customary law community with regard to civil and political rights

and economic, social and cultural.36 That condition requires steps to empower indigenous communities in creating a civil society

The ideal description of the traditional village is in its form as "*Sima swantantra*" or village civil. As a village which emphasizes the life of civil society, then customary community must meet the substance, namely:

a. Society based on sovereignty of the people with equal rights is democratic.
b. Having a social maturity with a high level of legal compliance and capable of displaying an independent attitude and to respect the independence of others.
c. Autonomous, namely have space and public discourse that cannot be intervened by outside parties.
d. Independent in solving existing problems and suspected there would be (politic, economy, social and culture) using local genius.37

Empowerment fora traditional village unit of indigenous people in Bali is very necessary and thus relevant instruments shall be set out in law. I Made Suasthawa Dharmayuda argues that "the empowerment of the indigenous villages in the preservation of the environment should continue to be pursued through the issuance of legal instruments such as regulation and legislation that serves as recognition, strengthening and development of the indigenous villages as well."38 Article 13 of Regulation of Bali Provincial No. 3 of 2001 mentioned that:

(1) Empowerment and preservation of traditional village directed to the following matters:
    a. community development in accordance with Balinese culture;
    b. the realization of cultural preservation in the traditional village;
    c. the creation of a culture of Bali in rural areas who are able to selectively filter out foreign cultural values;
    d. the creation of an atmosphere which could encourage an increase in the role and functions of the traditional village in an effort to:
        1) enhance the dignity and identity;
        2) actively participate in the implementation of development in all areas;

[36] Ministry of Social Affairs Republic of Indonesia, "Lokakarya Nasional Masyarakat Hukum Adat", http://www.depsos.go.id/modules.php?name=News&file=article&sid=1099, accessed 28 February 2016.
[37] I Made Suasthawa Dharmayuda, *Desa Adat Kesatuan Masyarakat Hukum Adat di Propinsi Bali*, Denpasar: Upada Sastra, 2001, p.7.
[38] *Ibid*., p. 39.

(2) In conducting empowerment and preservation of indigenous villages as referred to in paragraph (1), should encourage the creation of:
   a. Democratic attitude, fair and objective among devices and villagers respectively.
   b. Preservation of customs and culture by not closing the influence of other cultures are positive values.

Efforts that can be made to empower an indigenous village in the fulfillment of their traditional rights are:

a. Set the traditional rights into legal instruments at a local level.
b. Increase understanding of the local government for the rights of indigenous communities (traditional village).
c. Customary law community development by local authorities on an ongoing basis.
d. Activating function of traditional village council in resolving the cases related to the traditional rights of indigenous peoples.

A traditional village is a self-contained unit or a small country that has a democratic government. To that end, the substance of civil society in realizing the need to elaborate on the spiritual values, social and natural environment in accordance with the philosophy of *Tri Hita Karana*. A traditional village is assembled and contains citizens to realize the value of togetherness teachings "salunglung sabayantaka, sagilik saguluk and paras-paros" or concord, harmony and propriety born of philosophical "tat tvam asi" (I was you and you are me).

III. CONCLUSIONS

a. States have an obligation to give recognition to indigenous peoples based on the constitution. Responsiveness or the constitutional recognition of the existence of the rights of indigenous peoples has grown and developed in Bali are envisaged in the constitution, namely Article 18 B paragraph (2) and Article 28 paragraph (3) of the Constitution of the Republic of Indonesia of 1945. The recognition of indigenous communities as a customary law unit in Bali who have a constitutional right stipulated in the Bali Provincial Regulation

No. 3 of 2001 on Customary Village.The recognition of parahyangan by the State can be found in a constitutional rights relating to Land Law which taking into account religious and cultural aspect in its implementation. Constitutional rights in the realm of *pawongan*, namely skills and their traditional knowledge of art, including dance, carvings, sculptures, weavings, paintings, various culinary, architectural design, geographical indications, plant breeding knowledge and knowledge of plant medicines are accomodated in intellectual property rights owned collectively by the Balinese. Also constitutional rights in the realm of *palemahan*, ie constitutional rights in forestry and natural resources.

b. The constitutional mandate must be obeyed by state officials to regulate the recognition and respect for indigenous peoples in some form of legislation. While the empowerment of local people has been recognized by constitution, yet much remain to be done. The rights of indigenous peoples which has grown and developed in Bali should be legaly enforced in the life of society and state. There is a set of traditional rights into legal instruments at a local level, local government will improve the understanding of the rights of indigenous peoples, fostering of indigenous communities by the local government on an ongoing basis and enable the functions of traditional village council in resolving a case related to the traditional rights of indigenous peoples.

References

Allot, Antony. 1980. *The Limits Of Law*. London: Butterworths.

Amanwinata, Rukmana. 1996. *Pengaturan dan Batas Implementasi Kemerdekaan Berserikat dan Berkumpul dalam Pasal 28 UUD 1945*, Disertasi, Fakultas Pasca Sarjana Universitas Padjadjaran, Bandung.

Andrews, William G. 1968. *Constitutions and Constituonalism,* 3rd ed., New Jersey: Van Nostrand Co.

Anonym. 1997. *Deklarasi Vienna dan Program AksiJuni 1993*. Jakarta: KOMNAS HAM.

Azmi Siradjudin AR, "Pengakuan Masyarakat Adat dalam Instrumen Hukum Nasional", http://www.ymp.or.id/content/view/107/35/, accessed 28 February 2016.

Bagir Manan, "Dasar-Dasar Sistem Ketatanegaraan Republik Indonesia Menurut UUD 1945", Scientific Lecture Papers submitted to the Graduate Student, University of Padjadjaran 1994/1995 in Bandung on 3 September 1994.

Basah, Sjachran. 1985. *Eksistensi dan Tolok Ukur Badan Peradilan Administrasi di Indonesia*, Cet. ke-1. Bandung: Penerbit Alumni.

Brownlie, Ian. 1993. *Dokumen-Dokumen Pokok Hak Asasi Manusia,* Terjemahan Beriansyah, Jakarta: UI Press.

Dharmayuda, Suasthawa. I Made. 2001. *Desa Ada tKesatuan Masyarakat Hukum Adat di Propinsi Bali*. Denpasar: Upada Sastra.

Djokosutono. 1982. *Ilmu Negara*, Jakarta: Ghalia Indonesia.

Djubaedah, Djumhana R. 1993. *Hak Milik Intelektual (Sejarah Teori dan Prakteknya di Indonesia)*, Bandung: Citra Aditya Bakti,

Fadjar, Abdul Mukthie. 2013. *Teori-Teori Hukum Kontemporer.* Malang: Setara.

Hadikusuma, Hilman. 1992. *Pengantar Ilmu Hukum Adat Indonesia*, Bandung: Mandar Maju.

Harsono, Boedi. 2005. *Hukum Agraria Indonesia Sejarah Pembentukan Undang-undang Pokok Agraria, Isi dan Pelaksanaanya Jilid 1 Hukum Tanah Nasional*. Jakarta: Djambatan.

Idjehar, M.B. 2003. *HAM Versus Kapitalisme*.Yogyakarta: Insist Press.

IWGIA-Intitut Dayakologi. 2001. *Masyarakat Adat di Dunia Eksistensi dan Perjuangannya.* Jakarta: Gramedia.

Jennings R.Y. dan AD. Watts (ED). 1992. *Oppenheim's International Law*, Volume I Peace (London : Longman).

Maarseveen, Hene van dan Gervander Tang. 1978. *Written Constitutions, A Computerized Comparative Study*. New York: Oceana Publications, INC.

Ministry of Social Affairs Republic of Indonesia, "Lokakarya Nasional Masyarakat Hukum Adat", http://www.depsos.go.id/modules.php?name=News&file=article&sid=1099, accessed 28 February 2016.

Muladi (ed). 2009. *Hak Asasi Manusia Hakekat Konsep dan Implikasinya dalam Perspektif Hukum dan Masyarakat*. Bandung: Refika Aditama.

Mutiara Putri Artha, "Tanah Ulayat", http://www.hukumonline.com/klinik/detail/cl6522, accessed 28 February 2016.

Nonet, Philippe & Philip Selznick. 2008. *Hukum Responsif*, Bandung: Nusa Media.

Office of the United Nations High Commissioner for Human Rights, "Combating Discrimination against Indigenous Peoples", http://www.ohchr.org/EN/Issues/Discrimination/Pages/discrimination_indigenous.aspx, accessed 15th April 2016.

Saafroedin Bahar, "Kebijakan Negara dalam Rangka Pengakuan, Penghormatan, dan Perlindungan Masyarakat (Hukum) Adat di Indonesia" presented at the Workshop on Research in Three Areas "Mendorong Pengakuan, Penghormatan & Perlindungan Hak Masyarakat Adat di Indonesia" in Lombok, 21st - 23th Oktober 2008.

Soekanto, Soerjono. 2005. *Sosiologis Suatu Pengantar*, Jakarta: Raja Grafindo Persada.

Soemantri M., Sri. 1992. *Bunga Rampai Hukum Tata Negara Indonesia*, Bandung: Penerbit Alumni.

Soerjono Soekanto. 1984. *Pengantar Penelitian Hukum.* Jakarta: UI Press.

Suharto, Rachmat Bowo. 2001. *Perlindungan Hak Dunia Ketiga Atas Sumber Daya Alam*. Yogyakarta: Tiara Wacana.

Supriadi. 2010. *Hukum Kehutanan & Hukum Perkebunan di Indonesia*. Jakarta: Sinar Grafika.

Suryabrata, Sumandi. 1992. *Metodologi Penelitian*, Jakarta: CV. Rajawali.

Tanya, Bernard L., Yoan N. Simanjuntak, dan Markus Y. Hage. 2010. *Teori Hukum Strategi Tertib Manusia Lintas Ruang dan Generasi*. Yogyakarta: Genta Publishing.

Utrecht, E. 1960. *Pengantar Hukum Administrasi Negara Indonesia*, Cet. Ke-4, Bandung: Penerbit FHPM Universitas Negeri Padjajaran.

Wahjono, Padmo. 1983. *Sistem Hukum Nasional dalam Negara Hukum Pancasila*. Jakarta: CV. Rajawali, Cet. ke-1.

Wheare, K.C. 1975. *Modern Constitutional.* London: Oxford University Press.

Wulansari, Dewi. 2010. *Hukum Adat Indonesia Suatu Pengantar,* Bandung: Refika Aditama.

The Tenure Arrangement Of Primary Constitutional Organ Leaders In Indonesian Constitutional System

Bayu Dwi Anggono
Faculty of Law, University of Jember
Jalan Kalimantan 37 Jember
bayu_fhunej@yahoo.co.id

Abstract

The tenure arrangement of primary constitutional organ leaders is required as the implementation of power limitation principle and the manifestation of political equality principle as the characteristic of democratic state. The tenure arrangements of primary constitutional organ leaders in Indonesia have four models: tenure arrangement through the 1945 Constitution, tenure arrangement through Law, tenure arrangement which is not regulated by law but regulated in the constitutional organs' internal regulation, and tenure arrangement which is not regulated by law as well as internal regulation. The problem in this paper is: First, how is the arrangement of leadership tenure in the constitutional organs according to the Indonesian legislation system. Second, how to adjust the arrangement of constitutional organ leader in order to provide legal certainty and prevent conflict that can disrupt organs' performance. The arrangement through the Constitution is the most powerful model in term of legal certainty regarding that the Constitution is in the highest national legal order and materials related to the structure and organization of primary constitutional organs constitute the Constitution's substance. The model not regulated in law but regulated in internal regulation prone to cause conflict because every member of the constitutional organs which meets the requirements may change the internal regulation at any time. To avoid this conflict, this paper concludes that it requires the change of regulation regulating the tenure of constitutional organ leaders so that it is no longer regulated in the constitutional organs' internal regulations, but it is set in the 1945 Constitution or at least in the Law in order to have a better legal certainty.

Keywords: Arrangement, Tenure, Primary Constitutional Organ

I. INTRODUCTION

1.1 Background

One of the constitutional organs in Indonesia, i.e. Regional Representatives Council (DPD), is engaged in internal conflict among its members since March 2016. It is caused by different opinion on the ratification of DPD's code of conduct especially the limitation of DPD leadership tenure from five years to two and a half years.[1] The supporting party argues that the tenure of DPD leader is not explicitly mentioned in the Law No. 17/2014 on People's Consultative Assembly (MPR), House of Representatives (DPR), Regional Representatives Council (DPD), and Provincial Legislative Council (DPRD). Therefore, it becomes the authority of DPD members to determine DPD's code of conduct. Moreover, the limitation of leadership tenure from 5 years to 2.5 years is also required to evaluate leader's performance and make him focus on managing the institution. If it is too long, a leader can become complacent about the position.[2]

On the contrary, the party which does not agree with the tenure limitation from 5 years to 2.5 years argues this change is not taken in accordance with the constitutional practice stipulated in the Law No. 17/2014. Then, the change of leadership tenure is false and unfounded regarding the election cycle and DPD membership period are applied *mutatis mutandis* towards the tenure of DPD leader, i.e. five years. It is also applied to the tenure of MPR leader, DPR leader, and DPRD leader.[3]

The conflict happens to DPD as a constitutional organ will have a certain implication to the effective implementation of its authorities and duties. Moreover, the internal conflict on the limitation of leadership tenure can

[1] The DPD was established based on the 3rd amendment of the 1945 Constitution in November 2001. It aims to fulfill the need of justice for society in regions, to expand and to increase the motivation and the capacity of regions in the national life as well as to strengthen the Unitary State of the Republic of Indonesia. See DPD RI, "Profil", http://dpd.go.id/halaman-profil, accessed 10 April 2016.

[2] Kompas.com, "Anggota DPD: Polemik Pemangkasan Masa Jabatan Pimpinan Untuk Evaluasi Kinerja", http://nasional.kompas.com/read/2016/04/19/13072211/Anggota.DPD.Polemik.Pemangkasan.Masa.Jabatan.Pimpinan.untuk.Evaluasi.Kinerja?utm_campaign=related&utm_medium=bp-kompas&utm_source=news&, accessed 19 April 2016.

[3] Kompas.com. "Irman Gusman Anggap Pemangkasan Masa Jabatannya Bertentangan dengan UU", http://nasional.kompas.com/read/2016/03/17/22361671/Irman.Gusman.Anggap.Pemangkasan.Masa.Jabatannya.Bertentangan.dengan.UU?utm_source=RD&utm_medium=inart&utm_campaign=khiprd, accessed 10 April 2016.

also affect the dignity and public confidence in DPD. The public confidence is not quite high before the conflict. It is based on the survey findings conducted by the Indonesian Survey Circle (LSI) on 11-15 December 2015 showing only 53.4%.[4]

Internal conflict by the members of constitutional organs, including the leadership tenure, will greatly affect the performance and the goal achievement of constitutional organs. Jimly Asshiddiqie states that:

> Institutional structure consists of people who hold their own position and role with different attitude and behavior. If the togetherness at work environment creates a traditional work culture, then the work climate and work relationship among the members will be mixed between personal and official matters. The stronger is the paternalistic and feudalistic culture in institutional structure, the stronger is the conflict of interest in every position level. The conflict of interest between those two matters will disturb objectivity, rationality, and professional work culture. Then, it slows the growth of institutional performance to achieve a common goal.[5]

DPD's conflict on leadership tenure happens because there is no single basic regulation to unite the regulation of constitutional organ leadership tenure in Indonesian constitutional system, especially primary constitutional organs (President and Vice President, MPR, DPR, DPD, MA, MK, and BPK). The absence of single basic regulation here means that there some regulations ruling the tenure of constitutional organ leaders qualified as primary constitutional organs. Those regulations range from the 1945 Constitution (UUD 1945), Law (UU), constitutional organs' internal regulation, or even not regulated at all.

The diversity of regulations will have some consequences as experienced by DPD. It results from the incomplete process to regulate its leadership tenure. Logemann as cited by Sri Soemantri states that the mechanism of constitutional organ leader appointment, including the leadership tenure is an issue which needs certainty. Logemann suggests several issues in constitutional

[4] Kompas.com, "Survei LSI: Kepercayaan Publik terhadap DPR Ada di Titik Terendah", http://nasional.kompas.com/read/2015/12/17/14485741/Survei.LSI.Kepercayaan.Publik.Terhadap.DPR.Paling.Rendah, accessed 11 April 2016.

[5] Jimly Asshiddiqie, "Liberalisasi Sistem Pengisian Jabatan Publik", a paper presented at 2nd *Konferensi Hukum Tata Negara*, Universitas Andalas, September 2015, p. 4.

organs, as follows: (1) The creation of constitutional organs. It means who creates and arranges the organs. (2) Because every constitutional organ is led by a leader, the problem is how is the mechanism. It can be conducted by election, appointment, or other mechanisms. (3) What are their duties and authorities. To achieve the country's goal, every constitutional organ should be given duties and authorities. (4) How is the relationship between the constitutional organs.[6]

The leadership tenure and constitutional organ require certain arrangements to prevent absolutism. Christopher Pierson states that:

> Absolutism signaled the emergence of a form of state based upon: the absorption of smaller and weaker political units into larger and stronger political structures; a strengthened ability to rule over a unified territorial area; a tightened system of law and order enforced throughout a territory; the application of a 'more unitary, continuous, calculable and effective' rule by a single, sovereign head; and the development of a relatively small number of states engaged in an open-ended, competitive, and risk-laden power struggle.[7]

1.2 Questions

This paper will raise the issue related to the tenure of constitutional organ leader in the Indonesian constitutional system. First, how is the arrangement of leadership tenure in the constitutional organs according to the Indonesian legislation system. Then, how to adjust the arrangement of constitutional organ leader in order to provide legal certainty and prevent conflict that can disrupt organs' performance.

II. DISCUSSION

2.1 The arrangement of leadership tenure in primary constitutional organ according to the Indonesian legislation system.

The arrangement of constitutional organ leadership tenure is based on at least two considerations. The first consideration is the implementation of power

[6] Konsorsium Reformasi Hukum Nasional (KRHN) and Mahkamah Konstitusi RI, *Lembaga Negara dan Sengketa Kewenangan Antar Lembaga Negara,* Jakarta: KRHN, 2005, p. 15.

[7] Christoper Pierson, *Modern State*, Second Edition, New York: Routledge, 2004, p. 35.

limitation principle; and secondly, the manifestation of political equality principle among citizens as the characteristic of democratic state.

First, as the implementation of power limitation principle. The implementation of law-state principle adopted by Indonesia as stipulated in Article 1 (3) of the 1945 Constitution is power limitation.[8] According to the history of the birth of Article 1 (3) of the 1945 Constitution, it can be seen that Indonesia is a law-state which maintains the supremacy of law to uphold truth and justice, and there is no unaccountable power.[9]

According to legal experts' opinion, there are some characteristics of Indonesia as the law-state. Jimly Asshiddiqie suggests thirteen basic principles of law-state (Rechtsstaat), one of them is power limitation.[10] The power limitation is necessary because according to "the iron law" every power has a tendency to be arbitrary. It is in line with Lord Acton's opinion: "Power tends to corrupt, and absolute power corrupts absolutely".[11] Therefore, power must be limited by separating them into some branches which function as 'checks and balances'. Those branches balance and control each other as well as have an equal position.[12] The power limitation is also conducted by distributing the power into some organs arranged vertically. Therefore, the power is not centralized and concentrated in one single organ allowing the arbitrariness.[13]

The limitation of tenure can be seen as part of the power limitation from some point of views. Moreover, the limitation of state organs' authority as the main function of constitution is basically related to two different aspects of power, i.e. (a) scope of power; and (b) period of power. The limitation of the scope of power can be carried out by (a) separation of power; and (b) division of power. The limitation of the period of power can be done by establishing the tenure of state officials.[14]

---

[8] Article 1(3) of the 1945 Constitution, "The state of Indonesia is a state based on law".

[9] Sekretariat Jenderal MPR RI, *Panduan Pemasyarakatan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 dan Ketetapan Majelis Permusyawaratan Rakyat Republik Indonesia*, Jakarta: Sekjend MPR, 2012, p. 68.

[10] Jimly Asshiddiqie, "Gagasan Negara Hukum Indonesia", a paper presented at *Forum Dialog Perencanaan Pembangunan Nasional*, Badan Pembinaan Hukum Nasional (BPHN), Ministry of Law and Human Rights of Indonesia, 22-24 November 2011, p. 6.

[11] *Ibid*.

[12] *Ibid*.

[13] *Ibid*.

[14] Hotma P Sibuea, "Pemberhentian Presiden/Wakil Presiden Pada Masa Jabatan Oleh Majelis Permusyawaratan Rakyat Dalam Sistem Ketatanegaaan Indonesia*", Jurnal Hukum Staatrechts*, Volume 1, Issue 1, October 2014, p. 88.

Tenure limitation is also adopted by the 22nd amendment of United States Constitution stating:

> *No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this article shall not apply to any person holding the office of President when this article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this article becomes operative from holding the office of President or acting as President during the remainder of such term.*

The limitation of USA Presidential tenure for only two periods according to Stephen W Statis is "*to strengthen and safeguard democracy from what they believed to be its greatest danger: the aggran-dizement, consolidation, and even usurpation of political power by the executive branch of government*".[15]

Power needs to be limited because it will reduce the power devoted to certain interests which is inappropriate to the objective of the power itself. Alexander Tabbarok explains that:

> Since political exchange is rarely simultaneous or subject to enforce-able contracts there is potential for opportunism. Will the representative exert high effort for the interest? Will the interest fulfill its promises of support? Answering these questions in the affirmative requires that there be mutual trust between interest and representative, which can only be created in a long-term relationship.[16]

Second, as a manifestation of political equality principle among citizens as the characteristic of democratic state. According to Article 1(2) of the 1945 Constitution, Indonesia has declared itself as a democratic state. Then, Article 1(2) of the 1945 Constitution states, "*Sovereignty is vested in the people and implemented pursuant to the Constitution*". Miriam Budiardjo explains the compulsory elements must be possessed by the democratic state as follows: (1) constitutional protection, (2) independent and impartial judiciary, (3) free

[15] Stephen W Statis, *The Twenty-Second Amendment: A Practical Remedy or Partisan Maneuver?*, Constitutional Commentary, vol 7:61, p. 69.
[16] Alexander Tabbarok, "A survey,Critique, And New Defense Of Term Limits", *Ceto Journal*, Vol. 14, Issue 2, Fall 1994, p. 337.

election, (4) freedom of expression, (5) freedom of association, organization, or opposition, and (6) civic education.[17]

Furthermore, the elements of democratic state can be achieved if these conditions are available: (1) a responsible government, (2) house of representatives elected from the election conduct a free supervision, (3) the presence of several political parties, (4) the presence of independent press or media, and (5) a free judicial system which guarantees human rights.[18] Democratic state can also be achieved if every person has the same opportunity. James S. Fishkin states three democratic values, i.e. deliberation, political equality, and participation.[19]

Rainer Forst defines that deliberative value is not an individual and communal will as the source of legitimacy, but the source of legitimacy is the process of deliberative formation, argumentative discussion, a political decision which is reviewed together and it is temporary and open for revision[20]. According to James S. Fishkin, there are five conditions to obtain a quality deliberative value, as follows:

a. *Information*: The extent to which participants are given access to reasonably accurate information that they believe to be relevant to the issue.

b. *Substantive balance*: The extent to which arguments offered by one side or from one perspective are answered by considerations offered by those who hold other perspectives.

c. *Diversity*: The extent to which the major positions in the public are represented by participants in the discussion.

d. *Conscientiousness*: The extent to which participants sincerely weigh the merits of the arguments.

e. *Equal consideration*: The extent to which arguments offered by all participants are considered on the merits regardless of which participants offer them.[21]

---

[17] Miriam Budiarjo in *Moh. Mahfud MD, Demokrasi dan Konstitusi di Indonesia: Studi tentang Interaksi Politik dan Kehidupan Ketatanegaraan,* Jakarta: Rineka Cipta, 2000, p. 2.

[18] F*ranz Magnis-Suseno, Mencari Sosok Demokrasi: Sebuah telaah filosofis, Jakarta:* Gramedia Pustaka Utama, 1995, p. 56.

[19] James S. Fishkin, *When the People Speak Deliberative Democracy and Public Consultation*, Oxford: Oxford University Press, p. 33.

[20] Rainer Forst as quoted by F Budi Hardiman, *Demokrasi Deliberatif, Menimbang 'Negara Hukum' dan 'Ruang Publik' dalam teori Diskursus Jurgen Habermas*, Jakarta: Kanisius, 2009, p. 130.

[21] James S. Fishkin, *op.cit*, p. 34.

Moreover, the goal of democratic deliberation can be achieved by combining it with political equality, an idea in which everyone has an equal opportunity in every political choice. According to James S. Fishkin, the basic idea of political equality is every citizen has an equal possibility to support any alternative (candidate, party, or policy). Therefore, democratic system should give every citizen an equal probability to be voters determining the ones who will serve in important position.[22]

The recognition of political equality principle in democratic living has been acknowledged in Indonesian constitution, i.e. Article 28D(3) of the 1945 Constitution. It states, "*Every citizen has the right to equal opportunity in government*". The provision of Article 28D(3) of the 1945 Constitution regulates the important materials in modern constitutional life with the following characteristics: First, good governance. Second, the rule of law. Third, Democracy. Fourth, checks-and-balances principle. Fifth, upholding human rights.[23] Furthermore, the presence of citizens' political rights provision in the 1945 Constitution will enhance the constitutional guarantee towards Indonesia's human rights and make Indonesia as a more civilized country in the international arena.[24]

The presence of Article 28D (3) of the 1945 Constitution has become the foundation for the Constitutional Court of Indonesia to provide constitutional protection for citizens, as reflected in the Constitutional Court Decision No. 5/PUU-V/2007 reviewing Law No. 32/2004 on Regional Government (Regional Government Law) against the 1945 Constitution. In this case, the plaintiff argues that the nomination of regional head and deputy head which is monopolized by the political parties and does not give the opportunity for independent candidates to run for regional head and deputy head violates the 1945 Constitution. Then, the plaintiff also states that Article 28D (3) of the 1945 Constitution guarantees every citizen has the right to get an equal opportunity in government.[25]

---

[22] *Ibid*, p. 43

[23] Mahkamah Konstitusi RI, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 Latar Belakang, Proses, dan Hasil Pembahasan 1999-2002,* Book VIII concerning Warga Negara dan Penduduk, Hak Asasi Manusia, dan Agama, Jakarta: Sekretariat Jenderal MKRI, 2010, p. 219.

[24] *Ibid*.

[25] Constitutional Court Decision No. 5/PUU-V/2007 reviewing Law No. 32 of 2004 concerning Regional Government, p. 52.

The Constitutional Court responds to this appeal that to provide the equality of rights for all citizens as guaranteed by Article 28D(1) and (3) of the 1945 Constitution cannot be done by stating that the nomination of independent candidates as stipulated by Article 67(2) of the Law No. 11/2006 on Aceh Government violates the 1945 Constitution and therefore should be declared null and void, since the fact that the nomination of independent candidates does not violate the 1945 Constitution.[26] However, the equality of rights can be conducted by requiring the Regional Government Law adapts to new developments made by the law maker to give the right for every individual to run for regional head and deputy head as independent candidate as stipulated in Article 67 (2) of the Aceh Government Law.[27]

After knowing the importance of the arrangement of constitutional organ leadership tenure, this article will discuss the form of leadership tenure arrangement especially for constitutional organs categorized as primary constitutional organs. According to Asshiddiqie, there are more than 34 constitutional organs stated either directly or indirectly in the 1945 Constitution. Those 34 organs can be distinguished from two aspects, i.e. functionality and hierarchy.[28] In term of the hierarchy, all 34 organs can be differentiated into three layers. The first layer is primary constitutional organs. The second layer is constitutional organs, while the third layer is regional organs.[29]

Asshiddiqie explains after the amendment of the 1945 Constitution there is no terminology of primary constitutional organs. However, to facilitate the understanding, constitutional organs in the first layer are referred to primary constitutional organs, namely: (i) President and Vice President; (ii) DPR (House of Representatives); (iii) DPD (Regional Representatives Council); (iv) MPR (People's Consultative Assembly); (v) MK (Constitutional Court); (vi) MA (Supreme Court); and (vii) BPK (Supreme Audit Agency).[30]

---

[26] *Ibid*, p. 55.
[27] *Ibid.*
[28] Jimly Asshiddiqie, *Perkembangan dan Konsolidasi Lembaga Negara Pasca Reformasi*, Jakarta: Sekretariat Jenderal dan Kepaniteraan MKRI, 2006, p. 105.
[29] *Ibid.*
[30] *Ibid.*

Besides the hierarchy, they can be seen from their importance of position and function. The constitutional organs categorized as primary or principal are: (i) President; (ii) DPR (House of Representatives); (iii) DPD (Regional Representatives Council); (iv) MPR (People's Consultative Assembly); (v) MK (Constitutional Court); (vi) MA (Supreme Court); and (vii) BPK (Supreme Audit Agency.[31] Those organs are primary constitutional organs. Meanwhile, the other constitutional organs are supporting or auxiliary organs. Thus, the organs categorized as primary constitutional organs reflect countries' major power branches, i.e. legislature, executive, and judiciary.[32]

In connection to the arrangement of constitutional organ leadership tenure categorized as primary constitutional organ, there are four legislation models which govern it. **The first model** is the arrangement of tenure through the 1945 Constitution. The arrangement of the President and Vice President's tenure belongs to this category as stipulated in Article 7 of the 1945 Constitution, "*The President and Vice President hold office for a term of five years and can afterwards be elected to the same office, for one other term only".*

Prior to the amendment of Article 7 of the 1945 Constitution, the original text is, "*The President and Vice President hold office for a term of five years and can afterwards be elected again*". The amendment of Article 7 is motivated by the Indonesian constitutional practice in which there is no presidential turnover for decades.[33] It is caused by the formulation of Article 7 of the 1945 Constitution before the amendment which can bring several interpretations. It can be interpreted the president can be served many times or the president can only be served twice.[34]

Learning from the constitutional experience above, the amendment of Article 7 is carried out by defining and limiting the tenure period of President and Vice President. They can be re-elected only for one more term. Therefore, President or Vice President may serve only a maximum of two terms.[35]

[31] *Ibid,* p. 115.
[32] *Ibid*, p. 116.
[33] Sekretariat Jenderal MPR RI, *Panduan Pemasyarakatan , op.cit*, p. 86.
[34] *Ibid.*
[35] *Ibid*, p. 87.

Syamsuddin explains that the limitation of President's tenure through the amendment of Article 7 of the 1945 Constitution is needed because many developed, developing, or underdeveloped countries also limit their head of state or head of government's term of office for only two periods. The other consideration is the most appropriate leadership tenure for the head of state or head of government is two periods.[36]

Regardless of democracy, constitution, and other noble values, people basically have natural limitations especially if they hold powerful position. These natural limitations can be a prison lulling the sovereign, so the vested interest appears and leads to the abuse of power.[37]

The second model is the arrangement of tenure through legislation. The constitutional organs belong to the second category are the Supreme Court and the Constitutional Court. The Supreme Court as one of the judicial authorities shall have the competence to make judgment at the cassation level, to review regulations made under a law against that law, as well as other competences as provided by law.[38] The Supreme Court consists of chief justices, judges, registrars, and secretaries. The chief justices of the Supreme Court consist of one chief justice, two deputy chief justices, and some junior-chief justices. MA deputy chief justices consist of the deputy chief justice of judicial affairs and the deputy chief justice of non-judicial affairs.

MA Chief Justice and Deputy Chief Justice are elected from and by the supreme court justices and appointed by the President pursuant to Article 5(6) of the Law No. 5/2004 on the Amendment of the Law No 14/1985 on the Supreme Court holds office for a term of 5 (five) years. Although the tenure period of Chief Justice and Deputy Chief Justice has been determined, there is a note to this arrangement. The Law No. 14/1985 as amended by the Law No. 5/2004 and the Law No. 3/2009 did not regulate the limitation of how many times supreme court justice can serve as MA Chief Justice and Deputy Chief Justice.

[36] Syamsuddin Haris, "Soal Pembatasan Kekuasaan Presiden", *Kolom Tempo*, 3 September 1997, http://tempo.co.id/ang/min/02/27/kolom4.htm, accessed 30 April 2016.
[37] *Ibid*.
[38] Article 24A(1) of the 1945 Constitution.

The implication of the absence of limitation on how many times the ones can be MA Chief Justice and Deputy Chief Justice results in various interpretations whether supreme court justice can only serve as MA Chief Justice once or can serve as MA Chief Justice for many times. In other words, Article 5(6) of the Law No. 5/2004 has caused uncertainty. It undoubtedly violates Article 28D (1) of the 1945 Constitution which states, "*Each person has the right to recognition, security, protection and certainty under the law that shall be just and treat everybody as equal before the law".*

The provisions of Article 5(6) of the Law No. 5/2004 does not meet four things related to legal certainty as stated by Achmad Ali, namely: First, law is positive which means it is legislation (*Gesetzliches Recht*). Second, law is based on facts such as "goodwill", "decency". Third, the fact should be formulated in a clear way so as to avoid mistakes in the meaning and easier to be implemented. Fourth, the positive law can be changed many times.[39]

The provisions of Article 5(6) of the Law No. 5/2004 is not formulated clearly so it brings confusion in the meaning and it is also difficult to be implemented. The unclear arrangement stated in Article 5(6) of the Law No. 5/2004 has enormous potential to cause problems in its application because legal certainty demands a clear law.

In addition to the Supreme Court, Article 24(2) of the 1945 Constitution determines the other judicial authority, i.e. the Constitutional Court. The Constitutional Court shall have the authority to make final decisions in cases of first and last instance handling the review of laws against the Constitution, to decide on authority arguments among constitutional organs whose competence is enshrined in the Constitution, to decide on the dissolution of political parties, and to decide on disputes regarding general election results.[40] Moreover, the Constitutional Court also has the duty to rule on an opinion of the DPR regarding alleged violations by the President or the Vice President according to the Constitution.[41]

[39] Ahmad Ali, *Menguak Teori Hukum (Legal Theory) dan Teori Peradilan (Judical Prudence*, Jakarta: Kencana Prenada Media Group, 2009, pp. 292-293.
[40] Article 24C(1) of the 1945 Constitution.
[41] Article 24C(2) of the 1945 Constitution.

The Constitutional Court shall consist of Chief Justice and member, Deputy Chief Justice and member, as well as seven members of the constitutional justices. In connection to the election procedure and the tenure period of MK Chief Justice and Deputy Chief Justice, it is stipulated in Article 4(3) of the Law No. 8/2011 on the Amendment of the Law No. 24/2003 on the Constitutional Court. It states that MK Chief Justice and Deputy Chief Justice elected from and by constitutional justice members for a term of two years and six months from the date of appointment as MK Chief Justice and Deputy Chief Justice. Furthermore, Article 3A of the Law No. 8/2011 also regulates the elected MK Chief Justice and Deputy Chief Justice can afterwards be elected to the same office, for one other term only.

The tenure period of MK Chief Justice and Deputy Chief Justice in the Law 8/2011 is different from the Law 24/2003 which previously states MK Chief Justice and Deputy Chief Justice elected from and by constitutional justices for three years. According to the framers of the amendment of Law No 24/2003, the change of the tenure of MK Chief Justice and Deputy Chief Justice which is six-months lower than the previous tenure is to adapt to the tenure of constitutional justices which is five years, i.e. the tenure of MK Chief Justice and Deputy Chief Justice is only 2.5 years, but they can be re-elected. This is a correction to the discrepancy between the tenure of constitutional justices for a term of five years and the tenure of MK Chief Justice and Deputy Chief Justice for a term of three years. If the Chief Justice and Deputy Chief Justice are re-elected for the second times, it will pass their tenure as constitutional justices which is only five years.[42]

The change of the tenure to 2.5 years is also carried out in order to provide opportunity and evaluation for constitutional justices in selecting Chief Justice and Deputy Chief Justice. The good or bad performance of Chief Justice and Deputy Chief Justice can be seen after 2.5 years. The change of the tenure of Chief Justice and Deputy Chief Justice to 2.5 years is an agreement among DPR factions after a tough debate related to this matter because some DPR factions

[42] Hukumonline, "Masa Jabatan Ketua MK Dipersingkat, Masa jabatan Ketua dan Wakil Ketua MK ditetapkan selama 2,5 tahun sebagai bahan evaluasi, http://www.hukumonline.com/berita/baca/lt4df8706b5baae/dpr-pangkas-masa-jabatan-ketua-mk, accessed 10 April 2016.

have their own opinions. The majority wanted a term of 2.5 years. Meanwhile, Golkar Party wanted a term of 5 years and Demokrat Party wanted the tenure is internally regulated by the Constitutional Court and did not need to be stipulated by the Constitutional Court Law.[43]

The third model is the tenure arrangement which is not regulated by law, but it is regulated internally (code of conduct). People's Consultative Assembly (MPR), House of Representatives (DPR), and Regional Representatives Council (DPD) belong to this category. MPR has authority, including to amend and to ordain the Constitution, to inaugurate the President and/or Vice President, to decide on the DPR's proposal to dismiss the President and/or Vice President during their term of office in the event that the Constitutional Court resolves that the President and/or Vice President is proven guilty of violating the law, to inaugurate the Vice President as the President if during his term the President passes away, resigns, is impeached, or is unable to carry out his duties, to select a Vice President among two candidates nominated by the President if the position of the Vice President falls vacant.[44]

Article 15(1) of the Law No. 17/2014 states MPR leaders consist of one Chairman and four Vice Chairmen elected from and by the members of MPR. Then, the Article 15 (2) of the Law No. 17/2014 regulates MPR leaders are elected from and by the members of MPR in a "package".

The Law No. 17/2014 does not regulate the tenure of MPR leader. Moreover, there is no provision of the Law No. 17/2014 delegates where will the arrangement of MPR leadership tenure be arranged. The only provision of the Law No. 17/2014 which delegates the arrangement of MPR leaders is Article 15(10) stating the further provision for the election procedures of MPR leaders are stipulated in MPR's Code of Conduct.

For the absence of tenure arrangement in the Law No. 17/2014, Article 24 of the MPR Regulation No. 1/2014 on Code of Conduct regulates the tenure of MPR leaders are equal to the tenure of MPR members, as referred to in Article

[43] *Ibid.*

[44] Article 3(1) and (2), Article 7B (6), Article 8(2) of the 1945 Constitution.

8(2). The Article 8(2) of MPR Regulation No. 1/2014 regulates the tenure of MPR members is five years and ends when the new MPR members take an oath/pledge. Therefore, according to MPR Regulation No. 1/2014 the MPR leadership tenure is five years.

The House of Representatives (DPR) has the power to enact laws together with the President, to approve or not to approve the government regulations in lieu of law submitted by the President to be endorsed into law, to jointly discuss with the President by taking into account the recommendations from the DPD and to approve the bill on the state budget submitted by the President, to give the President approval to declare war and make peace with other countries.[45] Article 84 (1) of the Law No. 17/2014 regulates DPR leaders consist of one Chairman and four Vice-Chairmen elected from and by DPR members. Then, Article 84 (2) of the Law No. 17/2014 stipulates DPR leaders referred to in paragraph (1) is elected from and by DPR members in a "package".

The Law No. 17/2014 does not regulate the tenure of DPR leader. Moreover, there is no provision of the Law No. 17/2014 delegates where will the arrangement of DPR leadership tenure be arranged. The only provision of the Law No. 17/2014 which delegates the arrangement of DPR leaders is Article 84(10) of the Law No. 17/2014 stating the further provision for the election procedures of DPR leaders are stipulated in DPR's Code of Conduct.

For the absence of tenure arrangement in the Law No. 17/2014, Article 27(4) of the DPR Regulation No. 1/2014 on Code of Conduct regulates the tenure of DPR leaders are equal to the tenure of MPR members. Then, Article 76(4) of the Law No. 17/2014 and Article 8(4) of the DPR Regulation No. 1/2014 determine the tenure of DPR members is five years and ends when the new DPR members take an oath/pledge. Therefore, according to DPR Regulation No. 1/2014 the DPR leadership tenure is five years.

The Regional Representatives Council (DPD) has the authority to submit to the DPR bills dealing with regional autonomy, relations between the center and the regions, the establishment and growth as well as the merger of regions,

[45] See Article 11(1), Article 20 (1) and (2), Article 22(2), Article 23(2) of the 1945 Constitution.

the management of natural and other economic resources, and matters related to the financial balance between the center and the regions, to supervise the implementation of laws regarding: regional autonomy, the establishment, growth and merger of regions, relations between the center and the regions, the management of natural and other economic resources, the implementation of the state budget, taxation, education, and religion as well as to submit the results of its supervision to the DPR.[46] Article 260 (1) of the Law No. 17/2014 regulates DPD leaders consists of one Chairman and two Vice-Chairmen elected from and by DPD members in a DPD plenary session.

The Law No. 17/2014 does not regulate the tenure of DPD leader. Moreover, there is no provision of the Law No. 17/2014 delegates where will the arrangement of DPD leadership tenure be arranged. The only provision of the Law No. 17/2014 which delegates the arrangement of DPD leaders is Article 260(7) stating the further provision for the election procedures of DPD leaders are stipulated in DPD's Code of Conduct.

For the absence of tenure arrangement in the Law No. 17/2014, Article 66 of the DPD Regulation No. 1/2014 on Code of Conduct regulates the tenure of DPD leaders are equal to the tenure of DPD members as referred to in Article 7(4). Then, Article 7(4) of the DPD Regulation No. 1/2014 determines the tenure of DPD members is 5 (five) years and ends when the new DPD members take an oath/pledge. Therefore, according to DPD Regulation No. 1/2014 the DPD leadership tenure is five years.

The Fourth Model is the tenure arrangement is not regulated by law and internal regulation. Supreme Audit Agency (BPK) is categorized to the fourth model. BPK has the authority to audit the management and accountability of the state's finances conducted by the Central Government, Regional Government, other Constitutional Organs, Bank Indonesia, State-Owned Enterprise, Public Service Agency, Region-Owned Enterprise, and other institutions or entities managing the state's finances.[47]

[46] Article 22D(1), (2), and (3) of the 1945 Constitution.
[47] Article 23E(1) of the 1945 Constitution and Article 6(1) of Law No. 15 of 2006 on the Supreme Audit Agency.

Article 15(1) of the Law No. 15/2006 on BPK regulates that BPK leaders consist of one chairman and one vice chairman. The election procedures of BPK leaders are stipulated in Article 15(2) of the Law No. 15/2006 which regulates BPK Chairman and Vice Chairman are elected from and by BPK members in the BPK membership session not longer than one month after the date of BPK membership inauguration by the President.

The Law No. 15/2006 does not regulate the tenure of BPK leader. Moreover, there is no provision of the Law No. 15/2006 delegates where will the arrangement of BPK leadership tenure be arranged. The only provision of the Law No. 15/2006 which delegates the arrangement of BPK leaders is Article 15(5) stating the further provision for the election procedures of BPK Chairman and Vice-Chairman are stipulated in BPK Regulation.

BPK Regulation which implements Article 15(5) of the Law No. 15/2006 is the BPK Regulation No. 1/ 2009 on The Election Procedures of BPK Chairman and Vice Chairman. Based on the analysis of nineteen Articles in the BPK Regulation No. 1/2009, there is no provision regulating the tenure of BPK leaders. Article 18 of the BPK Regulation No. 1/2009 only states that BPK Chairman and Vice Chairman take oath or pledge according to their religion guided by MA Chief Justice soon after appointed as BPK Chairman and Vice Chairman. The absence of this arrangement causes problem related to when the tenure of BPK leaders will be over, although in practice the tenure of BPK Chairman and Vice Chairman is five years equals to the tenure of BPK members.

2.2 The arrangement of leadership tenure in primary constitutional organ that provides legal certainty.

Based on the four models of tenure arrangement in primary constitutional organs, i.e. regulated by the 1945 Constitution, regulated by law, not regulated by law but regulated in the internal regulation, and not regulated by law and also not regulated by internal regulation, it can be analyzed the degree of strength related to legal certainty. The first model, regulated through the Constitution, is the most ideal model and gives the strongest tenure certainty. Then, it is followed by the second model, i.e. regulated by law.

The model of leadership tenure arrangement in primary constitutional organs stated in the Constitution is the most powerful model in term of legal certainty for several reasons. First, Constitution as the state constitution is the highest legal order according to Hans Kelsen.[48] Constitution is considered to be a "constituent act", and it is not an ordinary legislative act.[49]

Constitution is a higher law or even the highest and most fundamental law, because constitution is the source of legitimacy or the authorization for other legal forms or legislation.[50] The consequence of constitution as the highest hierarchy of legislation is in accordance with the universal legal principle. Thus, legislation under the constitution must not conflict with the higher law in order to be valid and enforced.[51]

The recognition of constitution as the highest hierarchy of legislation is formally stipulated in the Law No 12/2011 on the Creation of Legislation. Article 7(1) of the Law No. 12/2011 sets the type and hierarchy of legislation as follows: 1945 Constitution; MPR Decree; Law/Government Regulations in Lieu of Law; Government Regulation, Presidential Regulation; Provincial Regulation; and Regency/City Regulation. Then, Article 7(2) of the Law No. 12/2011 states that the legal force of legislation is in accordance with the hierarchy.

Second, the tenure arrangement of primary constitutional organ leaders strongly associated with the structure and organization of primary constitutional organ constitutes the Constitution's substance. According to Sri Soemantri, various constitutions in the world generally include three substance groups, i.e.: (1) The presence of human rights and citizens protection regulation; (2) The presence of fundamental constitutional structure regulation; and; (3) The presence of the limitation and division of fundamental constitutional duties.[52]

Moreover, Merriam Budiardjo describes every constitution consists of some provisions as follows: (1) State Organization, e.g. division of power between the legislature, executive, and judiciary branches; division of power between federal

[48] Hans Kelsen, *General Theory Of Law and State*, translated By Anders Wedberg, New York: Russel & Russel, 1973, p. 156.
[49] Jimly Asshiddiqie, *Konstitusi & Konstitusionalisme Indonesia*, Jakarta: Konstitusi Press, 2005, p. 18.
[50] *Ibid*, p. 19.
[51] *Ibid.*
[52] Sri Soemantri, *Undang-Undang Dasar 1945 Kedudukan dan Aspek-Aspek Perubahannya*, Bandung: Unpad Press, 2002, p. 3.

government and state government; problem solving procedure of jurisdiction violation by government agencies and so on, (2) Human Rights, (3) Procedure of Constitution Amendment, and (4) Some of them include prohibition to change certain natures of the Constitution.[53] The notion that the arrangement of state organization including primary constitutional organs constitutes the Constitution's substance is also proposed by William G. Andrews. He suggests that constitution's substance is intended to regulate three important things, as follows: (a) to limit the authority of constitutional state organs, (b) to regulate the relationship among constitutional state organs, and (c) to regulate the power relation between constitutional state organs and citizens.[54]

The 1945 Constitution as the Indonesian constitution actually contains the arrangement of constitutional structure and state organization. AB Kusuma states the 1945 Constitution meets the qualification to be a constitution which includes some substances as follows: (a) preamble; (b) governance structure determining the function, duty, and authority of each constitutional organ; (c) citizens' rights and obligations according to Human Rights; (d) guarantee the constitutionality of law through judicial review which is the authority of Constitutional Courts; and € norms to amend the constitution.[55] However, it must be admitted that the 1945 Constitution does not fully regulate the state organization, e.g. it does not regulate the leadership tenure of primary constitutional organs such as MPR, DPR, DPD, MA, MK, and BPK.

Furthermore, the second model is the tenure arrangement of constitutional organ leaders through law. Although it is not as strong as provided by the Constitution, it is still acceptable. According to Hans Kelsen's opinion, the constitution material consists of regulations governing the creation of legal norms in general, especially law:

> *The material constitution may determine not only the organs and the procedure of legislation, but also, to some degree, the content of future laws. The*

[53] Mirriam Budiardjo, *Dasar-Dasar Ilmu Politik*, Jakarta: Gramedia, 1989, p. 101.
[54] Jimly Asshiddiqie, "Islam dan Tradisi Negara Konstitutional", a paper presented at *Seminar on Indonesia-Malaysia*, UIN/IAIN Padang, Padang, 7 October 2010, p. 4.
[55] Dewa Gede Atmadja, *Hukum Konstitusi, Problematika Konstitusi Indonesia Sesudah Perubahan UUD 1945*, Malang, Setara Press, 2010, p. 80.

> *constitution can negatively determine that the law must not have a certain content, e.g. that the parliament may not pass any statute which restrict religious freedom. In this negative way, not only the content of statutes but of all the other norms of the legal order, judicial and administrative decisions likewise, may be determined by the constitution. The constitution, however, can also positively prescribe a certain content of future statutes; it can, as does for instance the constitution of the United States of America, stipulate "that in all criminal prosecution the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district where in the crime shall have been committed which district shall have been previously ascertained by law, etc." This provision of the constitution determines the content of future laws concerning criminal procedure.* [56]

To further regulate the incomplete arrangement of constitutional organs that exist in the Constitution is conducted by Law because constitution has a special nature or characteristic, i.e. its substance only regulates or contains subject matter so its norm level is at legal principle level which belongs to meta-norm. Thus, it requires further regulation, i.e. Law, which is at legal norm level (legal norm regulates certain behavior).[57] The Constitution is a basic principle or state principle containing goals to be achieved. The Constitution is expected to have an indefinite range of validity. To enable the achievement of these goals, the Constitution is commonly formulated to allow a great adaptability with the occurred changes.[58]

The fact that the 1945 Constitution only includes presidential tenure and excludes other constitutional organ leadership tenure shows that the framers want to make it brief and flexible.[59] It is based on the mindset that the Constitution is enough to contain only the basic rules and the outline as an instruction to the central government and other state apparatus to organize the state. Meanwhile, the implementation of basic principles is given to the other legislation.[60]

According to Moh. Kusnadi and Bintan R. Saragih, as a written constitution the 1945 constitution tends to be short. Its short nature is intended to simply arrange the outline or the main issue while the other problems can be arranged

[56] Hans Kelsen, *op. cit.*, p. 157.
[57] Dewa Gede Atmadja, *Hukum Konstitusi, op. cit.*, p. 40.
[58] Bagir Manan, *Pertumbuhan dan Perkembangan Konstitusi Suatu Negara*, Bandung: Mandar Maju, 1995, p. 7.
[59] Dahlan Thaib, *et. al.*, *Teori Hukum dan Konstitusi*, Jakarta: RajaGrafindo Persada,1999, p. 140.
[60] *Ibid.*

by Law.[61] Some provisions in the 1945 Constitution require further regulation through the Law although its implementation is not explained in the article of the Constitution in order to run the provision well.[62]

Regarding the third regulation model that is not arranged by the Law but it is arranged in the internal regulation, and the fourth model that is not arranged by the law as well as internal regulation are models with the low level of legal certainty. It happens for several reasons, first, the internal regulation such as MPR regulation, DPR regulation, and DPD regulation does not fulfill the qualification as legislation.

According to Bagir Manan, legislation is any written decision issued by an authorized official which contains rules or behaviors in general.[63] In addition, A. Hamid S. Attamimi explains legislation is all laws created by constitutional organs in a certain form complemented by sanctions. It enforces and binds people.[64]

T J Buys interprets that legislation binds generally, whereas JHA. Logemann added with the formulation "*naar buiten werkende voorschriften*", so it becomes "*bindende algemeen en naar buiten werkende voorschriften*" (generally binding regulation and enacted out).[65] Article 1 (1) and (2) of the Law No. 12/2011 also defines legislation as a written regulation containing legal norm which binds generally and created or established by constitutional organs or authorized officials through the specified procedure in legislation

MPR's code of conduct, DPR's code of conduct, and DPD's code of conduct is fulfilled the written legislation elements containing legal norms and created or established by constitutional organs or authorized officials through the specified procedure in legislation, but it cannot be classified as legislation because it only binds MPR members, DPR members, or DPD members and does not bind all people. The other things showing that MPR's code of conduct, DPR's code of

[61] Moh. Kusnardi and Bintan R Saragih, *Susunan Pembagian Kekuasaan Menurut Undang-Undang Dasar 1945*, Jakarta: Gramedia, 1994, p. 35.
[62] *Ibid*, p. 39.
[63] Bagir Manan, *Dasar-Dasar Perundang-undangan Indonesia,* Jakarta: In-Hill-Co, 1992, p. 3.
[64] A. Hamid S. Attamimi, *Peranan Keputusan Presiden RI dalam Penyelenggaraan Pemerintahan Negara,* Disertasi, Jakarta: Fakultas Pascasarjana Universitas Indonesia, 1990, p. 200.
[65] Amirudin Syarif. *Perundang-undangan, Dasar, Jenis, dan Teknik Membuatnya,* Jakarta: Bina Aksara, 1987, p. 32-33.

conduct, and DPD's code of conduct are not a legislation is they are not enacted in state gazette or official gazette, whereas Article 81 of the Law No. 12/2011 requires all people should be informed, the Legislation should be enacted.

Second, the exclusion of constitutional organ leadership tenure such as MPR, DPR and DPD in Law but only regulated in constitutional organs' internal regulations are vulnerable to create a turmoil and commotion in case the constitutional organ leader fails to perform his authorities and duties, fails to manage and maintain the trust of the members. Considering that it is enough to change the internal regulation by fulfilling the members minimal quorum (fifty present plus one vote of all the members), it is exactly what is happening to DPD.

For example is the DPR Regulation no. 1/2014 on DPR's code of conduct which can be amended at any time as long as the DPR members desire it. Article 322 (1) of the DPR Regulation no. 1/2014 on the Proposal of DPR's Code of Conduct Amendment can be proposed by at least 5 (five) parliament factions. Article 323 (1) regulates the amendment proposal referred to Article 322 (1) shall be proposed by the DPR leader in the DPR plenary session. Furthermore, Article 323 (3) regulates in the event the amendment proposal is approved, DPR plenary session submits it to the Legislature to be discussed. According to Article 323(5) regulates the result of the discussion referred to paragraph (3) shall be reported to the DPR plenary session for making a decision.

The same regulation also applies to the DPD Regulation No. 1/2014 on DPD's Code of Conduct which can be amended at any time as long as the majority of the members desire it. Article 243 of the DPD Regulation no. 1/2014 regulates the proposal of DPD's code of conduct amendment may be proposed to the plenary session through the Deliberation Committee by: (a) Ethics Council; (b) at least two Board Fittings; or (c) at least 30% members (thirty-five per one hundred) which reflects the representation of ten provinces and spread over three regions proportionally. Article 244(2) regulates in the event the amendment proposal is approved, the plenary session establishes a Special Committee to make the

improvements. Article 244 (4) regulates the results of the discussion referred to paragraph (2) shall be submitted to the plenary session for making a decision.

III. CONCLUSION

The regulations about the tenure of constitutional organs leader required at least based on two considerations. The first consideration is, as the implementation of the principle of power limitation; and secondly, as a manifestation of the political equality principle among the citizens as the characteristic of a democratic state. From the hierarchy aspect if it is viewed in terms of the primary position and function, the constitutional organs which can be said as the principal or major after the 1945 amendments are (i) the President; (Ii) DPR (Representatives Council); (Iii) DPD (Regional Representatives Council); (Iv) MPR (People's Consultative Assembly); (V) MK (Constitutional Court); (Vi) MA (Supreme Court); and (vii) BPK (Supreme Audit Agency).

Regarding the regulation of constitutional organs tenure which qualified as primary constitutional organs if it is seen from the type of legislation which regulates it, evidently does not have the uniformity because it has four variants/ models: *First Model*, tenure regulation through a constitution namely 1945 constitution, belong to this category is the President and Vice President tenure. *Second Model*, state institutions tenure regulation through Law. Belong to this second category is Supreme Court (MA) and Constitutional Court (MK). *Third Model*, tenure regulations which are not regulated by law, but regulated in the internal regulations (code of conduct regulation), MPR, DPR, DPD include in this category. *Fourth Model*, tenure regulations which are not arranged in Law nor internal regulations. For instance, Supreme Audit Agency (BPK).

From the four models constitutional organs tenure regulations which regulated by the 1945 Constitution, regulated by the Law, are not regulated by the Law but regulated in the internal regulations of the primary constitutional organs, and are not regulated by Law nor by primary constitutional organs internal regulations, each of them has the degree of power related to the legal

guarantee. Model of primary constitutional organs tenure regulations in the 1945 Constitution is the most powerful model ensuring the legal guarantee because of some reasons which are the 1945 Constitution is the state constitution which placed in the highest order of national legal order and the arrangement of primary constitutional organs tenure regulations which is strongly associated with the structure and organization of primary constitutional organs is the substance of the 1945 Constitution. Next, the second model that is through the Law although it is not as strong as provided by the 1945 Constitution, but if this option is done then it still acceptable. Considering to organize incomplete constitutional organs regulation in the 1945 Constitution can be done by the Law because the constitution has its traits or characteristics namely the substance which only arrange or contains subject matter.

Concerning about the third model that is not regulated by the Law but is regulated in the internal regulations, and the fourth model that is not regulated by the Law nor in the internal regulations are the models which have a lower rank of legal guarantee. This is because the internal regulations, such as MPR, DPR, and DPD regulations, do not qualify as legislation. Furthermore, the exclusion of primary constitutional organs tenure regulations such as MPR, DPR and DPD in the Law only regulated in the internal regulations of primary constitutional organs are vulnerable create a turmoil and commotion because it is easy to change the internal regulation by only have to fulfill the members minimal quorum (over one from the half of total members) can change the tenure of the leader anytime.

To prevent the conflicts among the member of primary constitutional organs and prevent an unnecessary turmoil which can interfere the authority exercise of the primary constitutional organs, we need to conduct a change to the primary constitutional organs tenure regulations so that it is not regulated by the primary constitutional organs internal regulations, but it should be regulated in the 1945 Constitution or at least in the Law (UU) in order to better ensuring the legal guarantee.

References

Ali, Ahmad. 2009. *Menguak Teori Hukum (Legal Theory) dan Teori Peradilan (Judical Prudence*. Jakarta: Kencana Prenada Media Group.

Asshiddiqie, Jimly. 2004. *Perkembangan dan Konsolidasi Lembaga Negara Pasca Reformasi*. Jakarta: Sekretariat Jenderal dan Kepaniteraan MKRI.

Asshiddiqie, Jimly. 2005. *Konstitusi & Konstitusionalisme Indonesia*, Jakarta: Konstitusi Press.

Asshiddiqie, Jimly. 2010. "Islam dan Tradisi Negara Konstitutional", a paper presented at *Seminar on Indonesia-Malaysia*, UIN/IAIN Padang, Padang, 7 October 2010.

Asshiddiqie, Jimly. 2011. "Gagasan Negara Hukum Indonesia", a paper presented at *Forum Dialog Perencanaan Pembangunan Nasional*, Badan Pembinaan Hukum Nasional (BPHN), Ministry of Law and Human Rights, 22-24 November 2011.

Asshiddiqie, Jimly. 2015. "Liberalisasi Sistem Pengisian Jabatan Publik", a paper presented at 2nd *Konferensi Hukum Tata Negara*, Universitas Andalas, Padang, September 2015.

Atmadja, Dewa Gede. 2010. *Hukum Konstitusi, Problematika Konstitusi Indonesia Sesudah Perubahan UUD 1945*, Malang, Setara Press.

Attamimi, A. Hamid S. 1990. *Peranan Keputusan Presiden RI dalam Penyelenggaraan Pemerintahan Negara*. Dissertation. Jakarta: Fakultas Pascasarjana Universitas Indonesia.

Budiardjo, Mirriam. 1989. *Dasar-Dasar Ilmu Politik*, Jakarta: Gramedia.

DPD RI. 2006. "Profil", http://dpd.go.id/halaman-profil, accessed 10 April 2016.

Fishkin, James S. *When the People Speak Deliberative Democracy and Public Consultation*, Oxford: Oxford University Press.

Hardiman, F Budi. 2009. *Demokrasi Deliberatif, Menimbang 'Negara Hukum'dan 'Ruang Publik' dalam teori Diskursus Jurgen Habermas*, Jakarta: Kanisius.

Haris, Syamsuddin. 1997. "Soal Pembatasan Kekuasaan Presiden", *Kolom Tempo*, 3 September 1997, http://tempo.co.id/ang/min/02/27/kolom4.htm, accessed 30 April 2016.

Hukumonline 2011. "Masa Jabatan Ketua MK Dipersingkat, Masa jabatan Ketua dan Wakil Ketua MK ditetapkan selama 2,5 tahun sebagai bahan evaluasi", http://www.hukumonline.com/berita/baca/lt4df8706b5baae/dpr-pangkas-masa-jabatan-ketua-mk, accessed 10 April 2016.

Kelsen, Hans. 1973. *General Theory Of Law and State*, translated by Anders Wedberg, New York: Russel & Russel.

Kompas.com. 2015. "Survei LSI: Kepercayaan Publik terhadap DPR ada di Titik Terendah", http://nasional.kompas.com/read/2015/12/17/14485741/Survei.LSI.Kepercayaan.Publik.Terhadap.DPR.Paling.Rendah, accessed 11 April 2016.

Kompas.com. 2016. "Anggota DPD: Polemik Pemangkasan Masa Jabatan Pimpinan untuk Evaluasi Kinerja, http://nasional.kompas.com/read/2016/04/19/13072211/Anggota.DPD.Polemik.Pemangkasan.Masa.Jabatan.Pimpinan.untuk.Evaluasi.Kinerja?utm_campaign=related&utm_medium=bp-kompas&utm_source=news&, accessed 19 April 2016.

Kompas.com. 2016. "Irman Gusman Anggap Pemangkasan Masa Jabatannya bertentangan dengan UU", http://nasional.kompas.com/read/2016/03/17/22361671/Irman.Gusman. Anggap.Pemangkasan.Masa.Jabatannya.Bertentangan.dengan.UU?utm_source=RD&utm_medium=inart&utm_campaign=khiprd, accessed 10 April 2016.

Konsorsium Reformasi Hukum Nasional (KRHN) and Mahkamah Konstitusi RI, 2005. *Lembaga Negara dan Sengketa Kewenangan Antar Lembaga Negara,* Jakarta: KRHN, 2005.

Magnis-Suseno, F*ranz. 1995. Mencari Sosok Demokrasi*: *Sebuah telaah filosofis, Jakarta:* Gramedia Pustaka Utama.

Mahfud MD, Moh. 2000. *Demokrasi dan Konstitusi di Indonesia*: *Studi tentang Interaksi Politik dan Kehidupan Ketatanegaraan,* Jakarta: Rineka Cipta.

Manan, Bagir. 1992. *Dasar-Dasar Perundang-undangan Indonesia,* Jakarta: In-Hill-Co.

Manan, Bagir. 1995, *Pertumbuhan dan Perkembangan Konstitusi Suatu Negara*, Bandung: Mandar Maju.

Mahkamah Konstitusi RI. 2010. *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 Latar Belakang, Proses, dan Hasil Pembahasan 1999-2002,* Book VIII Warga Negara dan Penduduk, Hak Asasi Manusia, dan Agama, Jakarta: Sekretariat Jenderal MKRI.

Pierson, Christoper. 2004. *Modern State*. Second Edition, New York: Routledge.

Saragih, Moh. Kusnardi and Bintan R. 1994. *Susunan Pembagian Kekuasaan Menurut Undang-Undang Dasar 1945*, Jakarta: Gramedia.

Syarif, Amirudin. 1987, *Perundang-undangan, Dasar, Jenis, Dan Teknik Membuatnya.* Jakarta: Bina Aksara.

Soemantri, Sri. 2002. *Undang-Undang Dasar 1945 Kedudukan dan Aspek-Aspek Perubahannya*, Bandung: Unpad Press.

Sekretariat Jenderal MPR RI. 2012. *Panduan Pemasyarakatan Undang-Undang Dasar Negara Republik Indonesia Tahun Ketetapan Majelis Permusyawaratan Rakyat Republik Indonesia*, Jakarta: Sekjend MPR.

Sibuea, Hotma P. 2014. "Pemberhentian Presiden/Wakil Presiden Pada Masa Jabatan Oleh Majelis Permusyawaratan Rakyat Dalam Sistem Ketatanegaaan Indonesia*", Jurnal Hukum Staatrechts,* Volume 1, Issue 1, October 2014.

Statis, Stephen W. *The Twenty-Second Amendment: A Practical Remedy Or Partisan Maneuver?*. Constitutional Commentary, vol 7.

Tabbarok, Alexander. 1994. "*A Survey, Critique, and New Defense of Term Limits*", *Ceto Journal,* Volume 14, Issue 2, Fall 1994.

Thaib, Dahlan, et. al. 1999. *Teori Hukum dan Konstitusi*. Jakarta: Raja Grafindo Persada.

Green Development Rights For Optimizing Urban Area And Coastal Areas In Indonesia

(Consitency Of The State Of The Doctrine Of The Right To Control The State)

I Gusti Ayu Ketut Rachmi Handayani
Faculty of Law, Sebelas Maret University
Surakarta Indonesia,
E-mail. ayu_igk@yahoo.com.

Abstract

The green development right paradigm will elaborate the ontology (nature), and the ways or methods in order to achieve the ultimate goal of the green development right. This ultimate goal will be focused on the creation of the ideal maritime systems that may guarantee all related parties, such as individual, society, or community, private sectors and the government, to convert their potentials to be functional towards public welfare. The core elements of the green development right will emphasizes the series of norms in managing the coastal and frontline island potentials. The normative framework covers Environmental Law, Fishery Law, and Coastal Law. The research methods use an empirical approach and normative approach. The study documents the analysis consists of constitutions, legislation and various policies relating to the subject matter studied in Indonesia area and the problems it faces and report the results of the various meetings, seminars, public hearings.

Keywords*:* Green Development Rights, Optimizing Urban Area, Coastal Areas, Doctrine of the right to control the state.

I. INTRODUCTION

One of the current global environmental issues is that the world economic system tends to exploitative and damaging the environment in the meanwhile, the development of increasingly complex challenges, mainly as a result of global economic competition, climate change and population. Thus the conventional economic system, are not able to accommodate the principle of sustainable development, especially factors balance between human behavior and nature, which continues to erode the cultural exploitation limited natural resources.[1]

Although the constitutions of many nations specifically address the environment, few embody Fundamental Environmental Rights. Rather, most reflect legislative or procedural environmental policies, such as a general governmental charge to consider environmental impacts or to allow for public notice and comment concerning projects that significantly affect the environment, Indeed, of the 130 constitutions that address the environment, only about sixty grant individuals what may be fairly characterized as a fundamental right to a "clean," "healthful," or "favorable" environment.[2]

The damage and destruction of the environment due to industrial activity, mass consumption, modern lifestyles, and human greed, has encouraged the emergence of concern and ecological awareness. Global community is now charged with the role and greater responsibility and to address the serious problems faced by the environment and prevent environmental damage and more severe. It is now increasingly believed the importance of sustainable development that notice and consider the environmental aspects of sustainability our planet, human life, animals, plants and other species.[3] Therefore, the term sustainable development is one of the programs put forward by Agenda 21, which is one of the three documents as agreed in the United Nations Conference on Environment and Development in Rio de Janeiro in 1992, or the so-called Earth Summit, which

[1] Sunoto, 2013, *Menuju Pembangunan Kelautan dan Perikanan Berkelanjutan Dengan Konsep Green development right, Yogyakarta, Indonesia.*

[2] For the earliest comprehensive account of constitutional environmental rights, see Edith Brown Weiss, 1989. *In Fairness To Future Generations: International Law, Common Patrimony and Intergenerational Equity app. B.*

[3] Handayani, I Gusti Ayu Ketut Rachmi Handayani, 2013. *Embodying Green Constitution by Applying Good Governance Principle for Maintaining Sustainable Environment, Journal of Law, Policy and Globalization, ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online) Vol.11, 2013. p. 18.*

has been adopted by 178 countries including Indonesia. In Chapter 17 mentioned on programs that contain new approaches in the management and utilization of marine and coastal areas, among others: (a) the integrated management and sustainable development of coastal areas, including exclusive economic zones; (b) the protection of the marine environment; (c) the sustainable development of small islands.[4]

It is, however, important not to keep the domain of public reasoning confined to a given society only, especially in the case of human rights, in view of the inescapably universalist nature of these rights[5]. Over the last several decades, the environmental movement has become institutionalized within the policy process, as well-organized environmental groups have gained political influence over the direction of environmental law.[6] . The political forces that shape the design of environmental law still tend to support more conventional forms of regulation[7].

Since 1972, there have been hundreds of meetings and treaties. These will be looked at where are relevant below. However, one of the fundamental principles that have been emerged for the international arena is the issue of sustainability. This was developed in the 1980 International Union for Conservation of Nature's World Conservation Strategy – which lay down that there should be a sustainable utilization of species/ecosystems. The Stockholm Conference on the Human Environment, 1972, provided a new orientation to many national commitments at the level of policies, laws and, in some cases, even Constitutions. In 1982, the General Assembly of the UN adopted the World Charter for Nature – this states that there should be an optimal sustainable productivity of all resources, coupled with conservation/protection. In 1987, the World Commission on Environment and Development (WCED) reiterated the paradigm of sustainable development and stated that there should be co-operation on a worldwide basis to achieve these ends. However, the most important recent conference was in Rio in 1992.

[4] Dikdik Mohamad Sodik, 2011, *Hukum Laut Internasional Dan Pengaturannya di Indonesia*, Refika Aditama : Bandung, Indonesia, p. 216.
[5] Amartya Sen. 2005. Human Rights and Capabilities. *Journal of Human Development* Vol. 6, No. 2. p. 161. Routledge.
[6] Coglianese, C. 2001. Social Movements, Law and Society: The Institutionalization of The Environmental Movement. *University of Pennsylvania Law Review* 150: pp. 85-118.
[7] Keohane, N.O., Revesz,R.L., and Stavins,R.N. 1998. The Choice of Regulatory Instruments in Environmental Policy. *Harvard Environmental Law Review* 22: p. 313.

The UN Conference on Environment and Development led to five important outcomes:

(a) Framework convention on Climate Change;

(b) Convention on Biological Diversity;

(c) Agenda 21;

(d) Rio Declaration on Environment and Development;

(e) Forest Principles.

This was followed by the Kyoto and Buenos Aires Conferences on measures to tackle global warming.[8] Conversely, the Committee of the WHC has expressed concern with regard to unsustainable fisheries around Banc d'Arguin National Park in Mauritania, (commercial fisheries occurs in 24% of all WHC sites) and official logging (forestry and logging occur in 26% of the all WHC natural sites) in the buffer zones around sites in Australia and Cameroon and with regard to Mount Athos in Greece.[9]

Characteristics of Indonesia is an archipelagic nation (archipelagic state) in which the configuration of its territory surrounded by the sea most of the benefits and challenges of its own. Natural resources that are so abundant imply that this nation has a capital development should promise prosperity, yet on the other hand the territory consisting of a series of islands both large islands and small islands as the frontline most border regions, calls for harmony in development in each sector. Here is a graph showing that the sea is one contributor to the GDP (Gross Domestic Product) Indonesia with a contribution of 20%.[10]

Up to this time the number of small islands in Indonesia reaches 92 frontline islands and 31 islands of which are inhabited. Despite its vast natural resources as development capital, but the island also has many limitations, especially regarding the condition of facilities and infrastructure.[11] Event of the loss of Sipadan-Ligitan Indonesia implies that the loss of one of the small islands in the

[8] Rostron, Jack, 2001, *Environmental Law for the Built Environment*, Cavendish Publishing Limited, London UK.
[9] Gillespie, Alexander, 2007. *Protected Areas and International Environmental Law*, Martinus Nijhoff Publishers. Koninklijke Brill NV, Leiden the Netherlands.
[10] Stephen Adrian Ross, 2013, *Achieving Sustainable Development Targets through Green development right Development in the EAS Region*, Manila, Philippines : PEMSEA Resource Facility.
[11] http://www.ppk-kp3k.kkp.go.id/

border claims resulting from neighboring countries or acts of nature, its impact can change the borders of a state. Therefore, management is very important in the frontline islands, both uninhabited islands and uninhabited. The fact that is often encountered today is the disparity of natural resource management that led to gaps in the economic development of coastal communities and the small frontline islands.

The picture is in stark contrast with what is contained in Article 33 of the Constitution of 1945 that the earth, water, and natural resources contained within it are the subjects of prosperity of the people. In other words, all of the policy on the use of natural resources, in the end must be assessed by a single scale, the welfare of the people. Scales, in his way and then evolved into duumvirate with the emergence of a new benchmark, namely the preservation of natural resources.[12]

Environmental laws and policies are predominantly goal-oriented. Standards, principles and procedures for the protection of the environment are often instrumental to achieve, say, the conservation of fragile ecosystems and endangered species, the preservation of fresh water and other natural resources, the restoration of contaminated soils as well as the stratospheric ozone layer, and the protection of human health. This goal oriented feature is evident in national as well as international law, sustainable development as an overarching societal objective with obvious environmental connotations, reflects this goal-oriented paradigmion of environmental law and policy. Yet, environmental law also involves priorities, convicts and clashes of interests and concerns for justice and fairness. In fact, any drafting, negotiation, adoption, application and enforcement of environmental laws – indeed comprehending environmental law in general induces justice considerations: i.e. concerns for the distributive and corrective effects of laws and decisions pertaining to health, the environment and natural resources, as well as concerns for the opportunities of those potentially affected to participate in such law-making and decision-making in the first place.[13]

[12] Sudirman Saad, 2009, *Hak Pemeliharaan dan Penangkapan Ikan : Eksistensi dan Prospek Pengaturannya di Indonesia*, LKIS Yogyakarta, Indonesia, p. 109.
[13] Ebbesson, Jonas, 2009. *Environmental Law and Justice in Context*. Cambridge University Press New York.

Green school Development program in Indonesia

The Strategic Roadmap for Developing 'Green Schools' in Indonesia aims to assist the country in enriching and strengthening existing 'green school' initiatives (such as the Adiwiyata Programmer) through the adoption of a whole-school system approach and by embracing the whole concept of Education for Sustainable Development. Education for Sustainable Development is an educational framework that seeks to meet the needs of the present without compromising the needs of future generations. It is interdisciplinary, holistic and values-driven, and promotes the ideals of gender equality, just and peaceful societies, human rights, environmental preservation and restoration, cultural diversity, and poverty alleviation towards creating a sustainable future. Education for Sustainable Development focuses on critical thinking and problem solving, and adopts a multi-methodological approach, participatory decision making and local relevance. Development of the new 'green schools' is put in the context of wider national sustainable development issues, as well as being a step towards realizing the vision of the United Nations Decade for Education for Sustainable Development (UNDESD) 2005-2014 to create a future where everyone has the opportunity to benefit from education and learn the values, behaviors, and lifestyles required for a sustainable future and for positive societal transformation.[14] The new 'Green School' Programmer builds on and will strengthen current green school initiatives in Indonesia, especially the Adiwiyata Programmer, which is now the most comprehensive in the country. It will also acknowledge relevant experiences in neighboring countries. The programmer is designed to comprise the concept of Education for Sustainable Development, explicitly integrating social, environmental and economic dimensions while capturing the values of resilience, which is immensely important in the Indonesian context due to its vulnerability to natural disaster. The programmer entails having a Certification and Award system for meritorious schools that meet the Education for Sustainable Development criteria, for which schools will be assessed through a rigorous

[14] UNESCO,(2011). *Education for Sustainable Development Country Guidelines for Changing the Climate of Teacher Education to address sustainability: putting transformative education into practice, ISBN 978-602-98372-6-1.*

process using a comprehensive indicator system. Piloting in certain schools is envisioned, which, when successful, could then serve as models for others to emulate.[15]

Overall goals of Green Development School Programmer in Indonesia

The major goals of the new Green School Programmer are to:

1. Increase awareness and understanding, among students, communities and all stakeholders, both internal and external, of the fundamental interrelationships and interdependencies between natural and human systems;
2. Foster awareness of and concern about economic, social, and ecological interdependence;
3. Foster concern and a sense of responsibility for the environment and society;
4. Provide every person with opportunities to acquire the knowledge, values, attitudes, commitments, and skills needed to protect and improve the environment and promote societal and economic development;
5. Increase skills in synthesizing information from a variety of disciplines and knowledge areas in order to develop an integrated body of knowledge on Education for Sustainable Development;
6. Increase capacity to understand and make decisions about key issues affecting the individual, society, and the environment;
7. Foster new patterns of behavior among individuals, groups, and society as a whole towards the environment; and
8. Demonstrate the principles of sustainability in schools' operation, decision-making practices, attitudes and responsibility towards their communities.

Scope of the study

Based on the description of the setting in which it has been mentioned before, it is known that Indonesia is promoting the paradigm of green development right in the development of marine and fisheries sector, but it is

[15] Algonin, and *el*, 2014. *Variation of Environmental Awareness among the Student in Government High Schools in Solo City Indonesia.* International Journal of Applied Environmental Sciences, ISSN 0973-6077 Volume 9, Number 5 (2014), pp. 2701-2719.

not clear about how the Indonesian translate these paradigms, in addition to the configuration as it is proper philosophy island country green development right can contribute constructively to the economy not only in coastal but also for the frontline islands. Based on the general description of the problems that the team carefully, then at least the research plan will be divided into two years of implementation research.

In the first year study, researcher will focus on issues concerning the identification of the conditions that exist in the region studied Lombok as including the problems that related to anticipated efforts to maintain biodiversity and climate change, barriers, and existing prospects.

For the second year study, the research will be focused on the implementation model green development right including strategies for coastal management and optimization acceleration of small islands linked frontline most maintaining biodiversity and climate change anticipation.

The method of the research

The research method use an empirical approach and normative approach. The study documents the analysis consists of legislation and various policies relating to the subject matter studied in Indonesia area and the problems it faces and report the results of the various meetings, seminars, public hearings and so on.

The purpose of the research (general and specific)

From the research can be formulated that in the first year, the study aims to identify the conditions that exist at the sites associated with the application of the green development right associated with the management of coastal areas and small islands frontline most including also the identification of barriers or constraints and prospects held by the location of the research, to identify the problems and prospects of development associated with the maintenance of biodiversity and climate change in anticipation of the study sites.

In the second year of research, aims to assess the results of the research in the first year that examines barriers and prospects owned by study site for

later analysis by solving problems and seek solutions to these problems and then create a model for the implementation of the model in the form of green development right as optimizing acceleration and coastal management frontline most small islands in order to maintain biodiversity and the anticipation of climate change in Indonesia.

Research Achievement

Implementation research related to coastal management and small frontline islands has been done by previous researchers, one of whom is the research conducted by Mohammad Ali Nugroho who studied on Empowerment uninhabited Frontline Islands Around the waterway in Improving resilience of the State.[16] The pressure of this study was to try to describe the condition of the frontline islands are not inhabited around the waterway, how the empowerment of the frontline islands and role of stakeholders who play a role in the empowerment to enhance national defense. The results of the study refers to the empowerment of the frontline islands are uninhabited around the waterway must be implemented by stakeholders who have great authority and can carry out a variety of programs in accordance with the character of each area of the island.

Research conducted by Muhammad Kasnir 2011 who studied on "Aspect Analysis in Marine Ecology governance Minawisata Pangkep Spermonde Islands, South Sulawesi"[17]. This study aims to assess the ecological aspects of maritime governance minawisata development, with the main issue of coral reefs and seagrass beds Spermonde Islands. The research method is done by using primary data through field survey and secondary data through the study of literature. Indicators of the things that are analyzed include environmental characteristics and condition of coral reefs, coral cover conditions, as well as the quality of the waters to see how the next designated minawisata maritime development. The results showed that Spermonde Islands are directed to the development of marine tourism, fisheries and agriculture.

[16] Mohammad Ali Nugroho, 2011, *Pemberdayaan Pulau Terluar Tidak Berpenghuni Di Sekitar Selat Malaka Dalam Meningkatkan Ketahanan Negara (Perspektif Strategis Ketahanan Nasional)*, Pasca Sarjana Universitas Indonesia Program Studi Pengkajian Ketahanan Nasional, Indonesia.

[17] Muhammad Kasnir, 2011, *Analisis Aspek Ekologi Penatakelolaan Minawisata Bahari di Kepulauan Spermonde Kabupaten Pangkep-Sulawesi Selatan*, Semarang : Jurnal Ilmu Kelautan Universitas Dipenogoro Juni 2011 Vol. 16 (2) 61-69.

In 2013 research by Christopher Corbin, entitled "There is no Green Ways to Blue: An analysis of the importance of coastal and marine resources to the development of Green Economies by Caribbean SIDS". This study emphasizes the issue of SIDS (Small Island Developing States) focused on the Caribbean region where natural resources are the main source for the region's economy so vulnerable to environmental damage. Therefore, researchers provide effective land use planning recommendations which include fisheries, tourism and coastal infrastructure development.

Referring to the research that has been done previously by other researchers, demonstrate that the proposed research will be carried out and it becomes important to remember that the green development right paradigm is still new in Indonesia and no studies have comprehensively examines how the implementation model of green development right of coastal management and the frontline most small islands are seen not only from the economic dimension but also the challenges of climate change in coastal areas. This is very important because optimizing the development of the maritime sector are appropriately perceived by the people who interact directly with the marine environment, therefore, any related regulations should be green development right is not just a discourse but must be implementable and solutions.

II. DISCUSSION AND ANALYSIS

Environrnental norms can be "constitutionalized" in one of three ways, any of which can provide useful societal tools for environrnental stewardship." (1) as statements of policy, (2) as working procedural norms, or (3) as fundamental environmental rights. Each of the roughly 130 national constitutions listed in Appendix B contains statements of policy, many of which contain concomitant procedures. Policy-related provisions usually aim. To influence decision-making, and are neither substantive nor enforceable.[18]

[18] Ernest Brandl & Hartwin Bungert, 1992. *Constitutional Entrenchment of Environmental Protection: A Comparative Analysis ofExperiences Abroad,* 16 Harvard Environmental Law Review. 1,82, tbl.I. (discussing constitutional environmental policies of Germany, Austria, Switzerland, the Netherlands, Spain, Greece, Portugal, Turkey, and Brazil)

Legal regulation of the environment began as a series of attempts at the reconciliation of diverse groups of interests: a body of principles concerning property rights grew up around the resolution of clashes between private users, between private owners and commercial industrial interests, and between private or commercial interests and collective goals and interests. Environmental legislation was closely and explicitly associated with human welfare, with Parliament and the courts only willing to interfere in private property rights where necessary for securing important social benefits. Yet developments in legislation, as much as in the patterns of common law thinking which evolved to deal with nuisance claims, sometimes exceeded a purely instrumental approach to environmental protection. The evolution of legal responses to environmental problems, charted below, reveals a body of thought of increasing sophistication: the impact of human activity upon the natural environment is seen as constituting, not merely a convict between individual rights and collective interests, but a complex moral problem invoking notions of value and responsibility which cannot be fully articulated within a framework of interpersonal rights and duties (Suspected ocean conditions are now experiencing a growing number of environmental a stress and degradation of ecosystems. The lack of infrastructure and quality of human resources in small islands in response to all the destructive activities in the region, of course, also threaten the existence of the island and community resilience in small islands such as Ironically, coastal and offshore environments only about 1% potentially accounted for climate change gases, but they are the most vulnerable to be exposed to the adverse effects of climate change.[19] The existence of adverse impacts on coastal communities, it will also propagate to the fulfillment of basic rights which should be inherent in every human being, namely the substantive rights and procedural rights that will ultimately lead to change the enjoyment of human rights.[20] To overcome such problems, some developed countries include the paradigm of risk assessments and risk management in climate change-related policy options. That is, there is continuity

[19] Dossier, 2013, *Coastal Resources : Green development right in Crisis*, April-May 2013, Singapore, p. 15.
[20] Daniel Bodansky, 2010, *International Human Rights and Climate Change,* Georgia Journal of International and Comparative Law Vol. 38 No.3, p. 520.

in the program in any policy.[21] Therefore, policy development in coastal and small islands of Indonesia should be implemented on an ongoing basis with an approach that promotes ecological balance.[22] Public participation is an area that could potentially enhance public trust of government decision making, and thus reduce subsequent litigation[23]. A good law is one that with synergy, is able of producing the regulatory results required by policy makers.[24]

Economic and conservation, Sustainable development (sustainable development) itself is a development to meet the needs of today, without degrading or damaging the ability of future generations to meet their needs.[25]

According to Article 23 of Law No. 1 of 2014 on the Amendment of Act No. 27 of 2007 on the Management of Coastal Areas and Small Islands, utilization of small islands and surrounding waters is done by taking into account the ecological and economical aspects unitary and integrated with a large island nearby furthermore, also arranged that the activities of conservation, education, research, tourism, defense and security interests of the State are some of the priorities in the utilization of the relevant area.

In the management of small islands, there are at least three strategic issues that often arise are: the sovereignty of the Republic of Indonesia, environmental sustainability, and social welfare. The third issue relates to the above three important functions of small islands; The first function of defense and security, especially on the frontline islands (hereinafter abbreviated PPKT) bordering another country as an entry and exit gate the flow of people and goods that are vulnerable to occupation of another country. The second function of the economy, small islands region has a marine and fisheries resources with high biological productivity, as well as the center of marine tourism activities developed as a potential business area-based resource (resource-based industry). Third, the ecological function of coastal and marine ecosystems in which small islands serve

[21] John C. Dernbach, Seema Kakade, 2008, *Climate Change Law : An Introduction*, Energy Law Journal, Vol.29 No.1., p. 8.
[22] Coyle, Seand and Morrow, Karen, 2004. *The Philosophical Foundations of Environmental Law: Property, Rights, and Nature*, Hart Publishing Oxford & Portland Oregon, USA.
[23] Tabb, W. M. 1999. Environmental Impact Assessment in the European Community: Shaping International Norms. *Tulane Review* 337.
[24] L. Mader.2001. Evaluating the effect: a contribution to the quality of legislation. *Statute Law Review.* pp. 119-131. Scopus.
[25] *United Nations Convention on The Law of The Sea 1982 WCED, 1987.*

as a venue for the hydrological cycle and bio-geochemistry, waste absorbent, germplasm sources and alternative energy, global climate deciding factor, and other life support systems.[26]

Article 1 paragraph 2 in Government Regulation 62 of 2010 Concerning Utilization Minor Outlying Islands, mentions the notion of PPKT is small islands have basic geographic coordinates baselines connecting the islands of the sea in accordance with international and national law. Especially PPKT utilization for public welfare, Section 7 of this rule asserts some kind of activity, especially for the mainstream public welfare such as business, marine and fisheries, marine ecotourism, and maritime services industry. Impression of a lack of attention of the Government towards PPKT as the border area is always associated with the development approach used in the past, a greater emphasis on safety (security) than with increased prosperity (prosperity). However at this time where the process of globalization is characterized by a variety of economic cooperation both the regional and sub regional, the security approach needs to be accompanied by a balanced approach to welfare. On the other hand, some countries that border directly with Indonesia has developed its border region as an area of economic growth which has been developed with a variety of physical infrastructure is complete and qualified human resources.[27]

International provisions in Article 62 of the United Nations Convention on the Law of the Sea in 1982 regarding the use of biological sources of wealth, provides that the coastal State shall establish its ability to take advantage of the wealth of biological resources, especially in the exclusive economic zone (EEZ). In the case of the coastal State does not have the ability to utilize the full amount of the allowable catch of international law in this case provides an opportunity for other States to take advantage of the allowable catch for the remaining. Related to this, it can be seen that the geographical location of

[26] Agus Dermawan dan Arif Miftahul Azis, 2012, *Pengembangan Minawisata Pulau-Pulau Kecil Untuk Mendukung Implementasi Green development right*, Direktorat Pendayagunaan PPK-KKP, Disampaikan pada KONAS VIII Pengelolaan Pesisir, Laut dan Pulau-pulau Kecil, Mataram 22-24 Oktober 2012, p. 1.

[27] Mohammad Ali Nugroho, 2011, *Pemberdayaan Pulau Terluar Tidak Berpenghuni Di Sekitar Selat Malaka Dalam Meningkatkan Ketahanan Negara (Perspektif Strategis Ketahanan Nasional)*, Pasca Sarjana Universitas Indonesia Program Studi Pengkajian Ketahanan Nasional, Indonesia, p. 15.

Indonesia which lies between the Indian Ocean and the Pacific Ocean as well as between Asia and Australia, allowing Indonesian maritime zones crossed by various international shipping navigation in which this could be one factor in the threat to the stability of marine ecosystems such as the case of marine pollution and illegal fishing.[28]

In the Medium Term Development Plan (RPJMN), one of the important points to be achieved in marine and fisheries sector is strengthening the marine industry, with national priorities include poverty for coastal communities and the management of small islands including PPKT. Since the year 2012 the Ministry of Maritime Affairs and Fisheries adopted the paradigm of the Green development right (green development right) as a framework for the development of maritime and fisheries policies with sustainable management and conservation of assets. Paradigm is basically not the economy that relies on only marine but can provide assurance that an executed development will not only generate economic growth, but also create more jobs while ensuring the sustainability. In other words, efforts to improve the welfare of the people but caused no damage to the environment.[29] State beaches and islands belonging to the developing countries, is a major supporter of the advocacy of the Green development right, because the majority of economies in developing countries are faced on environmental exploitation.[30]

In practical terms, the green development right is an economy that is built or driven by activities that emit less CO2 (low carbon), using natural resources efficiently (efficient natural resources), social results can be enjoyed by all people with fair (socially inclusive), and supported by the innovation of environmentally friendly technologies (technology innovation). By implementing the paradigm of a green development right, is expected to decline in environmental quality, ecological health and economic productivity of coastal and marine areas, both in Indonesia and at the global level can be straightened back (reversed). In the

[28] Marine Institute of Indonesia, 2010, *Negara Kepulauan Menuju Negara Maritim*, Jakarta : INDHILL CO dan Lembaga Laut Indonesia, p. 138.
[29] Ministry of Maritime Republic of Indonesia, 2013, Mina Bahari Edisi 1, Januari 2013, p. 29.
[30] http://www.sids2014.org/

utilization of small islands, the implementation of the economic paradigm of the blue is a blend of sustainable economic growth, rising incomes and welfare, infrastructure development of innovative and environmentally friendly, and at the same time also have to preserve resources and biodiversity, as well as adapting to the impacts of changes climate.[31]

One of the potential of marine and environmental services that stand on small islands, are fishing and tourism especially with the islands of entering the conservation area. According to BPS data and Gahawisri (Marine Tourism Association), the potential of marine tourism in Water Conservation Area is estimated at $ 6.3 billion, or 25-30% of the foreign tourist. Projections for the next 10 years, its contribution can be increased up to 50%. It is based on the fact that the areas of marine tourism destination in small islands located primarily in the conservation areas of coral reefs, marine life, and coastal.[32]

The green development right paradigm will elaborate the ontology (nature), and the ways or methods in order to achieve the ultimate goal of the green development right. This ultimate goal will be focused on the creation of the ideal maritime systems that may guarantee all related parties, such as individual, society, or community, private sectors and the government, to convert their potentials to be functional towards public welfare. The core elements of the green development right will emphasizes the series of norms in managing the coastal and frontline island potentials. The normative framework covers Fishery Law, Maritime Law, Coastal Law and Environmental.

Indonesia is also located in a tropical climate, there are multispecies renewable resources, national fisheries production in 2010 reached 10.83 million tons and calculations in 2005 showed the fisheries sector has the ability to absorb labor that is 14.02 per cent. When viewed from a resource is not recovered, the marine sector also has a great asset in state revenues, as well as marine tourism, marine

[31] Agus Dermawan dan Arif Miftahul Azis, 2012, *Pengembangan Minawisata Pulau-Pulau Kecil Untuk Mendukung Implementasi Green development right*, Direktorat Pendayagunaan PPK-KKP, Disampaikan pada KONAS VIII Pengelolaan Pesisir, Laut dan Pulau-pulau Kecil, Mataram 22-24 Oktober 2012.

[32] Agus Dermawan dan Arif Miftahul Azis, 2012, *Pengembangan Minawisata Pulau-Pulau Kecil Untuk Mendukung Implementasi Green development right*, Direktorat Pendayagunaan PPK-KKP, Disampaikan pada KONAS VIII Pengelolaan Pesisir, Laut dan Pulau-pulau Kecil, Mataram 22-24 Oktober 2012, p. 4.

services and other marine potentials.[33] It can be concluded all the fisheries sector with great potential has been the backbone of development opportunities for PPKT. However, increasing economic development in the area of small islands would increase the risk to the degradation of ecosystems and natural resources of small islands, such as overexploitation, habitat degradation, pollution of waste, and decrease biodiversity. Ecosystem degradation and resource data showed that 32.05% of coral reefs were damaged, as well as the mangrove ecosystem damage by 40% which would also affect the decline in the stock of fish.[34] Relation to sustainable development, fishing activity has three important pillars in it namely: 1) environmental pillar, fisheries play a role and function of the balance of the marine ecosystem; 2) The social pillar, fisheries and by-products are a source of protein nutrition and food security, especially for poor countries and developing; 3) the economic pillar, more than 180 million people are employed, directly or indirectly, in the fisheries sector so that government policy in this sector will also contribute to economic development and poverty alleviation.[35]

From the above explanation, it appears that the Green development right is projected as a good framework for accelerated efforts for the management of the development potential of the maritime sector, as well as for dealing with environmental problems experienced by vulnerable coastal communities and small frontline islands. In line with the elements contained in the paradigm of green development right, begun in 2013 MoMF middle Minawisata promote development program aimed at developing small islands that provide economic benefits to the local community, especially people in small islands. Minawisata program will combine activities that encourage investment in small islands, especially tourism and the protection of ecosystems through conservation. At the Summit (Summit) Green development right within the framework of Abu Dhabi Sustainability Week 2014 which takes place in Abu Dhabi, it is known that the green development right Indonesian pilot project has been agreed that being in Lombok, Nusa Tenggara Barat and Nusa Penida, Bali.[36]

[33] http://esk.ipb.ac.id/
[34] Suharsono, 2008b, *Sustainable Harvest of Stony Corals [paper]. Di dalam: Workshop Penyusunan Peraturan Daerah Terumbu Karang-COREMAP II; Bogor, 12-13 Agustus 2008. Bogor: Coremap II, Departemen Kelautan dan Perikanan.*
[35] IOC/UNESCO, IMO, FAO, UNDP, 2011, *A Blueprint for Ocean and Coastal Sustainability*, Paris : IOC/UNESCO, p. 18.
[36] http: / /www.kkp.go.id/

III. CONCLUSION

Indonesia is recognized as the largest archipelago country, can be a pioneer in the green development right the implementation model that is useful as a reference for other island country. The green development right paradigm will elaborate the ontology (nature), and the ways or methods in order to achieve the ultimate goal of the green development right. This ultimate goal will be focused on the creation of the ideal maritime systems that may guarantee all related parties, such as individual, society, or community, private sectors and the government, to convert their potentials to be functional towards public welfare. The core elements of the green development right will emphasizes the series of norms in managing the coastal and frontline island potentials. The normative framework covers Environmental Law, Fishery Law, and Coastal Law. Urgency of innovation performance in this research is the existence of sustainable development that have a positive impact not only for the environment but also in the location of research can be used as a pilot project for the environment other region that has similar characteristics to the location of the research was conducted.

References

Algonin, A.A., et.al., 2014. *Variation of Environmental Awareness among the Student in Government High Schools in Solo City Indonesia.* International Journal of Applied Environmental Sciences, ISSN 0973-6077 Volume 9, Number 5 (2014), pp. 2701-2719.

Agus Dermawan and Arif Miftahul Azis, 2012, *Pengembangan Minawisata Pulau-Pulau Kecil Untuk Mendukung Implementasi Green development right*, Direktorat Pendayagunaan PPK-KKP, presented et KONAS VIII Pengelolaan Pesisir, Laut dan Pulau-pulau Kecil, Mataram 22-24 Oktober 2012.

Amartya Sen. 2005. Human Rights and Capabilities. *Journal of Human Development* Vol. 6, No. 2. Routledge. p. 161.

Christopher Corbin, 2013, *There is no Green without Blue : An analysis of the importance of coastal and marine resources to the development of Green Economies by Carribean SIDS*, Carribean Journal of International Relations & Diplomacy Vol.1, No.3, September 2013.

Coglianese, C. 2001. Social Movements, Law and Society: The Institutionalization of The Environmental Movement. *University of Pennsylvania Law Review* 150: pp. 85-118.

Coyle, Seand and Morrow, Karen, 2004. *The Philosophical Foundations of Environmental Law: Property, Rights, and Nature*, Hart Publishing Oxford & Portland Oregon, USA.

Daniel Bodansky, 2010, *International Human Rights and Climate Change,* Georgia Journal of International and Comparative Law Vol. 38 No.3.

Dikdik Mohamad Sodik, 2011, *Hukum Laut Internasional Dan Pengaturannya di Indonesia*, Refika Aditama : Bandung, Indonesia.

Dossier, 2013, *Coastal Resources : Green development right in Crisis*, April-May 2013, Singapore.

Ebbesson, Jonas, 2009. *Environmental Law and Justice in Context*. Cambridge University Press New York.

Edith Brown Weiss, 1989. *In Fairness To Future Generations: International Law, Common Patrimony and Intergenerational Equity app. B*.

Ernest Brandl & Hartwin Bungert, 1992. *Constitutional Entrenchment of Environmental Protection: A Comparative Analysis ofExperiences Abroad,* 16 Harvard Environmental Law Review. 1,82, tbl.I. (discussing constitutional environmental policies of Germany, Austria, Switzerland, the Netherlands, Spain, Greece, Portugal, Turkey, and Brazil)

Gillespie, Alexander, 2007. *Protected Areas and International Environmental Law*, Martinus Nijhoff Publishers. Koninklijke Brill NV, Leiden the Netherlands.

Government Regulation 62 of 2010 Concerning Utilization Minor Outlying Islands

Handayani, I Gusti Ayu Ketut Rachmi Handayani, 2013. *Embodying Green Constitution by Applying Good Governance Principle for Maintaining Sustainable Environment,* Journal of Law, Policy and Globalization, ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online) Vol.11, 2013. p. 18.

Herman Khaeron, 2012. *Transformasi Politik Kelautan Indonesia*, Pustaka Cidesindo : Jakarta, Indonesia.

http://esk.ipb.ac.id/

http://www.kkp.go.id/

http://www.ppk-kp3k.kkp.go.id/

http://www.sids2014.org/

Indonesia Maritime Magazine, 2011, Edition 13/Tahun II/Oktober 2011, Maritime Indomedia Perkasa : Jakarta, Indonesia.

IOC/UNESCO, IMO, FAO, UNDP, 2011, *A Blueprint for Ocean and Coastal Sustainability*, Paris : IOC/UNESCO.

John C. Dernbach, Seema Kakade, 2008, *Climate Change Law : An Introduction*, Energy Law Journal, Vol.29 No.1.

Keohane, N.O., Revesz,R.L., and Stavins,R.N. 1998. The Choice of Regulatory Instruments in Environmental Policy. *Harvard Environmental Law Review* 22: p. 313.

L. Mader.2001. Evaluating the effect: a contribution to the quality of legislation. *Statute Law Review. pp.* 119-131.

Law No. 1 of 2014 on the Amendment of Act No. 27 of 2007 on the Management of Coastal Areas and Small Islands *United Nations Convention on The Law of The Sea 1982 WCED, 1987.*

Ministry of Maritime Republic of Indonesia, 2013, Mina Bahari Edition 1, January 2013

Marine Institute of Indonesia, 2010, *Negara Kepulauan Menuju Negara Maritim*, Jakarta : INDHILL CO dan Lembaga Laut Indonesia, p. 138..

Mohammad Ali Nugroho, 2011, *Pemberdayaan Pulau Terluar Tidak Berpenghuni Di Sekitar Selat Malaka Dalam Meningkatkan Ketahanan Negara (Perspektif Strategis Ketahanan Nasional)*, Pasca Sarjana Universitas Indonesia Program Studi Pengkajian Ketahanan Nasional, Indonesia.

Muhammad Kasnir, 2011, *Analisis Aspek Ekologi Penatakelolaan Minawisata Bahari di Kepulauan Spermonde Kabupaten Pangkep-Sulawesi Selatan*, Semarang : Jurnal Ilmu Kelautan Universitas Dipenogoro Juni 2011 Vol. 16 (2) 61-69.

Rostron, Jack, 2001, *Environmental Law for the Built Environment*, Cavendish Publishing Limited, London UK.

Stephen Adrian Ross, 2013, *Achieving Sustainable Development Targets through Green development right Development in the EAS Region*, Manila, Philippines : PEMSEA Resource Facility.

Sudirman Saad, 2009, *Hak Pemeliharaan dan Penangkapan Ikan : Eksistensi dan Prospek Pengaturannya di Indonesia*, LKIS Yogyakarta, Indonesia.

Suharsono, 2008, *Sustainable Harvest of Stony Corals [paper]. Di dalam: Workshop Penyusunan Peraturan Daerah Terumbu Karang-COREMAP II; Bogor, 12-13 Agustus 2008. Bogor: Coremap II, Departemen Kelautan dan Perikanan.*

Sunoto, 2013, *Menuju Pembangunan Kelautan dan Perikanan Berkelanjutan Dengan Konsep Green development right, Yogyakarta, Indonesia.*

Tabb, W. M. 1999. Environmental Impact Assessment in the European Community: Shaping International Norms. *Tulane Review* 337.

UNESCO,(2011). *Education for Sustainable Development Country Guidelines for Changing the Climate of Teacher Education to address sustainability: putting transformative education into practice, ISBN 978-602-98372-6-1.*

The Decentralization Of Political Parties Through The Institutionalization Of The Local Political Parties

Muhammad Rifqinizamy Karsayuda
Jl. Brigjend H. Hasan Basry, Banjarmasin
email: rifqi.karsayuda@gmail.com

Abstract

The implementation of regional autonomy through Acts Number 23/2014 on Regional Government formulates the authority that can be maintained by local governments. One of the authorities' is the political autonomy. The efforts to implement the political autonomy can be done through the institutionalization of local political parties. However, according to Indonesian Law, the institutionalization of local political parties is not regulated in the provisions of acts related to political parties. The legislation that regulates local political parties can be found only in Acts Number 11/2006 on Aceh Government and Acts Number 21/2001 on Special Autonomy for Papua Province. Therefore, this paper analyzes the theoretical, juridical and sociological reasons underpinned the idea of local political parties' institutionalization. This research is a normative legal research which uses legal matter and acts to analyse the problems. This research finds strategies that is relevant to make local political parties institutionalized. There are five reasons to deliver local political parties in Indonesia based from this research. First, the theoretical foundation describes Indonesia as a country with federalism autonomy. Second, the constitutional juridical basis consists of two principles of the Constitution, namely the principle of the autonomy of the unitary state and the principle of equality and freedom of every citizen in governing. Third, The platform of sociological based on the fact that the choice of pluralistic Indonesian society is still diverse in many elections. Fourth, the historical background in the form of historical experience that in 1955 General Election and Local Election, there were several local political parties. Fifth, the comparative study in United Kingdom as a unitary state and Malaysia as

a Federal State, which both have local political parties. The concept of local political parties that are relevant to be applied in Indonesia in the constitutional juridical perspective related to the decentralization of political parties can be built through four strategies. First, the local political party whose presence was based on pluralist paradigm which provides the idea that in a pluralistic society should be built a decentralized party system in order to sustain the plurality of society. Second, the local political party which drafted is a separate legal entity which is dichotomous from the national political parties as a legal entity. Third, local political party's participation in elections only to the General Election and Local Elections for Legislative Elections candidates, the Provincial Representatives, Regency / City. Fourth, the formation mechanism, supervision and dissolution of local political parties are designed similar to national political process for parties as applicable today.

Keywords: Decentralization, Election, Institutionalization, Local Political Parties, Regional Autonomy

I. INTRODUCTION

The Regional autonomy in Indonesia, one of them is implemented through the division of government affairs at the central government and the local government, as stipulated in Article 18 paragraph (5) The Constitution of Republic of Indonesia 1945. The implementation of the provisions of that Article is regulated in Article 10 paragraph (1) of Acts Number 23/2014 on Regional Government. The provision of governmental affairs confirms that the absolute affairs of the central government cover government affairs in the areas: foreign policy; defense; security; judicial; national monetary and fiscal; and religion.

The article that describes the distribution of authority of government affairs if interpreted according to *a contrario* can be understood that one of the autonomy of the regions is the autonomous in the political field. The implementation of political autonomy one of them can be done by institutionalizing the local political party in the entire territory in the Republic of Indonesia. This is because the existence of the current party that is only national parties with structures that

center onthe Central Government and causing orientation problems of political parties at the local level that do not accommodate local interests.

This pattern makes political party leaders in the region as a sub-ordinate the same party leaders at the national level. Institutionalization can be seen from the mechanism formulation of dismissal party officials at the local level which made by the political party structure higher and center on the Central Government[1]. The process of intervention by the structure of the Political Party at the Central level to reduce the desires and aspirations of local communities is through the structure of political parties in the region. The consequence of this is causing a reduction of the political autonomy as well as the mandate of the Constitution above.

The reduction of political autonomy as a result of such political structure brought to the idea of forming a political party at the local level that is not part of the political parties at the national level. However, the provisions of the law which regulating the local political parties only give possibility to Nangroe Aceh Darussalam as regulated in the provisions of Acts Number 11 /2006 concerning on the Government of Aceh and Papua, as the provisionsin Article 28 paragraph (1) of Acts Number 21/2001 on Special Autonomy for Papua Province.

[1] It can be seen from the AD / ART Golkar Party . Article 13 paragraph (5) ART Golkar Party stated : dismissal of the Management Authority referred to paragraph (1) letter c is set as follows :

1. For the Central Board made by the Plenary Meeting of the Central Executive Council and reported to the National Executive Meeting ;
2. For the Executive Council of the Province conducted by the Central Board based on the proposals from Provincial Leadership Council ;
3. For the Executive Council of the Regency / City Executive Board based on the proposals from Provincial Executive Council of the Regency / City;
4. For the District Leadership conducted by the Executive Board of the District / Sub-District Head of State by the proposal;
5. For the Leader Village / Sub or any other designation made by the Chairman of the District based on the proposals of Leader Village / Sub or other designations;

While the reason for the dismissal or termination of the Golkar Party officials as stipulated in Article 4 ART is as follows: Members dismissed because:

1. No longer meets the membership requirements;
2. Become a member of another political party;
3. Breaking Budgeting Association, Bylaws, and the Decision of the Conference or National, or National Executive Meeting;
4. Perform the action or actions contrary to the decisions or policies of the Party;

Based on the reason for the presence of Acts Number 11 Year 2006[2] that is the privilege of Aceh through its autonomy is given based on the historical aspects of regionalism in Aceh, Aceh's struggling history, and the lives of the people of Aceh who are based on Islamic law. However, the presence of local political parties in Aceh special autonomy as a consequence is not the answer to the specialty of the people in Aceh who are known with a consistency values and Islamic law, including the matter of history and the culture in Aceh. The background of Islamic law and culture is reflected by the Aceh government by allowing the Acehnese made a Qanun[3], or made the institution of *Wali Nanggroe*[4] and *Ulama* (Religious Leader) Consultative Assembly[5] in the structure of local government in Aceh.

According to that condition, basically the presence of local political parties in Aceh with special autonomy is the reason of zero local accommodation for the aspirations of local communities to create good local governance or the difficulty of achieving development with prosperity. If so, then the reason for the establishment of local political parties in Aceh can also be used in other areas in Indonesia.

Beside Nanggroe Aceh Darussalam, local political party considered normatively can also be grown in Papua as the Acts Number 21/2001 on Special Autonomy for Papua Province. Article 28 of Acts Number 21/2001 are affirmed as follows:

---

[2] The presence of Acts Number 11 Year 2006 is motivated by some of the following:
   a. that the system of government of the Republic of Indonesia in accordance with the Constitution of the Republic of Indonesia of 1945 recognize and respect the units of local government that is special or that are regulated by the Act;
   b. that by the history of state administration in the Republic of Indonesia, Aceh is a unit of regional government that are specific or special related to one of the distinctive character of the history of the struggle of the people of Aceh who have endurance and perseverance;
   c. that endurance and perseverance are sourced from a view of life which is based on Islamic *Shariah*which born a strong Islamic culture, so that Aceh became the capital region for the struggle to seize and defend the independence of the Republic of Indonesia;
   d. That the administration and execution of development in Aceh have not been able to fully realize the people's welfare, justice and the promotion, fulfillment and protection of human rights so that the Government of Aceh should be developed and implemented based on the principles of good governance;
   e. that the earthquake and tsunami in Aceh has been growing solidarity of the entire potential of the nation of Indonesia to rebuild the communities and regions of Aceh as well as resolving conflicts in a peaceful, comprehensive, sustainable, and prestige in the form of the Unity in Republic of Indonesia

[3] What is meant by Qanun can be found in Article 1 point 21 and 22 of Law No. 11 Year 2006, namely:
   a. Qanun Aceh is similar legislation provincial regulations governing the administration and the Acehnese people.
   b. Qanun districts / cities are similar legislation regulations of the district / city regulating the conduct of government and public life districts / cities in Aceh.

[4] Article 1 point 17 of Law No. 11 of 2006 states that the institution of WaliNanggroe question is customary leadership as a unifying institution of society and the preservation of indigenous life and culture.

[5] Article 1 point 16 of Law No. 11 of 2006 states that the Ulema Consultative Assembly referred to hereinafter abbreviated as MPU is a council whose members consist of Muslim clerics and scholars who work as partners with the Government of Aceh and parliaments.

(1) The citizen in Papua Province may form a political party.

(2) The procedure for the formation of political parties and participation in elections are in accordance with the legislation.

(3) The political recruitment by political parties in the Papua Province must give priority to indigenous Papuans.

(4) A political party shall ask for consideration from the MRP in the selection and recruitment of each political party.

In the opinion by Hestu Cipto Handoyo, the provisions in Article 28 of Acts Number 21/2001 on Special Autonomy cannot be implemented because it was blocked by the provisions of paragraph (2) of Article referred. The provision was reiterated that the participation of political parties created by indigenous people in the elections must be in accordance with the provisions of the legislation on elections. Meanwhile, the relevant provisions of the political parties to follow the requirements as stipulated in the Acts Number 8/ 2012 about National Election for DPR, DPD and DPRD (Indonesian Legislative Assembly) presupposes the existence of a national political party with the management in all provinces in Indonesia.[6]

Based on those descriptions, It can be translated philosophically, it is important to present local political parties in all regions in Indonesia. From the ontological view, the presence of local political parties can maintain the values of pluralism in Indonesia as a pluralistic country. The value of pluralism is also inherent with the view of the life of our nation, namely *Pancasila* and symbolized by "Unity in Diversity". The pluralism includes political pluralism in the channel community. From the epistemological side, in order to realize the values of pluralism in autonomy through local political parties, the local government needs to conduct a government with the value of participatory and democratic.

The problems in this research are; (1) What are the fundamental reasons (theoretical, juridical and sociological) to deliver local political parties in

[6] Handoyo, Hestu Cipto. *Overview Law of the Republic of Indonesia Number 21 of 2001 on Special Autonomy for Papua Province*, Delivered In front of the Working Team Special Autonomy Committee Republic of Indonesia, November 2012.

Indonesia? (2) What are the concept or strategies for local political parties to be applied in Indonesia in the constitutional juridical perspective related to the decentralization of political parties?

The purpose of this research are to find the fundamental reason (theoretical, juridical and sociological) to deliver local political parties in Indonesia. The analyses based on the theoretical foundation about Indonesia country system, the constitutional juridical basis in Indonesia, the platform of sociological bases in Indonesia (pluralistic society), the historical background in General Election and Local Election, and the comparative study in other countries to the exixtancy of local political parties.

Besides, this research also try to find appropriate strategy for delivering local political parties in Indonesia. The strategy would be related to the sociological point of view (pluralistic society in Indonesia), the legal entity for the national political parties and local political parties, the participation of local political parties in election, and the suitable formation mechanism, supervision and dissolution of local political parties if applicable in Indonesia

II. RESULT AND DISCUSSION

The Development of Political Parties towards the Institutionalization of Political Parties and Decentralization

E. Schattscheider in his preposition states "*modern democracy in Unthinkable save in terms of political party*".[7] Political parties are essential elements of representative democracy. Through political party the circulation of elites and the political leadership of a country run. The good and bad of democracy lie in the quality of political parties. Hence, the improvement of democracy without touching the renewal of the political parties and the party system is a renewal that is not essential.[8]

In order to maintain sustain democracy and political stability through parties, the institutionalization of the party becomes an inevitable requirement.

[7] Dalton, J.Russel and Martin P.Waterberg, *Party Without Partisan: Political Change in Advence Industrial Democracies*, New York: OxfordUP, 2000, p.3

[8] Sigit Pamungkas, *Political Party: Theory and Practice in Indonesia*, Yogyakarta: Institute for Democracy and Welfares, 2012, p62.

According to Sigit Pamungkas, the institutionalization of the party will make the party work in the corridors of the functions and minimize the unnecessary political participation of citizens as a result of modernization.[9]

The institutionalization of political parties can be seen through the development aspects of the political parties. Barendt, as quoted Muchammad Ali Safa'at states, the development of political parties in a country can be examined through several stages, namely: (1) grouping (*factionalization*); (2) polarization or segregation; (3) expansion; and (4) institutionalization. The stages are based on the development of political parties in the United States as defined by Huntington.[10]

The history of the first political party was marked by the presence of political party development in Western countries such as Britain and France, political activity initially centered on political groups in the parliament. This activity was originally elitist and aristocratic, defend the interests of the nobility to the demands of the king.[11]

In this phase appears the *factionalization* (grouping) in the formation of political parties.*Factionalization* is a grouping that usually occurs between the representatives, but has not formed into an official organization. In this phase, the bond that is formed is not so strong, because the bond is dominated by motives of individual or group interests that are not supported by the carrying capacity of the voters and organizational sustainability.

The next stage is expansion. Expansion in the development of political parties meant as a way to disseminate political ties to the wider community. In this context the term "cadre" was introduced. This process contains a pre-requisite presence of an effective organization and structured. The expansion can happen in two patterns, namely: 1). Theexpansion comes from the internal political party. 2). The expansion coming from external party.

[9] Sigit Pamungkas, Loc.Cit,
[10] Muchammad Safa'at Ali, *the Political Parties Act: Practice setting and dissolution of political partiesin the struggle of the Republic*, Jakarta: Rajawali Press, 2011, p47.
[11] Miriam Budiardjo, *Fundamentals of Political Science: Revised Edition,* Jakarta: Gramedia Pustaka Mandiri, 2010, p398.

While the final stage after going through the stages of expansionis the stages of institutionalization. The institutionalization of political party is the phase of the emergence of political party organization that is well established and modern. By Huntington, the stage is reached when the institutionalization of political parties created a competition that born a particular party system. Therefore, the institutionalization of political parties will be present depends on the reliability of internal organization of political parties to make modern and state policies related to political parties and elections.[12]

Yves Mney and Andrew Knapp, as quoted Jimly Ashiddiqie states the degree of institutionalization of political parties is correlative with the maturity of democracy in a country.[13] The institutionalization depends on three things, namely;

1. The age of political parties (its age)
2. The organization's ability to break away from personal interests or groups in power (the depersonalization of organization)
3. The ability to present a well-established organization that distinguishes based on the ideology and the basic values of the struggle (organizational differentiation)

The process of institutionalization of political parties relying on three things above is not easy. According to Ali Safa'at citing JimlyAshiddiqie, political parties that still maintain the *Patrone-client* system in its party's leadership, including political parties who often experience internal conflict is characterized as a party with an absent of the depersonalization of organization. That symptom occurs in some political parties in Indonesia today. Hence the institutionalization of political parties is unprecedented in our political parties.[14]

According to Ramlan Surbakti, there are three theories that explain the origin of political parties from the aspect of the development of the formation. First: the political party formed by the legislative (and executive) because there is a need for the MPs (defined by appointment) to hold the relationship (contact)

[12] Samuel P.Huntington, op.cit, p 484.
[13] Jimly Asshiddiqie, *Freedom of Association, Dissolution of Political Parties and Constitutional Court*, Jakarta: Constitutional Press, 2005, p52-53.
[14] Muchamad Ali Safa'at, op.cit, p50.

with the public. Second: the political party formed during the transition of society from a feudal society to modern society. Third: In the modern era where there is modernization in various fields, the political organization that is able to integrate and promote the aspirations and interests of modern society is needed.[15]

Pederson distinguishes four phases of the development of political parties, namely: (1) a declaration; (2) authorization; (3) representation and; (4) relevance . The growth is also accompanied by the assumption that the phase can walk backwards and make the political party destroyed.

The Declaration is the first phase of the growth of political parties. In this phase, an entity publicly announced that his entity is a political party. The declaration became a confirmation about the status of the entity in question as well as distinct from social and business entities, or pressure groups, for example.

The second phase is the phase of development of a political party endorsement or authorization. In this phase, the organization of political parties inevitably come into contact with the organs of the state has the authority to declare whether invalid or not a political party legally.

The third phase in the development of political parties is the representation phase. This phase is measured by how much the public response to the political parties in the election. The more votes a party gained at the elections, the morecorrelated with the representations that it represents. The representation of political parties can also be measured by the degree to which the political parties represent the diversity of political trends, community groups, ethnic and even religious. This point of view is not merely look at the representation of voters in the election in terms of quantity, but rather lookfrom the background of his constituents.

The Institutionalization of the Organization of Political Parties

The stability of the political system that is growing very dependent on the robustness of political parties owned. Robustness of the party reflected the vision

[15] Ramlan Surbakti, *Understanding Political Science,* Jakarta: PT.Gramedia Widia sarana Indonesia, 1999, p112.

of support and its degree of institutionalization. Huntington warns, in developing countries that achieve high stability, at least one political party authoritative.[16]

Huntington describes four dimensions of an organization that shows the institutionalization of political parties in it, namely, first, the dimensions of adjustment and rigidity, second, the dimensions of complexity and simplicity, third,the dimensions autonomy and subordination, and the fourth dimension of unity and disunity.[17]

In the first dimension, the more adjustments of the political parties were able to make, the higher the level of its institutionalization. To measure the dimension to the adjustment of a political party, can be done through three approaches. First, the chronological age of political party point of view. The older age of political parties, it can be concluded the more power to endure. Second, look at the age of the generation in the party. The political party that still leaves the founders and the first generation in their political parties cannot be concluded as having a good adaptability. Third, the functions of the organization point of view. The measuring tool to see how well the adjustment power of a political party is a way to see how far the political parties can adjust to the change of function to which it aspires.Political parties can adjust from initially only represent one group to be many groups. From the opposition party into the ruling party.

The second, the dimension of complexity and simplicity.The more complex an organization of political parties, the higher the level of the institutionalization. The complexity of the political party may bring to many sub-ordinate organizations both hierarchically and functionally. The presence of sub-ordinate will be a challenge in the institutionalization of political parties.

The third dimension is autonomous and sub-ordinate. The autonomy of political party is defined as the absence of external strength interference party to political party organization. The more autonomy the organization of political parties, the higher the level of the institutionalization. The autonomy which is difficult to avoid is the autonomy that arise from the internal political

[16] Samuel P.Huntington, *Political Order in a Changing Society*, Jakarta: Rajawali Press, 2004 p. 484.
[17] *ibid*

parties, particularly relating to the intervention of the management structure of the hierarchy which is higher to lower. In this context, intervention can be tolerated as long as it does not negate the aspirations and sovereignty of the constituent political parties on the lower structure. The intervention related on the negation of the will of the people is the reduction of the institutionalization of the political party itself. Due to that condition, the political party will not get a support from the people.

The last dimension is unity and disunity. The more integrated and bond the whole organization, the higher the level of its institutionalization. Vice versa, the higher divisions and frictions in that political parties shows that the institutionalization is still low.

Randall and Svasand in "*Party Institusionalization in New Democracies*" specifically define the institutionalization of political parties. According to him, institutionalized political party is "*the process by which the party becomes established in term of both integrated patterns on the behavior and attitudes and culture.*"[18] The institutionalization of political parties is both structural stabilization process in the form of behavior, as well as cultural attitudes and culture. From that point of view, Randall and Svasand said, the institutionalizations of political parties in two areas are internal and external political, structural and cultural as well as political parties. The intersection of the two areas produces four aspects in assessing the institutionalization of political parties. The four aspects are; the aspect of systemic dimension, the aspect of identity, the aspect of autonomy policy and the aspect of reification.

The first aspect is the systemic dimension in political parties. The systemic dimension is the process performance of the functions of the party who made the order, requirements, procedures, and mechanisms agreed upon and defined by political parties, both formal and non-formal.

The second aspect is related to the identity of the political parties. The identity of the political parties based on ideology or party platform, the support

[18] Efriza, Political Explore: *A Study ofPolitical Science*, Bandung: Alfabeta Publishers, 2012, p240.

base of support and identification based on the pattern and direction of purpose of political parties.

The third aspect is the autonomy of decision. This aspect is related to the relations of political parties with actors outside the party, both with a certain authority, the source of funds(External), as well as the specific source of support. In measuring this dimension, the institutionalization of political parties can be measured by the extent to which the decision was taken, without any intervention from outside the interests of the party in order to perform its functions and the party's platform.

The last aspect is the reification of the political parties. This aspect is measured by how is the ability of the political parties to give a positive image to the public. The positive image is correlated with the leverage of the parties' concerned voice in the election. To improve electability by reification, political parties must be trusted by public as a bridge of public imagination in the implementation of the functions in politics and government. Reification makes others, both individuals and groups adjust to the presence of the political parties, because of their belief in its positive perception.

The Institutionalization of Political Parties System

Mainwaring and Schully are two scientists that are quoted in the discourse about the institutionalization of party system. They conceive that a strong democracy is when it is supported by institutionalized party system. In that context, there are four dimensions of the institutionalization of party system.[19]

The first institutionalization element is stability in the competition between political parties. Competition between parties influences the party system. In this case the characteristics of the inter-party competition stability refers to the stability over time the number of parties in the party system, its relative strength, and the party's relationship with the electorate. However it does not mean that stability presupposes the absence of change. It is not categorized as a stable party system if the change is wild and unpredictable.[20]

[19] Scott Mainwaring, *Presidensialism, Multyparty System, and Democracy : The Difficult Equation*, in Work Paper: 1999, p 25-39.
[20] *ibid*

Second, rooting the party at the grassroots. In this second element of the institutionalization, indicator that can be used to measureis related to the age of political parties. This indicator has similarities with indicators to measure the institutionalization of political party organization as mentioned earlier. The older the political parties, the higher the institutionalization of political parties had done in the context of the party rooting. In addition, other indicators that can be measured is a matter of geographical area consistency, economic and social groups of voters of the party, including the consistency of voters from one election to the next election and party preference consistency concerned.

The third element is the legitimacy of election-related parties in the determination of the right to govern. In this context the view is about the belief of society to the political actors and groups belonging in the political parties that they agree that the elections are a legitimate democratic for the rotation of power to govern. Confidence is important, to avoid the presence of political parties undermine the foundation of the democracy. Therefore, the indicator used in this case is the attitude of the people about the party and the party'sknowledge on the system of democracy applies.

While the last element is the rules and a stable political party structures. It can be approached through three dimensions, namely the first; organizational independence, second; internal discipline, and third; the routines run by political parties.

Related to the institutionalization of the party system, the scholars assume that a political party interaction study related to one another, patterned and systemic is an important study in order to see the degree of its institutionalization in the country.[21] In that study appears classification of party system based on the number of the dominant political party in the country. The classification appears motivated by the conditions and geo-political regime of a country. The classifications of political party system emerge three categories, namely, single-party system, bi-party system and th system or multi-party system.

[21] *ibid*

Single-party system can be found in some African countries (Ghana during Nkrumah, Guinea, Mali, Ivory Coast), Eastern Europe and China. The ambiance of the party called non-competitive because the existing parties must accept the leadership of the dominant party and not allowed to compete against the party's independence. The tendency to take the pattern of single-party system due in new countries, the condition requires political leadership of the country which is often faced with the problem of how to integrate the various classes, regions and ethnic groups of different social patterns and outlook on life.[22]

Based on published literature, the notion of bi-party system usually means the two parties or the existence of several parties but with the dominant role of the two parties. Nowadays, few countries have a bi-party system, except the United Kingdom, the United States and the Philippines, and by Maurice Duverger said that this system is a typical of Anglo Saxon. Nevertheless, specifically in the case of the UK, bi-party system which has been adopted by the United Kingdom has begun to erode.

In Britain today, in addition to the two existing parties, the Labor Party and the Conservative Party was also attended by other political parties such as the Liberal Democratic Party. Thus, party's influence is limited if we see from the acquisition of voice in Parliament, it becomes significant in a variety of policy-making when there is close differences of votes between two major parties. In such situations, the winning party should form a coalition with smaller parties.[23] In the United Kingdom, we can find its local political parties, for example Ireland which is granted with Special Autonomy and for other areas given the devolution of power (Devolution of power).[24]

The multi-party system is generally formed by the development of diversity in the composition of one community. Where differences of race, religion, or ethnicity are strong, factions of society earlier are more likely to connect the limited bonds (primordal) in one place only. Multi-party system is better reflecting

[22] *ibid*
[23] *Ibid*
[24] Sigit, *Op.Cit*, p. 207.

the diversity of cultural and political rather than a bi-party pattern. Multi-party system found in Indonesia, Malaysia, the Netherlands, France, Sweden etc.

Multi-party system, especially when coupled with a parliamentary system of government, have a tendency to focus on the power of the legislature so that the role of the executive branch is often weak and hesitant. This is because there is no one party that is strong enough to form a government alone, so it was forced to form a coalition with other parties. In these circumstances the coalition parties should always held a consultation and compromisewith the other parties and the possibility that at any time the support of the other coalition parties irrevocably.

The description of the party system above once again shows a pattern of a regime factor in the formation of the party system in a country. The more democratic a regime, The more open competition will be create. In an open competition, there are large numbers of political parties. Conversely, the more authoritarian a regime, the harder the political parties to be born.Political parties in the context of such regime is just a tool of the authoritarian regime.

In addition, the party system was also motivated by the heterogeneous-homogeneity of society in a country. The more heterogeneous society, the more diverse the political parties will be. Conversely, the more homogeneous society in a country, the more modest thenumber of political parties will be. Both factors form the political party system and they influence each other.

The Institutionalization Concept of Local Political Parties

The critical point of the institutionalization of political parties is the creation of a strong organization of political party, which can absorb and articulate the aspirations and desires that exist in society. Thus, the institutionalization of political parties built strived to achieve that goal.

In the context of Indonesia, the institutionalization of political party encountered some resistance, among others, the First is rooting dimension. Only a few political parties have strong roots throughout Indonesia. Most of the political parties are not getting enough support from one elections to other elections in all regions in Indonesia. Nevertheless, there are some political

parties that consistently maintain the carrying capacity of the one election to other elections on one or a few areas only. Some regions are even only support one spesipic political party. UN victory phenomenon in some regions, PBR in South Kalimantan, PDS in North Sulawesi and East Nusa Tenggara, are the phenomenon that happened in Indonesia as a unitary state of diversity. Such parties cannot be said as having no roots, although there carry enough capacity nationwide. So as an indicator to determine the dimensions of the rooting of political parties in Indonesia can only be viewed from two perspectives, namely: the national vote for political parties from one election to other election and votes in every region. The point of view above indicate that is not proportional for political parties solely on the basis of the national vote because Indonesia is heterogeneous country.

The second dimension is the autonomy of political parties, especially on decision-making. Some earlier scholars interpret that the autonomy of political parties is a form of independence of the political parties, without intervention of external groups or parties in decision-making. The real autonomy in political parties should present also the flexibility for the structure of political parties in the rank of the lower to take a decision in accordance with the conditions of the region and the growing aspirations of the people in the region. Intervention by higher party structures to the underlying structures can also be interpreted as the destruction of the autonomy of political parties. If the destruction happened, political party can be transformed into authoritarian even in the system of representative democracy. In some cases, intervention by policy-making structures of the party at the central level to the regions happens in the body of political parties in Indonesia. This situation makes the political parties do not have the dimensions of autonomy in making policy. This condition forces a slow grow for that political parties in some regions because they always have to follow what the higher (national level) member said.

The third dimension is about the coherence of a political party, that is how the political parties have a resistance of disputes over internal party politics. In this dimension relates to the fragility of the internal friction that occurs in

political parties. The resistance to internal party conflicts occurs because not all the views and interests of factions in the party concerned are accommodated. The case happens in political parties in Indonesia showsthat fact, as happened in the PDI-P, the National Awakening Party and some other political parties. This situation happened because the members in that political parties at the end have their own interets. It destroy the unity in the body of that political parties. Especially, if the tendency comes from different background or different regions of the member which make them want to do some actions in the names of their regions. At the end, it violates the vision and mission of that political parties in the first place.

Table 1

The Resistances of Institutionalization of Political Parties in Indonesia

The Institutionalization Dimension	Indicators	Resistances
The roots power of political parties in society	• The relativity age of the party towards independence, • The relativity age of the party towards the beginning of a multi-party system, • The changes in electoral support in the election for the last two or three elections • and the party's relationship with civil society organizations.	• There are some political parties that consistently maintain the carrying capacity of the one election to other elections on one or a few areas only. UN victory phenomenon in some regions, PBR in South Kalimantan, PDS in North Sulawesi and NTT, are the phenomenon that happened in Indonesia as a unitary state of diversity, • So as an indicator to determine the dimensions of the rooting of political parties in Indonesia can only be viewed from two perspectives, namely: the national vote for political parties from one election to other election and votes in every region.

The Institutionalization Dimension	Indicators	Resistances
The Autonomy of political parties	• Total turnover of party leadership, • a shift in the number of electoral support after a change of leadership of the party, • autonomy in decision-making • and the appreciation of the people on the party being imaged from various researches.	The real autonomy in political parties should present also the flexibility for the structure of political parties in the rank of the lower to take a decision in accordance with the conditions of the region and the growing aspirations of the people in the region. Intervention by higher party structures to the underlying structures can also be interpreted as the destruction of the autonomy of political parties. If the destruction happened, political party can be transformed into authoritarianeven in the system of representative democracy
The Organization	• The strength of the organization members quantitatively and qualitatively, • the mechanism of regular changes in leadership and mechanical, • the presence of an organization that is spread in many areas and not only present at the time of elections and campaigns.	• The influence of the political party figure leader is more dominant than the influence of the party as an organization • The harmony of the party organization, in line with the number of votes from one election to other election.

The Institutionalization Dimension	Indicators	Resistances
Coherence	Conflict happens in the internal body of the political parties	The resistance to internal party conflicts occurs because not all the views and interests of factions in the party concerned are accommodated. The case happens in political parties in Indonesia showsthat fact, as happened in the PDI-P, the National Awakening Party and some other political parties.

Source: Adapted by the author

P. Johnson Tan, an Indonesian, also has done the analysis related to the institutionalization of political parties in Indonesia, especiallyafterdirect legislative elections, Presidential and General Election in person in 2005. Tan gave four dimensions of evaluation institutionalization of political parties, namely; first; the stability of internal competition of political parties in elections, second; the root power of political parties, third; Legitimacy of Political Parties and Elections in the Public's perpecive and the last related to the structure and organization of political parties.[25]

Based on this, the institutionalization of political parties in Indonesia is not the same as the institutionalization of political parties centerly, because it is a fact that the rooting of political parties in Indonesia could only be seen in the specific area significantly. Consistency support of political parties from several elections that took place in certain areas illustrate that the political party has strong roots in the local community. Thus, political stenghth would be reduced as such, if the parameters used solely from the strength of support for political parties at the national level.

[25] Paige Johnson Tan, *Indonesia Seven Years after Soeharto : Party System Institutionalization in a New Democracy*, in Contemporary Southeast Asia Journal : April 2006, p. 97 – 108

The institutionalization of political parties in Indonesia is not the same as the simplification of the number of political parties. The institutionalization of political parties in Indonesia aimed to bulid astrong roots of party and the party's ability to articulate the voice of the people who elected significantly. Simplification of political parties is not impossible brings tothe restriction of the aspirations of the pluralistic Indonesian society. As the trend of multi-party systems in other countries as mentioned above, the multi-party in Indonesia is a need for various religion, ethnic, culture and socio-political background of Indonesian society.

Huntington pre-position receives support from the research conducted by Tan. In his opinion, the concentration of votes in 1955 elections, in 1999 and 2004 had a significant deployment. If in the 1955 election, 80% of the total votes are concentrated in four political parties winner of the election, in the 1999 election, 80% of the total votes in five political parties Election winner. In 2004, 80% of the total votes are distributed to the seven political parties as illustrated in the following table:

Table 2

The Acquisition Concentration of Election Vote in1955 elections, in 1999 and 2004 by Number of Political Parties

Number of Political Parties	Percentage of the distribuion of vote		
	National Election in 1955	National Election in 1999	National Election in 2004
4 winning political parties	78	79.5	58.8
5 winning political parties	80.9	86.5	66.3
6 winning political parties	83.6	88.5	73.6
7 winning political parties	85.6	89.9	80

Sources : Paige Johnson Tan, *Indonesia Seven Years after Soeharto : Party System Institutionalization in a New Democracy,* in Contemporary Southeast Asia Journal :April 2006, page 94.

The result from above research shows that the distribution of the aspirations of the people in national Election has increased and distributed in a number of political parties. Although the number of political parties that has followed the contestants experienced anomaly, even showed a declining number, but the number of majority voters has increased diversly and distributed to many parties. This shows that the trend of Indonesian society requires political parties as multi-party aspirations. Based on this, it is necessary to develop its own indicators to measure the degree of institutionalization of political parties in Indonesia as follows:

Table 3
The Dimensions of Institutionalization of Political Parties System and Political Parties for Indonesia

The institutionalization Dimension	Indicators for Indonesia
Legitimacy of Political Parties in the mechanism of the Electoral	• Acquisition of the party's vote of from 2-3 elections at the national and regional level ofElection. • Age of the Party since reform and regional autonomy rolling • Correlation between acquisition support candidates for President and Vice President of the party that carried by a vote of the party at the national level legislative elections • Correlation between acquisition spousal support candidates for regional head and deputy regional head who carried the party by a vote of the party at the local level legislative elections

The institutionalization Dimension	Indicators for Indonesia
Autonomy	• The independence of the party's policy-making from external parties • Autonomy party policy in accordance to the level of the region in the nomination of candidates, and the candidates for regional head • Autonomy of political parties on various issues related to the regional authority that is autonomous
Organization	• The existence of the organization of political parties at national and regional levels • The influence of the figure of party leader in the national and regional levels against the existence of political parties.
Coherence and Diversity	• The management of diversity in the party and the internal conflict resolution mechanism, including how to solve he internal friction in the party at both the national and local level.

Source: Adapted by the author

The first dimension to see the institutionalization of political parties in Indonesia is the dimensions of the legitimacy of political parties in the electoral mechanisms. The indicator used to implement the electoral mechanism for national and local level, is the vote of political parties at the national level legislative elections (to elect members of the House of Representatives) and the local level legislative elections (to elect the members of the Provincial Council, District / City). Another indicator used is the correlation of acquisition

support candidates for President and Vice President in the area that brought the party by a vote of the party in legislative elections at national level, just like the correlation of the acquisition support for candidates ofhead of region and deputy head of region who carried by the party through votingat the local level legislative elections. Based on the indicators above,we can see whether there is consistency of support for political parties in two levels, national and local electoral mechanisms, or there is a division of support. For example there is a significant voice/support at the national level, while lower at the local level, or vice versa. There is also a possibility of maximum voice/support at the national level, but in certain areas the voice/support is minimal, or vice versa. From those conditions, there will be a reflection in the level of legitimacy and the distribution of political parties. It will be judged from 2 to 3 elections whohad been run. With thismeasurement, the chronological age of political parties is calculated from the age when it was reformed and regional autonomy can also be known.

The second dimension is the autonomy of political parties. Indicators used to measure the autonomy of political parties in Indonesia is, first: The independence of the party's policy-making from external parties, Second; The Autonomy party policy is in accordance with the level of the region in the nomination of candidates and prospective of the head region, third; the autonomy of political parties on various issues related to the regional authority that is autonomous. The consequence of the presence of regional autonomy policy in Indonesia as defined in Article 18 of the Constitution of Republic of Indonesia1945, is the presence of political parties should be linear with the regional authority related to the autonomy. The framework generates a number of regulations governing the autonomy of political parties at the local level, such as in the case of the nomination of the head region and deputy head region as stipulated in Acts Number 32 /2004 on Regional Government. Article 59 paragraph (5) letter a of Acts Number 32/2004 confirms the nominative pair of head region and deputy head region of the political party or coalition of political parties marked with the nomination forms by political party officials at regional level that is signed by the chairman and secretary of the political parties in that region.

The third dimension is the dimension of political party organization. Indicators used to measure this dimensionare; first, the existence of the political parties at national and regional levels. Second, the influence offigure leaders in that party both in national and regional levels against the existence of political parties. As a unitary state with pluralistic society, there is a possibility of condition when political parties at the national level are not linear with a presence at the local level. The carrying capacity of political parties in elections is one of the factors that affect it. Most likely in certain areas the political party organization that runs is settled, but in other areas and nationally experienced otherwise.

The last dimension is the dimension of coherency and diversity. In this dimension, the indicator used is the management of diversity in the party and the internal conflict resolution mechanisms, including the system to prevent the internal friction in the party at both the national and local level.

III. CONCLUSION

There are five reasons to deliver local political parties in Indonesia based from this research. First, the theoretical foundation describes Indonesia as a country with federalism autonomy. The idea is the same as used by many countries to manage the plurality in their countries through a decentralized policy, including the party system. That is why the exixtency of local political parties would be necessary.

Second, the constitutional juridical basis consists of two principles of the Constitution, namely the principle of the autonomy of the unitary state and the principle of equality and freedom of every citizen in governing. Both of these principles cannot be implemented in the party system in Indonesia because the party system in Indonesia still uses a national patterned as today. The national patterned here means that political parties should be nationally acknowledge. There is no place for local political parties, except in Nangroe Aceh Darussalam and Papua.

Third, The platform of sociological based on the fact that the choice of pluralistic Indonesian society is still diverse in many elections. It is found that some political parties get significant votes in some areas consistently in the last election, despite the lack of a national vote.

Fourth, the historical background in the form of historical experience that in 1955 General Election and Local Election, there are several local political parties. One of the local political parties, namely PPD in West Kalimantan even won elections in 1955 and 1958 in that province and dissipates its cadres as Governor of West Kalimantan and some head of region there. It shows that local political parties have successsed to win citizens vote in previous election.

Fifth, the comparative study in United Kingdom as a unitary state and Malaysia as a Federal State. In both countries, local political parties are exist and provide wide authority for their area through devolution and autonomy. So, it does not matter what the country system is. What matter is the acceptance of the society in that region. Whether they want the local politcal parties or not.

The concept of local political parties that are relevant to be applied in Indonesia in the constitutional juridical perspective related to the decentralization of political parties can be built through four strategies. First, the local political party whose presence was based on pluralist paradigm which provides the idea that in a pluralistic society should be built a decentralized party system in order to sustain the plurality of society.

Second, the local political party which drafted is a separate legal entity which is dichotomous from the national political parties as a legal entity. It is based in the province with branches in regencies / cities in that Province.

Third, local political party's participation in elections only to the General Election and Local Elections for Legislative Elections candidates, the Provincial Representatives, Regency / City.

Fourth, the formation mechanism, supervision and dissolution of local political parties are designed similar to national political process for parties as applicable today.

References

Asshiddiqie, Jimly. 2005. *Freedom of Association, Dissolution of Political Parties and Constitutional Court*. Jakarta: Constitutional Press.

Budiardjo, Miriam. 2010. *Fundamentals of Political Science (Revised Edition),* Jakarta: Gramedia Pustaka Mandiri.

Dalton, J.Russel and Martin P.Waterberg. 2000. *Party Without Partisan: Political Change in Advence Industrial Democracies*. New York: Oxford UP.

Efriza. 2012. *Political Explore: A Study of Political Science*. Bandung: Alfabeta Publishers.

Huntington, Samuel P. 2004. *Political Order in a Changing Society.* Jakarta: Rajawali Press.

Mainwaring, Scott. 1999. *Presidensialism, Multyparty System, and Democracy : The Difficult Equation.,* in his Work Paper.

Muchammad,Safa'at Ali.2011. *The Political Parties Act: Practice Setting and Dissolution of Political Parties in the Struggle of The Republic*, Jakarta: Rajawali Press.

Pamungkas, Sigit. 2012. *Political Party: Theory and Practice in Indonesia*, Yogyakarta: Institute for Democracy and Welfares.

Surbakti, Ramlan. 1999. *Understanding Political Science.* Jakarta: PT.Gramedia Widia Sarana Indonesia.

Tan, Paige Johnson. 2006. *Indonesia Seven Years after Soeharto : Party System Institutionalization in a New Democracy* in Contemporary Southeast Asia Journal April 2006.

Acts Republic of Indonesia Number 23 Year 2014 on Regional Government

Acts Republic of Indonesia Number 11 Year 2006 on Aceh Government

Acts Republic of Indonesia Number 21 Year 2001 on Special Autonomy for Papua Province

A Prospect and Challenges for Adopting Constitutional Complaint and Constitutional Question in the Indonesian Constitutional Court

Pan Mohamad Faiz

TC Beirne School of Law, the University of Queensland
The University of Queensland, St. Lucia Campus, Australia
Email: pan.wijaya@uq.net.au

Abstract

A jurisdiction of the Indonesian Constitutional Court concerning constitutional adjudication is only limited to review the constitutionality of national law. There is no mechanism for challenging any decision or action made by public authorities that violate fundamental rights enshrined in the Indonesian Constitution. This article argues that constitutional complaint and constitutional question might be adopted as new jurisdictions of the Indonesian Constitutional Court in order to strengthen the protection of fundamental rights of its citizen. It also identifies main problems that will be faced by the Constitutional Court in exercising constitutional complaint and constitutional question. For instance, the Court will be burdened with too many cases as experienced by other countries. A clear mechanism for filtering applications lodged to the Constitutional Court and the time limit for deciding cases are important elements that have to be regulated to overcome the problems. In addition, the institutional structure of the Constitutional Court has to be improved, particularly to support its decision-making process.

Keywords: Constitutional Complaint, Constitutional Court, Constitutional Question, Fundamental Rights, Individual Application.

I. INTRODUCTION

One of the main agendas from constitutional reform in Indonesia that occurred from 1999 to 2002 is to strengthen the protection and promotion of human rights. The result of constitutional amendments has incorporated a specific chapter concerning constitutional guarantees of fundamental rights and freedoms which were adopted from the Universal Declaration of Human Rights and various international covenants. An effort to enforce those human rights is carried out by establishing several state institutions, particularly the Constitutional Court as a separate and independent court from the Supreme Court.

The Indonesian Constitutional Court is granted several constitutional powers, namely: (1) to review constitutionality of law; (2) to decide disputes concerning the authorities of state institutions whose powers are derived from the Constitution; (3) to decide matters concerning dissolution of political parties; (4) to decide disputes over the result of general elections; (5) to decide legal matters concerning impeachment process of the President and/or the Vice President. At the time of writing, the Constitutional Court has decided 3,519 cases with detailed statistics as follows.

Figure 1

Statistics of the Constitutional Court Decisions
(August 2003 – April 2016)

Type of Jurisdiction	Total Decision	Granted	Rejected	Inadmissible	Withdrawn	Injuction	Dismissed
Constitutional Review	815	187	280	261	87	-	-
Dispute of State Institution	25	1	3	17	4	-	-
Legislative Election	1,826 (issues)	120	1,224	400	44	38	

Type of Jurisdiction	Total Decision	Granted	Rejected	Inadmissible	Withdrawn	Injuction	Dismissed
Presidential Election	4	-	4	-	-	-	-
Local Election	849	73	459	288	26		3
Dissolution of Political Party	-	-	-	-	-	-	-
Impeachment	-	-	-	-	-	-	-

Source: Website of the Indonesian Constitutional Court

Mechanism of constitutional review in the Constitutional Court is the most frequent legal remedy used by justice seekers to protect their fundamental rights. The legality of a part or an entire law that is contrary to the Indonesian Constitution can be annulled by the Constitutional Court. However, constitutional review in the Indonesian Constitutional Court is only limited to national law, not other types of laws or decisions. From the perspective of constitutional government, it is believed that the current jurisdiction of the Indonesian Constitutional Court cannot optimally protect fundamental rights of its citizens. There is no direct mechanism available to the Court when citizens feel their fundamental rights have been violated by decisions, policies or actions made by public authorities or state institutions. In addition, the Indonesian constitutional adjudication system does not provide a mechanism for ordinary judges to ask the Constitutional Court concerning the constitutionality of laws or regulations being used as the basis for examining their cases.

Based on a comparative study of constitutional courts from different countries, the two mechanisms explained above are known as constitutional complaint and constitutional question. What are the characteristic of constitutional complaint and constitutional question cases? How can constitutional complaint and

constitutional question be adopted as the Indonesian Constitutional Court's jurisdiction? This article will investigate what constitutional complaint and constitutional question are and how the mechanisms could be adopted into the constitutional adjudication system in Indonesia. It will also highlight several aspects that should be considered seriously if these mechanisms are to be adopted by the Indonesian Constitutional Court.

II. DISCUSSION

A. Constitutional Complaint

Constitutional complaint provides one of the major powers of constitutional courts to protect the fundamental rights of citizens. It is defined as a complaint to a constitutional court, lodged by individuals who feel their fundamental or constitutional rights are being violated by public authorities.[1] In some circumstances, municipalities or associations of municipalities, on the basis of their right to self-government, may also lodge a constitutional complaint.[2] Dannemann suggests that constitutional complaint has several characteristics determined by four factors: (1) availability of legal remedies against violations of constitutional rights; (2) existence of a separate process that only examines constitutional issues of an act, not other legal issues; (3) it can be submitted by individuals who are directly affected by that act; and (4) the court that decides a constitutional complaint has a power to restore the rights of victims.[3]

The constitutional complaint can only be accepted by a constitutional court if all available legal remedies have been carried out or exhausted through the judicial process. In addition, all possibilities to correct or prevent violations of the Constitution must be used. This requirement is also identified as subsidiarity of the constitutional complaint.[4] In some countries, the constitutional complaint can be directed towards an act of public authority, the constitutionality of laws

[1] Victor Ferreres Comella, "The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism", *Texas Law Review,* Volume 82, Issue 7, June 2004, p. 710.
[2] Article 93(1)(4b) of the Basic Law for the Federal Republic of Germany.
[3] Gerhard Dannemann, "Constitutional Complaints: The European Perspective", *The International and Comparative Law Quarterly*, Volume 43, Issue 1, January 1994, p. 142.
[4] See The Federal Constitutional Court of Germany, *Constitutional Complaint,* http://www.bundesverfassungs gericht.de/EN/Verfahren/Wichtige-Verfahrensarten/Verfassungsbeschwerde/verfassungsbeschwerde_node. html, accessed 8 March 2016.

or court decisions.[5] The constitutional court only examines the conformity of an act against the Constitution, while the assessment of legal issues and other facts remain the authority of ordinary courts. As long as no violation of fundamental rights or constitutional rights occurs, the constitutional court is bound by decisions of ordinary courts. [6]

A study conducted by the Venice Commission in 2010 concerning the efficiency of individual complaint procedures in over fifty countries concluded that there are two types of individual access, namely: (1) a normative constitutional complaint that allows the individual to file a complaint on the violation of fundamental rights based on the unconstitutionality of a law; and (2) a full constitutional complaint that allows the individual to file a complaint on the violation of fundamental rights not only based on the unconstitutionality of law, but also an unconstitutional decision made by other ordinary courts and the Supreme Court.[7]

Constitutional Court power to examine constitutional complaint cases exists in many countries. This power is also known by different terms. For instance, in Western Europe, the Austrian Constitutional Court uses the original term of *Individualbeschwerde*,[8] the German Constitutional Court knows it as *Verfassungsbeschwerd*[9] and the Spanish Constitutional Court refers to this power

---

[5] Constitutional complaint against decisions of an ordinary court is not intended to review the decisions as a whole, but to examine whether the court has violated constitutional law. When there is a fact concerning the presence of a mistake in the process, findings, interpretation or application of a law in individual cases, it cannot be directly interpreted as a violation of fundamental rights. See The Federal Constitutional Court of Germany, *Instructions on Lodging a Constitutional Complaint with the Federal Constitutional Court*, http://www.bundesverfassungsgericht.de/EN/Homepage/_zielgruppeneinstieg/Merkblatt/Merkblatt_node .html;jsessionid=2C026E2CDFCF7EA417D663C5E084D94C.2_cid361, accessed 8 March 2016.

[6] I Dewa Gede Palguna, *Pengaduan Konstitusional* (Constitutional Complaint) *sebagai Upaya Hukum Perlindungan Hak-Hak Konstitusional Warga Negara: Studi Kewenangan Mahkamah Konstitusi Republik Indonesia dengan Rujukan Amerika Serikat, Republik Federal Jerman, dan Korea Selatan sebagai Perbandingan* [Constitutional Complaint: Legal Remedy of Protection of Citizen's Constitutional Rights: A Study on the Indonesia's Constitutional Court Competence in a Comparative Perspective], Doctoral Thesis, The University of Indonesia, 2011, p. 1.

[7] Gianni Buquicchio, "Constitutional Complaint as an Instrument for Protecting Fundamental Rights of Citizen" in M. Guntur Hamzah et al. (eds), *Proceeding of International Symposium on Constitutional Complaint,* the Constitutional Court of the Republic of Indonesia, 2015, pp. 168-169.

[8] Article 139, Article 140 and Article 144 of the Austrian Constitution and § 82 of the Austrian Constitutional Court Law. The Austrian model of constitutional complaint does not allow to challenge a court decision before the Constitutional Court although the court's decision is alleged to violate fundamental rights. However, this mechanism is being studied to be improved and has been included in the constitutional reform draft. See Anna Gamper and Francesco Palermo, "The Constitutional Court of Austria: Modern Profiles of an Archetype of Constitutional Review" in Andrew Harding and Peter Leyland (eds), *Constitutional Courts: A Comparative Study,* London: Wildy, Simmonds & Hill, 2009, pp. 44-45.

[9] Article 93(1)(4a) of the Basic Law for the Federal Republic of Germany and §§ 90 et seq. of the German Federal Constitutional Court Law. See also Donald P. Kommers and Russell A. Miller, "*Da Bundesverfassungsgericht*: Procedure, Practice and Policy of the German Federal Constitutional Court" in Andrew Harding and Peter Leyland (eds), *Constitutional Courts: A Comparative Study*, London: Wildy, Simmonds & Hill, 2009, pp. 112-113.

as *recurso de amparo.*[10] A constitutional complaint mechanism is also practiced in Central and Eastern European countries, such as Croatia,[11] Czech Republic,[12] Hungary,[13] Poland,[14] Russia[15] and Ukraine.[16]

In Asia, several constitutional courts hold a power to examine constitutional complaint cases, such as in Azerbaijan,[17] South Korea,[18] Thailand[19] and Turkey.[20] Furthermore, many constitutional courts in Latin America have similar power to constitutional complaint known as *juicio de amparo* or *writ of amparo*, for

[10] Article 53(2) of the Spanish Constitution and Article 41 to Article 47 and Article 50 of the Spanish Constitutional Court Law. See also Victor Ferreres Comella, "The Spanish Constitutional Court: Time for Reforms" in Andrew Harding and Peter Leyland (eds), *Constitutional Courts: A Comparative Study,* London: Wildy, Simmonds & Hill, 2009, pp. 182-183.

[11] Article 128 of the Constitution of the Republic of Croatia; Article 62 to Article 80 of the Constitutional Court Law of the Republic of Croatia; and Article 24 to Article 25 and Article 80 to Article 82 of the Rule of Procedure of the Constitutional Court of the Republic of Croatia. Further discussion on constitutional complaint cases in Croatia, see Dragana Bjelić and Mirela Mezak Stastny, "Constitutional Complaint as an Instrument of Fulfilling the Worker's Rights in Croatian Legal System", *International Journal of Social, Behavioral, Educational, Economic, Business and Industrial Engineering*, Volume 5, Issue 5, 2011, pp. 750-753.

[12] Article 87(1) of the Constitution of the Czech Republic and Article 72 to Article 84 of the Constitutional Court Law of the Czech Republic.

[13] See Article 24(2) of the Fundamental Law of Hungary (as enacted on 25 April 2011); Article 26 to Article 31 of the Constitutional Court Law of Hungary (2011); and the Decision 1001/2013. (II. 27.) AB Tü. on the Constitutional Court's Rules of Procedure. Discussion on the development of constitutional complaint in Hungary, see Fruzsina Gárdos-Orosz, "The Hungarian Constitutional Court in Transition - From Actio Popularis to Constitutional Complaint", *Acta Juridica Hungarica*, Volume 53, Issue 4, 2012, pp. 302-315.

[14] Article 79(1) and Article 188 of the Constitution of the Republic of Poland; Article 27 and Article 46 of the Constitutional Tribunal Law of the Republic of Poland. Further discussion on constitutional complaint in Poland, see Lech Garlizky, "Constitutional Complaint in Poland", a paper presented at *the Conference of the Constitutional Control Organs of the Countries of New Democracy*, the Constitutional Court of Armenia and the European Commission for Democracy through Law of the Council of Europe, Yerevan, 24 October 1997.

[15] Article 125 (4) of the Constitution of the Russian Federation and Article 3 of the Federal Constitutional Law of the Constitutional Court of Russian Federation. See also Mikhail I. Kleandrov, "Institute of Constitutional Complaint of Citizens at the Constitutional Court of the Russian Federation", in M. Guntur Hamzah et al. (eds), *Proceeding of International Symposium on Constitutional Complaint,* the Constitutional Court of the Republic of Indonesia, 2015, pp. 221-224.

[16] Article 150 of the Constitution of Ukraine (as amended by the Law № 2952-VI dated 1 February 2011) and the Law № 586-VII dated 10 September 2013; Article 13, Article 42, Article 43, and Article 82 to Article 85 of the Constitutional Court Law of Ukraine dated 17 May 2012. A case example of constitutional complaint in Ukraine, see The Constitutional Court of Ukraine, "Decision of the Constitutional Court of Ukraine in the Matter of the Constitutional Petition of Sixty People's Deputies of Ukraine Regarding an Official Interpretation of the Provisions of Article 103.1 of the Constitution of Ukraine in the Context of the Provisions of Its Articles 5 and 156, and the Constitutional Complaint of Citizens Vadym Serhiiovych Halaichuk, Viktoria Valentynivna Podhorna, and Tetiana Volodymyrivna Kysla Regarding an Official Interpretation of the Provisions of Articles 5.2, 5.3, and 5.4 of the Constitution of Ukraine (Case of the Exercise of Power by the People)", *Statutes and Decisions*, Volume 44, No. 3, May-June 2009, pp. 26–34.

[17] Article 130 para V of the Constitution of the Republic of Azerbaijan (as result of Referendum held on 18 March 2009) and Article 34 of the Constitutional Court Law of the Republic of Azerbaijan.

[18] Article 111(1) of the Constitution of the Republic of Korea; Article 68(1) and (2) of the Constitutional Court Law of the Republic of Korea. The constitutional complaint becomes a very important power for the Constitutional Court of Korea. See also Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, Cambridge: Cambridge University Press, 2003, pp. 206-246.

[19] Section 212 of the Constitution of the Kingdom of Thailand. Further discussion on the Constitutional Court of Thailand, see Chalermpon Ake-uru, "Promotion of Democracy and Constitutional Justice: the Case of Thailand", http://www.aaccei.org/ccourtDown?bbsSeqn=258&fileSeqn=2, accessed 28 February 2016, pp. 6-7; Andrew Harding and Peter Leyland, "The Constitutional Courts of Thailand and Indonesia: Two Case Studies from South East Asia" in Andrew Harding and Peter Leyland (eds), *Constitutional Courts: A Comparative Study*, London: Wildy, Simmonds & Hill Publishing, 2009, p. 122.

[20] Article 148 of the Constitution of the Republic of Turkey (as amended on September 12, 2010; Act No. 5982); Article 45 to Article of Law on the Establishment and Rules of Procedure of the Constitutional Court of Turkey (Law No: 6216, adopted 30 March 2011). The regional position of the Constitutional Court of Turkey is interesting. Turkey is a member of the Conference of European Constitutional Court and a member of the Association of Asian Constitutional Court and Equivalent Institution (AACCEI). In examining constitutional complaint or individual application cases, the Court uses the European Convention on Human Rights (ECHR) as its foundation. Further discussion on the constitutional complaint in Turkey, see Hüseyin Ekinci and Musa Sağlam, *Individual Application to the Turkish Constitutional Court*, Ankara: The Constitutional Court of Turkey, 2015; Nazlı Can Ülvan, "Constitutional Complaint and Individual Complaint in Turkey", *Ankara Bar Review*, Volume 6, Issue 2, 2013, p. 179-186.

example Chile, Colombia, Ecuador, Mexico and Venezuela.[21] Currently, some countries, such as France, Italy, Lithuania and Macedonia, lack a constitutional complaint mechanism and are working towards developing one to be adopted as an additional power in their constitutional courts.[22]

In Indonesia, the Constitutional Court does not have a power to examine constitutional complaint cases. However, in a draft constitutional amendment, the Constitutional Commission (*Komisi Konstitusi*) proposed a constitutional complaint mechanism to the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat* or MPR), suggesting that the Constitutional Court should hold a power to examine constitutional complaint cases.[23] According Palguna, Justice of the Indonesian Constitutional Court who involved in amending the Constitution, there was no further discussion in the MPR concerning this issue. The MPR members did not follow up the Constitutional Commission's proposal.[24] There is no clear explanation for why the MPR rejected this idea.[25] Neverthelesss, there are several possible reasons to explain the MPR's stance.

First, to maintain their influence and power, political interests between political factions dominated the constitutional amendment process in establishing the Constitutional Court. Thus, the amendment process was not predominantly led by sound discussions with intent to form a robust constitutional adjudication system. Second, the MPR did not want a Constitutional Court with full authority to protect fundamental rights or constitutional rights of citizens due to concerns

[21] Discussion on *writ of amparo* in Latin America, see Gianluca Gentili, "A Comparative Perspective on Direct Access to Constitutional and Supreme Courts in Africa, Asia, Europe and Latin America: Assessing Advantages for the Italian Constitutional Court", *Penn State International Law Review*, Volume 29, Issue 4, 2011, pp. 710-715.

[22] See Otto Pfersmann, "Concrete Review as Indirect Constitutional Complaint in French Constitutional Law: A Comparative Perspective", *European Constitutional Law Review (EuConst)*, Volume 6, Issue 2, June 2010, p. 223-248; Gentili, *op. cit.*; Aušra Kargaudienė, "Individual Constitutional Complaint in Lithuania: Conception and the Legal Issues", *Baltic Journal of Law & Politics*, Volume 4, Issue 1, January 2011, pp. 154-168; Tanja Karakamisheva, "Constitutional Complaint- Procedural and Legal Instrument for Development of the Constitutional Justice (Case Study – Federal Republic of Germany, Republic of Croatia, Republic of Slovenia and Republic of Macedonia)", a paper presented at *the World Conference on Constitutional Justice*, the Constitutional Court of South Africa and the Venice Commission, Cape Town, 24 January 2009.

[23] Hamdan Zoelva, "Pengaduan Konstitusional (*Constitutional Complaint*) dalam Sistem Peradilan di Indonesia [Constitutional Complaint in Judicial System in Indonesia]" *Jurnal Negarawan,* Volume 16, May 2010), p. 53. The Constitutional Commission was an ad hoc body formed by the MPR to conduct a study and give recommendations on the 1945 Constitutional amendment. This Commission consisted of experts chaired by Professor Sri Soemantri and supported by Albert Hasibuan (Deputy Chairman I), Isaac Latuconsina (Deputy Chairman II), Sri Adiningsih (Secretary), and DR. N.E. Fatima (Deputy Secretary). Unfortunately, recommendations submitted by the Constitutional Commission to the MPR were not binding.

[24] I Dewa Gede Palguna, "Overcoming Constitutional Obstacles in Dealing with Constitutional Complaint Issues: Indonesia's Experience" in M. Guntur Hamzah et al. (eds), *Proceeding of International Symposium on Constitutional Complaint,* the Constitutional Court of the Republic of Indonesia, 2015, p. 148.

[25] *Ibid*.

that the Court would examine the human right violations committed during the New Order.

Third, the MPR considered that introducing a constitutional complaint mechanism, with aims to challenge actions and decisions of the government, would reduce the authority of state officials and public authorities to act and make decisions, or create policies. Fourth, the MPR also believed the Court would be burdened with too many cases if it held authority to examine constitutional complaint cases, as compared to other countries with a similar mechanism. Fifth, the MPR concerned that giving a constitutional complaint power to the Constitutional Court will lead a potential conflict of jurisdiction with other courts, particularly the Supreme Court.

Now, more than twelve years after the establishment of the Constitutional Court, I am of the opinion that the MPR's reasons in rejecting constitutional complaint are no longer relevant. A constitutional complaint mechanism might be adopted in the constitutional adjudication system in Indonesia that upholds strong principles of constitutionalism and places the Constitution as the supreme law of the land.[26] In realising such principles, Indonesia has committed to implementing a system of constitutional government. One of the major elements derived from a constitutional government system is protection of fundamental rights of citizens, as explicitly contained in Chapter XA of the constitutional bill of rights in the Indonesian Constitution.[27] However, the inclusion of fundamental rights guaranteed in the Constitution is certainly not enough. It needs a reliable mechanism to protect, adhere to and enforce those rights.

Currently, Indonesia only provides limited protection for citizens who feel their fundamental rights have been violated. Only the Constitutional Court can directly examine a case of constitutional rights violation of individuals, yet it is limited to reviewing the constitutionality of laws. Given that the violations of constitutional rights not only occur because of the substance of national laws, but also because of actions or decisions taken by public authorities or state

[26] Article 1 para (2) of the Indonesian Constitution states, 'Sovereignty is in the hands of the people and is implemented according to the Constitution.' Moreover, Article 1 (3) states, 'The state of Indonesia is a law state.'
[27] Article 28 to 28J of the Indonesian Constitution.

institutions, the absence of a constitutional mechanism that can protect the constitutional right of Indonesian citizens is tantamount to negating an essential element in implementing the system of constitutional government. Therefore, adopting a constitutional complaint mechanism is imperative to strengthen the implementation of the constitutional government system, particularly in providing full protection of citizen's constitutional rights.

The need for establishing a constitutional complaint mechanism in Indonesia can also be seen in many cases lodged with the Constitutional Court that have similar characteristics to constitutional complaint cases.[28] The Court Registration Division, without any trial, rejected most of those cases because the applications were assessed to be beyond the Constitutional Court's jurisdiction.[29] However, there were also several cases examined by the constitutional justices through court hearings, even though these cases, in substance, were constitutional complaint cases. This practice frequently occurs when petitioners modify a constitutional complaint application so that it becomes a case of constitutional review or dispute between state institutions. These cases can be categorised as 'pseudo-constitutional complaint'. As a result, many legal arguments constructed by the applicants use concrete cases, whereas the doctrine held by the Constitutional Court in reviewing the constitutionality of laws is abstract.

Furthermore, some of Constitutional Justices delivered dissenting opinions in a constitutional review case where they argued that constitutional complaint cases should be examined and decided by the Constitutional Court. Justice Siahaan wrote, 'Therefore, there are reasons to assess from the angle of individual constitutional complaint that actually has a sufficient legal basis based on the

[28] Applications and letters received by the Court Registrar in 2005 or two years after the Court establishment showed that there were at least 48 petitions that had similar characteristics of constitutional complaint cases. This amount was equivalent to three times of judicial review applications in the same year. In its development, there have been approximately 106 petitions regarding constitutional complaint applications in 2010. See Pan Mohamad Faiz, 'Menabur Benih Constitutional Complaint' [Sowing the Seeds of Constitutional Complaint] <http://panmohamadfaiz.com/2006/02/28/constitutional-complaint>; and Hamdan Zoelva, above n 23, 54.

[29] In this context, Palguna suggested several case examples, such as Constitutional Court Case Number 016/PUU-I/2003 concerning the cancellation of Supreme Court decision on Reconsideration (*Peninjauan Kembali*); Constitutional Court Case Number 007/PUU-IV/2006 concerning the uncertainty of court process in an ordinary court and the allegations of bribery; Constitutional Court Case Number 030/PUU-IV/2006 concerning the authority to issue broadcasting licenses; and Constitutional Court Case Number 1/SKLN-VI/2008 concerning the findings of violations in local elections. See Palguna, *Pengaduan Konstitusional…, op. cit.*, p. 4.

principles contained in the 1945 Constitution.'[30] Thus, if Indonesia has a strong commitment to implementing the principles of constitutional government, a constitutional complaint mechanism is very appropriate for protecting the fundamental rights and freedoms guaranteed by the Constitution. There are few alternative measures that afford such protection, as detailed below.

First, the most ideal way to adopt the constitutional complaint is to amend the Constitution by explicitly adding a constitutional complaint mechanism as one of the Constitutional Court's jurisdiction. In this manner, constitutional and political legitimacy would be achieved by giving the constitutional complaint mechanism the highest place in the constitutional system in Indonesia. In this context, Indonesian can learn from the Turkish Constitutional Court. Turkey amended their Constitution in 2010 to incorporate constitutional complaint as the newest jurisdiction of the Turkish Constitutional Court. As a result, they began receiving individual applications on 23 September 2012.[31]

Second, the establishment of constitutional complaint mechanism can be conducted by revising the Constitutional Court Law through a legislative review process. Legislators could expand the meaning of constitutionality of laws that are not only limited to laws made by the DPR, but also to the entire laws, regulations, actions and decisions made by public authorities and state institutions.[32]

Third, if the first and second measures are too difficult, the Constitutional Court can make a constitutional interpretation by building a legal construction where a constitutional complaint is a part of the constitutional review system.[33] Thus, the Constitutional Court would have the power to hear and examine constitutional complaint cases, although it would lack legitimacy. In addition, the Court would be sharply criticised for practicing excessive judicial activism.

Furthermore, if the constitutional complaint is to be adopted into the system of fundamental rights protection in Indonesia, the improvement of

[30] See Constitutional Court Decision No. 001/PUU-IV/2006, reviewing the Supreme Court's Decision No. 01 PK/Pilkada/2005 concerning Regional Head Election in Depok (*Judicial Review on Depok Election* (2006) case).

[31] See Burhan Üstün, "Protection of Human Rights by the Turkish Constitutional Court", a paper presented at *the International Conference on the Role of Constitutional Justice in Protecting the Values of the Rule of Law*, the Constitutional Court of the Republic of Moldova, Chişinău, 8 September 2014.

[32] See Palguna, *Pengaduan Konstitusional..., op. cit.*

[33] See Faiz, *op. cit.*

the institutional structure of the Constitutional Court is a must. Additionally, limitations placed on constitutional complaint cases that can be examined by the Constitutional Court should be regulated. The experiences of other countries show that most cases examined by the constitutional courts have been constitutional complaints.

For instance, the Federal Constitutional Court of Germany received 200,482 (98%) constitutional complaints since 1951. This means that they receive around 5,000 constitutional complaint cases each year. This is only 2.5% of all constitutional complaint cases granted by the Federal Constitutional Court of Germany. In 2013, the Federal Constitutional Court of Germany received 6,238 constitutional complaint cases, but only 91 cases (1,46%) were granted.[34] Moreover, the Constitutional Court of South Korea received 26,006 constitutional complaint cases since it was founded in 1988. In other words, the Constitutional Court of South Korea receives about 1,000 constitutional complaint cases annually.[35] A similar condition is also faced by the Constitutional Court of the Russian Federation. The Court received more than 20,000 cases which more than 90% of those cases are related to constitutional complaints of its citizens.[36] Additionally, the Constitutional Court of Turkey received more than 45,000 individual application cases since constitutional complaint was implemented on 23 September 2012. The backlog is tremendously high. At the time of writing, the numbers of pending cases are roughly 20,000.[37] More than 85% of constitutional complaint cases handled by the Constitutional Court of Turkey are related to right to fair trial.[38]

In contrast, the Indonesian Constitutional Court only received 1,708 cases over the past twelve years. In addition, 52% of the total cases handled by the Indonesian Constitutional Court were related to disputes over election results, both

[34] See The Federal Constitutional Court of Germany, *Annual Statistics 2013*, http://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Statistik/statistics_2013.pdf?__blob=publicationFile&v=1, accessed 10 March 2016.

[35] See The Constitutional Court of Korea, *Caseload Statistics*, www.http://english.ccourt.go.kr/cckhome/eng/ index.do, accessed 10 March 2016.

[36] Kleandrov, *op. cit.*, p. 222.

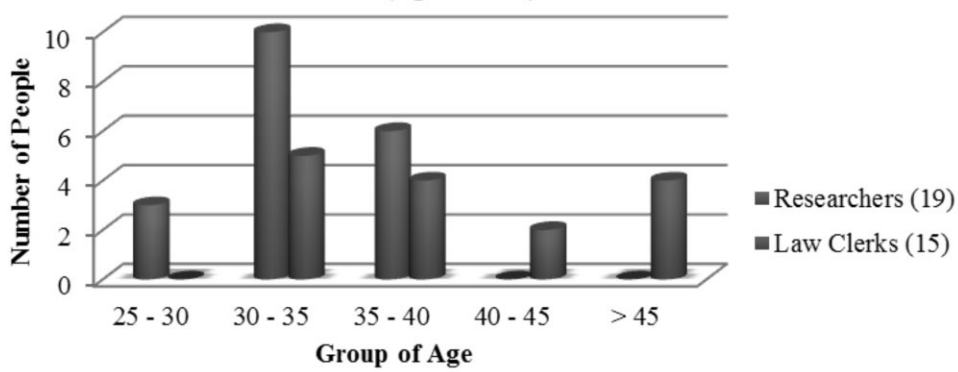
[37] See The Constitutional Court of Turkey, *Individual Application Statistics*, http://anayasa.gov.tr/en/inlinepages/IndividualApplication/Statistics.html, accessed 10 March 2016.

[38] Zühtü Arslan, "Constitutional Complaint as an Instrument for Protecting Basic Rights: The Case of Turkey" in M. Guntur Hamzah et al. (eds), *Proceeding of International Symposium on Constitutional Complaint,* the Constitutional Court of the Republic of Indonesia, 2015, pp. 174-175.

at the national and the regional level.[39] Although the Indonesian Constitutional Court received fewer cases than other constitutional courts, the Court still felt overwhelmed in resolving those cases. Therefore, several prerequisites must be considered if a constitutional complaint mechanism is to be adapted to the Indonesian Constitutional Court.

First, the organisational structure of the Indonesian Constitutional Court should be strengthened, particularly by increasing the number of skilled and experienced constitutional researchers and law clerks in order to support the constitutional justices in examining cases and making decisions. At the time of writing, the Indonesian Constitutional Court only has 19 researchers and 15 law clerks whose their average age is 36 years. With the current organisational structure, the Court will definitely face difficulty in handling constitutional complaint cases. Therefore, in the future, the structure and various programs of the Indonesian Constitutional Court should focus more on the management of case settlement as its primary function.

Figure 2
Statistics of Researchers and Law Clerks in the Indonesian Constitutional Court (April 2016)



Source: Human Resources and Finance Bureau of the Indonesian Constitutional Court

[39] See The Constitutional Court of Indonesia, *Case Recapitulation*, www.mahkamahkonstitusi.go.id, accessed 10 March 2016.

In this context, Indonesia can learn from Turkey's experiences. The 2010 Turkish constitutional amendment introduced the individual complaint system and restructured the Constitutional Court organisation. For instance, before the Constitutional amendment, they only had 11 Constitutional Justices and 20 Rapporteur Judges assisting the Court. After the amendment, the number increased to 17 Constitutional Justices, 77 Rapporteur Judges and 25 Assistant Rapporteur Judges. Previously, the Court exercised constitutional review in plenary session, but now two Sections were established for the purpose of handling constitutional complaint. In addition, three Commissions were also established under each section and the administrative bureau was strengthened.[40]

Second, the Constitutional Court should be given an authority of the dismissal process conducted by a panel of justices, not by registrars or administrative officers, to sort out whether a case can be examined further in court hearings or should be dismissed directly. This filtering mechanism is needed to ensure the Constitutional Court handles caseloads properly.

Third, the Constitutional Court should make clear boundaries regarding constitutional complaint cases that can be examined. Some of the main limitations are: (1) the applicant must be an individual who directly suffered from the loss of their constitutional rights; (2) the application can only be submitted after it has exhausted all available legal remedies; (3) there must be a time limit for applying a constitutional complaint case after a court judgment, actions or decisions made by public authorities or state institutions which violate the constitutional rights of the applicant.

In the context of Indonesia, which has a vast territory lacking adequate access to transportation, information and communication, the time limit for applying a constitutional complaint case should be regulated for at least three months starting from the exhaustion of legal remedies. The comparison concerning the time limit for constitutional complaint submission in various countries can be seen in the following figure.

[40] Email from Mucahit Aydin (A Rapporteur Judge of the Constitutional Court of Turkey) to Pan Mohamad Faiz Kusuma Wijaya, 6 October 2015.

Figure 3

Table of Comparison on Constitutional Complaint Application

Country	Time Limit	Legal Basis
Austria	six weeks	Article 82 of the Constitutional Court Law
Croatia	30 days	Article 64 of the Constitutional Court Law
Hungary	60 days	Article 28 of the Constitutional Court Law
Germany	one month	Article 93(1) of the Federal Constitutional Court Law
South Korea	90 days	Article 68(1) of the Constitutional Court Law
Spain	30 days	Article 44(2) of the Constitutional Court Law
Turkey	30 days	Article 47 of the Constitutional Court Law

Source: Compiled by the author

B. Constitutional Question

In addition to constitutional complaint, another jurisdiction that might be adopted by the Indonesian Constitutional Court is the constitutional question. It is a mechanism that allows ordinary judges to review the constitutionality of laws or regulations being used to decide cases in ordinary courts. If judges are unsure or doubtful about the constitutionality of laws or regulations being used for examining their cases, they may delay the examination and question the Constitutional Court. In this matter, the Constitutional Court will only decide the constitutionality of the law or regulation in question. The ordinary judges will then determine the case based on the Constitutional Court's decision.[41] While this mechanism has not been recognised in the Indonesian constitutional

[41] Victor Ferreres Comella, "The European Model of Constitutional Review of Legislation: Toward decentralization?", *International Journal of Constitutional Law*, Volume 2, Issue 3, July 2004, p. 465.

adjudication system, in many countries, such as Austria, Belgium, Germany, Italy, Luxemburg, South Korea and Spain, the constitutional question has been implemented.[42]

In Indonesia, litigants in ordinary courts file applications for constitutional review to the Constitutional Court by themselves without any assistance or coordination from the ordinary courts. For instance, this practice occurred in the *Leste Majeste* (2006) case. Eggi Sudjana, a political activist, who is also a popular lawyer, was charged, based on Article 134, Article 136 bis and Article 137 of the Indonesian Criminal Code, with insulting the president, known as the *Leste Majeste*. On his initiative, Sudjana lodged a constitutional review application with the Constitutional Court against those articles. The Constitutional Court annulled the articles as they proved to be contrary to the Constitution.[43]

Although the Court annulled it, the ordinary court still sentenced him to three months in prison and probation for six months.[44] The legal reason given by the ordinary court was that the action committed by Sudjana occurred before the Constitutional Court declared its decision. According to the judges who decided the case, the effect of Constitutional Court's decision was not retroactive and only applied prospectively. In addition, the Supreme Court strengthened the lower court's decision.[45] Based on this case, the decision of the ordinary court or the Supreme Court would be different if the ordinary court held authority, or at least had an initiative, to apply a constitutional question to the Constitutional Court. Thus, the constitutional rights of citizens would be protected.

The constitutional question mechanism offers several advantages for the constitutional adjudication system in Indonesia. First, the constitutional question can strengthen the protection, respect and fulfilment of constitutional rights of citizens. Thus, if there are citizens who lack awareness or the ability to defend

[42] Ibid.

[43] Constitutional Court Decision No. 013-022/PUU-IV/2006, reviewing Law No. 8 of 1981 on Indonesian Criminal Code. See also Naomita Royan, "Increasing Press Freedom in Indonesia: the Abolition of the Lese Majeste and 'Hate-Sowing' Provisions", *Australian Journal of Asian Law*, Volume 10, Issue 2, 2009, pp. 290-311.

[44] Hukum Online, "Eggy Divonis 3 Bulan Penjara [Eggy was sentenced to three months in prison]", 22 February 2007, http://www.hukumonline.com/berita/baca/hol16258/eggy-divonis-3-bulan-penjara, accessed 15 March 2016.

[45] Hukum Online, "Eggi Sudjana Ajukan PK Perkara Penghinaan Presiden [Eggi Sudjana filed a reconsideration of case for insulting the insulting the President]", 2 July 2010, http://www.hukumonline.com/berita/baca/ lt4c2d0148deb5e/eggi-sudjana-ajukan-pk-perkara-penghinaan-presiden, accessed 15 March 2016.

their constitutional rights, they will still receive the minimum protection of constitutional rights without having to actively apply for a constitutional review case to the Constitutional Court.

Nonetheless, the submission of the constitutional question to the Constitutional Court remains highly dependent on the initiative and willingness of ordinary judges. Second, ordinary judges will no longer be forced to use the applicable laws or regulations in examining a case if they doubt that it has potential conflict with the Constitution. Third, the presence of the constitutional question will help to achieve a common understanding among ordinary judges of the importance in upholding the principles of the constitutionality of laws and regulations. If the mechanism of the constitutional question is adopted in Indonesia, the ordinary judges could be more critical of the constitutionality of laws and regulations.[46]

Four options exist for the adoption of the constitutional question by the constitutional adjudication system in Indonesia. First, the best way to expand the Constitutional Court's jurisdiction is by adding the constitutional question as an additional power to the Court through a constitutional amendment. The main advantage in using this method is that there will be a strong constitutional basis for the Court to examine cases concerning constitutional questions. Second, the Constitutional Court Law could be revised by adding provisions that provide flexibility for ordinary judges to submit a constitutional complaint to the Constitutional Court. These provisions would be included in a specific chapter on constitutional review in the Constitutional Court Law, with an interpretation that the constitutional question is one of the constitutional review types provided by the Constitution.[47] Thus, the constitutional question would be part of constitutional adjudication under the Constitutional Court's jurisdiction.

Third, another option is to follow the mechanism adopted in the French system known as the *exception d 'inconstitutionnalité*. In this system, if there

[46] See also I Dewa Gede Palguna, "Constitutional Question: Latar Belakang dan Praktik di Negara Lain serta Kemungkinan Penerapannya di Indonesia [Constitutional Question: Background and Practice in Other Countries and the Possibility of Its Implementation in Indonesia]", *Jurnal Hukum*, Volume 17, Number 1, January 2010, pp. 16-17.
[47] Ibid 16.

is a judge in lower courts who have questions on the constitutionality of laws, they can ask the Constitutional Court. However, the application should be sent to and examined first by the *Conseil d 'État* or *the Cour de Cassation* prior to the submission to the Constitutional Council.[48] This system can also be applied in Indonesia without amending the Constitution or revising the Constitutional Court Law. According to the Constitutional Court Law, a state institution can apply for constitutional review.[49] The definition of state institutions here includes the Supreme Court.[50]

Thus, if there is a constitutional question requested by ordinary judges in Indonesia, the application should be submitted to the Supreme Court. Using the constitutional review mechanism, the Supreme Court can lodge a constitutional question to the Constitutional Court. Nevertheless, this French system has a weakness if the Supreme Court does not follow up the request submitted by ordinary judges to the Constitutional Court. To prevent this deadlock, the Supreme Court has to create an internal regulation concerning the mechanism and procedure to request a constitutional question. This regulation provides assurance and certainty that the request will be submitted to the Constitutional Court if it meets the requirements. This guarantee is necessary so that ordinary judges will not hesitate or worry that the Supreme Court will dismiss their constitutional questions without adequate reasons.

Fourth, the Constitutional Court can make a constitutional interpretation that the definition of state institutions in constitutional review system includes general courts, consisting of public courts, religious courts, military courts and administrative courts. Thus, the constitutional interpretation made by the Constitutional Court will become a key to introducing a constitutional question

[48] Federico Fabbrini, "Kelsen in Paris: France's Constitutional Reform and the Introduction of *a Posteriori* Constitutional Review of Legislation", *German Law Journal*, Volume 9, Number 10, 2008, p. 1306; Myriam Hunter-Henin, "Constitutional Developments and Human Rights in France: One Step Forward, Two Steps Back", *The International and Comparative Law Quarterly*, Volume 60, Issue 1, January 2011, p. 187.

[49] See Article 51(1)(d) of the Constitutional Court Law. There was a case filed by 31 Justices from the Supreme Court for reviewing the constitutionality of Judicial Commission's power for monitoring and supervising the behaviours of Justices both in the Supreme Court. See Constitutional Court Decision No. 005/PUU-IV/2006, reviewing Law No. 22 of 2004 on Judicial Commission (*Judicial Commission* (2006) case).

[50] The only thing prohibited for the Supreme Court according to the Constitutional Court Law is that they become a party to the dispute over the authorities of state institutions. See Article 65 of the Constitutional Court Law and Article 2(3) of the Constitutional Court Regulation No. 08 of 2006 on Guidelines for Litigation in Dispute on Constitutional Authorities between State Institutions.

mechanism that can be used by ordinary judges. In addition, the procedures and requirements will be similar to the process of constitutional review of laws, except the Court creates new court regulation concerning special procedures and requirements for a constitutional question.

The four options explained above offer alternatives for adopting the constitutional question into the constitutional adjudication system in Indonesia. However, there is also a serious challenge that has to be overcome before the constitutional question can be adopted. The length of time in deciding a constitutional question case by the Constitutional Court should be an important concern. In some countries that have implemented this mechanism, the length of time in deciding a constitutional question case has become an obstacle for the ordinary courts in making their final decision.

In this context, Comella compared constitutional court hearings concerning constitutional question cases in European countries. He found that the length of time in deciding a constitutional question case varies. Luxemburg can resolve a constitutional question case in just a few months; while in Austria and Belgium it may take up to one year. In addition, Italy takes one to two years for deciding a constitutional question case. Surprisingly, Germany and Spain has taken five to eight years to decide constitutional question cases.[51] Thus, the time limit for deciding a constitutional question case must be regulated based on the ability of the Constitutional Court in handling a case, either in the Constitutional Court Law or the Constitutional Court Regulation.[52]

III. CONCLUSION

This artile has analysed current challenges faced by the Indonesian Constitutional Court due to its limited jurisdiction. Without constitutional complaint and constitutional question jurisdiction, the Court cannot optimally safeguard the Constitution, particularly in protecting fundamental rights of

[51] Comella, "The European Model of Constitutional Review of Legislation: Toward decentralization?", *op. cit.*, p. 471.
[52] Article 86 of the Constitutional Court Law authorises the Constitutional Court to regulate further any shortcoming or absence of procedural law to support the implementation of its duties and responsibilities.

citizens. Thus, some developments related to its jurisdiction should be improved. The constitutional complaint and the constitutional complaint mechanism need to be adapted to the Indonesian Constitutional Court.

The most ideal way to add these jurisdictions to the Constitutional Court is by amending the Constitution. Thus, when the Constitutional Court exercises the jurisdictions there will be a strong basis and constitutional legitimacy. The main problems that will be faced when the Constitutional Court adopts these new jurisdictions are the number of cases that will increase sharply and the time limit for decising cases. Therefore, a filtering mechanism of constitutional complaint cases needs to be established. In addition, the institutional structure, human resources and decision-making process have to be strengthened. Otherwise, the Court will be overwhelmed in receiving cases concerning constitutional complaint and constitutional question.

References

A. Legal documents

1. Constitution

The Basic Law for the Federal Republic of Germany.

The Constitution of Austria.

The Constitution of Spain.

The Constitution of Ukraine.

The Constitution of the Czech Republic.

The Constitution of the Kingdom of Thailand.

The Constitution of the Republic of Azerbaijan.

The Constitution of the Republic of Croatia.

The Constitution of the Republic of Indonesia.

The Constitution of the Republic of Korea.

The Constitution of the Republic of Poland.

The Constitution of the Republic of Turkey.

The Constitution of the Russian Federation.

The Fundamental Law of Hungary.

2. Law and Regulation

The Constitutional Court Law of Austria.

The Constitutional Court Law of Germany.

The Constitutional Court Law of Hungary.

The Constitutional Court Law of Spain.

The Constitutional Court Law of Ukraine.

The Constitutional Court Law of the Czech Republic.

The Constitutional Court Law of the Republic of Azerbaijan.

The Constitutional Court Law of the Republic of Croatia.

The Constitutional Court Law of the Republic of Korea.

The Constitutional Court's Rules of Procedure of Hungary.

The Constitutional Tribunal Law of the Republic of Poland.

The Federal Constitutional Law of the Constitutional Court of Russian Federation.

The Law on the Establishment and Rules of Procedure of the Constitutional Court of Turkey.

The Regulation of the Constitutional Court of the Republic Indonesia on Guidelines for Litigation in Dispute on Constitutional Authorities between State Institutions.

The Rule of Procedure of the Constitutional Court of the Republic of Croatia.

B. Cases

Decision of the Constitutional Court of the Republic of Indonesia Number 016/PUU-I/2003.

Decision of the Constitutional Court of the Republic of Indonesia Number 007/PUU-IV/2006.

Decision of the Constitutional Court of the Republic of Indonesia Number 013-022/PUU-IV/2006.

Decision of the Constitutional Court of the Republic of Indonesia Number 030/PUU-IV/2006.

Decision of the Constitutional Court of the Republic of Indonesia Number 1/SKLN-VI/2008.

Decision of the Constitutional Court of the Republic of Indonesia Number 001/PUU-IV/2006.

Decision of the Constitutional Court of the Republic of Indonesia Number 005/PUU-IV/2006.

Decision of the Supreme Court of the Republic of Indonesia Number 01 PK/Pilkada/2005.

C. Books and Articles

Arslan, Zühtü. 2015. "Constitutional Complaint as an Instrument for Protecting Basic Rights: The Case of Turkey" in M. Guntur Hamzah et al. (eds), *Proceeding of International Symposium on Constitutional Complaint,* the Constitutional Court of the Republic of Indonesia.

Bjelić, Dragana and Mirela Mezak Stastny. 2011. "Constitutional Complaint as an Instrument of Fulfilling the Worker's Rights in Croatian Legal System", *International Journal of Social, Behavioral, Educational, Economic, Business and Industrial Engineering* 5 (5).

Buquicchio, Gianni. 2015. "Constitutional Complaint as an Instrument for Protecting Fundamental Rights of Citizen" in M. Guntur Hamzah et al (eds), *Proceeding of International Symposium on Constitutional Complaint,* the Constitutional Court of the Republic of Indonesia.

Comella, Victor Ferreres. 2004. "The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism", *Texas Law Review* 82 (7).

Comella, Victor Ferreres. 2009. "The Spanish Constitutional Court: Time for Reforms" in Andrew Harding and Peter Leyland (eds). *Constitutional Courts: A Comparative Study.* London: Wildy, Simmonds & Hill.

Dannemann, Gerhard. 1994. "Constitutional Complaints: The European Perspective", *The International and Comparative Law Quarterly* 43 (1).

Ekinci, Hüseyin and Musa Sağlam. 2015. *Individual Application to the Turkish Constitutional Court*. Ankara: The Constitutional Court of Turkey.

Fabbrini, Federico. 2008. "Kelsen in Paris: France's Constitutional Reform and the Introduction of *a Posteriori* Constitutional Review of Legislation", *German Law Journal* 9 (10).

Faiz, Pan Mohamad. 2016. "Menabur Benih Constitutional Complaint [Sowing the Seeds of Constitutional Complaint]", https://panmohamadfaiz.com/2006/02/28/constitutional-complaint (accessed on 2 March 2016)

Gamper, Anna and Francesco Palermo. 2009. "The Constitutional Court of Austria: Modern Profiles of an Archetype of Constitutional Review" in Andrew Harding and Peter Leyland (eds). *Constitutional Courts: A Comparative Study.* London: Wildy, Simmonds & Hill.

Gárdos-Orosz, Fruzsina. 2012. "The Hungarian Constitutional Court in Transition - From Actio Popularis to Constitutional Complaint", *Acta Juridica Hungarica* 53 (4).

Garlizky, Lech. 1997. "Constitutional Complaint in Poland", a paper presented at *the Conference of the Constitutional Control Organs of the Countries of New Democracy*, the Constitutional Court of Armenia and the European Commission for Democracy through Law of the Council of Europe, Yerevan, 24 October 1997.

Gentili, Gianluca. 2011. "A Comparative Perspective on Direct Access to Constitutional and Supreme Courts in Africa, Asia, Europe and Latin America: Assessing Advantages for the Italian Constitutional Court", *Penn State International Law Review* 29 (4).

Ginsburg, Tom. 2003. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*. Cambridge: Cambridge University Press.

Harding, Andrew and Peter Leyland. 2009. "The Constitutional Courts of Thailand and Indonesia: Two Case Studies from South East Asia" in Andrew Harding and Peter Leyland (eds). *Constitutional Courts: A Comparative Study*. London: Wildy, Simmonds & Hill Publishing.

Hunter-Henin, Myriam. 2011. "Constitutional Developments and Human Rights in France: One Step Forward, Two Steps Back", *The International and Comparative Law Quarterly* 60 (1).

Karakamisheva, Tanja. 2009. "Constitutional Complaint- Procedural and Legal Instrument for Development of the Constitutional Justice (Case Study – Federal Republic of Germany, Republic of Croatia, Republic of Slovenia and Republic of Macedonia)", a paper presented at *the World Conference on Constitutional Justice*, the Constitutional Court of South Africa and the Venice Commission, Cape Town, 24 January 2009.

Kargaudienė, Aušra. 2011. "Individual Constitutional Complaint in Lithuania: Conception and the Legal Issues", *Baltic Journal of Law & Politics* 4 (1).

Kommers, Donald P. and Russell A. Miller. 2009. "*Da Bundesverfassungsgericht*: Procedure, Practice and Policy of the German Federal Constitutional Court" in Andrew Harding and Peter Leyland (eds). *Constitutional Courts: A Comparative Study*. London: Wildy, Simmonds & Hill.

Palguna, I Dewa Gede. 2010. "Constitutional Question: Latar Belakang dan Praktik di Negara Lain serta Kemungkinan Penerapannya di Indonesia [Constitutional Question: Background and Practice in Other Countries and the Possibility of Its Implementation in Indonesia]", *Jurnal Hukum* 17 (1).

Palguna, I Dewa Gede. 2011. *Pengaduan Konstitusional* (Constitutional Complaint) *sebagai Upaya Hukum Perlindungan Hak-Hak Konstitusional Warga Negara: Studi Kewenangan Mahkamah Konstitusi Republik Indonesia dengan Rujukan Amerika Serikat, Republik Federal Jerman, dan Korea Selatan sebagai Perbandingan* [Constitutional Complaint: Legal Remedy of Protection of Citizen's Constitutional Rights: A Study on the Indonesia's Constitutional Court Competence in a Comparative Perspective], Doctoral Thesis, The University of Indonesia.

Palguna, I Dewa Gede. 2015. "Overcoming Constitutional Obstacles in Dealing with Constitutional Complaint Issues: Indonesia's Experience" in M. Guntur

Hamzah et al. (eds), *Proceeding of International Symposium on Constitutional Complaint,* the Constitutional Court of the Republic of Indonesia.

Pfersmann, Otto. 2010. "Concrete Review as Indirect Constitutional Complaint in French Constitutional Law: A Comparative Perspective", *European Constitutional Law Review (EuConst)* 6 (2).

Royan, Naomita. 2009. "Increasing Press Freedom in Indonesia: the Abolition of the Lese Majeste and 'Hate-Sowing' Provisions", *Australian Journal of Asian Law* 10 (2).

The Constitutional Court of Ukraine. 2009. "Decision of the Constitutional Court of Ukraine in the Matter of the Constitutional Petition of Sixty People's Deputies of Ukraine Regarding an Official Interpretation of the Provisions of Article 103.1 of the Constitution of Ukraine in the Context of the Provisions of Its Articles 5 and 156, and the Constitutional Complaint of Citizens Vadym Serhiiovych Halaichuk, Viktoria Valentynivna Podhorna, and Tetiana Volodymyrivna Kysla Regarding an Official Interpretation of the Provisions of Articles 5.2, 5.3, and 5.4 of the Constitution of Ukraine (Case of the Exercise of Power by the People)", *Statutes and Decisions* 44 (3).

Ülvan, Nazlı Can. 2013. "Constitutional Complaint and Individual Complaint in Turkey", *Ankara Bar Review* 6 (2).

Üstün, Burhan. 2014. "Protection of Human Rights by the Turkish Constitutional Court", a paper presented at *the International Conference on the Role of Constitutional Justice in Protecting the Values of the Rule of Law*, the Constitutional Court of the Republic of Moldova, Chişinău, 8 September 2014.

Victor Ferreres Comella. 2004. "The European Model of Constitutional Review of Legislation: Toward decentralization?", *International Journal of Constitutional Law* 2 (3).

Zoelva, Hamdan. 2010. "Pengaduan Konstitusional (*Constitutional Complaint*) dalam Sistem Peradilan di Indonesia [Constitutional Complaint in Judicial System in Indonesia]" *Jurnal Negarawan* 6.

D. Websites

Ake-uru, Chalermpon. 2016. "Promotion of Democracy and Constitutional Justice: the Case of Thailand", http://www.aaccei.org/ccourtDown?bbsSeqn=258&fileSeqn=2 (accessed 28 February 2016).

Hukum Online. 2016. "Eggy Divonis 3 Bulan Penjara [Eggy was sentenced to three months in prison]", 22 February 2007, http://www.hukumonline.com/berita/baca/hol16258/ eggy-divonis-3-bulan-penjara (accessed 15 March 2016).

Hukum Online. 2016. "Eggi Sudjana Ajukan PK Perkara Penghinaan Presiden [Eggi Sudjana filed a reconsideration of case for insulting the insulting the President]", 2 July 2010, http://www.hukumonline.com/berita/baca/lt4c2d0148deb5e/eggi-sudjana-ajukan-pk-perkara-penghinaan-presiden (accessed 15 March 2016).

The Federal Constitutional Court of Germany. 2016. *Constitutional Complaint*, http://www.bundesverfassungsgericht.de/EN/Verfahren/Wichtige-Verfahrensarten/ Verfassungsbeschwerde/verfassungsbeschwerde_node.html (accessed 8 March 2016).

The Federal Constitutional Court of Germany. 2016. *Instructions on Lodging a Constitutional Complaint with the Federal Constitutional Court*, http://www.bundesverfassungsgericht.de/EN/Homepage/_zielgruppeneinstieg/Merkblatt/Merkblatt_node.html;jsessionid=2C026E2CDFCF7EA417D663C5E084D94C.2_cid361 (accessed 8 March 2016).

The Federal Constitutional Court of Germany. 2016. *Annual Statistics 2013*, http://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Statistik/statistics_2013.pdf?__blob=publicationFile&v=1 (accessed 10 March 2016).

The Constitutional Court of Indonesia. 2016. *Case Recapitulation*, www.mahkamahkonstitusi.go.id (accessed 10 March 2016).

The Constitutional Court of Korea. 2016. *Caseload Statistics*, www.http://english.ccourt.go.kr/cckhome/eng/index.do (accessed 10 March 2016).

The Constitutional Court of Turkey, *Individual Application Statistics*, http://anayasa.gov.tr/en/inlinepages/IndividualApplication/Statistics.html (accessed 10 March 2016).

The Common Access as Pro People Management of Natural Resources (An Analysis of Decision Number 3/PUU-VIII/2010 about Judicial Review of Law 27/2007)

Faiq Tobroni
faiqttobroni@gmail.com
Faculty of Syari'ah and Law

Izzatin Kamala
izaatinkamala@gmail.com
Department of Biology, Faculty of Tarbiyah IAIN Tulungagung
Jalan Mayor Sujadi Timur 46 Tulungagung-Jawa Timur 66221

Abstract

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

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

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

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

I. INTRODUCTION

1.1. Background

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

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

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

[1] In this paper, some times the term of "the People" is replaced by local (*masyarakat biasa*) and customary communities (*masyarakat adat*).

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

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

1.2. Questions

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

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

II. DISCUSSION

2.1. Urgency of Revoke of the Former Concept

2.1.1. The Decision of Constitutional Court

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

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

[2] It is summarized from Decision Number 3/PUU-VIII/2010.

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

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

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

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

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

[6] By the common access, every members of communities could participate in utilization of coastal resources. See the further exploration in sub chapter 2.2.1.

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

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

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

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

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

2.1.2. Inconsistency of CR-CW with the 1945 Constitution

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[8] Satjipto Raharjo, *Hukum dan Perubahan Sosial,* Bandung: Penerbit Alumni, 1979, p. 126.
[9] The Blackwell Dictionary of Modern Social Thought. (2002). http://www.blackwellreference.com/public/tocnode?id=g9780631221647_chunk_g97806312216472o_ss1-44. Accessed 19 November 2015.
[10] Paul Patton, "Michel Foucault" in *Creating Culture,* ed. Diane J. Austin-Bross, Sydney, London, Boston: Allen & Unwin. Patton, 1987, p. 234.

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

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

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

[11] Geoff Danaher, Tony Schirato & Jen Webb, *Understanding Foucault,* London, Thousand Oaks and New Delhi: Sage Publication, 2000, p. 70.
[12] Michael Foucault, *Power/Knowledge: Selected Interviews & Other Writing 1972-1977,* ed. Colin Gordon, New York: Pantheon Books, 1980, p. 89-90.

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

2.2. The New Concept in Management of CA-SI

2.2.1. The Common Access in Management of CA-SI

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

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

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

[15] Bruce Ackerman, *Private Property and the Constitution*, New Haven: Yale University Press, 1977, p. 116.

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

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

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

build responsibility for governing the common resource in nested tiers from the lowest level up to the entire interconnected system.[17]

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

2.2.2. The Common and the 1945 Constitution

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

[17] Elinor Ostrom, 'Private Property and Common Property Rights', http://encyclo.findlaw.com/2000book.pdf, page. 341. Accessed 15 April 2016.
[18] It is cited from Decision Number 3/PUU-VIII/2010.

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

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

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

[19] Bagir Manan, *Menyongsong Fajar Otonomi Daerah*, Yogyakarta: Pusat Studi Fakultas Hukum UII, 2004, p. 55.
[20] Aceng Hidayat, 'Institutional Change At Local Level: How Gili Indah Villagers Build an Effective Local Governance of Coral Reef Management?', *Journal of Coastal Development*, Volume 8, Number 2, February 2005: 123-154, p. 131.

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

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

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

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

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

[21] Deepa Narayan, *Empowerment and Poverty Reduction*, Washinton D.C.: the World Bank, 2002, p. 11.

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

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

2.3. Consistency of the Common Access with People Empowerment

2.3.1. People Empowerment and the 1945 Constitution

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

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

[22] Etzioni, *State And Civil Society,* New York: Long Mann, 1992, p. 364.
[23] *Ibid,*. p. 13.

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

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

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

[24] Rhonda Phillips and Robert H. Pittman, "A framework for community and economic development," in *An Introduction To Community Development,* ed. Rhonda Phillips and Robert H. Pittman, New York: Routledge, 2009, p. 10.
[25] Aceng Hidayat, 'Institutional Change At Local Level: How Gili Indah Villagers Build an Effective Local Governance of Coral Reef Management?', *Journal of Coastal Development*, Volume 8, Number 2, February 2005: 123-154, p. 131.

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

2.3.2. Consistency of the Common Access with People Empowerment

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

First Point

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

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

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

Second Point

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

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

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

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

Third Point

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

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

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

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

III. CONCLUSION

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

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

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

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

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

References

Ackerman, Bruce. 1977. *Private Property and the Constitution*, New Haven: Yale University Press.

Cheater, Angela, 1999. "Power in the Postmodern Era", in *The Anthropology of Power: Empowerment and Disempowerment in Changing Structures,* ed. Angela Chetaer, London and New York: Routledge.

Danaher, Geoff, Tony Schirato & Jen Webb, 2000. *Understanding Foucault,* London, Thousand Oaks and New Delhi: Sage Publication.

Etzioni, 1992. *State And Civil Society,* New York: Long Mann.

Foucault, Michael, 1980. *Power/Knowledge: Selected Interviews & Other Writing 1972-1977,* ed. Colin Gordon, New York: Pantheon Books.

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

Manan, Bagir, 2004. *Menyongsong Fajar Otonomi Daerah*, Yogyakarta: Pusat Studi Fakultas Hukum UII.

Narayan, Deepa. 2002. *Empowerment and Poverty Reduction*, Washinton D.C.: the World Bank.

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

Ostrom, Elinor, 1992. *Crafting Institutions for Self-Governing Irrigation System,* San Fransisco: Institute for Contemporary Studies.

Ostrom, Elinor, 2000. 'Private Property and Common Property Rights', http://encyclo.findlaw.com/2000book.pdf, Accessed 15 April 2016.

Patton, Paul, 1987. "Michel Foucault" in *Creating Culture,* ed. Diane J. Austin-Bross, Sydney, London, Boston: Allen & Unwin.

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

Raharjo, Satjipto, 1979. *Hukum dan Perubahan Sosial,* Bandung: Penerbit Alumni.

The Blackwell Dictionary of Modern Social Thought. (2002). http://www.blackwellreference.com/public/tocnode?id=g9780631221647_chunk_g978063122164720_ss1-44. Accessed 19 November 2015.

Biography

I Gede Yusa, born in Klungkung, July 20, 1961. He is a Associate Professor of Faculty of Law, University of Udayana. He is passed Masters in Law Graduate Program, Udayana University and Graduated Doctoral Program Law, Faculty of Law Brawijaya University.

Bayu Dwi Anggono was born on 23 June 1982, in Sidoarjo, Indonesia. He earned his Bachelor of Laws from University of Jember in 2004, Master of Laws from University of Indonesia in 2009, and Doctor of Laws from University of Indonesia. Moreover, he had joined several non-degree international education such as Doctoral Sandwich Program at Leiden University Netherlands (2012), CPG Spring School Scholarship at Westfälische Wilhems University Munster Germany (2015), and Tenth Southeast and Northeast Asia Session on International Humanitarian Law at Korea University (2015). The author currently works as a lecturer in Department of Constitutional Law and Director of Center of Excellence of Pancasila and Constitution Faculty of Law, University of Jember. The author also writes and publishes some books including Kumpulan Pemikiran Hukum dan Konstitusi (2012), Perkembangan Pembentukan Undang-Undang di Indonesia (2014), Perancangan Peraturan Perundang-undangan (2015), Teori Hukum dan Konstitusi (2015). The author is also heavily involved in the making of Academic Paper and Draft Bill for the Government of the Republic of Indonesia and the Regional Representative Council of the Republic of Indonesia (DPD RI). Email: bayu_fhunej@yahoo.co.id

I Gusti Ayu Ketut Rachmi Handayani. Dr. in Law, the University of Gadjah Mada, Yogyakarta Indonesia, 2004; Magister Management (MM), the University of Gadjah Mada, Yogyakarta Indonesia, 1997; Sarjana Hukum (SH), the University of Sebelas Maret, Surakarta Indonesia, 1995. She is a senior Lecturer at the Faculty of Law Sebelas Maret Unversity, Surakarta. She was Head of research institutions and community service (2001-2003), Director of Graduate Program UNISRI Surakarta (2003-2004), Secretary of Environmental Science Postgraduate Program Sebelas Maret University Surakarta (2006-2008), Head of the Administrative Law Faculty of Law Sebelas Maret University Surakarta (2008-2011), She was Vice Dean of the Faculty of Law Sebelas Maret University Surakarta (2011-2015). Her academic works have been published in a number of national journal publication and international journal publications. Active as a researcher, presenter in national and international seminar, workshop, and conference. As a reviewer and board editor in some national and international journal publication. Active research and write some books. She was received an award as the best researcher in national level (2011) from DIKTI. She is currently as a reviewer in DIKTI and LPDP.

Muhammad Rifqinizamy Karsayuda, born on Hulu Sungai Tengah, 6 November 1982. There are many scientific paper of him, such as Regional Election, The Law of State Perspective (Total Media: Yogyakarta, 2006), Developing a New Indonesia: The Reflection of The Member of The Association of Muslim Students Indonesia (Total Media: Yogyakarta, 2006), The Structure And Village Government Agents: Study Four Villages in South Kalimantan (MU: 3 Communications: Yogyakarta, 2010) and many other. He lives in Perdagangan Street Komplek Perdagangan Permai II Number 23 B Banjarmasin, South Kalimantan.

Pan Mohamad Faiz is a PhD Candidate in Constitutional Law at TC Beirne School of Law, the University of Queensland, Australia. He has been working as a Researcher, Law Clerk and Speechwriter to the Chief Justices of the Indonesian Constitutional Court since 2005. Faiz completed his Bachelor of Laws degree from the University of Indonesia and Master of Comparative Laws degree, concentrating in comparative constitutional law, from the University of Delhi. He is a guest lecture at Faculty of Law, the University of Indonesia on constitutional theory, comparative constitutional law and procedural law of the Constitutional Court. In 2012 he became a Research Scholar at the Centre for Public, International and Comparative Law (CPICL) at the University of Queensland, Australia. Presently, he is a Manager at Jimly School of Law and Government (JSLG) under the leadership of the first and the former Chief Justice of Indonesian Constitutional Court, Professor Jimly Asshiddiqie. He is also the Executive Secretary of the Expert Council of Indonesian Law Graduates Association (ISHI). The U.S. Department of State awarded Faiz a premier professional exchange program known as the International Visitor Leadership Program (IVLP) in the United States of America in 2012.

Faiq Tobroni, born in Bojonegoro, East Java, 02 April 1988. A lecturer in Faculty Syari'ah and Law, in State Islamic Institute (IAIN) Tulungagung. First master program on Human Right and Law From Indonesian Islamic University (UII) Yogyakarta (2011) with thesis on the title of "Legal Policy of Human Rights in the Management of Natural Resources". Second master program on Management of Infrastructure and Community Development from Gadjah Mada University (UGM) Yogyakarta (2012) with the thesis on the title of "Waste Infrastructure and People Empowerment". The author is interested on issues of management of

natural resources on the perspective of human rights. Some publications are To Empower Rights of Customary Communities in the Management of Customary Forestry and The Idea of Forest's Conservations in the Challenging of Exploitation.

Izzatin Kamala, born in Pati, Central Java, 01 July 1988. A lecturer in Department of Biology, in State Islamic Institute (IAIN) Tulungagung. Undergraduate program on Science Education From Yogyakarta State University (UNY) in 2011. Master program on Science Education from Sebelas Maret University (UNS) Surakarta (2014). The author is interested on issues of management of natural resources. A publication on the management of natural resources is A New Hope of Management of Water Resources After Decision of Constitutional Court.

Contitutional Review

The Board of Editors of the Journal on Constitutional Review invite academics, observers, practitioners and other interested parties to submit articles concerning decisions of constitutional courts and topics on constitutional law, either related to Indonesian Constitutional Court decisions and constitutional law or perspectives on constitutional court decisions and constitutional law from other countries. Articles may be based on research or conceptual analysis that have not been published elsewhere. Each manuscript submitted must conform to author guidelines as stated below.

Author Guidelines

The Journal *Constitutional Review* is a medium intended to disseminate research or conceptual analysis on constitutional court decisions all over the world. The Journal will be published twice a year in May and November. Articles published will cover research and conceptual analysis on constitutions, constitutional court decisions and topics on constitutional law that have not been published elsewhere. The journal is intended for experts, academics, practitioners, state officials, non-governmental organisations and observers of constitutional law.

1. Manuscripts submitted must be original scientific writings and must not contain elements of plagiarism.
2. Manuscripts should be written in English at a length of 8500–8600 words on A4 paper, in 12 point Times New Roman, and 1,5 spacing.
3. Manuscripts should be written in journal format with byline system.
4. Manuscripts should include title, name of author(s), institution(s) of the author(s), address(es) of the author(s) institution(s), email address(es) of the author(s), abstract and key words.
5. Titles of manuscripts should be specific and concise—not more than 10 words or 90 characters—describing the content of the article comprehensively.
6. Abstracts should be clear, full and complete, describing the essence of the content of the whole writing in one paragraph.

7. Key words selected must denote the concept of the article in 3–5 terms (*horos*).
8. Manuscripts based on **Research** should be written in the following order:
   I. Introduction
      A. Background
      B. Research Questions
      C. Research Method
   II. Result and Discussion
   III. Conclusion
9. Conceptual Analysis should be written in the following order:
   I. Introduction
      A. Background
      B. Questions
   II. Discussion
   III. Conclusion
10. Footnotes should be written in the following format:

    Books : author's name, *title of the book,* place of publication: name of publisher, year published, page cited.

    Example:

    A.V. Dicey, *An Introduction to The Study of The Law of The Constitution*, 10th ed., English Language Book Society, London: Mc Millan, 1968, p. 127.

    Jeffrey Goldsworthy, *Intepreting Constitutions: A Comparative Study, Oxford University Press,* 2006, p. 40.

    Journal Article : author's name, "title of article", *name of journal*, volume, number, month and year, page cited.

    Example:

    Rosalind Dixon, "Partial Constitutional Amendments", *The Journal of Constitutional Law*, Volume 13, Issue 3, March 2011, p. 647.

    John Tobin, "Seeking Clarity in Relation to the Principle of Complementarity: Reflection on The Recent Contributions of Some International Bodies", *Melbourne Journal of International Law*, Volume 8, 2007, p. 23.

Paper or Speech presented in a scientific forum: author's name, "paper title", name of forum, place, date, page cited.

Example:

A. Orford, "The Subject of Globalization: Economics, Identity and Human Rights" in *Proceedings of the 94 Annual Meeting of The American Society of International Law*. 2000.

Anthony Wetherall, "Normative Rule Making at The IAEA: Codes of Conduct, Paper", *Unpublished*.

Internet/Online sources:

Examples:

Simon Butt, "Islam, the State and the Constitutional Court in Indonesia",http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1650432, accessed 28 July 2010.

Siregar, P. Radja. 2003. *World Bank and ADB's Role in Privatizing Water in Asia.* http://www.jubileesouth.org/news/EpZyVyEyylgqGYKXRu.shtml, accessed 5 October 2005.

11. References list all books, journals, papers either printed or online cited in the text and are arranged alphabetically in the following order: writer's name (family name first), year, *title*, place of publisher, etc., as shown in the example below:

Example:

Baehr, Peter and Monique Castermans-Holleman. 2004. *The Role of Human Rights in Foreign Policy*, 3rd Edition. New York: Palgrave Macmillan.

Bello, Walden. 2003. *Deglobalization: Ideas for a New World Economy.* London: Zed Books.

Bienefeld, Manfred. 2000. "Can Global Finance be Regulated?",*Global Finance: New Thingking on Regulating Speculative Capital Markets*, edited by Bello, Walden, Nicola Bullard, and Kamal Malhotra. London: Zed Books.

Cingranelli, David Louis. 1992. *Ethics, American Foreign Policy, and the Third World.* New York: St Martins Press.

Chossudovsky, M. 1997. *The Globalization of Poverty: Impacts of IMF and World Bank Reforms.* London: Zed Books.

Dasgupta, Biplap. 1998. *Structural Adjustment, Global Trade and the New Political Economy of Development.* New Delhi: Vistaar Publications.

Dumenil, Gerard and Dominique Levy. 2005. "The Neo-Liberal (Counter-) Revolution" in *Neo-Liberalism, A Critical Reader.* London: Pluto Press.

Edwards, Chris. 2001. *Poverty Reduction Strategies: Reality or Rethoric?* The Hague: Institute of Social Studies.

Flowers, N. 2000. The Human Rights Education Handbook: Effective Practices For Learning, Action, And Change. Minneapolis, MN: University of Minnesota.

Friedman, Thomas. 2000. *The Lexus and The Olive Tree: Understanding Globalization*, 2nd Edition, New York: Anchor Books.

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.

Griffin, Keith. 1995. "Global Prospects for Development and Human Security", *Canadian Journal of Development Studies* 16 (3).

Harsono, Andreas. 2003. "Water and Politics in the Fall of Suharto" in *WaterBaronReport* (ICIJ).

Holsti, K.J. 1995. *International Politics, A Framework for Analysis*, 7th Edition. Englewood Cliffs NJ: Prentice Hall International Editions.

IMF. 2005. *International Monetary Fund*, http//:www.imf.org/glance (accessed 11 October 2005).

Marglin, Stephen and Juliet Schor. 1990. *The Golden Age of Capitalism: Reinterpreting the Postwar Experience.* Oxford: Clarendon Press.

Nicholson, Michael. 1998. *International Relations, A Concise Introduction.* London: Macmillan Press.

Petras, James and Henry Veltmeyer. 2001. *Globalization Unmasked, Imperialism in the 21st Century.* Delhi: Madhyam Books.

12. Manuscripts in Microsoft Word (.doc) format can be sent via email to jurnal@mahkamahkonstitusi.go.id
    Manuscripts can also be mailed to the following address:
    BOARD OF EDITOR CONSTITUTIONAL REVIEW
    CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA
    Jl. Medan Merdeka Barat, No. 6 Jakarta 10110
    Telp.: (+62) 2123529000; Fax: (+62) 21 352177
    Website: www.mahkamahkonstitusi.go.id
    Email: jurnal@mahkamahkonstitusi.go.id

11. The Board of Editors select and edit manuscripts submitted without changing the content. A fee will be provided for every manuscript published. Unpublished manuscripts will be returned and authors will be notified.

Index

Author Indexs

Constitutional Review
Thank you very much to
Reviewers

Hayyan Ul Haq
Dhiana Puspitawati
Shimada Yuzuru
Simon Butt

We Also Publish: "Jurnal Konstitusi"

Accredited By LIPI (Indonesian Institute of Sciences) and DIKTI (Indonesian Directorate General of Higher Education)


ISSN 2460-0016
9 772460 001002