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THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

December 2016, Volume 2, Number 2

CONTENTS

Note From Editors

This is the last edition of Year 2016 of Constitutional Review. In this year-end edition, Constitutional Review presents six articles discussing various topics such as the idea of strong state and the protection of human rights, the incorporation of some ideas into the provision of the constitution, the analysis of constitutional court decision and some insights in the process and substance of constitutional amendment. We expect that these articles will provoke further discussion among our readers, jot down their ideas and present them in the future editions of Constitutional review.

The idea of strong state is needed to protect human rights. On the other hand, the lack of stateness might cause failure of a democratic state to protect human rights. This is a weakness that occurs in Indonesia. In the case of Indonesian democracy, Zezen Zaenal Mutaqin, the author of the first article argues that the ambiguity in the interpretation of *Pancasila* (the Five-Principles) as the indonesian ideology proves to be the principal cause of the weakness.

Constitutionalizing budget for education paves the way to challenge government policy to the Constitutional Court if the government fails to fulfill this obligation. Andy Omara, the author of the second article, presents a discussion on the two aspects of this constitutionalization of national education budget in Indonesian Constitution. *First*, the background and *second,* its judicial

enforcement in the Constitutional Court. In his writing, the author raises argument on those two aspects which are the proper funding of the national education and the legal and extralegal approach taken by Constitutional Court in examining some judicial review cases concerning this matter.

The third article is co-authored by Fajar Laksono and Oly Viana Agustine. The article deals with the election design in Indonesia based on a decision of Constitutional Court, decision No. 14/PUU-XI/2013, on the constitutionality review of presidential election law. The authors are of the opinion that the decision poses fundamental changes to the design of general election. Based on the decision, the authors argue that general election, both presidential election and the election of members of representative bodies, should be held simultaneously.

The fourth article, written by Winda Wijayanti, deals with the issue on the importance of birth certificate. The author discusses the decision of Constitutional Court No. 18/PUU-XI/2013. In this decision the Constitutional Court emphasizes that government should take an active role in the registration of birth. Through this decision the Constitutional Court removes the deadline to report the birth of a child.

The form of unitary state and the Preamble of the Constitution are things that cannot be amended in the constitutional amendment of the Republic of Indonesia. The first is expressly stated in the Article 37 paragraph (5) of the Constitution while the latter is stated implicitly. Luthfi Widagdo Eddyono discusses this issue in the fifth article of this edition. The author, in this writing, provides interesting finding based on his analysis, the original intent of this unamendable provision of the Costitution.

Architecture of Indonesia's checks and balances is presented in the last article of this edition. In this article, Ibnu Sina Chandranegara, provides analysis on the aspects of checks and balances including its portion and posture based on its incorporation into the Constitution.

Keywords are derived from the article
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Zezen Zaenal Mutaqin

The Strong State and *Pancasila*: Reflecting Human Rights in the Indonesian Democracy

Constitutional Review Vol. 2 No. 2 pp. 159-188

The rights of every Indonesian citizens are protected by the 1945 Constitution. Does the reality matches with the normative regulations? Does democratization improves the protection of human rights especially in term of the religious freedom? We find that there is a discrepancy between the ideal written constitution and the reality. In this following essay I argue that the failure of Indonesian democratic regimes to protect human rights is the result of the lack of "*stateness*". The ideal of "stateness" is referring to Fukuyama idea that is "the ability of state to plan and execute policies and to enforce law". I will present the argument that the weakness of the administration cause by an ambiguity in the interpretation of the Indonesia ideology, *Pancasila* (the Five-Principles). This paper will firstly discuss the idea of strong state and its relation to the protection of human rights. Alongside the theoretical examination of the concept, I will discuss the weakness of democratic regimes in Indonesia to protect human rights. This will be followed by an examination of the core argument of the paper, argue that the principle cause of the state weakness lies on the ambiguity of the administration to interpret *Pancasila*.

Keywords: *Pancasila,* Strong State, Human Rights, Democracy.

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Andy Omara

The Constitutionalization of Budget for Education and Its Judicial Enforcement in Indonesia

Constitutional Review Vol. 2 No. 2 pp. 189-215

The introduction of provision concerning budget allocation for education in the amended constitution is not a common method in constitutional drafting in Indonesia. This article aims to understanding the background of the inclusion of this provision and its judicial enforcement. It argues that the establishment of this provision closely related to the fact that education was not properly funded. As a result, the quality of education was negatively affected. The constitutionalisation of budget for education opens the possibility to allocate the national budget in this field in a more sustainable way. In addition, by constitutionalizing budget for education, there is a legal avenue available to challenge the government policy if the government fails to fulfill its constitutional obligation. The newly established Constitutional Court has the power to review whether the allocation of national budget for education is consistent with the Constitution. In some judicial review cases on budget for education, the Court took legal approach and also extralegal factors in its rulings.

Keywords: Constitutionalization, Budget Education, Judicial Enforcement.

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Fajar Laksono and Oly Viana Agustine

Election Design Following Constitutional Court Decision Number 14/PUU-XI/2013

Constitutional Review Vol. 2 No. 2 pp. 216-233

The major implication from Constitutional Court Decision No. 14/PUU-XI/2013 is that the Constitution promotes fundamental changes to the design of the general election regarding both process and substance. Therefore, in order to uphold the Constitution, efforts are required to reconstruct the design of the general election, particularly so that elections are conducted in accordance with Decision No. 14/PUU-XI/2013 as a representation of the spirit and the will of the 1945 Constitution. Essentially, the current norm regarding the implementation of general elections following the election of members of the representative institution is not consistent with the stipulations in Article 22E Paragraph (1) and Paragraph (2) and Article 1 Paragraph (2) of the 1945 Constitution. Constitutional Court Decision No. 14/PUU-XI/2013 aims to realign the implementation of the elections with the intentions of the 1945 Constitution. Through implementation of the original intent method and systematic interpretation, the Constitutional Court offered its interpretation that the framers of the amended Constitution intended that general elections have five ballot boxes, with the first for the People's Representative Council (*Dewan Perwakilan Rakyat, DPR*), the second for the Regional Representative Council (*Dewan Perwakilan Daerah, DPD*), the third for the president and vice president, the fourth for the Regional People's Representative Council (*Dewan Perwakilan Rakyat Daerah, DPRD*) at the provincial level and the fifth for the DPRD at the regency level. Thus, it can be concluded that the presidential elections should be conducted simultaneously with elections of members of the representative bodies. Through this decision, the Constitutional Court revoked the prevailing norm, such that Presidential Elections and Elections of members of representative bodies were no longer valid because they violated the 1945 Constitution. The Constitutional Court introduced a new legal condition that obligated General Elections to be held simultaneously.

Keywords: General Elections, Constitutional Court

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Winda Wijayanti

Dynamics of the Obligation to Register Birth Certificates as a part of the Right to Issuance Population Documents

Constitutional Review Vol. 2 No. 2 pp. 234-251

The state is obliged to protect and recognise the legality of a person's birth. Registration of birth in the form of a birth certificate is proof of one's origin issued by the competent authorities. However, in practice, the time limit of one year given for such registration has proven a burden to citizens, such that complaint of constitutional damages has been brought before the Constitutional Court of Indonesia. Population administration is regulated under Act Number 23, Number 23 Year 2006 and amended by Act Number 24, Number 24 Year 2013 in accordance with Constitutional Court Decision 18/PUU-XI/2013. In order to take an active role in the registration of births, the government and local governments have to remove the deadline to report the birth of a child, as stipulated by the district court and as an effort to improve state responsibility. This requires that citizens have the "right to be heard" and, in future, there should be an integrated service from the government for the registration of births.

Keywords : Birth Registration, Birth Certificate, Right to be Heard

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Luthfi Widagdo Eddyono

The Unamendable Articles of the 1945 Constitution

Constitutional Review Vol. 2 No. 2 pp. 252-269

The amendments of the 1945 Indonesian Constitution between 1999 and 2002 have significantly changed the state system in Indonesia. In such a short period, the Constitution has been amended four times, provokes enormous additional norms and causes the establishment of several new institutions, including the Constitutional Court and Judicial Commission. However, after the amendments to the 1945 Indonesian Constitution on Chapter XVI about Amendments to the Constitution, the framers of the amended Constitution created Article 37 paragraph (5) that stated, the form of the unitary state of the Republic of Indonesia may not be amended. The Preamble is also implicit unamendable. My purpose in this article is to understand the original intent of Article 37 paragraph (5) of the 1945 Indonesian Constitution, the real function of the article and also to describes original intent arguments explaining why the Preamble of the Constitution also unamendable. Before the amendments between 1999 and 2002, there is no article and provision like that, especially in the original 1945 Constitution. At last, I found that two important points that explain why this new provision created. First, the framers still afraid of separatism based on experience in 1950's when federalism occurred in Indonesia. Second, the procedure to amend the articles of the 1945 Constitution shows that the framers only wants to strengthen the important system of unitary state because there is no differences process to amend articles of the 1945 Constitution.

Keywords: 1945 Constitution, Constitutional Amendment, Unamendable Articles.

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Ibnu Sina Chandranegara

Architecture of Indonesia's Checks and Balances

Constitutional Review Vol. 2 No. 2 pp. 270-291

Research on "checks and balances" in legal studies often raises high quality questions such as, is the checks and balances a doctrine, principle, or legal theory, or maybe precisely the formula of power in politics. History has been recorded that in any discussions regarding the formation of the constitutional separation, division and smelting power is something that is popular to be discussed before and even after becoming the constitution. Therefore, the casting of checks and balances into the constitution is an interesting study to determine the portion and posture. This study used using legal normative methodology. In addition, comparative studies on constitution was conducted using classic and modern constitutional law literature. Several approaches were used on this research such as, historical, political, economical approach on understanding the practice on checks and balance which stated in constitutions in some countries.

Keywords: Checks and Balances, Separation Power, Politics, Constitution.

The Strong State And *Pancasila*: Reflecting Human Rights in the Indonesian Democracy*

Zezen Zaenal Mutaqin

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Abstract

The rights of every Indonesian citizens are protected by the 1945 Constitution. Does the reality matches with the normative regulations? Does democratization improves the protection of human rights especially in term of the religious freedom? We find that there is a discrepancy between the ideal written constitution and the reality. In this following essay I argue that the failure of Indonesian democratic regimes to protect human rights is the result of the lack of "stateness". The ideal of "stateness" is referring to Fukuyama idea that is "the ability of state to plan and execute policies and to enforce law". I will present the argument that the weakness of the administration cause by an ambiguity in the interpretation of the Indonesia ideology, *Pancasila* (the Five-Principles). This paper will firstly discuss the idea of strong state and its relation to the protection of human rights. Alongside the theoretical examination of the concept, I will discuss the weakness of democratic regimes in Indonesia to protect human rights. This will be followed by an examination of the core argument of the paper, argue that the principle cause of the state weakness lies on the ambiguity of the administration to interpret *Pancasila*.

Keywords: *Pancasila,* Strong State, Human Rights, Democracy.

* This article have been submitted as part of the assignment for "International Human Rights Law" course during my Master's Coursework (LL.M) at Melbourne Law School in 2009 and edited to fulfill the requirement for "Constitutional Review". My thanks to Bisariyadi who has edited this work.

I. INTRODUCTION

Indonesia has amended its Constitution (*Undang-Undang Dasar 1945*) which adopted Bill of Rights, as can be found in the article 28A-J of the Constitution.[1] The idea of incorporating bill of rights emerged for the first time when the constitution was prepared by the Investigatory Committee for the Effort for the Preparation of Indonesian Independence (BPUPKI, *Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan Indonesia*) in June 1945. This historical evident is rarely mentioned by Indonesianist scholars. Bolan as long as my concern, is the one who describes in his book that Ulfa Santoso, a member of BPUPKI, proposed a draft of the constitution that included a section on human rights. But the idea was rejected and considered as an optional element by Supomo.[2] The adoption of the human rights sections in the constitution then happened 57 years later when it was amended in 2000.

The willingness of Indonesian governments to respect human rights came up concomitantly with the process of democratization. Ratification of covenants in relation to human rights protection took place in the Reformation era, except for the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) which was ratified on 13 April 1984.[3] During the Reformation era, the governments also enacted two laws related to human rights: the Human Rights Law (Law 39 of 1999) and the Human Rights Court Law (Law 26 of 2000).[4] Thus, the rights of Indonesian citizens today are, normatively, protected by the 1945 Constitution.

Does the reality matches with the normative regulations? Hikmahanto Juwana argues that a positive development of the legislation was not followed by a real practice in the protection of human rights.[5] The annual report of

[1] Tim Lindsey, 'Constitutional Reform in Indonesia: Muddling toward Democracy' in Tim Lindsey (ed), *Indonesia Law and Society* (2th ed, 2008) 23, 28.

[2] B. J. Bolan, *The Struggle of Islam in Modern Indonesia* (1982) 30. Lindsey notes that Supomo, a supporter of the *integralistic staatside*, a kind of organic command-style of state, was the chief drafter of the Constitution.

[3] The United Nations Human Rights Treaties, 'Indonesia, Ratification History' (2009) <http://www.bayefsky.com/pdf/indonesia_t1_ratifications.pdf> at 12 April 2009.

[4] The act also became the legal basis for the establishment of the Indonesian National Human Rights Commission (KOMNAS-HAM). See, Hikmahanto Juwana, *Human Rights Practice in Post-Suharto Era: 1999-2006* in Naoyuki Sakumoto and Hikmahanto Juwana (eds), *Reforming Laws and Institution in Indonesia: An Assessment* (2007) 125.

[5] *Ibid.*, p. 127.

Human Rights 2008 by The Wahid Institute and the Setara Institute confirmed the statement. The violations of human rights in 2008 escalated particularly in relation to the issues of the religious freedom. The Setara Institute,[6] for example, recorded approximately 265 incidents of human rights in 2008. The apex of those incidents was the violations of some Muslim groups to the members of *Ahmadiyah*[7] sect with 103 cases.[8]

Does democratization in Indonesia improves the protection of human rights especially in term of the religious freedom? Why we find a discrepancy between the ideal written constitution and the reality? In this following essay I will argue that the failure of Indonesian democratic regimes to protect human rights is the result of what Fukuyama called as the lack of 'stateness'. Using Weberian theory of state, Fukuyama argues that stateness is 'the ability of state to plan and execute policies and to enforce law'.[9] Furthermore, I will argue that the weakness of Indonesian regimes is caused by an ambiguity of its very basic principle of the ideology, *Pancasila* (the Five-Principles).

Pancasila is a negotiated ideology that would become a sources of constant negotiation. *Pancasila* was created as the result of negotiation between the nationalist and the Islamist groups that yearn to apply the Jakarta Charter (*Piagam Jakarta*).[10] It drives every regime to a dilemmatic position to stand in an outright principle of secular state respecting all religions and believes as stated clearly in the 1945 Constitution. Every administration, especially after the *Reformation* era, tends to lose to the pressures and demands of the Islamist groups. The Joint Letter of Decision (SKB, *Surat Keputusan Bersama*) on *Ahmadiyah* is one of the example which I wil elucidate it furthermore in the next chapter.[11]

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[6] The Setara Institute is a non-government organization that focuses on the monitoring of human rights in Indonesia. The organization was founded by many prominent human rights activists as well as Indonesian religious and intellectual leader such as Abdurahman Wahid, Azyumardi Azra, Hendardi and Zumrotin. <http://www.setara-institute.org/content/profil> at 12 April 2009.

[7] Ahmadiyah is a minority religious sect in Islam founded by Mirza Gulam Ahmad in India in 1889. Ahmadiyah came to Indonesia at about 1920, long before the independence. See Alfitri, 'Religious Liberty in Indonesia and the Rights of "Deviant" Sects' (2008) 3(1) *Asian Journal of Comparative Law* [18], The Berkeley Electronic Press <http://www.bepress.com/asjcl/vol3/iss1/art3>

[8] The Setara Institute, *Berpihak dan Bertindak Toleran: Intoleransi Masyarakat dan Restriksi Negara dalam Kebebasan Beragama/ Berkeyakinan di Indonesia. Laporan Kondisi Kebebasan Beragama/Berkeyakinan di Indonesia 2008*(2008) 20-24.

[9] Francis Fukuyama, *State-building: Governance and World Order in 21st Century*, (2004) 6-7.

[10] See below Part III (A).

[11] The SKB issued on 9 June 2008 under the pressure of the Islamists demonstrations. The SKB is an unclear decision because it does not clearly ban Ahmadiyah as favoured by the Islamists. However, the SKB order to the Ahmadiyah members to 'discontinue the promulgation of interpretations and activities that are *deviant from the principal teachings of Islam*, that is to say the promulgation of beliefs that recognize a prophet with all his teachings who comes after the Prophet Muhammad SAW'. The English version of the Decision accessed from (http://www.thepersecution.org/world/indonesia/docs/skb.html) at 13 April 2009.

This paper will firstly discuss the idea of strong state and its relation to the protection of human rights. Alongside the theoretical examination of the concept, I will discuss the weakness of democratic regimes in Indonesia to protect human rights. This will be followed by an examination of the core argument of the paper, argue that the principle cause of the state weakness lies on the ambiguity of the administration to interpret *Pancasila*.

II. STRONG STATE AND HUMAN RIGHTS

A. Defining "Strong State"

Do human rights need a strong state? Francis Fukuyama asked this question to discuss the human rights abuses in China. To answer that question, we will directly assume that the violations were the result of the ignorance of the strong central Communist government to protect human rights. That may be right, but for Fukuyama, the abuses happened mainly because the central Chinese government has failed to defend the rights of its people from the violations of the Chinese local governments. These local governments, especially under a particular body called township and village enterprises, had a powerful authority to do anything to establish and enhance business for the sake of economic development.[12] The body gained extraordinary achievement, but with the risk of the human rights abuses.

In response to this issue, the Chinese government may argue that the matter is merely the scale of priority. For Chinese people, economic rights are in the top agenda and need to be accomplished even with the risk of the limitations of political rights.[13] This is a common phenomenon in undemocratic Asian developing countries like China, Malaysia, Singapore and Indonesia during the Suharto era. In fact, this issue has been debated since the prevailing of human rights paradigm in 1950s. Post-colonial states and the Communist bloc have resisted the idea of civil and political rights proposed by the Western countries as a normative standard of human rights in international community. Economic

[12] Francis Fukuyama, *Do Human Rights Require a Strong State* (2008), <http://www.digitalnpq.org/archive/2008_summer/13_fukuyama.html> at 1 April 2009.

[13] Adamantia Pollis, 'Cultural Relativism Revisited: Through a State Prism' (1996) 18 (2) *Human Rights Quarterly* 316, 328.

and social rights are on the top priority of the Communist and post-colonial states.[14] Although the Vienna Declaration stated clearly that "All human rights are universal, indivisible and interdependent and interrelated",[15] in reality, every state has its own independency, based on the principle of the sovereignty of state, to carry out one aspect as a priority above the other.

When we discuss authoritarian states such as Indonesia under the Suharto regime or Malaysia, China and Singapore, the image of a strong state always comes up to our mind. Suharto easily diminished and suppressed every criticism to his regime. The criticism should be oppressed because it would be an obstacle to achieve a stability and economic development. The kidnapping activists were the known phenomena during the New Order era.[16] Every step of activists took would be under surveillance of the state apparatus. For the Suharto regime, development and human rights were seen as two conflicting concerns. Human rights, in this case, can temporarily be suspended.[17]

For this reason, demanding a strong state to protect human rights in contemporary Indonesian context seems to be an obscure idea. Bringing the idea of strong state back into the political life is like restoring the Suharto regime back to the nation. The obscurity to understand the concept of strong state, for Fukuyama, is "...because the word strength is often used indifferently to refer both to the scope as well as to the capacity".[18] Therefore we need to make a clear distinction between the scope and the strength of state. The scope of state relates to the role and function of state while the strength of state refer to the capability of state "to plan and execute policy and to enforce law clearly and transparently".[19]

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[14] Henry J Steiner, Philip Alston, Ryan Goodman, *International Human Rights in Context* (3th ed, 2007) 263, 264.

[15] *Vienna Declaration and Programme of Action: Report of the world Conference on Human Rights*, UN DOC A/CONF.157/23 (1993). Document accessed from: <http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument>.

[16] This condition triggered the rise of resistance from human rights activist in the late Suharto Era, where a number of NGOs established KIP-HAM (The Independent Commission for the Monitoring of Human Rights Violations). This body later transformed into Kontras (The Commission for "the Disappeared" and Victims of Violence) <http://www.kontras.org/eng/index.php?hal=profile> at 2 April 2009.

[17] To discuss this issue, see, for example: Jack Donnelly, 'Human Rights and Development: Complementary or competing Concerns' (1984) 36(2) *World Politics*, p. 255.

[18] Fukuyama, *Op.Cit.*, n. 9, 7.

[19] Fukuyama notes that the other scholar called the strength of the state as the state capacity. *Ibid.*

The idea of strong state is not a new one.[20] In his work, *Political Order in Changing Society*, Samuel Huntington argues that for new post-colonial states, political order had to be their primary agenda. Political order could be achieved by making a balance improvement between rapid social changes and political institutionalization.[21] The failure to create political institutions in response to a rapid social change were the cause of social conflicts, violence, revolutions and rebellions as can be seen in Asia, Africa and Latin America between 1945 to 1965.[22] To maintain an order in a complex community like state, the strength of political institutions were needed. Furthermore, "...the strength of political institution depends on the scope of support and level of institutionalization".[23]

Huntington's book was a respond to the failure of the modernization theory which believed that political order would rise as a consequence of economic development and social reform. While examining the handicap of the American foreign policy in 1950s which influenced by the modernization theory, Huntington said, "... in reality, economic development and political order were two independent elements and not necessarily connected one each other."[24] Furthermore, for the post-colonial states, stability was more important than liberty. The central question for a post-colonial state government was not whether the state could, for example, guarantee the political freedom and human rights, but how the government could govern. The government, first of all, must have legitimate authority to maintain public order before execute the other function.[25] Huntington argues, "...men may have order without liberty but they cannot have liberty without order".[26]

When the book was republished in 2006, Fukuyama in the foreword of the book argues that the Huntington's approach has become a foundation for a 'development strategy' where an authoritarian regime in a new state is needed

[20] For comparison, see also Joel S. Migdal, *Strong Societies and Weak States* (1988). In his book he describes strong state as high capability to penetrate and regulate society as well as extract and use resource. In contrary, a weak state is the one that has low capability to do those things.
[21] Huntington means this term as 'the process by which institution or organization obtain value and stability'. See, Samuel P. Huntington, *Political Order in Changing Societies* (1968), 12.
[22] *Ibid.*, p. 4.
[23] *Ibid.*, p. 12.
[24] *Ibid.*, p. 6.
[25] *Ibid.*, p. 7.
[26] *Ibid.*, p. 8.

temporarily to establish political order and law enforcement for the sake of economic and social development. When these foundations are established, democracy and political freedom will rise concomitantly.[27] However, this mode of thinking is dangerously used as a foundation for authoritarian regimes to preserve their despotic governments. For this reason, Thomas Carothers, criticizes this view as the fallacy of 'sequencing' idea.[28]

Like Huntington, the theory of strong state proposed by Fukuyama came up as a response to the decreasing role of state in a liberalizing world. No doubt that Fukuyama is a proponent of liberal policy. In *The End of History*, Fukuyama states that since the collapse of the Communist bloc, the only system that can survive and gives benefit for human being is liberalism. But, by cutting back the role of state, especially by privatization, the capability of state to regulate society and to enforce law unintentionally decreasing. Consequently, the liberalization does not bring a better condition. Otherwise, the decreasing scope of state generates a number of crisis ranging from diseases and poverty to human rights, especially in the third world countries.[29]

For this reason, Fukuyama argues, "... the state-building agenda is as important as state reducing one". To begin this program, the distinction between the scope and the strength of state is needed. Furthermore, the distinction is useful to measure the degree of stateness. In this point, Fukuyama offered a new outlook to see and measure the degree of stateness of a particular country. In relation to the scope of state, Fukuyama uses three different categories adopted from the World Bank Development Report 1997 that differentiated the size of states into minimal, intermediate and activist. Liberal or neo liberal states stand in the minimalist position where its scope includes the very basic functions such as providing public goods, defense, enforcing law, provide order in society, protecting property rights and providing public health. In the opposite side are socialist or communist states where its scope includes not only the basic functions but

[27] Francis Fukuyama, *Foreword* in Samuel Huntington, *Ibid*, xiii. This type of thinking can be found in Huntington's disciple, Fareed Zakaria who warns the rising of dangerous illiberal democracy (democracy without rule of law). See Fareed Zakaria, '*The Future of Freedom: Illiberal Democracy at Home and Abroad*' (2003).
[28] Thomas Charoters, 'How Democracy Emerge the "Sequencing" Fallacy' (2007) 18 (1) *Journal of Democracy* 12-27.
[29] Francis Fukuyama, 'Imperative of State Building' (2004) 15 (2), *Journal of Democracy,* 17-31, p. 18.

also the redistribution of wealth. In the middle position are states with welfare state system.[30]

How to measure the strength of state? The strength of state relate to, mainly, the capability of state to design and execute policy and to enforce law. In this case, aspect of effective bureaucracy, controlling corruption, maintaining transparency and accountability of government are included to measure the strength of state. To measure all these aspects, Fukuyama uses reports from several institutions such as Transparency International, Freedom House, and the World Bank as well as the Polity project. Using the data from those organizations, Fukuyama formulates a matrix with 'x' (the scope of state) and 'y' (the strength of state) axis. By this method he describes, for example, that the US is a state which has a moderate scope of state but has very good capacity to design and execute the policies, while Sierra Leone considered as a country which has not only a narrow scope of state but also weak capability to enforce law and to regulate its society.[31] Fukuyama stated that even for orthodox economist such as Milton Friedman, the agenda to strengthen the capacity of state is more important than economic liberalization. Privatization is less important than the rule of law, especially for the third world where the state institutionalization is ongoing process for establishment.

B. The Weakness of State and Human Rights Abuse

What Fukuyama describes in his book mostly relate to the economic issues. However, Fukuyama's work implicitly suggests that the state-based analysis has become a central argument to examine politics, social, economic as well as human rights problems. This approach has been flourishing since 1980s, mainly after the printing of '*Bringing the State Back in*'. This book marked the prevailing of statist approach not only in political field but also in the others.[32] The book gives attention to state as an autonomous actor and sees it not merely as 'the arena for which social conflict are waged' as can be seen in the Marxist theory.[33]

[30] Fukuyama, *Op.Cit.,* n. 9, p. 8-11.
[31] *Ibid.*, p. 14-15.
[32] Karen Barkey and Sunita Parikh, 'Comparative Perspectives on the State'(1991) 17 *Annual Review of Sociology* 523-549, p. 524.
[33] *Ibid.*, see also Theda Skochpol, 'Bringing the State Back in: Retrospect and Prospect' (2008) 31 (2) *Scandinavian Political Studies* 109-124, p. 110.

Thus, using the statist approach in examining human rights issues will beneficial due to the fact that the problems of human rights does not lies merely in, for example, the normative regulations of human rights or the adoption of a particular convention into national regulations, but in the disability of states to execute those regulations.

Indonesia has incorporated Bill of Rights in the amendment of its Constitution. It also has signed and ratified a number of the covenants of human rights. Furthermore, two human rights regulations have been enacted in the state. But, does Indonesia today has a better condition in term of human rights record in compare to the Suharto regime?

According to the Commission on Weak States and U.S. National Security, there are approximately 60 states in the world categorized as weak states.[34] The main problem of the weak states is the inability to control violence. The states also suffered by ineffective bureaucracy, mushrooming of corruption, lack of independent judiciary and disability to control its territories.[35] Put another way, the weak states are burdened by the low ability to "penetrate, regulate, extract and appropriate their resource".[36] Moreover, sometimes the weak states have a high capability in some aspects such as in penetrating its apparatus into the society and extracting the resource while very low in the others: regulating and controlling their societies as well as using the resources in uncorrupted way. All those states have problems with delivering "the fundamental political goods: physical security, legitimate political institutions, economic management as well as social welfare".[37] In the realities, different states will have different cases. Therefore, we have to put the weak states in a gradation ranging from the failed and collapse states to the relatively better but still fragile one.[38]

In addition, the problem of state weakness is not merely caused by the lack of state capacity, but also the result of deficiency of political will. Refer to Patrick, four different categories can be created to cluster weak states in relation to the

[34] Stewart Patrick, 'Weak States and Global Threats: Facts or Fiction (2006) 29 (2) *The Washington Quarterly* 27-53, p. 29.
[35] Neil A. Englehart, 'State Capacity, State Failure, and Human Rights (2009) 46 (2) *Journal of Peace Research* 163-180, p. 163.
[36] Migdal, *Op.Cit.*, n. 21, 5.
[37] *Ibid.*
[38] Patrick, *Op.Cit.*, n. 42, 30.

lack of both its capacities and will: "'weak states with relatively high capacity and strong will, states that weak but have willing, state that have the means but not the will, and states that lack of both the capacity and the will". [39]

Furthermore, weak states also can be defined based on "three capability gaps: security gap, capacity gap and legitimacy gap". By the security gap means that states cannot perform properly its basic function in controlling the use of forces within the territories. If states fail to control the violence, groups within the civil societies will have an ability to utilize violence and become a state competitor in this task. The second gap relates to the role of state in encountering basic goods for its society. Inability of states to meet this demand will create several crises such as poverty, pandemics of diseases and humanitarian. The last category has to do with legitimacy gap. In this case states have to develop and keep its legitimacy by enforcing law, protecting basic rights and freedom and giving opportunities to its citizen to participate in the political process.[40]

We have to go further by asking a question: If state weakness is the source of multiple crises, including human rights, can the strength of state or state capacity be the guardian of human rights? Reasonably, it should be like this: the stronger the state the better protection of human rights will be. Look a glance to reality will confirm the statement: Sudan, Burundi, Afghanistan, and the Congo Republic are the states with very low capacity to govern and very bad record in protecting human rights.[41]

C. Reflecting on Indonesia: Democratic Transition and Human Rights Violations

The rise of the New Order era in the late 1960s was marked by a massacre of hundreds of thousands up to millions of Indonesian communists and people who were suspected as the members of the communists. A number of scholars estimated that the victims of the New Order anti-communist policy ranged from

[39] *Ibid*, See also The Commission on Weak States and U.S. National Security, 'On the Brink: Weak States and US National Security' (2004) p. 1.
[40] The Commission, *Ibid.*, p. 14-15.
[41] Englehart, *Op.Cit.*, n. 43, 166.

78,000 up to 2,000,000 peoples.[42] If we use a maximum estimation, the massacre would be one of the worst human rights disaster in the modern history.

Since that time, mainly during the Suharto regime, sporadic violence and human rights abuses have continuously occurred in Indonesia. Possibly due to this reason, Andrian Vicker, in his exaggerated phrase, called Indonesia as violent state.[43] He notes that what was called as 'order' during the New Order era was the order that based not on the law enforcement but on the state coercion. Correspondingly, Elizabeth Collinse in her article discusses a question: do Indonesian people culturally tolerate violent? She argues that the assumption saying that Indonesian people characteristically vicious was claimed usually by Indonesian elites in seeking their ground for a particular purpose such as to stop criticism using repression or to cover their weakness in regulating the society.[44] Furthermore, Collinse notes that the violence that continuously occurs is the result of four causes: the institutional failure, the defect of developmental policy, the paramilitary tradition and the use of paramilitary force by the elites to justify their interest.

If we look into violations of human rights during the Suharto regime, we can add one more cause: it was the result of an anxiety of the regime assuming that some people in the society wished for replacing *Pancasila* by other ideology.[45] The regime continuously suspected both the 'left extremist'; mostly refer to whom that suspected had any relation with the PKI and 'the right extremist' usually relate to the radical Islam, as the groups that endangered *Pancasila.*[46] The result of this anxiety was clear: massacre of thousands of the communist member. The communism was banned while socialism has become a distrustful ideology.

On the other hand, the repression to the Muslim groups was not as bad as what happened to the communist group. Among a number of human rights

[42] Helen Fein, 'Revolutionary and Antirevolutionary Genocides: A Comparison of State Murders in Democratic Kampuchea, 1975 to 1979, and In Indonesia, 1965 to 1966' (1993) 35 (4) *Comparative Studies in Society and History* 796-823, p. 802.

[43] Andrian Vicker, 'Reopening Old Wounds: Bali and the Indonesian Killings-A Review Article'(1998) 57 (3) *The Journal of Asian Studies* 774-785, p. 774.

[44] Elizabeth Fuller Collins, 'Indonesia: A Violent Culture?'(2002) 42 (4) *Asian Survey* 582-604, p. 583.

[45] The analysis saying why a regime violates human rights can be found in Christian Davenport and David A. Armstrong, 'Democracy and the Violation of Human Rights: A Statistical Analysis from 1976 to 1996'(2004) 48 (3) *American Journal of Political Science* 538-554, p. 539-540.

[46] Donald E. Weatherbee, "Indonesia in 1984: Pancasila, Politics, and Power" (1985) 25 (2) *Asian Survey* 187-197, p. 189.

abuses occurred during the Suharto regime to the Muslim groups, the *Tanjung Priok* incident on 12 September 1984 was the most outrageous one. The incident was triggered by the insolence act of the Military Sub-District Officers by entering a mosque without taking off their shoes and spraying dirty water on the mosque wall. The real number of the victims was never known. But it was estimated that 600 people were killed, several hundreds injured and 171 people were missing.[47] Subsequently after the incident, the authoritarian regime arbitrarily arrested a number of prominent Muslim leaders such as Abdul Qadir Djaelani, H. M. Sanusi, Usman Alhamidi and A.M. Fatwa[48].

The kidnapping of activists and the violent disturbances of amok people were the landmark of the ending of the Suharto regime. During this phase, Indonesian-Chinese people became the target of hostility of mass violent. A series of violence targeting Chinese community occurred in several cities in Java such as in Purwakarta, Pekalongan, Jakarta, Karawang, and Tasikmalaya within three months, from October to December in the late 1997. Hundreds of houses and public facilities were burned down. Tens of people died.[49] The brutality of the regime showed clearly at the *Trisakti* incident where the army shot student's demonstration and caused four students died and tens of them injured. In the last days of the regime, the brutality still hunted down the victims: the Indonesian Special Force (*Kopassus*), under the command of Prabowo, kidnapped tens of activists. Today about 14 people of the victims are still missing.

When Suharto fell in 1998, a chaotic situation later followed for several years. It was happened because the regimes that replaced Suharto, BJ Habibie, Abdurahman Wahid and Megawati, failed to regulate and penetrate into the society. In this case, those regimes were weaker than the previous one. Suharto was successful in penetrating his power into the society. At the same time, he also was capable of extracting resources for establishing his regime. But, Suharto failed both to regulate the society in establishing order based on the rule of law and to appropriate resources for the benefit of the people.

[47] Carmel Budiarjo, 'Militarism and Repression in Indonesia'(1986) 8 (4) *Third World Quarterly* 1219-1238, p. 1233.
[48] Bahtiar Effendi, *'Islam and the State In Indonesia'*(2003) p. 52.
[49] Collinse *Op.Cit.*, n. 58, p. 592.

The weakness of the regimes after Suharto can be seen obviously when we look into several ethnic conflicts occurred from 1998 to 2003 in Maluku, Poso, and Kalimantan. During this disaster era, those provinces were like the land belongs to no one: no law no authority no security. Every group had ability to utilize violence using any kinds of weapon. The war in Maluku, for instance, was triggered by a small incident of fight between two young men. Within several days, the incident generated the riots that spread to the other regions. Within several months, the riot suddenly transformed to be an ethnic and religious war.[50] Consequently, thousands of people died. Mosques, churches, public facilities, houses and villages were destroyed and burned down. It wishes never happened if the governments at that time had an ability to enforce human rights regulations as stated in the Constitution and other regulations (including several ratified covenants). It would not take more than 4 year to solve, because it was too long and too expensive, if the governments at that time were strong enough to handle the crisis.

During the New Order period the actor of human rights abuses was the state, otherwise, at the transition time the violations usually carry out by the citizens as a consequence of the weakness of state. The powerful civil society has risen as the state competitor in monopolizing violence. Accordingly, the paramilitary groups such as *Laskar Jihad* (the Jihad Paramilitary Force), *Laskar Pembela Islam* (The Paramilitary Force of Defender of Islam) and *Laskar Mujahidin Indonesia* (the Indonesian Holy Warrior Paramilitary Force), as noted by Collinse, have privatized violence. These paramilitary groups act like military man. They wear a particular uniform and keep different kind of weapons. They also have a recruitment mechanism as well as military training. In several moment, these groups operates like policemen: sweeping discotheques, cafes and casino, stopping demonstration, closing down 'heretic' *Ahmadiyah* mosques, and, during the Maluku conflict, transforming to be armed militias.[51]

[50] Jacques Bertrand, 'Legacies of the Authoritarian Past: Religious Violence in Indonesia's Moluccan Islands' (2002) 75 (1) *Pacific Affairs* 57-85, p. 74-80.
[51] Noorhaidi Hasan, 'Faith and Politics: The Rise of the Laskar Jihad in the Era of Transition in Indonesia' (2002) 73 *Indonesia* 145-169

The existences of these quasi-military groups are the major problem for Indonesia today. Collinse is quite true when she notes that one cause of the prevailing of violence in Indonesia is the presence of paramilitary tradition. In 2008, the Islamic Defender Front (FPI, *Front Pembela Islam)*, a main body of the *Laskar Pembela Islam*, was the most frequent actor of human rights abuses. The Setara Institute recorded that FPI was responsible for 27 incidents of human rights abuses in 2008, while the report of the Wahid Institute notes 18 cases of violation initiated by the same actor.

With the coming of the *Reformasi*, Indonesia, in fact, has been moving from a bad autocracy to a weak democracy. No doubt that in the last 5 years the country achieved several progresses. The most obvious one is the progress in political field. Democracy has become a guarantee for everybody to express their opinions, ideas or critics without fear of being jailed or kidnapped. Freedom House scored Indonesia with 2 for the political rights and 3 for the civil liberty in 2008.[52] Democracy also brings about some developments in the legal issue. Regulation on the eradication of corruption and the human rights protection were among dozens acts passed by Indonesian parliament. The establishing of the constitutional court in August 2003 was a landmark of this development. The court is the safeguard of constitutional rights of Indonesian citizen. Since that time every citizen has a constitutional right to ask the court to make a judicial review on a particular law if the law violated his or her constitutional rights.[53] Last but not least, the conflict resolution between the Free Aceh Movement (GAM, *Gerakan Aceh Merdeka*) and the Indonesian government in 15 of August 2005 was the most important achievement in Indonesian security. This peace agreement terminates the rebellious conflict that continued for decades and caused humanitarian crisis in Aceh.

However, democracy is not enough; normative regulations as well. Indonesia, in fact, is still regarded as the weak state. One indicator supporting the argument

[52] See Freedom House, Country Report 2008 <http://www.freedomhouse.org/template.cfm?page=22&year=2008&country=7412> at 12 April 2009. The organization uses score from 1 to 7 where 1 describe a fully free democracy and 7 for the lowest freedom condition.

[53] The Constitutional Court of the Republic of Indonesia, 'The Constitutional Court Regulation No. 06/PMK/2005 On The Procedures of Judicial Review of Law' (2005) <http://www.mahkamahkonstitusi.go.id/eng/peraturan_mkri.php>.

is that Indonesian record on corruption is disgraceful. In the last 5 years, almost no progress in term of eradication of corruption in the country. According to the Corruption Perception Index published by the Transparency International, Indonesia was one of the world's most corrupt country with score 2 in 2004 and 2.6 in 2008.[54] No doubt that corruption is one factor that weakens the state. Furthermore, the Fund for Peace, an organization published the Failed State Index, in its annual report 2008 noted Indonesia as the weak state. Overall score for the state was 83 in 2008. This score slightly well than the same report in 2007 where the score was 84.4. However, those achievements were relatively good in compare to the score of the state in 2006 where the score was 89.2.[55] The Fund also asserted that there were four the state institutions with very weak condition and that have to be strengthened: military, police, judiciary and civil service[56]. These institutions were troubled by the corruptions and the inefficiency to carry out their functions to enforce law and regulations.

Based on the reason above, we can understand why human rights record of the state achieved only a little progress in the last several years. Refer to the Political Terror Scale (PTS) report, the country ranking from 2003 to 2007 was 3.[57] It means that the country was still considered as having bad record on human rights due to the presence of political murders and brutality as well as other human rights incidents. The assassination of the human rights activist, Munir, on 6 September 2004 was a real evident of the political murders. The data from the Ciri Human Rights Index 2008 confirmed the PTS record. The Physical Integrity Rights Index, an index found in the Ciri Project that measure state record which uses four indicators: torture, extrajudicial killing, political imprisonment and disappearance, scored 3 to Indonesia in 2007. The Physical Index uses score ranged from 0 to 8 where 0 shows no government respect for those four rights and 8 for full government respect[58]. In addition, the Ciri

[54] The Transparency uses ranking from 0 to 10 where 1 show shows highly corrupt and 10 for highly clean. See <http://www.transparency.org/policy_research/surveys_indices/cpi>.
[55] The Fund, *Op.Cit.*, n. 52.
[56] *Ibid.*
[57] See, <http://www.politicalterrorscale.org/download.php>.
[58] Ciri Human Rights Data Project, 'Short Variable Descriptions for Indicators in The Cingranelli-Richard Human Rights Dataset (2008) <http://ciri.binghamton.edu/documentation.asp> at 4 May 2008.

also noted that torture, freedom of religion and worker's rights were the major problem faced by the country. These three areas have not improved, with 0 score that indicate very bad record, since 2005. Thus, the Indonesian record is far from what could be expected in regard to all the regulations that have been enacted in relation to human rights.

III. THE AMBIGUITY OF INTERPRETING *PANCASILA* AND RELIGIOUS FREEDOM

A. Ambiguity on Interpreting *Pancasila?*

Among several human rights problems, religious freedom seems to be the most interesting one to be examined. The issue relates to the debate of compatibility between Islam and both democracy and human rights. The prevailing assumption sees Islam as an obstacle or, at least, as unfriendly culture for both democracy and human rights.[59] Indonesia, in this context, is an interesting case since the world's largest Muslim country have adopted democracy followed the collapse of the Suharto's New Order in 1998. Since that time, Indonesia has conducted three democratic, fair and peacefully elections.[60] It is too early to say that Indonesia is an exception for this general assumption. However, for Indonesian people, the recent situation can be a challenge to proof whether or not the country can be the exception. It also a momentum to gain a better life in all aspect.

To be a good example of the compatibility between Islam and both democracy and human rights, Indonesia confronts a perpetual challenge: negotiating Islam and the state. This problem has risen since the early days of the state when the founding fathers sought a foundation of ideology for the state in preparation for the independence in 1945. The negotiation seems to be an unfinished business because it remains a main problem of the days as can be seen in the demand of the implementation of Shari'a law that predominance in the *Reformasi*. It also can be the source of the state weakness as well as the cause of the vulnerability of religious freedom in the future.

[59] See for example Samuel P. Huntington, '*The Clash of Civilizations and the Remaking of World Order* (1996).

[60] The first democratic election in the *Reformasi* era was in 1999. In 2004 for the first time the people voted for their president. Last month (April 2009), Indonesia conducted the third general election that will followed by the presidential election in next September.

Pancasila is the state ideology that was an outcome of a contentious negotiation between *santri*, a devout Muslim group as opposed to an *abangan* who less devout,[61] and *kebangsaan* (the nationalist) in the beginning of the republic. The ideology consists of five principles: belief in (1) One Supreme Being; (2) just and civilized humanity; (3) nationalism; (4) democracy; and (5) social justice. These principles are incorporated into the Preamble of the 1945 Indonesian Constitution.

Look into the history, in facing the independence, the founding fathers who were involved in BPUPKI, also known as *Dokuritsu Zyunbi Tyoosakai*, trapped in severe and long debate to find an ideology for the state. The debate was around the question whether the state should adopt Islam as its ideological foundation or not. The founding fathers in BPUPKI that the majority of them were Muslim split into two groups: the nationalists and the Islamists. The latter insisted that the country should be based on Shari'a law while the former saw that the country should be based on a secular-inclusive ideology.[62]

Before the independence, social and political movements in the country were initiated by the Islamists groups. It was the Islamic Trading Association (SDI, *Sarekat Dagang Islam*), founded by H. Samanhudi in Solo in 1911, that initiated the first political movement. The SDI later transformed to be the Islamic Association (SI, *Syarekat Islam*) and became a more significant organization under the leadership of H.O.S. Tjokroaminoto and Agus Salim. George Mc.T. Kahin notes in his famous book, *Nationalism and Revolution in Indonesia*, that the organization was the first undertaker in fighting for the independence using a modern political program.[63] The organization attracted follower from various social class: trader, *ulama* (religious leader), worker, some *priyayi* (aristocrats) and also peasants.

Unfortunately, the organization could not maintain its viability since the organization was suffered by internal friction in 1920s. The friction began when

[61] This is a distinction of social group in Indonesia proposed by a famous Indonesianist, Clifford Geertz, see Clifford Geertz, *'The Religion of Java'* (1960) p. 6.
[62] Effendy, *Op.Cit.*, n. 62, p. 13-14.
[63] George Mc.T. Kahin, *'Nationalism and Revolution in Indonesia'* (1952) p. 65-66).

the organization was infiltrated by the Marxist-oriented members. The infiltrators mostly were the former member of a leftist organization called *Indische Social Democratische Vereeniging* (ISDV), founded by Hendrik Sneevlet, a former member of the Social Democratic Labor Party in Netherland, in 1914 but later collapsed because it failed to attract *pribumi* (indigenous Indonesia).[64] The friction was obvious when Darsono, Alimin and Semaun became a prominent figure of the organization. They were the main actors in articulating Marxist ideology among the members. The schism was more serious after the sixth congress of the SI that held in Surabaya in 1921. The congress, according to von der Mehden, "signaled the end of an era for Sarekat Islam and the demise of the organization as a mass movement".[65]

The diminishing role of SI and its internal friction made the organization failed to draw attention of many emerging Western-educated intellectuals like Sukarno, a disciple of Tjokroaminoto. He decided to form a new political organization in 1927 by establishing the Indonesian National Party (PNI, *Partai Nasional Indonesia*) which had different political view with his master's party. The Sukarno's party later would attract young intellectual leaders; among them were Muhammad Hatta and Sjahrir. These young people then became a prominent figure of the nationalist groups. This nationalist movement, in turn, took stage in confrontation with the Islamist activists, as noted by Bahtiar Effendi:

> "...this nationalist movement, more than the earlier encounter with Marxism, set the stage for the ideological confrontation between the leader and activists of political Islam and their nationalist counterpart, especially with regard to the relationship between Islam and the state in an independent Indonesia."[66]

Since that time, the debate between these two groups had continued around the nature of nationalism. Both of these groups, in fact, had the same purpose: making Indonesia free and independence. The only different was whether they should adopt Islam for the basis of the state or not. The Islamist groups argued that the character of the nation should be based on Islamic values. Furthermore,

[64] Effendy, *Op.Cit.*, n. 62, p. 16-17.
[65] Fred R. von der Mehden, 'Marxism and Early Indonesian Islamic Nationalism' (1958) 73 (3) *Political Science Quarterly* 335-351, p. 348.
[66] Effendi, *Op.Cit.*, n. 62, p. 20.

for this group, the foundation of a nation should be understood as a medium to seek *ridha* Allah (transcendental consent of Allah), and implementing Shari'a law as a law of the nation would be the best way to achieve this purpose. On the other hand, Sukarno, the leading figure of the nationalist groups, argued that the idea of making Islam as a foundation would make a discrimination because not all people who live in the country were adherents of Islam. For this reason he proposed that there should be a clear separation between Islam and the state. He wrote:

> "Thus reality shows us that the principle of the unity of state and religion for a country which its inhabitant is not 100% Muslim could not be in line with democracy. In such a country, there are only two alternative; there are only two choices: the unity of state-religion, but without democracy, or democracy, but the state is separated from religion."[67]

We can put the debate in the BPUPKI (later transformed became the Preparatory Committee for Indonesian Independence, PPKI) to determine the foundation of the state on this historical development. The Committee that established on 1 March 1945, with 62 members, was continuously devoted to work for the preparation of the independence until mid-August 1945. Despite examining the appropriate ideology for the state, the Committee also focused on several issues such as defence, economy, finance and educational systems of the new state.[68] Among those issues, the debate on finding basis of the state was the most confiscated one. Sukarno, Hatta, Supomo, Muhammad Yamin, A. A. Maramis were among others who stood for the secular principle in confrontation with Agus Salim, Kahar Muzakkar, Wahid Hasyim and many others who insisted on the demand of Islamic state. While the former agreed to accept Pancasila, a five principles that proposed by Muhammad Yamin and Sukarno, the latter insisted on their demand. The meeting was stuck and ended up with agreement to form a small committee, with 9 members from both factions, focusing on compromising these two views.[69]

[67] Soekarno, *Dibawah Bendera Revolusi* (1964) p. 452. The English translation is quoted from Effendi, *Ibid.,* p. 23.
[68] Bolan, *Op.Cit.,* n. 2, p. 17.
[69] *Ibid.,* p. 23-25.

The small committee which held a meeting on 22 June 1945, with very hard endeavour, finally achieved a compromise. They created a draft of constitution which would be legalized in the subsequent full member meeting. Muhammad Yamin called this document of agreement as the Jakarta Charter. The Charter contained the introduction, the draft declaration of independence and revised five principles (Pancasila). The point that had revised was the first principle which initially sound "*the belief in God*" changed to be "*the belief in God with the obligation for adherent of Islam to carry out Islamic Shari'a*"

In the subsequent meeting, held on 10 to 16 July 1945, the agreement failed to be legalized. Two prominent figures represent the Christians community, A.A Maramis and Latuharhary, supported by two persons from the nationalist groups, Hosen Djajadiningrat and Wongsonegoro, objected to the additional sentence "*with the obligation...*" because it would be the source of discrimination. The Committee again involved in a severe debate. Instead, in response to the rejection of the committee, the Islamists demanded one more provision that should be included in the Constitution. The provision followed as "*the President of the Republic of Indonesia must be a born Indonesian who is a Muslim*". The Islamists later insisted with these two demands. The meeting ended after Sukarno appealed personally to the nationalist and Christian members requesting sacrifice for the sake of the independence.[70] The meeting brought nothing about but a shaky agreement as can be seen in the objection of the Christians community who lived in the eastern region. They would abandon from the Republic if the provision and additional sentence in the five principles were not deleted.[71] The Islamists were in turn to give their great sacrifice. Muhammad Hatta, a nationalist but had very close relation with the Islamists, appealed the Islamists to agree to make a particular modification of the Constitution, especially in relation to the provisions that became the objection. Finally, the Jakarta Charted was nullified, but the first principle then was transformed to be "*the Belief in the One and Only God*".

[70] *Ibid.*, p. 33.
[71] Deliar Noer, *"Partai Islam di Pentas Nasional 1945-1965"* (1987) p. 40.

Bahtiar Effendi describes the two reasons why the Islamist group easily accepted the nullification of the Jakarta Charter. Firstly, the phrase "*One and the Only God*" was "a symbolic gesture to denote the presence of Islamic monotheism element in the state ideology". Secondly, the Islamists saw an opportunity to make an Islamic constitution for the nation through a general election that believed to be held in the near future after the independence.[72] The 1945 Constitution, as stated several times by Sukarno, was only a temporary constitution. However, several leaders in this group such as Isa Anshary and Kasman Singodimedjo remained reluctant to accept the revision. Furthermore, they saw this moment as the first defeat of the Islamist groups in their effort to form an Islamic state in the republic.[73] Since that time, the Islamist groups has involved in a perpetual struggle to realize a dream that recognized as their rights: implementing Islamic law in the land.

The historical development of how *Pancasila* was formulated, indeed, have opened a wide interpretation in relation to the question whether Indonesia is a secular state that clearly separate state and religion or a semi-Islamic state as interpreted by the Islamist groups or neither both of them[74]. *Pancasila*, until today, is 'vague enough to be acceptable to all the disparate political and religious belief"[75]. Moreover, this situation, to some extent, originates an unsteady foundation for every regime in the nation to formulate a fair policy in regard to the religious issues. This condition also weakens the state institutions in regulating society.

B. The Guardian and the Sympathizer

> "*... No mountain is too high, no ravine too deep, no river too rapid, no forest too dense to form an obstacle for the soldiers of our army...defending the proclamation, the Revolution and the Pancasila...He who deviates will experience total destruction*".[76]

This exalted phrase was quoted by Bolan from Anne Marie Thé to describe the ending of a long rebellious movement of *Darul Islam* (DI, the Territory

[72] Effendi, *Op.Cit.*, n. 62, p. 32-33.
[73] *Ibid*.
[74] Michael Morfit, 'Pancasila: The Indonesian State Ideology According to the New Order Government' (1981) 21 (8) *Asian Survey* 838-851, p. 840.
[75] Budiarjo, *Op.Cit.*, n. 61, p. 1224.
[76] Anne Marie Thé, *'Darah Tersimbah di Jawa Barat' (1968)*. Quoted from Bolan, above n. 2, p. 62.

of Islam) in West Java in 1962. Several months before, the Indonesian army arrested Sekarmadji Maridjan Kartosuwirjo, the one who in the mid 1920s spent his time in Surabaya in the same lodging with Sukarno and became the disciple of the SI leader Tjokroaminoto. While Sukarno later became a leader of the nationalist groups, Kartosuwirjo consistently followed the idea of his master in struggle to implement Islamic law in the country.[77] He was the one who stand in the extreme position of the Islamists line as can be seen when he declared the independence of the Islamic state (*Darul Islam*) on 14 August 1945 as the result of his disagreement with the nationalist leaders[78]. However, it was not until 1948, however, that the declaration turned into an armed rebellion when Kartosuwirjo declared the independence of *Negara Islam Indonesia* (NII, the Indonesian Islamic State) in West Java. This rebellion was more serious problem for the republic when Kahar Muzakkar, a former member of BPUPKI, in 1952 declared that he and his follower in Sulawesi were became a part of *Darul Islam* under the leadership of Kartosuwirjo. The rebellion later continued for 11 years and ended when the Indonesian army captured Kartosuwirjo in June 1962. The rebellion caused approximately 25,000 people died and 120,000 houses were burned.[79] In my view, this event was the first human right tragedy in the country as the consequence of an unsteady foundation of the ideology.

The rebellion of DI had intensified an antagonistic relationship between Islam and the state. In spite of this revolutionary struggle, the Islamists continued their effort to implement Shari'a in the nation through a constitutional way. The first national election in 1955, 10 years after the declaration of independence, would be the best moment to realize the dream. They could organize a popular support, through a democratic mechanism, to pave the way for realizing the Islamic state. But, the hope might be difficult to be realized since the Islamists parties which consisted of Masyumi,[80] NU and PSII, controlled only 43.5 per cent of the seats. They failed to be a majority in the parliament.

[77] Liem Soei Liong, 'Indonesian Muslims and the State: Accommodation or Revolt?' (1988) 10 (2) *Third World Quarterly* 869-896, p. 874).
[78] Karl D Jackson, 'Traditional Authority, Islam and Rebellion: A Study of Indonesian Political Behavior (1980) p. 9-10, Effendi, *Op.Cit.*, n. 60, p. 35, Bolan, above n. 2, p. 57.
[79] Jackson, *Op.Cit.*, p. 15.
[80] The biggest Islamic party at the moment, formed in November 1945 as the sole party for the Islamists groups at the moment. See Bolan, *Op.Cit.*, n. 2, p. 10-12.

It is interesting to see the reason why the election was delayed for 10 years. Despite the revolutionary period from 1946 to 1950 where the nation faced re-occupation of the Dutch, there was another reason as noted by Herbert Feith: the fear of the nationalist groups to the great possibility of the Islamists group to win the election if it held too early.[81] Due to this anxiety, the nationalists group did anything to postpone the election until the supporter of Pancasila was stronger.[82] Thus, when the first election was held in 1955, the nationalists were confident that the Islamists, even though still significant, would not get a majority.

One of the main tasks of the new elected members of the parliament at that time (Constituent Assembly, *Dewan Konstituante*) was to design a permanent constitution to replace a temporary one.[83] The debate between the Islamists and the nationalists regarding whether the Jakarta Charter or Pancasila that should be adopted as ideological basis of the state resurfaced again during the meeting. Because the two-third majority decision failed to be achieved, the meeting which held periodically from 1956 to 1959 resolved nothing except a stuck and hateful moment. This situation was the main reason behind the Presidential Decree issued by Sukarno on 5 July 1959 that dissolved the Assembly and marked the beginning of what later called as the Guided Democracy and the end of constitutional democracy. The decree also arbitrary stated that the ideology of the state was the Constitution of 1945 with Pancasila in its preamble. The Jakarta Charter, even though said as a document that inspired the constitution, was pushed aside and treated merely as no more than a historical document.[84] The decree leaded Sukarno to be the first despot of the country. He banned Masyumi on 17 August 1960, and in the following years he arrested a number of Masyumi leaders such as Muhammad Natsir, Sjafruddin Prawiranegara, Burhanuddin Harahap and many others.[85]

Thus, by early 1960s, the Islamists struggle, both through a constitutional way or rebellion, to realize Islamic state could be repressed by the regime. But

[81] Herberth Feith, '*The Decline of Constitutional Democracy in Indonesia* (1962) p. 274-275.
[82] *Ibid.*
[83] From 1945 to 1959 Indonesia had three different constitutional arrangements: the 1945 Constitution (1945-1949), the Federal Parliamentary Constitution of 1949 (1949-1950) and the 1950 Provisional Parliamentary Constitution (1950-1959), see Lindsey, *Op.Cit.*, n. 1, p. 43.
[84] Bolan, *Op.Cit.*, n. 2, p. 97-101.
[85] *Ibid.*, p. 104.

this was not the end of story, it was just a beginning. The DI rebellion and the constitutional struggle of the Islamic parties to implement the Jakarta Charter, along with the communist rebellion that took place in 1965, were the basis for the politics of guardianship. Both the regime of Sukarno and Suharto (officially became a president on 27 March 1968) claimed himself as the defender and guardian of Pancasila and the 1945 constitution. They "would take firm steps against anyone which will deviate from Pancasila and the 1945 Constitution…".[86] As the guardian, they also were responsible to prevent any possibility of deviation from Pancasila. Due to this reason, a right interpretation of Pancasila, which in fact meant as non Islamic or socialist interpretation, was needed. A massif workshop and upgrading courses called *Manipol-Usdek* during the Sukarno regime and *Penataran P4* (*Penataran Pedoman Penghayatan dan Pengamalan Pancasila*, Upgrading Course on the Directives for the Realization and Implementation of Pancasila) during the New Order time was organized to be an obligation for the entire citizen.[87] Ironically, *Pancasila* which initially perceived at least by the Islamist groups as the Islamic-tasted ideology, later turn into a means to repress the political Islam. The regime continuously suspected the Islamists groups as a dangerous threat for Pancasila.

This guardianship policy continued until the late 1980s and changed gradually when Suharto's policy became more pleasant to these groups. The shifting policy of the regime at that time was the result of two things: the modification of the New Order's political strategy[88] and the rising of a new genre of Islamist groups that promoted a substantive rather than a legal-formalistic Islam.[89] This shift, in my view, was a sign for the rising of the sympathetic policies for Muslim groups. During the late of the New Order regime, a numbers of policies were implemented to meet the aspiration of Muslim groups. Among those policies were the passing of the Religious Judiciary Act (1989), the Founding of ICMI (*Ikatan Cendekiawan Muslim Indonesia*, Indonesian Muslim Intellectuals Association) (1990), the Compilation of Islamic Law (1991) and the founding of Islamic Bank (1992).[90]

[86] Allan A. Samson, 'Islam in Indonesian Politics' (1968) 8 (12) *Asian Survey* 1001-1017, p. 1005.
[87] Morfit, *Op.Cit.,* n. 88, p. 843-845.
[88] R. William Liddle, 'The Islamic Turn in Indonesia: A Political Explanation, (1996) 55 (3) The Journal of Asian Studies 613-634, p. 625-631
[89] Effendi, *Op.Cit.,* n. 60, p. 195.
[90] Arskal Salim and Azyumardi Azra, 'The State and Shari'a in the Perspective of Indonesian Legal Politics' in Arskal Salim and

The desire for a formalistic Islam, mainly relate to the demand of the implementation of Sharia law, returns to the stage of political life as a consequence of the political liberalization and democracy in the *Reformasi* era. Arskal Salim and Azyumardi Azra notes four phenomena indicate the resurgence of political Islam. Firstly is the formation of several Islamic political parties that adopt Islam as their foundation. These parties, like Mayumi in 1955, fight for the implementation of Shari'a law through a constitutional way. The idea of implementation of the Jakarta Charter once again appeared in 2000 and 2001 when the United Development Party (*Partai Persatuan Pembangunan*, PPP) and the Crescent Star Party (*partai Bulan Bintang*, PBB) proposed it during the amendment session of MPR (People's Consultative Assembly) to replace Article 29 of the 1945 constitution. This event was impossible to be realized during the New Order era because the regime arbitrarily imposed a regulation to use *Pancasila* as a sole basis. Secondly, the *Reformasi* is marked by the rising demand from a number of regions in the country to implement Sharia bylaws. There are at least 37 local governments (districts or provinces) in the country that enact *Shari'a* bylaws[91]. Those *Shari'a* bylaws, no doubt, are discriminatory in its nature. Third is the rising of the Islamic paramilitary groups such as *Front Pembela Islam* (FPI) and Laskar Jihad. These groups do not hesitate to use violence in achieving their goals as noted by this essay above. Lastly, Azra and Arskal Salim notes the rising of some Islamic magazines such Sabili and Hidayatullah as a medium to promote the idea of Islamic state.[92]

All those features show us how the regimes, mainly since the late 1990s of the Suharto's New Order to the present day, act as the sympathizer of political Islam. By doing this, the problems is not solved, rather it creates the new ones: discriminatory and unfair policy for minorities and the prevailing of violent culture in the name of religion. The issuance of the Joint Letter of Decision (*Surat Keputusan Bersama*, SKB) No. 3 Year 2008, No: KEP-033/A/JA/6/2008, No. 199 Year 2008 by the Attorney General, Ministry of Religion and Ministry of Interior Affairs on Ahmadiyah sects in 2008 was a clear example of a discriminatory

Azyumari Azra (eds) *Shari'a and Politics in Modern Indonesia* (2003) p. 10.

[91] Dawam Raharjo, Seputar Masalah Syariat, *Koran Tempo* (Jakarta) 8 December 2006.

[92] Salim and Azra, *Op.Cit.*, n. 104, p. 1-3.

policy. This Decision was issued pursuant to the pressure of several Muslim organizations. The SKB did not stop the violence on Ahmadiyah sect; rather it was used by those organizations as a legitimate reason to continue the persecutions. According to the Setara Institute Annual Report 2008, about 145 of 193 human rights violations on Ahmadiyah occurred after the issuance of the SKB. This Decision clearly shows us how the state cannot stand in a steady foundation to act fairly pursuant to its constitution in guarantee the freedom of religion. Thus, either stands as the guardian of Pancasila or as the sympathizer of the political Islam will lead the state to a dilemmatic position causing discriminatory and human rights problems.

IV. CONCLUSION

This essay describes that the problems of human rights abuses in Indonesia, and possibly in other developing countries, is mainly because the state not strong enough to execute the regulations that have been enacted. In term of normative regulations, the state has guarantee fundamental rights of the citizen. The amended 1945 Constitution also states clearly the human rights section. But the weakness of the state seems to be the real obstacle to make the state stands in the place to be.

Indonesia is a new emerging democracy that stands in the late transition time. Despite a number of problems that weaken the state such us corruptions, ineffective bureaucracy, and paramilitary traditions as well as low ability to control its territory, Indonesia faces a fundamental problem: unfinished negotiation between Islam and the state. The negotiation has taken place since the early days of the nation and it seems to be a real treat for the future. Pancasila which initially supposed to be the best way to negotiate Islam and secular nationalism unintentionally becomes the source of human rights abuse. It because Pancasila, especially in the first principle, contain an ambiguity that can be interpreted differently depends on the desire of the regimes. Thus, this situation pushes every regime to a dilemmatic position to stand fairly in respecting the rights to life of every religion and believes in the country.

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The Constitutionalization of Budget for Education and Its Judicial Enforcement in Indonesia

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Abstract

The introduction of provision concerning budget allocation for education in the amended constitution is not a common method in constitutional drafting in Indonesia. This article aims to understanding the background of the inclusion of this provision and its judicial enforcement. It argues that the establishment of this provision closely related to the fact that education was not properly funded. As a result, the quality of education was negatively affected. The constitutionalisation of budget for education opens the possibility to allocate the national budget in this field in a more sustainable way. In addition, by constitutionalizing budget for education, there is a legal avenue available to challenge the government policy if the government fails to fulfill its constitutional obligation. The newly established Constitutional Court has the power to review whether the allocation of national budget for education is consistent with the Constitution. In some judicial review cases on budget for education, the Court took legal approach and also extralegal factors in its rulings.

Keywords: Constitutionalization, Budget Education, Judicial Enforcement.

I. INTRODUCTION

The recent constitutional amendments have significantly changed the Indonesian Constitution. Beside changing the governmental structure and introducing new state institutions, the updated constitution also elaborated provisions on other important aspects such as human rights, social welfare, and education. Qualitatively, the updated constitution inserts more comprehensive

constitutional principles of a modern constitution such as separation of powers, check and balances, rule of law, and protection of human rights. Some constitutional law scholars both from Indonesia and overseas have analyzed and evaluated the recent constitutional amendments.[1] For that reason, this article does not intent to examine all updated provisions of the new constitution as have been sufficiently discussed; it instead will focus on certain constitutional provisions i.e. provisions on education. This is because updated provisions on education changed significantly, both in quality and quantity, compared to that of the previous constitutions.[2] In terms of quality, the new provisions add government obligations to manage national education and guarantee the right to education.[3] More importantly, they explicitly stipulate certain percentage of both national and regional budgets that should be allocated by the governments for education.[4] The inclusion of percentage on budget for education was believed the first provision in the Indonesian constitutions that spell out the quantitative measure since the first constitution established in 1945. Of course, the previous constitutions stipulated the duties of government on education and also guarantee the rights of people to education.[5] However, these provisions were written in qualitative and abstract way. In other words, the constitutional drafters did not insert percentage or number in the constitution.

The inclusion of budget allocation for education in the constitution (or I call constitutionalization[6] of budget for education) is not common in Indonesia. Generally, provisions of the constitution were written in a general and abstract way. This way the constitution can keep up with the recent development of the country. However, without spelling out the details in the constitution, the implementing regulations which elaborate the provisions of the constitution often

[1] Denny Indrayana, "Indonesian Constitutional Reform 1999-2002: An Evaluation of Constitution-Making in Transition."Tim Lindsey, "Economic Reform When the Constitution Matters: Indonesia's Constitutional Court and Article 33 of the Constitution."Kawamura, "Politics of the 1945 Constitution: Democratization and Its Impact on Political Institutions in Indonesia." Tim Lindsey and Simon Butt , *The Constitution of Indonesia: A Contextual Analysis* (Bloomsbury Publishing, 2012).

[2] The amended constitution contains more provisions on education. It mentions in two separate chapters: chapter on human rights and chapter on education.

[3] Article 31 and article 28 of the amended constitution.

[4] Article 31 (4) of the 1945 Constitution: The state shall prioritize the budget for education to a minimum of 20% of the State Budget and of the Regional Budget to fulfill the needs of implementation of national education.

[5] Art 31 (1): 'Every citizen has the right to receive education. Art 31 (2): The government shall manage and organize one system of national education which shall be further regulated by law.

[6] *Undang-Undang Dasar 1945 Konstitusi Yang Hidup, penulis*. P. 565.

simplified the very meaning of the provisions of the constitution. Therefore, the inclusion of percentage in the constitution raises questions: why did the framers of the updated constitution insert these provisions in the new constitution, while the previous constitutions never explicitly and quantitatively mentioned budget allocation for education? What factors contribute to the establishment of this provision? In practical level, are there any legal consequences if the government fails to fulfill this constitutional duty? What is the role of the new Constitutional Court if the government fails to fulfill its constitutional obligation concerning budget allocation for education? How does the constitutional court uphold these constitutional provisions?

This article aims to answer the questions mentioned above. It argues that there are multiple factors that contribute to the inclusion of budget for education in the new constitution. In addition, the inclusion these provisions will ensure the government to fulfill its constitutional obligation. In case the government fails to prioritize at least twenty percent of national and regional budget for education, there is a legal avenue available for the public i.e. judicial review to challenge the government incompliance. If the Constitutional Court is compelled to decide this case, this article predicts that the Court will likely to utilize textual interpretation as the main approach rather than extra legal factors. This is because the requirement of twenty percent budget allocation explicitly mentions in the text of the constitution.

This article will proceed as follows: Part I discusses the features of the updated constitution. It focuses on the "quantitative" aspect of the updated constitution. In doing so, this part compares some provisions in the new constitution to similar provisions in the old constitutions to show that the new constitution is more quantitative in nature. Part II examines the rationales of the drafters to include provisions on budget allocation for education through studying the minutes of the constitutional drafter when deliberating these provisions. Part III analyzes the possible the legal consequences that the government faces if the government fails to properly allocate budgets for education. Part IV analyzes the Constitutional Court approaches when it decided judicial review on budget for education. The final part provides conclusion.

II. DISCUSSION

1. The 1945 Constitution Constitution: from a "Qualitative" to a more "Quantitative" Constitution

The amended constitution is arguably better in terms of the quality compared to the previous constitutions. This can be seen, for example, it inserts some fundamental principles of the modern constitution that were absent in the previous constitutions such as check and balances, separation of powers, and rule of law. The new constitution also guarantees human rights protection.

In four consecutive years from 1999-2002, more than seventy percent provision of the old constitution was amended during this series of constitutional reforms. The number of provisions in the updated constitution is three times more than the old constitutional provisions.[7] Some provisions tend to be more "quantitative" compared to that of the old constitutions. By quantitative I mean the updated constitution inserts provisions that contain numbers, percentage, or fractions. For example, some provisions contain number of years to determine the term of office of government officials. For example, Article 7 of the (new) 1945 Constitution states the President and the Vice President can only hold an office for five years and can be reelected in the same position for two terms of office.[8] This provision is significantly different from the old constitution which stated that the President and the Vice President hold office for five years and they can be re-elected afterward.

Article 6A (3) mentions certain percentages of total number of votes for the candidates of president and vice president in order to be declared as the President and the Vice President.[9] The previous constitution said nothing about percentage. It stated that the President and the Vice President shall be elected by the MPR by

[7] Denny Indrayana, "Indonesian Constitutional Reform 1999-2002: An Evaluation of Constitution-Making in Transition."Kompas Book Publishing 2008. p. 331. Approximately 95% of chapters, 89% of the articles and 85% of the paragraphs are either new or were alteration of the originals.

[8] Article 7 of the 1945 Constitution says" The President and the Vice President shall hold an office for five years and can be reelected in the same office only for another term of office." Article 7 of the old constitution said: The President and the vice President shall hold an office for a term of five years and shall be eligible for re-election.

[9] Art. 6A (3) Any ticket of candidates for President and Vice President which have reached a poll of more than fifty percent of total number of votes during general election and an additional poll at least twenty percent of the votes in more than half of the total number of provinces in Indonesia shall be declared as the President and the Vice-President. This provision did not exist in the old constitution.

a majority vote.[10] Article 7B uses fraction to determine the threshold of the MPR members to impeach the President and the Vice President and uses number as a time limit to convene a sitting to decide the proposal for impeachment.[11] There was no similar provision in the old constitution. There are also provisions that contain number to indicate the time limit. Article 20 (4) is the case on point. It gives time limit to the president to ratify the bill. Again, the old constitution did not mention anything about this matter. Numbers are also used to limit the number of state institution. Provisions concerning the Constitutional Court and Supreme State Audit determine that there is only one Constitutional Court and one Supreme Audit Body in Indonesia. This general observation reflects how some provisions in the updated constitution are more quantitative compared to that of the old constitution. Apart from the term of office, threshold, and time limit, numbers (either percentage or fraction) are also used to determine the budget allocation. Article 31 (4) is the perfect example. It uses percentage to require the government to prioritize at least twenty percent of national and regional budgets to be allocated for education. The old constitution did not say anything about budget for education let alone stipulated certain percentage budget for education. This new provisions raise a question why the framers of the constitution decided to include percentage in the new constitution, provided the fact that the old constitutions never mention anything about percentage? This article attempts to answer this question and analyzed its legal implication in practice.

2. Why did the Constitutional Drafters Insert Percentage for Education Budget Allocation?

Before discussing the background why the constitutional drafters include budget for education in the new constitution, it is important to understand the worldwide view regarding budget for education. Katarina Tomasevski provides

[10] Article 6 (2) of the (old) 1945 Constitution.

[11] Art. 7 B (7) says: The decision of People's Consultative Assembly over the proposal to remove the President and/or the Vice President shall be taken during a plenary session of the People's Consultative Assembly attended by at least ¾ of the total of member and shall require the approval of at least 2/3 of total member who are present, after the President and / or the Vice President have been given the opportunity to present his. Her explanation to the plenary session of the people's Consultative Assembly. This provision did not exist in the old constitution.

four variations how countries in the world treated right to education in their constitution.[12] First, there are about 79 countries that constitutionally guarantee free and compulsory education. Second, around 37 countries guarantee right to education in their constitutions but only limited to citizens or residents. Third, about 30 constitutions partially or progressively realize the guarantee of right to education. And last, about 40 constitutions do not mention about right to education. Under this model, Katarina Tomasevski placed Indonesia in the last model. I argue that it does not represent how Indonesia treated right to education in its Constitution. The Indonesian constitution might be best placed in the second or third model –certainly not the last model. This is because Indonesian Constitution recognized right to education as explicitly stated in article 28 E and article 31. In addition, the Constitution also stipulates that budget allocation for education should be at least 20 percent of the national and regional budgets.[13] It might be true that there is no provision in the constitution that explicitly mention education is free but the government is constitutionally responsible to fund the education.[14] While the constitution does not mention about free education, basic education in Indonesia is mostly free. But this does not apply to higher education.

In Indonesian context, provisions on education have been discussed since 2000 during a series of constitutional amendments (1999-2002). While some provisions on education remained the same, there are significant additions in this Chapter including the inclusion of budget allocation for education. Indrayana argued that article 31 (4) which stipulates twenty percent of state and regional budgets for should be allocated to education is largely symbolic.[15] This is because article 31 (4) does not provide clear sanction which can be applied against the government, regional authorities and/or the DPR if the budgets do not reach twenty percent.[16] I do not think that article 31 (4) is symbolic. While it may be true that there is no direct sanction for the lawmakers both

[12] Katarina Tomasevski, Manual on Rights-Based Education: Global Human Rights Requirements Made Simple, Bangkok UNSCO 2004 p. 15.
[13] Aricle 31 (4) of the 1945 Constitution.
[14] Article 31 (2) of the 1945 Constitution.
[15] *Ibid.*, p. 309.
[16] *Ibid.*, 309-310.

in national and regional level, this provision is judicially enforceable. The court especially constitutional court can use this provision to adjudicate cases if there is an allegation that the government fails to fulfill its constitutional obligation. The court can review the government policy through its judicial review power. With regard to the constitutionalisation budget for education, there were at least three areas that have been the focus of the constitutional framers when they discussed budget allocation for education. First, what are the rationales to include (or not to include) the percentage of budget for education in the updated constitution. Second, what are the references when the drafters decided to include the percentage of budget for education in the new constitution? And last, what is the proper percentage of the national and regional budgets to be allocated for education? The following part will discuss these three areas in order.

The Rationales to Include Budget for Education in the Updated Constitution

Inserting percentage of budget for education in the constitution is arguably a new method of constitutional drafting at least in the context of Indonesia.[17] Perhaps, Indonesia is one of few countries whose constitutions require the government to allocate certain percentage of national and regional budget for education.[18] Since the first constitution in 1945 up to the reinstatement of the 1945 Constitution, the Indonesian constitutions never explicitly mentioned budget allocation for education. The 1945 Constitution, for example, said that every citizen has the right to receive education.[19] With slightly different wordings, subsequent constitutions: The 1949 Constitution and the 1950 Constitution also stipulated similar provision on education.[20] Of course, it does not mean that there was no budget allocation for education during the implementation of these two constitutions. Rather, budget for education was not stipulated in the constitutions, it was regulated in the legislation such as the MPR decrees[21] or laws.[22] During the recent constitutional amendments, the MPR started to

[17] Some countries such as Taiwan and Costa Rica explicitly mention percentage of national or reginal budget for education in their constitution.
[18] Munafrizal, Manan, "The Implementation of the Right to Education in Indonesia." *Indonesia Law Review* 5, no. 1 (2015): 56.
[19] Art. 31 of the 1945 Constitution.
[20] Article 39 of the 1949 Constitution and Article 30 (1) of the 1950 Constitution.
[21] These include; TAP MPRS No II/MPRS/1960, TAP MPRS No. XXVII/MPRS/1966.
[22] Education law of 1950, 1954, 1989, and 2003 regulated national education system.

discuss provisions on education in 2000 -the second year of the constitutional amendments. In general, The MPR agreed in most part of the updated provisions on education. There was only minor disagreement regarding the word choice between *pendidikan* (education) or *pengajaran* (teaching).[23] In addition, the MPR also aimed to insert provision on budget for education in the constitution. The MPR intention to elaborate budget for education in the constitution reflects two important points: first, it is likely that the current budget allocation for education is not sufficient. Second, there is a need to increase the quality of education.

There are some contributing factors why the MPR want to insert this provision. First, there was uncertainty about budget allocation for education.[24] There was no minimum threshold or bottom line regarding the percentage of budget for education. Budget allocation may be different from time to time. It can go high in certain period but it also can go low in other period. Unfortunately, so far most of the time budget for education was relatively low.

Prior to recent constitutional amendments, budget for education was placed in the MPR decree or laws, not in the constitution. This would not be a problem if the MPR or the lawmakers, through decree or laws, funded the education adequately. In addition, there is also mechanism in place to monitor or to review the implementation of the MPR decree or laws. Unfortunately, this mechanism was absent in the past. This situation created the uncertainty regarding the percentage of budget allocation for education. It very much depended on the political will of the lawmakers or the MPR as they wer the only bodies that could amend the laws and the decree as they wish. Unfortunately, often time budget for education was not the main priority for them.

Second, there was no legal avenue available to challenge the government policy if the government did not fulfill budget allocation for education. There was no judicial review mechanism available to challenge the government policy either to challenge the MPR decree or to challenge laws. In other words, in case the

[23] TimPenyusun, *Naskah Komprehensif Proses Dan Hasil Perubahan UUD 1945, Latar Belakang, Proses, Dan Hasil Pembahsan, 1999-2002, Buku IX Pendidikan Dan Kebudayaan*. p. 164.
[24] *Ibid.*, 174.

government failed to fulfill budget allocation for education, there was no mechanism to challenge it. In fact they can change the laws or the decree as they wish.

Third, the fact that from time to time budget for education was insignificant created the situation that education in Indonesia was lagged behind.[25] If in the past students from neighboring countries come to Indonesia to study, the opposite applies today.[26]

Based on these factors, the MPR believed that education in Indonesian should be the main priority. One way to make education the main priority is by increasing budget for education. There is also a need to make budget allocation for education sustainable. This can be done by stipulating the bottom line budget allocation for education in the constitution –not in laws or MPR decrees. By inserting this provision in the constitution, budget for education will be constitutionally guaranteed which means there will be more certainty about its availability and its sustainability.

In addition, the introduction of judicial review in the new constitution provides legal avenue for the public to challenge the government policy if it fails to fulfill its constitutional duty. The government stipulates the allocation of annual national budget iwn the form of law (Law on National Annual Budget –*Undang-Undang APBN*). This law can be to the constitutional court if it is likely inconsistent with the provisions of the constitution which require at least twenty percent budget allocation for education.

During the constitutional amendment, there were two different views among the MPR members regarding whether the new provisions should provide in details budget allocation for education. Some of the MPR members[27] suggested the provisions of education should only contain fundamental principles and guidance for the government in managing national education. These include,

[25] Bivitri Susanti, "The Implementation of the Rights to Helath Care and Education in Indonesia," in *Courting Social Justice: Judicial Enforcement of Economic and Social Rights in the Developing World*, ed. Varun Gauri and Daniel Brink, First (New York: Cambridge University Press, 2008), 234.

[26] TimPenyusun, *Naskah Komprehensif Proses dan Hasil Perubahan UUD 1945, Latar Belakang, Proses, dan Hasil Pembahsan, 1999-2002, Buku IX Pendidikan dan Kebudayaan*. 181.

[27] Jacob Tobing suggested to avoid the use of percentage or number in the constitution (p. 173), Abdul Khaliq Ahmad (p. 177), Soedirjarto (*Ibid.*, p. 178) Hobbes Sinaga (*Ibid.*, p. 178).Tim Penyusun, *Naskah Komprehensif Proses dan Hasil Perubahan UUD 1945, Latar Belakang, Proses, dan Hasil Pembahsan, 1999-2002, Buku IX Pendidikan dan Kebudayaan*, Revised Ed (Jakarta, n.d.).

among other things, the goals of the national education, the obligation of the government to education, and the guarantee for the people to access to education. For them, these general and somewhat abstract wordings reflect the nature of the constitution which should keep up with the development of the country.[28] A constitution should not contain the details of an issue such as numbers or percentage. This is because the details often change depending on the national economic performance. Therefore, it should not be inserted in the constitution. It is more appropriate if they are included in lower legislation such as laws.

Other members[29] viewed that besides guaranteeing the right to education and placing obligation to government on education, it is also important to explicitly state the percentage of budget allocation for education in the new constitution. This is because until today education in Indonesia never become top priority. Even though formally government allocate budget for education, it was often inadequate. Or sometimes the implementation of budget for education was smaller than what was written in the government policy plan. As a result, education in Indonesia is lagged behind compared to that of other neighboring countries.[30]

Based on these facts, some of the MPR members suggested to explicitly state percentages of budget allocation for education in the new constitution. There are positive and negative aspects if budget allocation for education is explicitly mentioned in the constitution. On the one hand, inserting budget for education clearly guarantee the availability and the sustainability of fund for education. It also significantly increases the fund for education which has been overlooked quite some time.

On the other hand, in the real world the government should allocate the national budget in many different fields. Increasing budget in particular sector such as education may reduce fund for other important sectors such as health or infrastructure. As a result advancing one sector may be disadvantaging other

[28] *Undang-Undang Dasar 1945 Konstitusi Yang Hidup Op.Cit.* p. 576

[29] This includes, inter alia, Andi Mattalatta (FPG), Patrialis Akbar, Jacob Tobing, Hafiz Zawawi . Naskah Komprehensive p. 142.

[30] Based on World Development Indicators 2004, Indonesia spent less than 2% of its GDP for education. Other countries such as Vietnam, Sri Lanka, and Malaysia allocated bigger portion for education close to two percent. Gauri, Varun, and Daniel M. Brinks, eds. *Courting social justice: Judicial enforcement of social and economic rights in the developing world*. Cambridge University Press, 2008. p. 229

sectors. In addition, the national economic performance is not always good. Allocating certain percentage will likely sacrifice the fund for other important sectors.[31] As stated by Boediono the Minister of Finance in that period, he argued "[t]he 20% specified in the constitution is too binding, especially in the current financial problem that we are facing. We all, I think, agree that education should be our priority. However, I do not think inserting an exact number into the Constitution is a good idea." [32] In fact, Every human right potentially has implication for budgetary allocation and public finance.[33]

However, it is widely agreed among the MPR members that advancing education is very important. And providing sufficient funding is one of the main factors. This can be seen countries that are prioritizing sufficient budget of education for their citizens like Germany, Taiwan, and Malaysia have good quality of human resources. As a result, even though a country does not have significant natural resources, it can be a developed country with its advanced human resources.[34] Recognizing that education in Indonesia is lagged behind, the constitutional drafters finally agreed to insert percentage on budget for education in the updated constitution.

References of Budget Allocation for Education

The next question that should be addressed was if the MPR agreed to include percentage of budget for education in the constitution, what were the references to determine the percentage of budget for education? With regard to this matter, there are some references available that can be referred to such as the guidance from international organizations or other countries' constitutions that include budget for education in their constitutions.

UNESCO provides guidance that budget allocation for education is at least 4% of the GDP[35]. Taiwanese Constitution stipulates that the expenditure for

[31] Manan stated that inserting budget for education in the constitution will potentially lead to constitutional hostage for the government as the government is compelled to fulfill this requirement regardless the actual state finance performance. Manan, Munafrizal. "The Implementation of the Right to Education in Indonesia." *Indonesia Law Review* 5, no. 1 (2015): 56.

[32] As quoted by Indrayana, "Indonesian Constitutional Reform 1999-2002: An Evaluation of Constitution-Making in Transition." p. 310.

[33] Nolan, O'Connell, and Harvey, "Human Rights and Public Finance." p. 1

[34] Tim Penyusun, *Konstitusi Sebagai Rumah Bangsa*, Pertama (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2008). p. 149.

[35] Naskah Komprehensif, p. 89.

education at least 15% of the national government revenue, while expenditure are 25% in the provinces and 35% in local government.[36] Costa Rican Constitution explicitly mentions that budget for education is not less than 8% of its GDP.[37] Brazil Constitution requires the government to provide 18 per cent of national level and 25 per cent of regional level of tax income shall be allocated to educational sector.[38] There are also countries that do not explicitly mention the budget allocation for education in the constitution but they committed to allocate 4% GDP for education.[39]

In discussing this matter, the MPR referred to the guidance of the UNESCO and looked other countries constitutions. It found out the some of the guidance and the constitution used GDP to allocate the budget for education but there were some constitutions that use their national budget as a parameter. A member of the MPR asked other member of the MPR who used to be the Minister of Finance whether it is better to use GDP or national budget as a parameter.[40] In the context of Indonesia it was basically the same whether we used national budget or GDP. He argued four percent of GDP equals to 20% of national revenue.[41] The MPR finally decided to use national budget as the parameter. This was because national budget was commonly used. It stipulated in the form of law so that it was more certain and have legal authority. More importantly it could be reviewed by the court if there was an indication that the law was not consistent with the constitution.

3. The Legal Consequences of the Inclusion of Budget for Education in the Constitution

Provisions concerning budget for education was finally inserted in the updated constitution in 2002. It was stipulated in Article 31 (4). It says "The

[36] The constitution (Article 164) stipulates that the government's educational expenditures at all levels account for at least 15 percent of the general government net revenues (including science and culture), while expenditures are 25 percent in the provinces and 35 percent under the local governments (including municipalities and counties) (Office of the President 2011).

[37] Article 78: For the State education, superior [education] included, the public expenditure will not be inferior to the annual eight percent (8%) of the gross domestic product, in accordance with the law, without prejudice to that established in Articles 84 and 85 of this Constitution.

[38] Manan, Munafrizal. "The Implementation of the Right to Education in Indonesia." *Indonesia Law Review* 5, no. 1 (2015): 57.

[39] These include the USA, Germany, the Netherland, South Korea, Taiwan and Malaysia. Naskah Komprehensive .p. 89.

[40] *Ibid.*, p. 173.

[41] *Ibid.*, p.

state shall prioritize the budget for education to a minimum of 20% of the State Budget and of Regional Budgets to fulfill the needs of implementation of national education." There are two different views regarding the inclusion of this new provision. The first view believes that this article is arguably one of the most significant new provisions besides new provisions on human rights protection. It clearly and explicitly requires the government to allocate twenty percent of the national budget and of the regional budgets for education. The government is constitutionally obliged to do so. If the government fails to satisfy this provision, there is a possibility that the government will face complaints from people through judicial review mechanism to the newly established Court –the Constitutional Court. The new Court has the authority to conduct judicial review of laws against the Constitution. Since the national budget is stipulated in a statute, it is possible for the people to challenge it if they believe that the statute is inconsistent with the constitution.

The second view believes that this new article is symbolic or aspiration. Beside there is no sanction stated in this article, the word "prioritize" in this article does not automatically bind the government to allocate twenty percent budget for education. Prioritize means "to organize (things) so that the most important thing is done" or "dealt with first or to make (something) the most important thing in a group."[42] Therefore, while it is suggested that the government places education in its priority, the government still have the flexibility to determine the percentage to be allocated to educational sector.

In other words, twenty percent budget allocation for education as stated in this new provision is not binding the government so that the government must achieve this percentage. It is possible that the government achieve this percentage when the national economic performance is good. However, it is also possible that the government does not achieve this target if the national financial performance is not good.

It is interesting to see how this provision is interpreted differently by the constitutional framers. It is true that this article does not mention sanction.

[42] http://www.merriam-webster.com/dictionary/prioritize accessed 26 September 2016.

Therefore, the argument that concludes there is no sanction if the government fails to fulfill twenty percent requirement can be understood. In addition, the word "prioritize" does not legally binding the government to allocate twenty percent of its budget for educational sector. Textually, that is what we may understand when we read article 31 (4). But it is still and open ended question as to whether this is the correct interpretation of this article? Or perhaps there were other interpretations.

One way to understand the more reliable interpretation regarding the meaning of this new provision is by looking at the legislative history. This can be done by reading and understanding the statements delivered by of the constitutional framers during the deliberation/formulation of this article. Reading and understanding the minutes of the constitutional drafters may help understand the purpose of the framers when the inserted these provisions in the constitution. However, sometime it is not easy to identify whose opinions were prevailed among other competing opinions. During the deliberation different persons may give different opinions so that there are multiple opinions regarding one thing. As a result, it is not easy to find the more authoritative interpretation regarding the meaning of this provision.

Another way to understand the meaning of this provision is by looking at how the judiciary especially the newly established Constitutional Court interpreted this provision. The Constitutional Court has the power to conduct constitutional review –the power to examine whether a statute is consistent with the constitution. In examining the consistency of a statute toward the constitution, this Court will look at the provision of the constitution and give meaning/certain interpretation to this provision and then the Court applies this provision to the statute. It is possible that different justice may have different opinions or interpretation regarding the provision of the constitution. However, in the end of the day the Court will use the opinions of the majority in rendering the decision. Compared to understanding the legislative history, this method is perhaps less difficult in understanding the meaning of the provision of the constitution. Except in the special circumstances when all framers of the new constitution had exactly the

same opinion regarding the meaning of the provision of the constitution which I believe is unlikely to happen.

The following part will examine how the Constitutional Court interpret article 31 (4) when it decided cases on budget for education. It will answer whether the court's approach is the similar to the interpretation of the constitutional framers or will its approach differ from the constitutional drafters. In addition, this part will also answer whether the court interprets the word 'prioritize' as a constitutional obligation or it is only a constitution symbol.

4. The Constitutional Court Approach in Deciding Judicial Review Cases on Budget for Education

This part examines five cases of the judicial review on budget for education to understand the judicial enforcement of this new provision on the ground. These cases are selected not only because they are closely related to budget for education but also because it require significant resources to fulfill this right. There are three important issues that will be answered in these five cases. First, whether the fulfillment of 20 percent budget for education can be done gradually. Second, there is a fact that budget for education has not yet achieved 20 percent. And last, whether the educator's salary is excluded (or included) in calculating budget for education.[43]

These five cases indicated how the Court, through its rulings, response the branches of government when the government reluctantly complied its constitutional duty. What is the strategy of the Court in deciding these cases so that the government willing and can achieve its constitutional obligation concerning budget for education? To answer this question, this part will use legal and extra legal approach of the court decision.[44] Legal approach is broadly defined as the judge discovers and applies legal principles as stated in the law. In a broader context, legal approach also takes into account the legislative history of

[43] Tim Penyusun, *Putusan Mahkamah Konstitusi Tanpa Mufakat Bulat: Catatan Hakim Konstitusi Soedarsono*, Pertama (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2008). p. 725

[44] Tracey E. George and Lee Epstein, "On the Nature of Supreme Court Decision Making," *American Political Science Review* 86, no. 2 (1992): 323.

the law and the decisions of the court in similar cases in the past (precedents). Extra legal approach, on the other hand, is defined as the judges consider factors outside the law such as the social, financial, and political aspects.

As has mentioned above, the updated Constitution explicitly stipulates Chapter on Education.[45] In this Chapter, the state has several constitutional obligations including to fund the basic education, to manage and organize one educational system, and to prioritize the budget for education to a minimum of 20% of national budget and of the regional budget.

To implement these constitutional duties, the government and the legislature enact laws. The contents of these laws must be in line with the constitution provisions as the constitution is the supreme law of the land. In practice, the laws are not always consistent with the constitution. This is because Laws are created by political agencies that have different political interests. The political interests may influence the contents of the laws. To maintain the fidelity of laws toward the constitution, there is a specialized court namely the Constitutional Court that has the power to conduct judicial review.

The National Budget Law Case (2005)

The drafters of the updated Constitution see education as human rights and the right of citizens. Article 28 C (1) of Chapter XA on Human rights says 'Every person shall have the right to get education.' Article 31 of Chapter XIII on Education reemphasizes 'every citizen has the right to receive education.' The Constitution also puts obligation to the state to fund the basic education[46] and allocates of twenty percent of the national budget and regional budget for education.[47]

The first judicial review on budget to education was occurred in 2005. Teachers of elementary and middle schools and education activists filed a petition to the Constitutional Court.[48] They questioned the constitutionality of the elucidation of Article 49 (1) of the National Education Law (Undang-Undang

[45] Chapter XIII on Education consists of 2 articles and 7 sub articles.
[46] Art. 31 (1) of the 1945 Constitution.
[47] Art. 31 (4) of the 1945 Constitution.
[48] Constitutional Court Decision No 011/PUU-III/2005.

Sistem Pendidikan Nasional)[49] that allowed the state to incrementally fulfill 20 per cent of the state budget and regional budgets for education.

The petitioners argued that this elucidation violated Article 31 (4) of the Constitution that required the education budget of minimum of 20 per cent. In addition, the petitioners also claimed that this Law infringed their right to work and to receive fair and proper remuneration and treatment employment, and enjoy physical and spiritual prosperity, as well as the right to social security.

The majority ruled in favor of the petitioners and declared that the Elucidation of Article 49(1) that allowed the fulfillment of 20 per cent of state budget for education can be done incrementally was unconstitutional.[50] The Court acknowledged that Article 31(4) explicitly require the state to allocate at least 20 per cent of state budget for education. The Court also addressed that education in Indonesia is lagged behind and it is the time that education should be the priority. This can be done, among other things, through increasing budget for education up to a minimum 20 per cent of state budget.

It appears that when deciding this case, the majority adopt legal model i.e. the plain meaning. The majority stated that "the 1945 Constitution *expressis verbis* has determined that budget for education should be prioritized at a minimum 20% of the National Budget and Regional Budget. This requirement cannot be altered by lower rank of legislation."[51] The word *expressis verbis* which essentially means explicitly or expressly written in the majority opinion reflects the adoption of plain meaning. The majority interpret Article 31 (4) as it is written in the text of the constitution. However, the majority also considered the real problem on the ground by acknowledging that education in Indonesia is lagged behind. This opinion is not based on the text of the constitution.

Three Justices[52] dissented. They questioned the legal standing of the petitioners especially whether they really experienced damage because of the

[49] Law 20/2003 on National Education System

[50] *Ibid.*, 102.

[51] The original text is as follow: "UUD 1945 secara *expressis verbis* telah menentukan bahwa anggaran pendidikan minimal 20% harus diprioritaskan yang tercermin dalama APBN dan APBD tidak boleh direduksi oleh peraturan perundang-undangan yang secara hierarkis berada dibawahnya." The Court used the German phrase "expressis verbis" to show that the constitution explicitly and expressly requires 20 percent.

[52] Justice Natabaya, Justice Achmad Roestandi, and Justice Soedarsono. Constitutional Court Decision No 011/PUU-III/2005. p. 103.

existence of this law.[53] These Justices believed that there was no constitutional damage toward the petitioners because of the Elucidation of Article 49 (1). Even if there is a constitutional damage, such constitutional damage is not because of the Elucidation of Article 49 (1). Therefore, the petitioners were not eligible to file this petition to the Court.

They also believed that the word 'incrementally' cannot be interpreted as a violation or contradiction toward Article 31 (4) of the Constitution.[54] The word 'incrementally' explains the way in which the government will fulfill constitutional requirement of 20 per cent for education since Article 31 (4) does not mention how 20 per cent budget for education should be fulfilled.[55]

In this case, the dissenters take slightly different approach by acknowledging that while the constitution requires 20 per cent of national and regional budgets for education, there is no requirement that the fulfillment of 20 per cent should be done at once. It is the domain of the executive and the legislature to determine how such requirement should be fulfilled. It appears that the dissenters also use legal approach i.e. the plain meaning as it is written in the constitutional text. It is interesting that even though both of them use the same approach, they come up with two different outcomes. The majority opinion placed stricter rule to the executive in the way they will fulfill the requirement while the minority provides more flexibility to the executive in satisfying of the requirement.

The Calculation of Budget for Education: How to Calculate Budget for Education?

In the same year, the Court received a petition from teachers and individuals activists. The petitioners challenged the constitutionality of Law 36/2004 on National Budget on the basis that this Law only allocated 6% of national budget for education yet the Constitution requires 20% of national budget for education at minimum.[56] The Court, in split decision, ruled in favor of the petitioners. The Court ruled that Law on National Budget was inconsistent with

[53] TimPenyusun, *Kontroversi Atas Putusan Mahkamah Konstitusi: Catatan Hakim Konstitusi Soedarsono.* p. 237.
[54] TimPenyusun, *Ikhtisar Putusan Mahkamah Konstitusi 2003-2008.* p. 496.
[55] *Ibid.*,
[56] Constitutional Court Decision No 26/PUU-III/2005.

the Constitution. The Court, however, did not declare the Law unconstitutional. In its opinion, the Court considered that there will be a negative consequence if the Court invalidated this Law. This is because the invalidation of this Law will require the government to apply last year the national budget. In fact the previous budget allocation for education was even smaller compared to the recent budget allocation.

Two Justices provided concurring opinions[57] while the other two Justices[58] dissented. One of the concurring justices believed that the recent national budget has been allocated in many different fields and the government was bound by this budget allocation.[59] It would be difficult for the government to fulfill the 20 per cent budget allocation for education since this means reducing the fund allocation for other sectors. This will lead to significant economy instability for the country.

In addition, whether the 20 percent budget for education has been achieved depends on how we calculate budget allocation. If budget for education include the salary for teachers and instructors, the 20 percent requirement may be already achieved. The other Justice questioned the legal standing of the petitioners and also believed that granting this petition will disadvantage the petitioners. Two dissenters [60] believed that there is no contradiction between this Law and the Constitution. The Law provides gradual increase to achieve the intended percentage. The 20 percent budget allocation for education will be achieved in 2009.[61]

This decision shows that the Court took different approach. It adopted legal model in the sense that the court seriously considers the provision of the Constitution and decided the case based on that provision. The Court ruled that the provision of the Law did not confirm the Constitution. The Court, however, did not invalidate the Law. The Court considered other aspects outside the constitution. The Court took into account the real world facts and possible

[57] Justice I Dewa Gedhe Palguna and Justice Soedarsono. *Ibid*., p. 88.
[58] Justice Ahmad Roestandi and Justice Natabaya *Ibid.,* 92-98.
[59] *Ibid*., p. 66.
[60] Justice Achmad Roestandi and Justice Natabaya. *Ibid.,* 92-98
[61] *Ibid*., p. 67.

problems faced by the government such as financial chaos if the Court grant the petition. Considering the significant impact that may occur if the Court invalidated the Law, it declared that the Law is inconsistent with the Constitution but did not invalidate the provision of the law.[62] In this case, the Court used two different approaches. In determining whether the law is consistent with the constitution, the Court adopted legal approach. In determining whether the Court should invalidate the law; its approach is beyond the legal model. The Court adopted strategic approach in rendering this decision. It took into account the consequence and difficulty of other branches of government if the Court invalidated the law.

The National Budget Law Case (2006)[63]

In 2006, The Indonesian Teacher Association and some individuals filed a petition to the Constitutional Court questioning the constitutionality of Law on National Budget 2007 specifically on allocation of educational budget. [64] This Law allocated 11, 8% for education which was allegedly inconsistent with the Constitution that requires 20% at minimum for education. In its ruling, the Court considered its previous decisions in 2005 in which the court agreed that budget for education was excluded the salary of teachers and also the fulfillment of 20% budget for education cannot be done incrementally. The Justice who dissented in the previous decisions did not dissent anymore since he was bound by the Court previous decision.[65] It was the hope of the Court that through these two rulings the lawmakers would amend the law so that it was consistent with the Constitution. The Court acknowledged that it did not have the authority to force the lawmakers to amend the law. Considering that since 2004 up to 2007 the national budget for education never achieve 20%, the Court believed that the lawmakers have not done optimally to increase the education budget. The Court, therefore, stated the provision of the law that stated budget for education 11,8% was in consistent with the Constitution and declared it un constitutional.

[62] Tim Penyusun, *Menegakkan Tiang Konstitusi: Memoar Lima Tahun Kepemimpinan Prof. Dr. Jimly Asshiddiqie,S.H. Di Mahkamah Konstitusi*, Pertama (Jakarta: Sekretariat jenderal dan Kepaniteraan Mahkamah Konstitusi, 2008). p. 174-175.
[63] Constitutional Court Decision 026/PUU-IV/ 2006.
[64] *Ibid.*, p. 93.
[65] *Ibid.*,

It appears that in rendering this decision, the Court was consistent referring its previous decisions in similar cases.[66] The Court summarized these decisions in its opinion and used them as a reminder for the lawmakers in allocating the national and regional budgets for education.[67]

The Government argued that in calculating the allocation of budget for education, the Court should not refer to legislation below the Constitution. The Court should refer to the Constitution. In responding this statement, the Court stated that this formulation is determined by the lawmakers who have the power to determine how budget for education will be allocated based on the constitution.

The Court in this case adopted legal model in two ways. First, it refers to the relevant constitutional provisions related to budget for education as appears in article 31 (4). Second, in rendering its ruling the Court also consistently referred its previous decisions in similar cases namely the 2006 decisions on budget of education. Apart from legal model approach, the Court also warned to the government to fulfill the constitutional mandate of 20% budget for education or else it will invalidate the national budget law for its entirety in the future in there is a similar case filed to the Court.[68]

Educators Salary Case[69]

In 2007 a teacher and a lecturer filed a petition to the constitutional court and challenged the constitutionality of Article 49 (1) of Law 20/2003 on National Education System. The petitioners argued that provisions in this Law do not benefit teachers and lecturers as one of elements in education because it excluded the salary of educators from 20% of National and regional budget.

The Majority stated that Article 31(4) does not elaborate what will be included in the 20% of budget for education, however, it does not mean that Article 31(4) can be interpreted differently by Article 49 (1) of Law 20/2003. The majority believed that Article 49 (1) is inconsistent with Article 1(3) and (6) of this law and narrowed the meaning of Article 31 (4) of the Constitution.[70] The

[66] Constitutional Court Decisions No. 012/PUU-III/2005 and 026/PUU-III/2005.
[67] Constitutional Court Decision No. 026/PUU-IV/2006.
[68] *Ibid.*, p. 95.
[69] Constitutional Court Decision No. 24/PUU-V/2007.
[70] *Ibid.*, p. 84.

Court, in split decision, ruled that the salary of educators should be included in calculating 20% budget for education.

Three Justices dissented.[71] They believed that there was no constitutional damage experienced by the petitioners because of Article 49(1). Thus, they did not have legal standing to file petitions to the Court. In fact, the decision of the Court in this case might disadvantage the allocation of budget of education since the inclusion of teacher salary in the budget of education would reduce the amount of rupiahs that will be allocated for education.

The dissenters, further, reminded that based on the Court previous rulings, whether educators' salary will be included in 20% budget for education is the domain of the lawmakers to decide. Therefore, for the sake of consistency of the court rulings, the Court should consider what stated in article 49(1) is constitutional.[72] The Court should allow the lawmakers to determine whether or not Article 49(1) should be amended. The Court should not review and declare Article 49(1) is inconsistent with the Constitution and invalidate Article 49(1).

The Dissenters understand the government will perhaps continually violate the Constitution if the government does not fulfill the 20% budget for education and as a result it may de-legitimize the Constitution and the Court existence. But the Court should consistent with its rulings. In doing so, the dissenters cited *Brown v. Board of Education* which needs 10 years to be fully implemented.[73]

In rendering this decision, the Court adopts a unique approach. The Court seemed to adopt legal model i.e. by referring other articles of the reviewed law (Article 1 (3), (6)) and Article 31 (4) of the Constitution in determining the constitutionality of Article 49 (1). At the same time, however, the Court rejected the legal model in which it did not refer to its previous decisions in its ruling. There have been three court rulings in this case and none of them are fully implemented by the government. The majority believed that it is likely there will be continuous violation of the constitution if the court consistently applies the same rules i.e. excluding the educators salary from budget for education.

[71] Justice Abdul Mukthie Fadjar, Justice Maruarar Siahaan, and Justice Harjono. *Ibid.*,
[72] *Ibid.*, p. 90.
[73] *Ibid.*, p. 93.

The Court granted the petition and explicitly mentioned that by including the teachers' salary as the components of budget for education, there is no reason for the government to delay its constitutional duty to achieve 20 percent budget for education.

The National Budget Law Case (2008)[74]

The final case on budget for education was decided in 2008. The Indonesian Teacher Union (PGRI) filed a petition to the Court to challenge the constitutionality of Law on National budget 2008, which allocated 15,6 percent for education. The Court highlighted that it has issued four rulings in this case. The lawmakers, however, keep ignoring the court rulings. In its opinion, the Court stated that it had given enough time for the lawmakers to satisfy their constitutional duty. It declared the state budget unconstitutional.[75]

The lawmakers were responsible for these constitutional violations. The Court demanded that the full allocation should be made in the 2009 budget. Surprisingly, the Court allowed the underfunded budget to stand until the 2009 national budget cycle took effect to avoid financial disaster.[76] The Court reminded that if the 2009 national budget failed to fulfill 20 percent for education, the Court would referred this decision to invalidate the national budget.

In deciding this case, the Court referred to its previous rulings and emphasized that the lawmakers did not take seriously the court decisions. The Court took further step by warning the government and the parliament that the Court would invalidate the national budget law in its entirety if they keep ignoring the court rulings. The Court also gave deadline for the lawmakers and once again reminded the lawmakers that they should fulfill their constitutional duty to provide 20 per cent budget for education in 2009 at the latest.

From the five judicial review cases mentioned above, there are some significant features that can be identified. First, in these cases, the Court largely adopted legal model. In rendering the decisions, it referred to written provisions of the law and the constitution. This approach, however, is not consistently adopted by

[74] Constitutional Court Decision No. 13/PUU-VI/2008.
[75] *Ibid.*, p. 100.
[76] *Ibid.*, p. 101.

the Court in the later cases. In one case, the Court ignored its previous rulings (precedent) concerning the method to calculate budget for education. At the same time, the Court accepted the argument of the petitioners which was based on the Article of the law that stated that teacher salary should be included in budget for education. The inclusion of teacher salary is a way for the Court to narrow the gap between the 20 percent of constitutional obligation and the reality on the ground. The Court expected that by rendering this decision the government will finally fulfill its constitutional duty and at the same time the court decision will be easier to be materialized by the lawmakers.

Second, the Court rulings in these cases are not unanimously decided. While the majority agreed to grant the petitions, some Justices dissented and provided significant legal arguments to the majority why they took different positions.

III. CONCLUSION

This paper has reviewed that the establishment of provision on budget for education in the updated constitution constitutes an uncommon method in drafting the constitution in Indonesia. Unlike many other provisions in the Constitution that are written in general and more qualitative ways, this particular provision explicitly mention the percentage of the national and regional budgets that should be allocated by the government for education. It quantitatively mentions twenty percent of the national budget and the regional budgets for education.

The paper has also explained some factors that contribute to the stipulation of this provision. The fact that in the past budget allocation was stipulated in laws or in the MPR decree created less certainty. This was because laws and the MPR decree were easier to be amended. In addition, the absence of legal mechanism to challenge the government policy created difficulty for the public to monitor the implementation of government policy. This resulted in fund for education was relatively low which significantly affected the quality of the education.

Since the recent constitutional amendments (1999-2002), the updated Constitution explicitly stipulates a provision on the percentage of budget for education. This provision is significant because it provides constitutional guarantee on budget for education. In addition, there is a potential legal consequence through judicial review if the government fails to fulfill its constitutional duty.

The Constitutional Court took article 31 (4) very seriously. There were at least five different judicial review cases that closely related to this provision. In general, the Court employed several approaches in deciding these cases. Even though legal approach became the main approach, the Court also considered factors beyond the text i.e. the real problem on the ground. This resulted in the court rulings declared that the law was inconsistent with the constitution but it did not invalidate it at the first place. This reflected the understanding of the Court that decisions on these cases have significant financial consequences in which the government needs some time to appropriately fulfill its constitutional duties on this matter.

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Election Design Following Constitutional Court Decision Number 14/PUU-XI/2013

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Abstract

The major implication from Constitutional Court Decision No. 14/PUU-XI/2013 is that the Constitution promotes fundamental changes to the design of the general election regarding both process and substance. Therefore, in order to uphold the Constitution, efforts are required to reconstruct the design of the general election, particularly so that elections are conducted in accordance with Decision No. 14/PUU-XI/2013 as a representation of the spirit and the will of the 1945 Constitution. Essentially, the current norm regarding the implementation of general elections following the election of members of the representative institution is not consistent with the stipulations in Article 22E Paragraph (1) and Paragraph (2) and Article 1 Paragraph (2) of the 1945 Constitution. Constitutional Court Decision No. 14/PUU-XI/2013 aims to realign the implementation of the elections with the intentions of the 1945 Constitution. Through implementation of the original intent method and systematic interpretation, the Constitutional Court offered its interpretation that the framers of the amended Constitution intended that general elections have five ballot boxes, with the first for the People's Representative Council (*Dewan Perwakilan Rakyat, DPR*), the second for the Regional Representative Council (*Dewan Perwakilan Daerah, DPD*), the third for the president and vice president, the fourth for the Regional People's Representative Council (*Dewan Perwakilan Rakyat Daerah, DPRD*) at the provincial level and the fifth for the DPRD at the regency level. Thus, it can be concluded that the presidential elections should be conducted simultaneously with elections of members of the representative bodies. Through this decision,

the Constitutional Court revoked the prevailing norm, such that Presidential Elections and Elections of members of representative bodies were no longer valid because they violated the 1945 Constitution. The Constitutional Court introduced a new legal condition that obligated General Elections to be held simultaneously.

Keywords: General Elections, Constitutional Court

I. INTRODUCTION

A. Background

If we are to accept that Constitutional Court decisions are manifestation of the constitution, then it follows that they should be upheld in the same way that the constitution itself is upheld. This concept is consistent with the doctrine of constitutional supremacy, which assures the constitution as the supreme law of the land. Therefore, the greatest and most important implication from Constitutional Court Decision No. 14/PUU-XI/2013 is that the 1945 Constitution wills a foundational change to the design of the general elections as it has been implemented thus far.

Through Decision 14/PUU-XI/2013 on 23 January 2014, the Constitutional Court granted a petition to review the contents of Law No. 42, 2008 concerning Presidential and Vice-presidential General Election (Presidential Election Act). The petition was brought before the Court by the People's Coalition for Simultaneous Elections. The Constitutional Court revoked Article 3 Paragraph (5), Article 12 Paragraphs (1) and (2), Article 14 Paragraph (2) and Article 112 of the Presidential Election Act. These provisions regulated the conduct of the presidential and vice-presidential elections separately from the elections of members of the representative bodies. This was determined contrary to the Constitution concerning general elections, as regulated in Article 22E Paragraphs (1) and (2) and Article 1 Paragraph (2).

Through the original intent method and systematic interpretation as one of the bases for the decision, the Constitutional Court made the interpretation that the authors of the Constitution intended for an election of five ballot boxes with the first for the People's Representative Council (*Dewan Perwakilan Rakyat,*

DPR), the second for The Regional Representative Council (*Dewan Perwakilan Daerah, DPD*), the third for the president and vice president, the fourth for the Regional People's Representative Council (*Dewan Perwakilan Rakyat Daerah, DPRD*) at the provincial level and the fifth for the DPRD at the regency level. It can be understood, therefore, that the presidential elections should be held simultaneously the other elections of members of the representative bodies.

Through this decision, the Constitutional Court revoked the prevailing norm, such that Presidential Elections and Elections of Members of Representative Bodies were no longer valid because they violated the 1945 Constitution. However, this provision was not immediately implemented for the 2014 elections, but rather it was to be implemented from the 2019 elections and all elections thereafter.

Based on the description above, there are two things that need attention. First, the Constitutional Court decision must be implemented in the spirit of Decision as intended by the decision itself. Therefore, it is important to think about how the decision has been followed up on. If the addressee of Constitutional Court Decision No. 14 / PUU-XI / 2013 were the legislators, it is 'homework' for the legislators to formulate regulation within the legislation by reference to the Decision. Secondly, the implication supposes the first simultaneous elections in the context of the Indonesian political system and Indonesian democracy. Since the first elections in 1955 up to the 2014 general election, elections have never been conducted simultaneously, so that the country has absolutely no experience with such a system. If the election is understood as a long process beginning with the nomination stage and continuing through the campaigns, voting, determination of voting, dispute resolution, election results and finally ending with the determination of the election results, it is clear, in order to successfully hold elections simultaneously requires thorough preparation in all aspects, both regulation substance and technical administration, which requires effort and necessitates the participation of from components of the state.

These two points make this study both very urgent and interesting. The study is focused on two things, namely (1) the design of the electoral system for simultaneous elections, which includes the implementation of simultaneous

elections, the time of execution, the participants in the election, and the selection of the electoral system that is considered most appropriate and efficient; and (2) the mechanism for settling disputes over the results of simultaneous elections within the jurisdiction of the Constitutional Court, which also includes a discussion of how the mechanism will be implemented, considering completion period, procedural law, and other technical matters. Thus, reflecting on the experience from previous elections, including the practical experience of several different countries in conducting simultaneous elections, is a very important part of this research.

B. Research Question

Based on the above, the problem is how to reconstruct the format of the general elections in light of Constitutional Court Decision No. 14/PUU-XI/2013?

II. DISCUSSION

A. Format of General Elections In Light of Constitutional Court Decision No. 14/PUU-XI/2013

1. Variants of Simultaneous Elections

Simultaneous elections can be simply defined as an electoral system that conducts multiple elections at one time simultaneously.[1] These elections include executive and legislative elections from the national, regional and local levels. In the member countries of the European Union, simultaneous elections even include elections at the supra-national level, namely the European parliamentary elections, which are held concurrently with the national regional and local elections. With the variety of factors affecting the implementation of simultaneous elections, there are several variants, some of which have already been implemented and some that are still hypothetical. A simultaneous electoral system has been applied in many democracies; not only those countries who have long implemented a democratic system, such as the United States and some Western European countries,[2] but also many

[1] Benny Geys, Explaining Voter Turnout: A Review of Aggregate-Level Research, *Electoral Studies* 25 (2006): 652.

[2] David J. Andersen, *Pushing the Limits of Democracy: Concurrent Elections and Cognitive Limitations of Voters*. PhD Dissertation, (New Jersey: The State University of New Jersey, 2011). See also Benny Geys, —Explaining Voter Turnout: A Review of Aggregate-Level

relatively younger democracies, such as those in Latin America[3], and Eastern Europe[4]. However in Southeast Asia, the simultaneous electoral system is not yet widely known. Of the five countries that implement election—though not entirely democratic—only The Philippines conduct simultaneous elections for elections of the president and legislators, while Indonesia, Malaysia, Singapore and Thailand do not use simultaneous elections.[5]

In the implementation of simultaneous elections, executive elections have commonly been combined with legislative elections. In Latin America, Jones noted that presidential and legislative elections are conducted simultaneously in Bolivia, Columbia, Costa Rica, Guatemala, Guyana, Honduras, Nicaragua, Panama, Paraguay, Peru, Uruguay, Venezuela. In some countries, simultaneous elections also combine national and regional or local elections. In the United States, for example, some states incorporate not only the presidential election and members of Congress and the Senate at the central level, but at the same time also hold elections for governors and legislators at the state level.[6] In Latin America, Brazil also implements a similar model. Elections are conducted simultaneously by combining the presidential and parliamentary elections at the national level, and elections for governors and legislators at the state level.[7]

Variants of simultaneous elections can be distinguished by the implementation time and the level of government that can affect voters' perceptions of the importance of the elections. Theoretically, the holding of multiple elections at the same time—such as legislative elections with presidential elections, legislative elections with a referendum on public

Research, *Electoral Studies* 25 (2006): 637-663.

[3] David Samuels, —Concurrent Elections, Discordant Results: Presidentialism, Federalism, and Governance in Brazil, *Comparative Political Studies* 33 (1): 1-20.

[4] Tatiana Kostadinova and Timothy J. Power, —Does Democratization Depress Participation? Voter Turnout in the Latin American and Eastern European Transitional Democracies, *Political Research Quarterly* 60 (3) 2007: 363-377. See also Thomas Sedelius, *The Tug-of-War between Presidents and Prime Ministers: Semi Presidentialism in Central and Eastern Europe*, (Orebro University: Orebro Studies in Political Science 15, 2006).

[5] Schraufnagel, Scott, Michael Buehler, dan Maureen Lowry-Fritz, —Voter Turnout in Democratizing Southeast Asia: A Comparative Analysis of Electoral Participation in Five Countries, *Taiwan Journal of Democracy* 10 (1) 2014: 1-22.

[6] David J. Andersen, *Pushing the Limits of Democracy: Concurrent Elections and Cognitive Limitations of Voters*. PhD Dissertation, (New Jersey: The State University of New Jersey, 2011). See also Benny Geys, —Explaining Voter Turnout: A Review of Aggregate-Level Research, *Electoral Studies* 25 (2006): 2.

[7] David Samuels, —Concurrent Elections, Discordant Results: Presidentialism, Federalism, and Governance in Brazil, *Comparative Political Studies* 33 (1): 1-20.

issues, as well as all sorts of elections for public positions and important policy issues—is usually closely linked to the electoral cycle, mechanical effect utilities of the election, oppressive regimes, and also the existing party model. Elections might be held simultaneously if the fixed terms for multiple political offices coincide, so that at certain times elections will be held in unison for a variety of public positions even though the respective term of office for each position is different. An example of this is in America, where the president's term is four year, senators' six years, and board members two years. The term of office for public positions at the state level, districts, and cities are also similar to those applied in the federal government so that simultaneous elections occur in cycles that can affect political constellation. However, simultaneous elections can also be held when the government gets a parliamentary no-confidence motion and must hold an election to fill a public office at the national or regional level.[8]

Simultaneous elections can also be designed such that one election has an impact on another election. Usually the consideration is to influence the outcome of the presidential election with the results of legislative elections as a basis for determining the winner. Under certain rules, it is possible to influence the vote a particular party on the condition that the party's presidential candidate wins, so that one type of election will have a mechanical effect on the results of other elections. The party with the most votes, it can deliver the presidential candidates for the presidency even though the result in the presidential election is not necessarily the best result. In some variants, mechanistic effects are expected to occur within a certain timeframe, which is commonly referred to as the coattail effect. For example, legislative and presidential elections are expected to affect the outcome of mid-term elections, or elections to be held thereafter. In the context of Indonesia, based on empirical and hypothetical variants, there are at least six models of simultaneous elections. First, simultaneous elections held once every five years for all public positions at the national level down

[8] Electoral Research Institute – LIPI, 2014, *Position Paper Pemilu Nasional Serentak 2019,* Jakarta, page: 18-19 (www.eri-indonesia.org) access on Oktober 2015

to the district/city level. This election includes the election of the legislature (DPR, DPD, Provincial and District/City), the presidential election, and the local leaders election. It is often called seven box election or bulk election. Second, simultaneous elections for legislative positions only (central and local), followed by the simultaneous elections for executive positions (central and local). In this clustered simultaneous model, DPR, DPD, Provincial and District/City elections are implemented at the same and are then followed by the presidential election and elections for the governor and regent/mayor a few months later.[9]

Third, simultaneous elections with by-election based on government level, where the national elections and local elections are separated (simultaneous election concurrent with mid-term election). In this model DPR and DPD elections are concurrent with the presidential election, and the elections of Province and district/city councils are concurrent with elections for governors and regents/mayors two or three years after the general elections. Fourth, simultaneous elections at the national and local levels that are distinguished by intervals of time (simultaneous election with regionally-based simultaneous elections). In this model, the presidential election and the legislative elections for the DPR and DPD are conducted at the same time. Then in the second year the local level simultaneously holds elections to choose the provincial and Regency/City DPRD and as well as the election of Governor and Regent/ Mayor by grouping certain regions or island areas. For example the second year on the island of Sumatra, the third year for the island of Java, and the fourth year for Bali and Kalimantan, and the fifth year for the remaining areas. With this model, every year all parties have to work to gain voter support, and the government and political parties can be evaluated by voters annually. Fifth is simultaneous national elections followed by simultaneous elections in each province at an agreed time or based on the local election cycle in their respective provinces. This model, simultaneous elections with flexible simultaneous local elections, the Presidential election is combined

[9] Electoral Research Institute – LIPI, 2014, *Position Paper Pemilu Nasional Serentak 2019,* Jakarta, page: 19-20 (www.eri-indonesia.org) access on Oktober 2015

with the legislative elections for the DPR and DPD. Then after that depends on the local elections cycle schedule for simultaneous elections at the local level to choose governors, regents, and mayors as well as select members of the Provincial DPRD and Regency/City, and later followed by simultaneous elections in the same locale across other provinces, such that in one year there could be several simultaneous local elections in certain provinces.[10]

Sixth, are simultaneous elections for members of the DPR, DPD and DPRD as well as the President and Vice-President, followed after a certain time interval by simultaneous elections for the province. In this election, the local level simultaneous elections are for selecting governors, regents and mayors simultaneously in a province, and the schedule depends on the agreed cycle of local elections in each province. In the first, second, and third models, if the goal of simultaneous elections is simply cost saving, it has certainly been achieved. However, the administration of the elections becomes more complex; the political configuration becomes erratic; it may even result in obscured political blocking and encourage transactional politics because of the need for electoral support to win the election. On the other hand, the simultaneous elections in the third, fourth, and fifth models is believed to make the electoral system more simple. With the concurrent implementation of elections for members of Parliament and for the president, the tendency is that there are only two major blocks of a coalition of political parties, which both nominate presidential and vice presidential candidates. Blocking politics created by the executive and legislative election results at the national level are likely also to manifest itself also in the region. If the national elections provide good results from the president and the legislative members, then voters will also choose a partner and regional head of Parliament from the candidate of the governing parties of national elections. Thus congruence be created not only in the executive–legislative level, but also central and local.[11]

[10] Electoral Research Institute – LIPI, 2014, *Position Paper Pemilu Nasional Serentak 2019,* Jakarta, page: 19-20 (www.eri-indonesia.org) access on Oktober 2015

[11] Electoral Research Institute – LIPI, 2014, *Position Paper Pemilu Nasional Serentak 2019,* Jakarta, page: 20-21 (www.eri-indonesia.org) access on Oktober 2015

2. Time of Execution of Simultaneous Elections

When referring to the norms of simultaneous election administration, the Constitutional Court decision refers to Article 22E Paragraph (1) of the 1945 Constitution, which states, "The general election is held directly, public, free, confidential, honest, and fair once in every five years ". It is understood that the constitution mandates that there is only one election in five years. This is immediately followed by Paragraph (2) stating, "The elections are held to elect members of the House of Representatives, Regional Representatives Council, the President and the Vice President and the Regional Representatives Council." It is understood, therefore, that the direct, public, free, confidential, honest, and fair elections held once every five years are intended to elect members of the House of Representatives, Regional Representatives Council, the President and the Vice President and the House of Representatives Area all at one time, simultaneously. However, the argument for a five-box simultaneous election has drawn criticism for several reasons:[12]

a) Lack of Coattail Effect

The desire to strengthen the presidential system brings about a mutually supportive relationship between the executive and the legislature, thus creating strong governance. This is not so easy to create if all five elections are administered simultaneously because the separate ballot papers allow voters to make inconsistent choices. Voters may vote for a party A to the legislature, and party B's candidate for president; thus there is no coattail effect.

b) The Possibility of W

So far in Indonesia's experience holding elections, it can be seen that voter behaviour in Indonesia is still heavily influenced by campaign materials or affiliation with potential proximity reasons, for example because of shared ethnicity, physical performance or other such instant factors. Therefore, based on recent elections in Indonesia, there have been many cases of money politics, but new jargon has developed

[12] Electoral Research Institute – LIPI, 2014, *Position Paper Pemilu Nasional Serentak 2019,* Jakarta, page: 103 (www.eri-indonesia.org) access on Oktober 2015

within the community, creating a perception that such cases are normal and not problematic. As such, there must be engineered an electoral management and a tightening of legal sanctions for those involved in money politics. Provisions in the electoral law that prohibit giving, receiving or promising goods and services during the elections need to be enforced. In addition, the voters' ability to make rational, informed decisions based on the parties's programmes is minimal. Parties fail to socialise their programmes to prospective voters and candidates efforts to drive the success of their respective party programmes are weak. Hence the necessity for a formula to systemically to address the issue.

c) Security Factors

In recent experience of legislative elections held simultaneously nationwide, there have not been any high security risks. However, it should be noted that the escalation of friction amongst supporters during contestation of the legislative elections and the presidential elections are significantly different. For example, because there were only two pairs of candidates in the 2014 presidential elections, the friction between supporters of each candidate was considerable, which has implications for public security. If five elections are combined into one simultaneous election, then the question of security is necessary to draw greater attention due to the potential compounding of friction amongst the supporters of different presidential candidates with the interests of the supporters of contesting parties.

d) Logistical Arrangements

Thus far, logistic arrangements have used a centralised logistics and distribution system to implement zoning with enforced zones arranged in a way to get closer to the winning bidder's plant and logistics distribution area. With simultaneous elections across diverse regions, it remains to be seen whether the election organisers (KPU) will apply the same systems and mechanisms or find a new approach. The complexity of a five-way simultaneous election requires more thoroughness from the organisers.

Thus, a national-local model for simultaneous elections has been proposed, which must pay consideration to the following:

a. the end-of-term for the president, DPR and DPD for the national elections;
b. the end-of-term for the governor, regent/mayor, provincial DPRD and district/municipal DPRD for the local elections.

Historically, the president and vice president have been inaugurated on 20 October, and the DPR and DPD are inaugurated on 1 October. Since the legislative elections are held on the 9 April, the time between the election and the inauguration is 5 or 6 month, which allows for the emergence of ineffective legislation, particularly for those who are not reelected. Therefore, if there is to be a simultaneous election, it is best if the time between the election and the inauguration is reduced, though with consideration to the time needed for recapitulation, which is one month, as well as the time needed for the settlement of claims with the Constitutional Court. In light of these matters, May 2019 was suggested as an appropriate time for the first simultaneous national election because it does not interfere with the ending of the president's term. If local simultaneous elections are to follow two and a half years later, then they will be held in November 2021. Regarding budgeting responsibilities, finances can be accounted for in December.

3. Possible Systems for Simultaneous Elections

Systems in this case refer to the procedures involved involved in conducting a simultaneous election, consisting of the mechanism and procedures for directly electing the president and vice president and for electing the members of the DPR and DPD. Procedures for local elections are not considered a part of the national system. The national system is concerned with how the presidential and vice presidential candidates as well as candidates for the DPR and DPD will be elected directly by the people. Meanwhile, the choosing of presidential and vice presidential candidate will not experience a change of system. The system for electing the president and vice president is a plurality system, not a majority system (50% + 1), as

regulated by the Constitution. Meanwhile, the Multi-member district system is used to elect members of the DPD for each region, whereby multiple members are chosen based on the top largest votes relative to the number of chairs available, e.g. for regions with three chairs, the top three candidates with most votes in that region are elected.

As for selecting candidates for members of DPR, there are two main types of system available, namely, proportional and majoritarian. Some countries have developed from these two systems a mixed system that combines the two mechanisms. In the context of simultaneous elections, this option requires that there be a presidential coattail and political efficacy, such that the choice of candidates for president / vice president will have an impact on the choice of a political party or candidates for Parliament nominated by political parties. The presidential coattail effect and political efficacy, can be influenced by whether the choice of candidate for president/ vice-president and for members of DPR/parties are on a single ballot paper or separate ballot papers. Although there are different mandates for each, preventing them from being combined as one, some countries unite the electoral process in a single ballot nonetheless. Aside from efficiency, this is done in the context of simultaneous elections in order to magnify the impact of the presidential and vice-presidential election on the election of party members and members of DPR/parties.[13]

However, the technical implementation must also be considered in order to find the electoral system that is most convenient. Furthermore, the system should be tailored to the specific goals, particularly regarding efforts to realise a simple multi-party system. To that end, there are several options for combining systems with technical implementation. First, continue to use the open proportional system (Open PR) to elect the members of the DPR. The advantages of using Open PR include reducing party oligarchy in the recruitment and nomination of members of Parliament and allowing voters to vote for representatives directly. However drawbacks are that the political

[13] Electoral Research Institute – LIPI, 2014, *Position Paper Pemilu Nasional Serentak 2019,* Jakarta, page: 71-72 (www.eri-indonesia.org) access on Oktober 2015

parties lose control over the candidates for the people's representatives, the widespread use of money politics in the search for support, the unhealthy intra-party and inter-party competition and pencurian suara antarkandidat. Regarding technical implementation, voters are given the opportunity to elect a party and/or to select individual candidates from an open list. In practice, voters are often confused when selecting a candidate as there are so many to choose from. Often many voters who do not have an individual preference end up choosing a political party rather than choosing candidates. In a simultaneous election, the use of an open proportional system is technically very difficult to combine on one ballot paper the prospective presidential/vice-president with the open list of candidates and political parties. Consequently, if the open PR system is used, there will still be three boxes in the administration simultaneous elections, namely box 1 the presidential/vice-presidential candidate; box 2 for members of Parliament/ political parties; and box 3 for members of the DPD.

The second option is a closed proportional system, though this can be considered a step backwards. Nevertheless, there has not been any evaluation using the Open PR system of how many voters opt to elect a party rather than an individual candidate. At a glance, results from polling stations suggest that there is still a tendency towards voters choosing a party rather than selecting from the open list of candidates. The effectiveness of using an Open PR system, as well as the shortcomings mentioned above, is not yet an option for voters. If the Closed PR system is used, the elections can be conducted more efficiently, and the effects of presidential coattail and political efficacy will be significantly higher because the voters can directly compare the presidential/vice-presidential candidates with the political parties upon the same ballot paper. With the presidential/vice-presidential candidates placed so close to the party logos, the coattail effect will be much higher than with two separate papers.

A third option is holding simultaneous elections at the same time by changing the system of parliamentary/party elections from a proportional

electoral system to a mixed system, specifically a parallel election. This is a valid option, considering the trials conducted by the LIPI Political Research Centre (P2P LIPI) on the effectiveness of the parallel electoral system to produce a moderate multiparty system. The results of simulations conducted by P2P LIPI based on data from the 2009 and 2014 Elections showed acceleration in producing a moderate political party composition (moderate) in parliament without parliamentary threshold. The parallel electoral system is a system where most members of the DPR are elected through a proportional system (closed) and others are selected through a majoritarian system.

In the context of technical administration, it is more feasible to conduct a simultaneous presidential and vice-presidential elections with a parallel electoral system using a single ballot paper rather than the Open PR system. Tingkat kemungkinan teknis penyelenggaraanya hampir sama dengan simultaneous elections combining the plurality system with closed lists and/or parallel election, because each party only presents the party logo and a single name for a majoritarian election. Thus, it is technically easier to implement than the open list, which would require three ballot papers, while the combination of closed list and parallel system requires only two papers: one for the president/vice-president and the party/candidate and one for members of the DPD. One major benefit of the parallel election is that it solves the problem of spread results in a proportional system caused by a fragmented multiparty system. From the three variants offered, this paper suggests a change in the system used for electing members of DPR in order to realise the goal of simplifying the multiparty system.

4. Settlement of Disputes in Light of Constitutional Court Decision No. 14/PUU-XI/2013

a. Violations and Disputes

In matters of election law, we can refer to Law No. 8, 2012 concerning General Elections for Members of the People's Representative Council, Regional Representative Council and Regional People's Representative

Council because it is more complete than Law No. 42, 2008 concerning General Election for the President and Vice-president, Law No. 15, 2011 concerning Administration of General Elections and Government Regulation in Lieu of Law No. 1, 2014 regarding Elections for Governer, Regent and Mayor. Law No. 8/2012 recognises two legal problems: violations and disputes. Violations refers to criminal acts related to general elections, and disputes refers to electoral disputes, and disputes over the administration of elections and results of elections. There are three kinds of election violations: Electoral violations are misdemeanours or felonies under electoral law. Unlike the laws before, Law No. 8/2012 differentiates between misdemeanours and felonies. Said Law determines19 articles of misdemeanours, from giving false information on the electoral roll to announcing survey results during the cooling–off period. There are also 29 articles of felonies determined by Law 8/2012, including depriving another of the right to vote to election officials not taking action or reporting when discovering violations.

Electoral administration violations are violations that relate to the methods, procedures and mechanisms in each stage of the election other than violations of the electoral administration code of ethics. Because these violations are related to the administration of elections, they constitute violations of KPU regulations. Law No. 8/2012 does not specify the type or form of sanctions for such violations. Sanctions are directly related to the administration process, starting from verbal warning, written warning to revocation of position as a voter or candidate.

Violations of the election administration code of ethics are violations of the ethics of election administration in accordance with the oaths taken before the commencement of the elections. According to Law No. 15/2011, the election administration code of ethics is compiled and implemented by the DKPP with a view to protecting the independence, integrity and credibility of the administration of elections. Penalties for violators of the election administration code of ethics of consist of written warning, suspension, and permanent dismissal. There are also

three types of electoral dispute: Disputes amongst participants of the election and disputes between participants and administrators of the election as a result of decisions issued by KPU at the national, provincial or regency/city level. According to Law No. 15/2011, in the administration of elections, KPU at the national level can issue KPU Regulations and KPU Decisions, while KPU at the province and lower levels can issue decisions with reference to the KPU at the national level. Regarding legislative elections, there have been many decisions issued by KPU at all levels, consistent with the procedures and stages of administering the elections, and all of which are results of disputes, whether amongst participants or between participants and administrators.

State administrative electoral disputes arise between candidates for members of DPR, DPD, DPRD and parties on the one hand and KPU on the other as a result of decisions issued by KPU. These disputes arise when a party candidate does not pass verification as a result of a KPU Decision concerning the determination of participant political parties; and a candidate for membership to the DPR, DPD or DPRD is stricken from the candidate list as a result of a KPU Decision concerning the determination of the candidate list. Disputes over election results arise between KPU and the participants regarding the national determination of votes. Disputes over the determination of votes in the national election may affect the number of seats for participants of the election. The Constitution affirms that such disputes are handled by the Constitutional Court. Originally, disputes over regional election results were also addressed the Constitutional Court, but recently a Constitutional Court Decision handed these cases off to the Supreme Court.

III. CONCLUSION

A. Summary

The format of the election after Constitutional Court Decision No. 14/PUU-XI/2013 is a five-box election, where box 1 is for the DPR, box 2 is

for the DPD, box 3 is for the president and vice-president, box 4 is the DPRD at the province level, and box 5 is for the DPRD at the regency/city level and is conducted simultaneously. Aside from changes to the time of administration, there are also changes to the candidacy system, electoral system, campaign models and the election area and presidential threshold in simultaneous elections.

B. Recommendations

1. All stakeholders in the simultaneous elections—the government, DPR, DPD, administrators—must share a common understanding of simultaneous elections;
2. This shared understanding will ease the formulation of laws for the simultaneous national general elections for president/vice-president, members of DPR and DPD and for the local simultaneous general elections for Governer and DPRD at the province level and Regent and Regency DPRD as well as Mayor and City DPRD;
3. At least two laws pertaining to simultaneous elections must be made:
   i. law on Simultaneous National General Elections;
   ii. amendment to the law on General Elections for Regional Leaders to cover Simultaneous Local General Elections at the Provincial Level.

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Dynamics of the Obligation to Register Birth Certificates as a part of the Right to Issuance Population Documents

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Abstract

The state is obliged to protect and recognise the legality of a person's birth. Registration of birth in the form of a birth certificate is proof of one's origin issued by the competent authorities. However, in practice, the time limit of one year given for such registration has proven a burden to citizens, such that complaint of constitutional damages has been brought before the Constitutional Court of Indonesia. Population administration is regulated under Act Number 23, Number 23 Year 2006 and amended by Act Number 24, Number 24 Year 2013 in accordance with Constitutional Court Decision 18/PUU-XI/2013. In order to take an active role in the registration of births, the government and local governments have to remove the deadline to report the birth of a child, as stipulated by the district court and as an effort to improve state responsibility. This requires that citizens have the "right to be heard" and, in future, there should be an integrated service from the government for the registration of births.

Keywords : Birth Registration, Birth Certificate, Right to be Heard

I. INTRODUCTION

Humankind experiences a number of phenomena, including birth, death, fetal death, marriage, divorce, child recognition, child legitimation child adoption, change of name and change of nationality.[1] Birth, the welcoming of a new member to a family, is certainly a source of happiness for those who experience it. On

[1] Article 1 subsection 17 Act Number 23, 2006 concerning The Population Administration as Amendment to Act Number 24, 2013.

the other hand, the birth of a child also brings about certain responsibilities for the parents in the form of reporting and registering the birth with the Civil Registry office in order to document the event and thus secure the protection of the law by the state for the citizen. With obligations fulfilled, the subject can act freely, safely and peacefully in the pursuit of his or her interests and needs under the protection and guarantee of the law.

In the broader scope, a community strives for an orderly society so that human interests can be duly protected. Society requires order and stability to ensures legal certainty. In he formulation of laws, legislators must give consideration to this matter. Similarly, the law protects the interests of the people, which are dynamic, ever-changing, growing both in number and in nature. As such, the law must be equally dynamic to keep up with these developments and ensure that protection is maintained. Thus, the law is *historisch bestimmt,* a phenomenon of history concerning both stability and change.[2]

Historically, Population Administration has been regulated by Book One, Chapter Two, Part Two and Chapter Three of the Civil Law Book (*Burgerlijk Wetboek voor Indonesie, Staatsblad* 1847:23), European Civil Registration Regulations (*Reglement op het Holden der Registers van den Burgerlijken Stand voor Europeanen, Staatsblad 1849:25* last altered by *Staatsblad 1946:136*) Chinese Civil Registration Regulations (*Bepalingen voor Geheel Indonesie Betreffende het Burgerlijken Handelsrecht van de Chinezean, Staatsblad* 1917:129 *jo. Staatsblad 1939:288*, last altered by *Staatsblad 1946:136*), Indonesian Civil Registration Regulations (*Reglement op het Holden van de Registers van den Burgerlijeken Stand voor Eenigle Groepen v.d nit tot de Onderhoringer van een Zelfbestuur, behoorende Ind. Bevolking van Java en Madura, Staatsblad 1920:751 jo. Staatsblad 1927:564*), Indonesian Christian Civil Registration Regulations (*Huwelijksordonantie voor Christenen Indonesiers Java, Minahasa en Amboiena, Staatsblad* 1933:74 *jo. Staatsblad 1936:607* last altered by *Staatsblad 1939:288*) and Act Number 4, 1961 concerning Alterations and Additions to Family Name (1961 State Gazette, Number 15, Supplement State Gazette Number 2154). Later, upon the enactment of Act

[2] Sudikno Mertokusumo, *Teori Hukum,* Yogyakarta: Universitas Atma Jaya Yogyakarta, 2011, p. 25-26.

Number 23, 2006 concerning Population Administration (hereinafter referred to as Population Administration Act), the previous regulations were retracted and declared invalid.[3]

In principle, the issuance of a birth certificate is a right of citizens as regulated by Article 2, Point a of the Population Administration Act, which states that all citizens have the right to receive population documents. Citizen complaints that there is constitutional damage are caused by Article 32 of the Population Administration Act, which reads as follows:

(1) *Births reported, as referred to in Article 27, Paragraph (1), in excess of the limitation of 60 days up to one year after the date of birth, will be registered upon consent from the local Head of Executing Agency.*
(2) *Registration of births later than one year, as described in Paragraph (1), is conducted in accordance with District Court regulations.*
(3) *Further provisions on the requirements and procedures for birth registration, as referred to in Paragraphs (1) and (2), are stipulated by Presidential Decree."*

This is considered contrary to those principles within the constitution, namely the principle of equality before the law, the principle of legal certainty and the right of citizenship status to every citizen, that are found under Article 27, Paragraph (1); Article 28D, Paragraph (1) and Article 28D, Paragraph (4) of the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the Constitution), which state respectively as follows:

> Article 27, Paragraph (1)
> Every citizen is granted equality before the law and government and shall abide by the law and government without exception.
> Article 28D, Paragraph (1)
> Every person is entitled to recognition, security, protection, legal certainty and equality before the law.
> Article 28D, Paragraph (4)
> Every person is entitled to citizenship status

The Petitioners of Constitutional Court case Number 18/PUU-XI/2013 were the individual citizens Mutholib—a parking attendant represented in court proceedings by H. Sholeh Hayat, S.H.—H. Subroto Kalim and Bambang Juwono,

[3] Article 106 Act Number 23, 2006 concerning The Population Administration.

S.H., M.Hum, a member of East Java Regional People's Representative Council who represented the voice of the people of Surabaya (*Kota)*, Magetan (*Kabupaten*) and Lamongan (*Kabupaten*) regarding the difficulties involved in processing birth certificates. The Petitioners submitted the petition on 13 January 2013, and said petition was accepted and registered with the Constitutional Court Secretariat on 23 January 2013.[4]

The Petitioners postulated that children's rights guaranteed by the law generate obstacles, complexities, fees and added burdens for the District Court and the Ministry for Home Affairs. Furthermore, Article 32, Paragraph (2) of the Population Administration Act has resulted in the violation of rights guaranteed by Article 28D, Paragraph (4) of the Constitution, whereby the right to citizenship is burdened by obligation and by sanction requiring stipulation from the District Court should a birth be reported more than one year after the birth date.

These obligations and sanctions relating to the processing of a birth certificate generate excessive costs, especially for the underprivileged who live in rural areas, such as the transportation fares when visiting the court on multiple occasions, certification fees at the post office and the requirement to present two witnesses and to obtain a recognition of the birth from the head of the village. These matters have resulted in constitutional damages for Indonesian citizens, particularly those requesting birth certificates.[5]

II. DISCUSSION

A. Citizens' Rights and Obligations Regarding Births

The law must be differentiated from rights and obligations, which arise upon the application of the law to circumstances. However, neither one can be separated from the other.[6] The granting of rights to members of a society results in obligations being posed upon those same members. The Population Administration Act, with regard to the right of all citizens to receive population documents, guarantees equal treatment by the Civil Registry and Population

[4] MK's Decision Number 18/PUU-XI/2013 concerning Judicial Review of Act Number 23, 2006 concerning The Population Administration.
[5] *Ibid*.
[6] Sudikno Mertokusumo, *Mengenal Hukum: Suatu Pengantar,* Yogyakarta: Liberty, 1999, p. 41.

Registration procedures, data security, legal certainty regarding ownership of documents, information regarding the results of registration and civil records for the individual and his/her family and recompense and vindication in the event of error resulting from misuse of private data by the executing agency.[7] As such, citizens are obliged to report population events and other important events to the executing agency in order to fulfil the necessary requirements of population registration and the Civil Registry office. The obligation to report each birth to a citizen to the executing agency within 60 days of the birth so that the Civil Registry official can enter the birth into the Birth Certificate Register and issue an excerpt from the birth certificate.[8]

The Petitioner Mutholib was a citizen who requested a birth certificate from the Surabaya District Court outside of the time limit with the case number 2194/Pdt/20/PN.Sby. The Petitioner experienced difficulty in organising the registration owing to the meandering bureaucratic procedure, namely his having to request an accompanying letter from his hamlet and neighbourhood, urban village, sub district, Office of Demography and Civil Registry Affairs, District Court, Central Post Office, the bank and having to present two witnesses. The Petitioner also expended official fees of Rp 236,000 as well as further costs, which placed significant pressure on the Petitioner.[9] In essence, the Petitioner felt that he had been unfairly treated by the implementation of Article 32 of the Population Administration Act, given that population documents are, in principle, an entitlement granted to all citizens in accordance with Article 2 Point a of the same Act. Every child, from the moment of birth, is entitled to an identity, in the form of a name, and citizenship, as stipulated in Article 3 and Article 5 of the Child Protection Act. Under Article 32 of the Population Administration Act, which regulates the birth registration process, births reported more than 60 days to one year from the date of the birth are registered only with confirmation from the Regional Head of the Executing Agency, namely the Head of the District/City Government who is responsible for and authorised to handle

[7] *Ibid*.
[8] Article 27 paragraph (1) and Article 27 paragraph (2) Act Number 23, 2006 concerning The Population Administration.
[9] MK's Decision Number 18/PUU-XI/2013 concerning Judicial Review of Act Number 23, 2006 concerning The Population Administration.

matters of Population Administration in the region where the child in question was born. This procedure is carried out in accordance with stipulations from the District Court. It is further stipulated that provisions regarding any further delay in the reporting and registration of births, as referred to in paragraphs (1) and (2) are regulated under Presidential Decree. These regulations are considered in contraction with the principle of equality before the law, the principle of legal certainty and fairness and the right to citizenship status granted to every person as guaranteed by Article 27 Paragraph (1) and Article 28D Paragraph (1) and Paragraph (4) of the 1945 Constitution.[10]

B. Constitutional Court on the Process for Overdue Birth Registration

Based on Article 24C paragraph (1) and Article 24C paragraph (2) of the 1945 Constitution and Article 10 paragraph (1) and Article 10 paragraph (2) Constitutional Court Act as follows that Constitutional Court has responsible for reviewing the law against the Constitution, so that petition of Population Registration Act can held in Constitutioanl Court. In a public plenary session, the Constitution Court issued a decision wherein it was stated that the delivery of public services at current are still faced with conditions that do not correspond to the needs and changes in various spheres of life of society, nation and state. This is due to an unpreparedness to face the diverse transformation of values and the impacts of various complex development the development of complex development issues. A higher public awareness with regard to seeking a quality education is often hampered by various technical administrative issues that cannot be addressed because prevailing laws are not conducive to a fast, simple, and inexpensive public service.[11]

Article 27 Paragraph (3) of the Child Protection Act states, "*a birth certificate is based on a letter from the person who witnessed and/or assisted in the birth.*" Article 27 Paragraph (4) of said Act states, "*In the case of a child whose process of birth is unknown, and the whereabouts of whose parents are unknown, the birth certificate shall be based on the information given by those people who discover*

[10] *Ibid.*
[11] MK's Decision Number 18/PUU-XI/2013 concerning Judicial Review of Act Number 23, 2006 concerning The Population Administration.

said child." Article 28 Paragraph (1) of the Child Protection Act states, "*The issuing of a birth certificate is the responsibility of the government and is to be conducted at the lowest regional level possible.*" Thus, the birth certificate procedure is a responsibility of the government in the field of population administration to be implemented with simplicity and accessibility. On the other hand, every citizen is obliged to report any matters of population or special events experienced, including births. The Unitary State of the Republic of Indonesia is formed upon the principles of Pancasila and the 1945 Constitution and as such is obliged to provide protection and recognition regarding the determination of personal status and legal status for each population event and important event experienced by Indonesian citizens whether within or without the national boundaries of the Unitary State of the Republic of Indonesia. Protection granted by the state is implemented through population administration. Population Administration, particularly the birth certificate, is important for citizens because in the birth certificate, citizens possess a population document that provides authentic proof of one's identity and of one's relationship to his or her family, which contains within it certain legal consequences be they the civil responsibilities of a parent to a child or a person's right to inheritance. Any person who does not hold a birth certificate, does not legally exist in the eyes of the state. This results in such a child not being registered by name, genealogy or nationality and not having his/her existence protected. The worst possible outcome is manipulation of such a child's identity, making it easier to exploit said child, for example through child trafficking, child labour or child abuse. The birth certificate is also connected with the legal-formal matter of a person's identity before the law, which includes the determination of a persons adulthood based upon his/her age, which determines a person's competency in his/her actions and his/her ability to recognise the legal situation concerning said actions. Therefore, the birth certificate is an important document to any individual because with it, said individual receives recognition, security, protection and legal certainty because he/she is registered with the state, bringing about rights and legal obligations, personal status and citizenship.[12]

[12] *Ibid.*

On the other hand, regulations concerning population administration are also important to the state administration because the state requires population data in order to plan and execute purposeful and targeted development programs. These provisions indicate the importance of population administration regulations as a part of the effort to realise good governance. Thus, the birth certificate is extremely important in order that the state's protection of the rights arising from certain population events and other important events be rendered in an orderly and efficient manner. The Constitutional Court further remarked that the term "consent (*persetujuan*)" in Article 32 Paragraph (1) of the Population Administration Act generates legal uncertainty and unfairness in the process of registering and issuing the birth certificate because such consent is an internal matter of the executing agency. Thus, in order to ensure fair legal certainty, the recording or not of a birth that has been reported out of the time limit should be determined by a decision from the Head of the Executing Agent based on the accuracy of the data subited in accordance with the provisions in the law, so that the aforementioned term "consent (*persetujuan*)" should read be understood as meaning "decision (*keputusan*)".[13]

The Constitutional Court decision submitted that the extra provisions applied for births registered after the given time period is a burden upon the citizen. This burden affects not only those who live in remote areas but also for those who live in urban areas. Moreover, the court process, which involves a lengthy administrative procedure and incurs higher costs, is not a simple procedure for the layperson/general public, which places an obstacle to the constitutional rights of the citizens regarding legal certainty. For these reasons, Article 32 Paragraph (2) of the Population Administration Act not only violates the provisions in Article 28D Paragraph (1) of the 1945 Constitution but is also contrary to the principle of fairness, since justice delayed is equivalent to justice denied. The Petition was considered to have legal grounds and thus the Constitutional Court granted in its verdict that the term "*agreement*" as referred to above is indeed in contradiction with the 1945 Constitution and does not

[13] *Ibid*.

possess binding legal force insofar as it is to be interpreted as "decision"; that the phrase "*up to one year*" is in contradiction with the 1945 Constitution and does not possess binding legal force. As such, Article 32 Paragraph (1) of the Population Administration Act becomes, in full, "When reporting of a birth, as referred to in Article 27 Paragraph (1), which is later than sixty days from the birth, registration requires a decision from the Head of the Executing Agency". Furthermore, the Constitutional Court verdict considered Article 32 Paragraph (2) along with the phrase "*and Paragraph (2)*" as found in Paragraph (3) to be contradictory to the 1945 Constitution and to not possess binding legal force. Henceforth, this decision of the Constitutional Court, Number 18/PUU-X/2013 was published in the Official Gazette of the Republic of Indonesia in accordance with Article 57 paragraph (3) of the Constitutional Court Act.

C. Dynamics of the Obligation to Report for the Registration of Births with regard to the Constitution as the Protector of the State for the Realisation of General Well-being.

Dynamics, in the context of this paper refers to forces of change within the conditions of society. In this case, the Constitutional Court's verdict, which deemed the prevailing laws in question no longer legally binding, constitutes such a force. Thus, the rule of law is a product of history that, once formed, will have an impact upon history and society and in turn can be historically and socially affected. Any legal system constructed within such a context is as such an pen and dynamic system.[14] Society can be well governed as long as the necessary institutions are formed in such a way that they generate the greatest possible satisfaction for all members of the society. Just as a private individual aims to achieve the maximum possible happiness for hisself, so, according to Jeremy Bentham, a society aims to achieve the greatest satisfaction for the greatest number.[15]

Bentham states that the essence of happiness is pleasure and the absence of misery. Thus, the purpose of human efforts is to maximise happiness and reduce

[14] Bernard Arief Sidharta, *Refleksi Tentang Struktur Ilmu Hukum: Sebuah Penelitian Tentang Fundasi Kefilsafatan dan Sifat Keilmuan Ilmu Hukum sebagai Landasan Pengembangan Ilmu Hukum Nasional Indonesia*, Bandung: CV. Mandar Maju, 1999, p. 186-187.
[15] Sudikno Mertokusumo, *Mengenal Hukum: Suatu Pengantar*, Yogyakarta: Liberty, 1999, p. 74.

suffering.[16] Bentham further suggests that a state arises not through the will of nature but through the will of society in the form of a contract, which becomes the basis of the state and is intended to create the maximum prosperity for its people. Therefore, should the constitution be found to generate a condition other than that described, the constitution should be altered accordingly. So it is with the law: the objective of the law is to realise the greatest possible satisfaction for the greatest number of people, and evaluation of the law is conducted against the outcomes of implementing the law. Thus, the law is made up of provisions for realising a prosperous state.[17]

Comparing the Constitutional Court Decision Number 54/PUU-XI/2013 on judicial review of Act Number 23, 2006 concerning Population Administration Act that birth registration is a child rights. In addition, the state also has the same obligation. But the country has very limited apparatus, with a very wide area coverage, and with a population that is very much unlikely to be able to find one after a birth that occurred in its territory. Therefore, the obligation for every citizen to report any births occurring. Birth registration is not just recorded on the birth of a person but also to the broader legal issue is the status of one's child. His parents, guardian, or other person who knows the event in terms of the parent or guardian does not exist. A fairness there is the state's obligation to note there is also a civic duty to report the birth event. Thus it is not obligatory that fetched when the policy options in the Law on Civil Registration which adheres to the principle of active stelsel. The participation of every citizen to report any incident of population and important events that have happened, including births, is one form of awareness and concern of citizens in determining the legal status as citizens in survival, grow, and develop as stated in Article 28B paragraph (2) and Article 28D paragraph (4) of the 1945 Constitution. [18]

State Administration has a combinational meaning (*verzamelterm*): 1) state administration as an organisation; 2) administration as an effort to achieve the state's objectives, meaning those objectives encoded as enforced by the law

[16] H. Lili Rasjidi and I.B. Wyasa Putra, *Hukum Sebagai Suatu Sistem,* Bandung: CV. Mandar Maju, 2003, p. 116.
[17] *Ibid*.
[18] Yusti Nurul Agustin, *Active Stelself "Principle in The Adminsitration Population No Contradiction with Constitution,* 26 February 2014, <http://www.mahkamahkonstitusi.go.id/index.php?page=web.Berita&id=9665#.V_7WdOWLTIU,> accesed 13 Oktober 2016.

(*dwingend recht*).[19] The deadline on reporting births is a policy of the state administration that is coercive in nature. Consistent with the Constitutional Court decision, the principle of rechtmatigheids van bestuur holds that acts of the government need not always be justified in the event that they are not based upon the law. The government's actions towards the state must be based upon the law, but citizens are not bound by the law of the administration and do not face the same limitations.[20]

Following the Constitutional Court decision, Supreme Court Circular Number 6, 2012 concerning Guidelines on the Collective Determination of Birth Registrations Beyond the One-year Deadline, which had been issued by the Chief of the Supreme Court pursuant to the Population Administration Act on 6 September 2012, was determined similarly in contradiction with the constitution, and under these circumstances, it should be revoked.[21] Thus, the Chief of the Supreme Court further issued on 1 May 2013 Circular Number 1, 2013 on the revocation of Circular Number 6, 2012 concerning Guidelines on the Collective Determination of Birth Registrations Beyond the One-year Deadline.[22] Subsequently, the Population Administration Act was adjusted by Act Number. 24, 2013 concerning Amendment to Act Number 23, 2006 concerning Population Administration, which was valid immediately[23] from the moment of issue on 24 December 2013. Thus, the People's Representative Council as legislators and the Civil Registrar as the relevant government agency executed their commitments to achieve general well-being and to work towards the best life possible.

According to Lord Acton, any amount of power, no matter how little, can be abused, such that under the discretion born by the state administration at all sectors of the life of society occasionally injures that society.[24] Agencies and officials within the state administration, as the determiners of policy (*beleidsregel*), often make decisions that are not in accordance with the law, so it is necessary

[19] Philipus M. Hadjon, et.al., *Pengantar Hukum Administrasi Indonesia*, Yogyakarta : Gajah Mada University Press, 1999, p. 26.
[20] M. Guntur Hamzah, "Hukum Administrasi (Negara)" (Paper in lecture Doctor Brawijaya University Program in Constitutional Court Indonesia Republic, 5 September 2014.
[21] Hadjon, *Pengantar Hukum .... Op.cit.*, p. 155
[22] Hadjon, *Pengantar Hukum .... Op.cit.*, p. 279.
[23] Article II Act Number 24, 2013 concerning Amend of Act Number 23, 2006 concerning Administration Population.
[24] Diana Halim Koentjoro, *Hukum Administrasi Negara,* Bogor: Ghalia Indonesia, 2004, p. 70.

to anticipate such occurrence to ensure that policies fulfil the requirements of good governance, considering that Indonesia as a state is based on the rule of law oriented towards social welfare (*sociale rechtstaat*).[25] The positive law can sometimes hinder the development of life; in fact, it has been said that those who most consistently follow the law are most detrimental to justice (*summum ius summa iniuria*).[26] Regarding the deadline for reporting births, this regulation constitutes a freedom of action of the government (*freies ermessen*), whereby the power of the government (*legis executio*) to execute the law, [27] as a matter of fact cannot be implemented as in the case of the Petitioner, where a right becomes a burden in the form of a sanction determined by the district court should the birth be reported late[28], which is a constitutional injustice.

It is natural that there be oversight in the running of the government, which represents security in the event of a conflict with the rule of law, so that there must be a system in place to protect the governed from the aforementioned discretionary measures (*Freies ermessen*).[29] Certain countries, including Japan, Australia and the Netherlands, no longer use the court for small matters with a small number of involved parties, but rather implement a mediation approach to settling conflict so that proceedings do not drag on.[30] In this light, use of the district court as a way to ensure timeliness from citizens in the birth registration process is a convoluted approach resulting, furthermore, in constitutional injustice. Population Registration is an active system for citizens.[31] This relates to dynamics in that not every inner dynamic represents a process of development. In this case we can see that there was no transformation[32] of the obligation of the public into an obligation of the government. Rather, we see a dynamic beginning with the absence of any deadline for birth registration and continuing with the introduction of a one-year deadline through the enactment of the Population

[25] Hadjon, *Pengantar Hukum .... Op.cit.*, p. 152. In H. Abdul Latief, *Hukum dan Peraturan Kebijaksaan (Beleidsregel) pada Pemerintah Daerah,* Yogyakarta: UII Press, 2005, p. 8-9.
[26] Theo Huijbers, *Filsafat Hukum dalam Lintasan Sejarah,* Yogyakarta: Kanisius, 2006, p. 33.
[27] Philipus M. Hadjon, *Perlindungan Hukum bagi Rakyat di Indonesia: Sebuah studi tentang Prinsip-Prinsipnya, Penanganannya oleh Pengadilan dalam Lingkungan Peradilan Umum, dan Pembentukan Peradilan Administrasi*, Surabaya: Peradaban, 2007, p. 184.
[28] Achmad Dodi Haryadi, "Pengurusan Akta Lewat Setahun, Tak Perlu ke Pengadilan," *Majalah Konstitusi* Nomor 75 Mei (2013): 10.
[29] Koentjoro, *Ibid*.
[30] Supreme Court of Republic Indonesia, "Hakim, Salah Satu Kunci Keberhasilan Mediasi" (http://www.pembaruanperadilan.net/v2/category/akses_terhadap_keadilan/page/2/) (Accesed 22 September 2014).
[31] General Act Number 23, 2006.
[32] Philippe Nonet and Philip Selznick, *Hukum Responsif*, Bandung: Nusamedia, 2008, p. 28.

Administration Act and then completing with the Constitutional Court decision that such a provision is unconstitutional and non-binding, and finally the Act in question was amended. This is consistent with Article 28D Paragraph (4) of the 1945 Constitution, which states, "*every person is entitled to citizenship status,*" which implies that every person is obligated to report births in order to receive citizenship status for the newborn child. The obligation for citizens to register births through the birth certificate process, followed by the government's (central government and regional administrative) obligation to provide excellent service to the public by playing an active role. According to Population Administration Act, population administration is a public system expected to fulfil the rights through public service and provide protection to the issuance of population documents without any discrimination.[33]

Following up on the Constitutional Court ruling, the Ministry of Home Affairs issued Circular Letter Number 472.11/2304/SJ concerning Follow-up Implementation of Decision Number 18/PUU-XI/2013 dated May 6, 2013 that the date of May 1, 2013, reporting of births exceeded the time limit of 1 (one) year, recording no longer requires the court ruling the country but directly processed by the Department of Population and Civil registration Regency/City. Then, government publishing Ministry of Home Affairs Regulation Number 9 Year 2016 on Accelerating the Improvement Coverage Owners of Birth Certificate which came into force on February 29, 2016 to follow the Law of the Population Administration as the country's efforts to provide protection and recognition of the determination of the personal status and the legal status of any event births experienced by the population included protection of children's rights because the ownership is still low birth certificates through the acceleration of birth certificates that birth registration procedures done by manually or online that have the same legal force.

This is relevant to legal protection for the public in that there are preventative legal safeguards, namely the principle that every citizen has the right to be heard from either side (a*udi alteram partem*) in those countries that have laws on the general provisions for administrative procedures, such as Australia, Germany,

[33] General Act Number 23, 2006.

Norway, Spain, Sweden and Switzerland, where individuals who are affected by acts of government can present their rights and interests in order to foster good governance and engender an environment of trust amongst the government and the governed.[34] Although such law can have an impact on the relationship between government institutions and the public tending towards intimidation, conflict, unresolved conflict and difference of opinion, such outcome is usually resultant of the government asserting its power in conflict with the interests of the public.[35] Ernest Gollhorn presents his opinion as follows:

> "*The constitutional foundation indicating when administrative action must be preceded by a trial-type (adjudicative) hearing and when rule making... administrative action must be preceded by notice and a hearing – particularly by an opportunity to be heard in an adjudicative setting*."[36]

In the implementation of democracy in administrative law occurs the hearing process, whereby the government, before it issues its decision, gives the opportunity through public announcement for interested parties to be heard first.[37] The right to be heard is one method of socialisation that the government uses in the case of new laws that will have an impact on the public in order to guarantee fairness and a just government.[38] According to Jürgen Habermas in the theory of deliberative democracy, the legitimacy of the law is ensured through unbiased discourse amongst the interested parties, namely the government and the citizens who will be affected by the law.[39] Such discourse, and the implementation of the right to be heard, is a realisation of public participation in the creation of the law and is in turn an important part of realising good governance.[40] Any government policy that goes through such a hearing before it is issued experiences dynamics, and provided the government is committed to the participation from the public, then their positions are proportional and the result will be a government with better policies.

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[34] Hadjon, *Perlindungan Hukum ... Op. Cit.*, p. 3.
[35] Charles Sampford, *The Disorder of Law: A Critique of Legal Theory,* New York: Basil Blackwell, 1989, p. 252-253.
[36] Irfan Fachruddin, *Pengawasan Peradilan Administrasi terhadap Tindakan Pemerintah,* Bandung: PT. Alumni, 2004, p. 107.
[37] Paulus Effendie Lotulung, *Beberapa Sistem Tentang kontrol Segi Hukum terhadap Pemerintah,* Bandung: Citra Aditya Bakti, 1993, hlm. 27. In Fachruddin, *Ibid.*, p. 107.
[38] Hadjon, *Perlindungan Hukum ....Op. Cit.*, p. 4.
[39] Reza A.A. Wattimena, *Melampau Negara Hukum Klasik Locke-Rousseau-Habermas*, Yogyakarta: Kanisius, 2007, p. xix and 124-125.
[40] Miranda Risang Ayu, dkk., *Partisipasi Publik dalam Proses Legislasi sebagai Pelaksanaan Hak Politik,* Bandung: Fakultas Hukum Universitas Padjajaran, 2004, p. 57-59. In Hernandi Affandi, *Konsepsi, Korelasi, dan Implentasi Hak Asasi Manusia dan Good Governace Mengurangi Kompleksitas Hak Asasi Manusia (Kajian Multi Perspektif),* Yogyakarta: Pusham-UII, 2007, p. 62.

III. CONCLUSION

With a birth certificate, citizens hold a population document that provides incontrovertible proof of identity and proof of relationship, which may bring with it legal consequences, such as a parent's civil liability to children or rights to inheritance. Any person who does not hold a birth certificate legally (*de jure*) does not exist in the eyes of the state. As such, a birth certificate is an extremely important document to he or she who holds it because with it, that person receives recognition, security, protection and legal certainty. One a person is registered with the state, they are granted these rights and also are given legal obligations, personal status and citizenship status.

The instance of dynamics can be seen within the adjustment of the law regarding the imposition of a deadline on the birth registration process. Article 32 of the Population Administration Act was determined contrary to the constitution for the following reasons, amongst others:

1. In Article 32 Paragraph (1), the term "*agreement*", unless interpreted as meaning "decision", and the phrase "*up to one year*" were in contradiction with the 1945 Constitution and as such held no binding legal power;
2. Article 32 Paragraph (2) was in contradiction with the 1945 Constitution and as such held no binding legal power;
3. The phrase "and Paragraph (2)" in Article 32 Paragraph (3) was in contradiction with the 1945 Constitution and as such held no binding legal power.

Thus, the one-year deadline was repealed. Act Number 24, 2013 amended the Population Administration Act and the provisions thereunder in accordance with the Constitutional Court decision in order to ensure legal certainty and rigour in the implementation of population administration. In the implementation of the above measures, socialisation of the Constitutional Court's decision to the community and the relevant government agencies, namely the district courts throughout Indonesia and the Civil Registry Office for the Republic of Indonesia, is necessary. Commitment is also important to increase concern about for the importance of birth registration as an obligation for the citizens and for the state.

In addition, the dynamics of society need to be considered by any government policy in the field of population administration in accordance with the people's right to be heard through public participation, regarding both the drafting of legislation and feedback and criticism related to the implementation thereof. Also needed is an integrated service under one roof as a birth certificate (through cooperation with government office, necessity of verification and validation of the birth certificate's requirements, and reporting the information of birth certificates for increasing coverage of districts/cities cumulatively to the governor every month) is the doorway for citizens to obtain the fullest extent of their various rights through the course of their lives (a decent education, adequate job, marriage, etc.) so that the state apparatus and all citizens as a part of the Republic of Indonesia can jointly realise the best life possible.

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The Unamendable Articles of the 1945 Constitution

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Abstract

The amendments of the 1945 Indonesian Constitution between 1999 and 2002 have significantly changed the state system in Indonesia. In such a short period, the Constitution has been amended four times, provokes enormous additional norms and causes the establishment of several new institutions, including the Constitutional Court and Judicial Commission. However, after the amendments to the 1945 Indonesian Constitution on Chapter XVI about Amendments to the Constitution, the framers of the amended Constitution created Article 37 paragraph (5) that stated, the form of the unitary state of the Republic of Indonesia may not be amended. The Preamble is also implicit unamendable. My purpose in this article is to understand the original intent of Article 37 paragraph (5) of the 1945 Indonesian Constitution, the real function of the article and also to describes original intent arguments explaining why the Preamble of the Constitution also unamendable. Before the amendments between 1999 and 2002, there is no article and provision like that, especially in the original 1945 Constitution. At last, I found that two important points that explain why this new provision created. First, the framers still afraid of separatism based on experience in 1950's when federalism occurred in Indonesia. Second, the procedure to amend the articles of the 1945 Constitution shows that the framers only wants to strengthen the important system of unitary state because there is no differences process to amend articles of the 1945 Constitution.

Keywords: 1945 Constitution, Constitutional Amendment, Unamendable Articles.

I. INTRODUCTION

A. Background

According to Jimly Asshidddiqie, the original text of the 1945 Constitution contains 71 points of provisions, then, after going through four amendments, between 1999 and 2002, the material of content of the 1945 Constitution covers

199 points of provisions.[1] The amendment was stipulated and conducted gradually and became one of the agendas of the Meetings of the People's Consultative Assembly (Majelis Permusyawaratan Rakyat) from 1999 until 2002.[2] It happened after the resignation of President Soeharto on May 21, 1998, that already in power for almost 32 years.[3]

In the reform era, Indonesia has taken comprehensive reform measures by bringing the sovereignty back to the hand of the people. The peak of such efforts was the amendments to the 1945 Constitution which were made within four consecutive years, namely the First Amendment in 1999, the Second Amendment in 2000, the Third Amendment in 2001, and the Fourth Amendment in 2002. MPR).[4] The objectives of the Amendments were to complement the basic rules of living as a state, which caused the abuse of power in the past.[5] These those amendments, according to Jimly Asshiddiqie, resulted in a blueprint of state administration system which is totally different from the previous one. Two of the fundamental principles adopted and reinforced in the new formulation of the 1945 Constitution are: (i) the principle of constitutional democracy, and (ii) the principle of democratic rule of law or "*democratische rechtsstaat*.[6]

Finally, Indonesian Constitution adopts the principle of democracy (people's sovereignty) as well as nomocracy (the rule of law) as expressly stated in Article 1 paragraph (2) and paragraph (3) of the 1945 Constitution (UUD 1945). In a

[1] Jimly Asshiddiqie, "*Struktur Ketatanegaraan Indonesia Setelah Perubahan Keempat UUD Tahun 1945*", paper was presented at the Symposium convened by the National Law Fostering Agency (Badan Pembinaan Hukum Nasional), the Department of Justice and Human Rights, 2003, p. 1 on Jimly Asshiddiqie, "The Role of Constitutional Courts In The Promotion of Universal Peace and Civilization Dialogues Among Nations", paper was presented at the International Symposium on "he Role of Constitutional Courts in Universal Peace and Meeting of Civilizations", Ankara, April 25, 2007, p. 6-7.

[2] Jimly Asshiddiqie, "The Role of Constitutional Courts", p. 5.

[3] Moh. Mahfud MD, in his speech at the World Conference on Constitutional Justice, Cape Town 2009, states, "In the era prior to the amendments to the 1945 Constitution made in 1999–2002, authoritarianism had always been the actual practice, despite the fact that Indonesia adheres to a democratic system in the formal provisions of the Constitution. During this era, many legislations were deemed to be contradictory to the Constitution, but there was only one way to have them amended, namely through legislative review. It was difficult to do considering that the legislative body was politically dominated by the President, either due to his position as a state body which is also involved in the law-making process together with the People's Legislative Assembly or his cooptation of all political parties. Such executive heavy configuration placed the President as the determiner of all national political agenda." Moh. Mahfud MD, "Speech" in the World Conference on Constitutional Justice, Cape Town, 2009, p. 2.

[4] M. Jusuf Kalla in his speech at International Symposium on Constitutional Complaint, 15-16 August 2015 held by the Constitutional Court of Indonesia states, "The Indonesian Constitution, in the 70 years since it was first written, has undergone four changes. When we first achieved Independence, the Constitution was very short at just 37 paragraphs, but it has played a very important role in the founding of this nation. Then in 1949, when Indonesia became a federal state, The Unitary State of Indonesia, we transformed the Constitution into the Constitution of the Unitary State of Indonesia. Upon becoming a united state, we implemented a temporary Constitution before, In 1959, by Presidential Decree we returned to the Constitution of 1945. Finally, after the reformation, we amended the Constitution to its current state."

[5] Moh. Mahfud MD, "The Role of the Constitutional Court in the Development of Democracy in Indonesia," paper is presented at the World Conference on Constitutional Justice, Cape Town, January 23-24, 2009, p. 1.

[6] "Jimly Asshiddiqie, "Creating a Constitutional Court In a New Democracy," paper presented in Australia, March 2009, p.1.

democratic constitutional state, democracy, and nomocracy complement each other. Democracy is selected by many countries, including Indonesia which has abandoned authoritarianism because of democratic values the principles of humanity more, guarantees the principal interest of the citizen and prevents absolute power.[7]

There is an underlying agreement for conducting the amendment using addenda gives rise to the consequence that the official text of the Constitution of 1945 consists of 5 (five) parts, namely:

a. The Constitution of the State of the Republic of Indonesia of the Year 1945 (the original text);
b. The First Amendment to the Constitution of the State of the Republic of Indonesia of the Year 1945;
c. The Second Amendment to the Constitution of the State of the Republic of Indonesia of the Year 1945;
d. The Third Amendment to the Constitution of the State of the Republic of Indonesia of the Year 1945;
e. The Fourth Amendment to the Constitution of the State of the Republic of Indonesia of the Year 1945.[8]

The First Amendment that stipulated on October 19, 1999 was conducted in the General Meeting of the People's Consultative Assembly in 1999 which covers Article 5 paragraph (1), Article 7, Article 9, Article 13 paragraph (2), Article 14, Article 15, Article 17 paragraphs (2) and (3), Article 20, and Article 22 of the 1945 Constitution. Under the provisions of the amended articles, the objective of

[7] The Constitutional Court of Indonesia, *Annual Report 2011: Upholding the Constitutional Democratic State*, Secretariat dan Registry Branch of the Constitutional Court of Indonesia, Jakarta 2012, p. 1. [http://www.mahkamahkonstitusi.go.id/public/content/infoumum/laporantahunan/pdf/laporan%20tahunan%202011%20english.pdf].

[8] By standing on the said basic agreements, the Constitutional Court of Indonesia had publishes a compilation book containing the Constitution of 1945 in its standard official text namely by containing the composition of the text of the Constitution of 1945 prior to its amendment which is followed by the text containing the result of the amendment to the Constitution of 1945 in four stages as mentioned above. Nevertheless, besides containing the official text of the Constitution of 1945, this book also contains the Constitution of 1945 composed in one manuscript. The Chief of Constitutional Court in Foreword of the book said, "*To be known, the making of the Constitution of 1945 in the said one text was initially an agreement of the Ad Hoc I Committee of the Workers Body of the People's Consultative Assembly during its session term 2001-2002. In the said agreement, the Constitution of 1945 in the said one manuscript is not an official text of the Constitution of 1945, but rather minutes of the session of the plenary meeting of the Annual Session of the People's Consultative Assembly of the year 2002. Therefore, with the intention for the society to understand easier the Constitution of 1945 systematically, holistically, and comprehensively, this book contains the Constitution of 1945 in One Manuscript containing the material content of the articles of the text of the Constitution of 1945 which have not been amended as well as the material content of the articles as amended by the four amendments.*" Arief Hidayat, "Foreword of Compilation UUD 1945 and Constitutional Court Law", The Office of the Registrar and the Secretariat General of the Constitutional Court of the Republic of Indonesia, Jakarta, 2015, p. v-vi.

the First Amendment to the 1945 Constitution is to restrict the authority of the President and to strengthen the position of the House of People's Representatives as a legislative institution.[9]

The Second Amendment that stipulated on August 18, 2000 was conducted at the Annual Meeting of the People's Consultative Assembly in 2000, which covers Article 18, Article 18A, Article 18B, Article 19, Article 20 paragraph (5), Article 20A, Article 22A, Article 22B, Chapter IXA, Article 28A, Article 28B, Article 28C, Article 28C, Article 28D, Article 28E, Article 28F, Article 28G, Article 28H, Article 28I, Article 28J, Chapter XII, Article 30, Chapter XV, Article 36A, Article 36B, and Article 36C of the 1945 Constitution. This Second Amendment covers issues regarding state territory and regional governance, perfecting the first amendment in the matters about the strengthening of the position of the House of People's Representative, and detailed provisions regarding Human Rights.[10]

The Third Amendment that stipulated on November 9, 2001 was conducted at the Annual Meeting of the People's Consultative Assembly in 2001, which amended and or added the provisions of Article 1 paragraphs (2) and (3), Article 3 paragraphs (1), (3), and (4), Article 6 paragraphs (1) and (2), Article 6A paragraphs (1), (2), (3), and (5), Article 7A, Article 7B paragraphs (1), (2), (3), (4), (5), (6), and (7), Article 7C, Article 8 paragraphs (1) and (2), Article 11 paragraphs (2) and (3), Article 17 paragraphs (4), Chapter VIIA, Article 22C paragraphs (1), (2), (3), and (4), Article 22D paragraphs (1), (2), (3), and (4), Chapter VIIB, Article 22E paragraphs (1), (2), (3), (4), (5), and (6), Article 23 paragraphs (1), (2), and (3), Article 23A, Article 23C, Chapter VIIIA, Article 23E paragraphs (1), (2), and (3), Article 23F paragraphs (1), and (2), Article 23G paragraphs (1) and (2), Article 24 paragraphs (1) and (2), Article 24A paragraphs (1), (2), (3), (4), and (5), Article 24 B paragraphs (1), (2), (3), and (4), Article 24C paragraphs (1), (2), (3), (4), (5), and (6) of the 1945 Constitution. The material for the Third Amendment to the 1945 Constitution covers the provisions regarding the Principles for the foundation of state affairs, state institutions, relations among state institutions, and provisions relating to the General Election.[11]

[9] Jimly Asshiddiqie, "The Role of Constitutional Courts", p. 5.
[10] Jimly Asshiddiqie, "The Role of Constitutional Courts", p. 5-6.
[11] Jimly Asshiddiqie, "The Role of Constitutional Courts", p. 6.

The Fourth Amendment that stipulated on August 10, 2002, was conducted at the Annual Meeting of the People's Consultative Assembly in 2002. The Fourth Amendment covers Article 2 paragraph (1); Article 6A paragraph (4); Article 8 paragraph (3); Article 11 paragraph (1); Article 16, Article 23B; Article 23D; Article 24 paragraph (3); Chapter XIII, Article 31 paragraphs (1), (2), (3), (4), and (5); Article 32 paragraphs (1), (2), (3), and (4); Chapter IV, Article 33 paragraphs (4) and (5); Article 34 paragraphs (1), (2), (3), and (4); Article 37 paragraphs (1), (2), (3), (4), and (5); Articles I, II, and III of the Transitional Rules; Articles I and II of the Additional Rules of the 1945 Constitution. The provisions of the amendment in the Fourth Amendment are the provisions regarding state institutions and relations among state institutions, the elimination of the Supreme Consultative Board, provisions regarding education and culture, provisions regarding economics and social welfare, and transitional rules as well as additional rules.[12]

However, the provisions of the Fourth Amendment includes Article 37 paragraphs (5) that stated, "Provisions relating to the form of the unitary state of the Republic of Indonesia may not be amended." Before the amendments between 1999 and 2002, there is no unamendable article and provision like that, especially in the original text 1945 Constitution.

Chapter XVI. Amendments to the Constitution **(Original Text)**	Chapter XVI. Amendments to the Constitution **(the Fourth Amendment)**
Article 37 1. In order to amend the Constitution, not less than two-thirds of the total number of members of the People's Consultative Assembly shall be in attendance. 2. Decisions shall be taken with the approval of not less than two-thirds of the number of members in attendance.	Article 37 1. A proposal to amend the Constitution may be placed on the agenda of a session of the People's Consultative Assembly if it is proposed by not less than one-third of the total number of members of the People's Consultative Assembly. 2. Each proposal to amend the Constitution shall be submitted in writing and shall clearly show the parts which are proposed to be amended, with reasons.

[12] Jimly Asshiddiqie, The Role of Constitutional Courts, p. 6.

	3. In order to amend the Constitution, not less than two-thirds of the total number of members of the People's Consultative Assembly must be present at the session. 4. Decisions to amend the Constitution shall be made with the agreement of not less than fifty percent plus one member of the entire membership of the People's Consultative Assembly. 5. Provisions relating to the form of the unitary state of the Republic of Indonesia may not be amended.*

The Preamble after and before amendments is still same, but there is difference implicitly. Article II Additional Provisions the 1945 Constitution after amendment states, "With the finalization of this amendment of the Constitution, the 1945 Constitution of the Republic of Indonesia is comprised of the Preamble and the Articles." It means that amendment only possible for articles exclude the Preamble.

THE 1945 CONSTITUTION OF THE REPUBLIC OF INDONESIA, BEFORE AMENDMENT	THE 1945 CONSTITUTION OF THE REPUBLIC OF INDONESIA, AS AMENDED BY THE FIRST, SECOND, THIRD AND FOURTH AMENDMENTS
THE PREAMBLE TO THE CONSTITUTION Whereas Independence is truly the right of all nations and therefore colonization in the world shall be abolished, as it is not in accordance with humanity and justice. And the struggle of the movement towards the independence of Indonesia has now reached the moment of rejoicing to guide the people of Indonesia safely and soundly to the threshold of the independence of the State of Indonesia, which is independent, united, sovereign, just	**THE PREAMBLE TO THE CONSTITUTION** *No change.*

* This translation is taken from Denny Indrayana, "Indonesian Constitutional Reform 1999-2002: An Evaluation of Constitution-Making in Transition", thesis, University of Melbourne, 2005.

and prosperous. By the Grace of God the Almighty and impelled by the noble desire to live a free national life, the people of Indonesia at this moment declare their independence. Subsequent thereto, to form a Government of the State of Indonesia which shall protect the whole Indonesian nation and the entire native land of Indonesia and to advance the public welfare, to educate the life of the nation, and to participate in the execution of world order which is by virtue of freedom, perpetual peace and social justice, therefore the National Independence of Indonesia shall be composed in a Constitution of the State of Indonesia, which is structured in the form of the State of the Republic of Indonesia, with people's sovereignty based on the belief in One and Only God, just and civilized Humanity, the Unity of Indonesia and a Democratic Life guided by wisdom in Deliberation/Representation, and by realizing social Justice for all the people of Indonesia.[2]	

B. Research Method

This paper examined the discussion of the People's Consultative Assembly in 1999-2002 to understand the original intent related to unamendable articles and also to understand the effect of the unamendable articles for constitutional activity in the future.

II. DISCUSSION

A. The Original Intent[13]

Based on meeting proceeding of the People's Consultative Assembly in 1999-2002 that collected comprehensively by books with title "*Proses dan*

[13] Original intent is a conservative theory in constitutional law: only those guarantees intended by the framers and outlined in the text of the Constitution are valid. [http://www.merriam-webster.com/legal/original%20intent],

Hasil Perubahan UUD 1945, Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, Latar Belakang, Proses, dan Hasil Pembahasan, 1999-2002" published by the Constitutional Court of Indonesia in 2008, there are substantive and hard discussion about the Article 37 paragraphs (5) and position of the Preamble.[14]

In the Fourth Meeting of the A Commission that responsible to discussed the Amendment of Constitution on August 8, 2002. Some important information shows what happened at that time. On that session, the draft of Article 37 paragraphs (5) the 1945 Constitution has been created by a particular Drafting Team and read by Speaker of the A Commission, Jakob Tobing, to get input from the member.

Draft of Article 37

1. A proposal to amend the Constitution may be placed on the agenda of a session of the People's Consultative Assembly if it is proposed by not less than one-third of the total number of members of the People's Consultative Assembly.
2. Each proposal to amend the Constitution shall be submitted in writing and shall clearly show the parts which are proposed to be amended, with reasons.
3. In order to amend the Constitution, not less than two-thirds of the total number of members of the People's Consultative Assembly must be present at the session.
4. Decisions to amend the Constitution shall be made with the agreement of not less than fifty percent plus one member of the entire membership of the People's Consultative Assembly.
5. Provisions relating to the form of the unitary state of the Republic of Indonesia may not be amended. [15]

Hartono Mardjono from Perserikatan Daulatul Ummah Faction delivered a statement about the Draft.

> "I examine the changes in Article 37 paragraph (5) draft. Originally in the draft, which is produced by the Working Committee, there was special rules for changing of the Unitary State of the Republic of Indonesia through a

[14] Read more Fulthoni and Luthfi Widagdo Eddyono, *Proses dan Hasil Perubahan UUD 1945, Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, Latar Belakang, Proses, dan Hasil Pembahasan, 1999-2002, Buku X Perubahan UUD, Aturan Peralihan, dan Aturan Tambahan*, Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, Jakarta, 2008.

[15] The A Commission Meeting Proceeding, the People's Consultative Assembly, Agustus 8, 2002, p. 10.

national referendum and the approval of at least 2/3 of the number of people who have the right to vote. Now the Chairman said that the Unitary State of the Republic of Indonesia could not be changed. I just want to remind that in the formulation of Article 37 like this there is "*contradiction insubstantial's"* because the authority of the Assembly itself not only to change the article but also able to change the entire of Constitution. I want to remind us about the fallacy of the New Order that states, to make changes to the 1945 Constitution must be carried out referendum which results declared more than 90% of voters who have the right to approve the referendum. Even for the rules like that, we able to pull out. So, I remind this Assembly does not do anything that contains contradictions in substantial because the authority of the Assembly to change the constitution beheaded by the Assembly itself. If we return to the old formula, we do not diminish the authority of the Assembly but give more requirement regarding changing the Unitary State of the Republic of Indonesia, not just filled as regulation in Article 37.[16]

Moh. Askin from Reformasi Faction also delivered his opinion.

"If we look at paragraph (5), everything was locked, and in my view, it seems there was a conflict in the terminology, and also in substantially, but also in the meaning of popular sovereignty ... in debate only the Preamble can not be changed. Why? Because in that Preamble Indonesia declared independence so that it should not be modified. And this provision that should be included if we want to include and not the paragraph (5) ... These things, in my opinion, is contrary to the principles of democracy. Different with the case with the ban to change the Preamble of the Constitution of 1945 because the Preamble is the declared of independence."[17]

Nurdiati Akma from Reformasi Faction delivered her opinion.

"The words of Article 37 paragraph (5) that we've discussed before being taken to Draft Team and Lobby Team seems better which means what is written on this screen same and related to the special rule on changes to the Unitary State of the Republic of Indonesia conducted through a national referendum, and the national approval of at least 2/3 of the number of people who have the right to vote. It means, in fact, the unitary state essentially can not be changed because it is so complicated too ... There is still a slight chance if anytime there are needs to be a change..."[18]

[16] The A Commission Meeting Proceeding, the People's Consultative Assembly, Agustus 8, 2002, p. 13-14.
[17] The A Commission Meeting Proceeding, the People's Consultative Assembly, Agustus 8, 2002, p. 16-17.
[18] The A Commission Meeting Proceeding, the People's Consultative Assembly, Agustus 8, 2002, p. 17.

J.E. Sahetapy from Partai Demokrasi Indonesia Perjuangan Faction supports the Draft.

> "In democracies, such as in Europe, is known that there are provisions unamendable. I, concerning the opinion of my colleague Mr. Hartono Mardjono who argued about the contradiction in substantial, want to remind that in the world of law there are also provisions, the edge on blah blah blah, it means that there were always exceptions. Well, I am here do not want to argue academically, but I do not agree that in Article 37 paragraph (5) not included the Preamble of the Constitution of 1945."[19]

As a Speaker of A Commission, Jakob Tobing tried to explain the drafting process.

> "Of course, this commission need to check before giving a decision. Although this proposal is the results conducted by a Working Team which we assigned and also through Lobby Team which are elements of faction leaders which we entrusted. So, several things that parts of information we can deliver. The first, whole concept of the Constitution is the Preamble which position is very high and do not part of the object of the amendment. So, it can not be changed. Therefore, Paragraph (1) of Article 37 have clear and clearly state that changes can only be made on the Articles. In the discussion at the initial level occurred disagreements that illustrate the opinions that delivered right now. As a piece of information, I just want to convey that in the end, Lobby Team have agreed with the established formulas in the slide earlier. With a careful consideration and it does take a very long conversation, all of us finally decided ..... It is an assertion that states by several speakers as attitudes which are incorporated herein reflect our will this time. As unamendable articles that are also known in the practice of other democratic countries. But the important thing is already an existing agreement.[20]

Immanuel Ekadianus Blegur from Golongan Karya Faction asked a question about the status of the Preamble of Constitution.

> "There are constitutional guarantees about unamendable articles, the Preamble to the 1945 Constitution, which refers to Article 37 paragraph (2) of the proposed amendments. Thus there is no proposal to change the Preamble. But the provisions of paragraph (2) of Article 37 is an article... What is the guarantee that the Preamble will not be modified? The provisions about it are in Article 37 paragraph (2). Article 37 paragraph (2) is an article. So, people can also change the proposed amendment of this Article 37."[21]

[19] The A Commission Meeting Proceeding, the People's Consultative Assembly, Agustus 8, 2002, p. 18.
[20] The A Commission Meeting Proceeding, the People's Consultative Assembly, Agustus 8, 2002, p. 20-21.
[21] The A Commission Meeting Proceeding, the People's Consultative Assembly, Agustus 8, 2002, p. 25.

Jakob Tobing then explained.

> "Articles of the Constitution of 1945 consists of the Preamble and the Articles. Article 37 paragraph (1) states the change related to the articles. So, the Preamble can not be changed. It is a construction that we have agreed before. There is proposal as proposed by Pak Sahetapy earlier, but that is precisely had agreed at that time. So the proposal that was discussed by Pak Sahetapy has presented at that time. That's the things that we reached."[22]

With that explanation, all member of the A Commission finally agreed with the Draft. Then the Commission send the Draft to Plenary Session of the People's Consultative Assembly, and in acclamation process, all faction agreed on Agustus 10, 2002.

B. Constitutional Amendability

According to Mohammad Mahfud MD., in theory, and practice, a constitution is a form of the transfer of the people's sovereignty, whereby the people state their willingness to surrender a portion of their rights to the state. That is the idea articulated in Article 1 Paragraph (2) of the 1945 Constitution that declaring "*Sovereignty shall be in the hand of the people and shall be implemented in accordance with the Constitution*." This provision implies that the implementation of the people's sovereignty is not to be performed arbitrarily; rather than that, it must be by, and it must be based upon the Constitution.[23]

Article 37 paragraph (5) of the 1945 Constitution is the norm that experts of constitutional law referred as a rule which can not be changed or can be said as an immortal article (unamendable constitutional provision). The uniqueness of the article is confirmed that the Unitary State of the Republic of Indonesia (NKRI) can not be changed. The norm is related to Article 1 paragraph (1) of the 1945 Constitution which reads, "The state of Indonesia is a Unitary state which has the form of a Republic ."

[22] A Commission Meeting Proceeding, the People's Consultative Assembly, Agustus 8, 2002, p. 25.
[23] Moh. Mahfud MD, Constitutional Review: Doctrine and Practice under Indonesia's Constitutional System, Paper presented at the International Conference "Constitutional Review: Doctrine and Practice" held in the commemoration of the 20th Anniversary of the Constitutional Court of the Russian Federation, on October 28-30, 2011 at Palace's of Congresses, Saint Petersburg, Russia, p. 4.

According to Tom Ginsburg, many constitutions purport to make some provisions immune from common amendment processes.[24]

> "The Constitution of Turkey, for example, states that the character of the country as a secular democracy and republic cannot be changed, and forbids any proposal to amend these provisions. Thailand's constitution entrenches the monarch as head of state. Other countries purport to prohibit amendments with regard to such features as term limits, official languages and religions, flags and anthems, and the boundaries of sub-national units. I would tentatively suggest that we might begin by distinguishing the substantive provisions being entrenched from second-order proscriptions on debate or proposal of amendments. The latter seem to be of more serious concern, as they freeze the deliberative process that the constitution may be designed to encourage. Indeed, the prohibition on debate may conflict with other parts of the Constitution that are of equivalent normative authority, in particular, a right to free speech.
>
> On the other hand, a substantive prohibition on amendment may perhaps be best effectuated by nipping proposals in the bud. And some issues such as the religious or republican character of the state may indeed be best handled by removing them completely from ordinary or constitutional politics. But others, in particular, the issue of term limits, do not seem so contentious as to prohibit all discussion of them. Term limits, after all, restrict democratic choice. Perhaps the only conclusion then, is that constitution-makers should tread cautiously when purporting to make some provisions unamendable: different issues seem differentially suited to this approach, and second-order prohibitions on debate risk the unintended consequence of premature constitutional death."[25]

As Yaniv Roznai has observed, the content of unamendable provisions varies, but despite some minor exceptions, one can identify several common components. The first notable protected group is the form and system of government. The second notable group is the state's political or governmental structure. The third prominent component is the state's fundamental ideology or "identity." The fourth notable group is that of basic rights. The fifth notable group is that of the state's integrity. Then, some constitutions protect unique constitutional subjects, such as immunities, amnesties, reconciliation and peace agreements,

[24] Tom Ginsburg, "The Puzzle of Unamendable Provisions: Debate-Impairing Rules vs. Substantive Entrenchment", [http://www.iconnectblog.com/2009/08/the-puzzle-of-unamendable-provisions-debate-impairing-rules-vs-substantive-entrenchment/].
[25] *Ibid*.

mandatory international law norms, the institution of chieftaincy, taxation, or rules governing nationality.[26]

In Indonesian context, the content of unamendable provisions is the form and system of government. The strength of the norms enshrined in Article 37 paragraph (5) of the 1945 Constitution which is part of the Fourth Amendment in 2002 which expressly states, "Provisions relating to the form of the unitary state of the Republic of Indonesia may not be amended .[27]

Why does this happen? From the historical point of view, the existence of the form of the unitary state of the Republic of Indonesia is a very important part in the course of constitutional history in Indonesia. There are two main substances in the phrase "the unitary state of the Republic of Indonesia," namely the form of state and form of government. A unitary state is a form of state, and a Republic is a form of government.

After Indonesia's independence in 1945 and the enactment of the 1945 Constitution since August 19, 1945, the Dutch military occurred aggression that made the founding fathers held meetings and negotiations with Dutch. After that, as part of negotiations, Indonesian state administration have changed its system into a federal system within the framework of the Republic of Indonesia States. At that time, Indonesia are divided into various states.[28]

But the desire to return to a unitary state system was still quite high. Finally, by the expertise of Mohammad Natsir who is the Chairman of the Masjumi that ultimately filed an integration Motion in the Parliament of the Republic of Indonesia States and also delivered compromise to put forward the idea that all states jointly establish a unitary state with parliamentary procedure, the proposal was finally accepted by leader of other factions. The government, represented by Mohammad Hatta as a Vice President and/or Prime Minister also approved the Motion. Finally, on August 15, 1950, President Soekarno declared the Charter

[26] Roznai Yaniv, "Unamendability and the Genetic Code of the Constitution" New York University Public Law and Legal Theory Working Papers. Paper 514. 2015. P. 11-13. [http://lsr.nellco.org/nyu_plltwp/514].

[27] "Compare with Turkey Constitution at Article 4 that states, "the provision of Article 1 regarding the form of the State being a Republic, the characteristics of the Republic in Article 2, and the provisions of Article 3 shall not be amended, nor shall their amendment be proposed."

[28] Luthfi Widagdo Eddyono, "Norma Konstitusi yang Tidak Dapat Diubah," *Majalah Konstitusi*, March 2016, p. 5-6.

of the Establishment of the Unitary State. On August 17, 1950, the President announced the birth of the Republic of Indonesia who is remembered as the Second Proclamation of the Republic of Indonesia.[29]

The discussion of the 1945 amendment that has resulted in substantial changes in the four times from 1999 to 2002 has apparently not made specific changes regarding the form of the unitary state of the Republic of Indonesia.[30] It was based on an agreement since the beginning of the changes. Meanwhile the amendment specified states, "the Constitution of the Republic of Indonesia Year 1945 (UUD 1945) as amended by the first amendment, the second amendment, the third amendment and fourth amendment is the Constitution of the Republic of Indonesia Year 1945 is set on 18th in August 1945 and was reintroduced by Presidential Decree on July 5, 1959, and confirmed unanimously adopted on July 22, 1959, by the House of Representatives ".

While stipulating the amendment to the Constitution of 1945, the People's Consultative Assembly has stipulated 5 (five) basic agreements, namely: (1) not to amend the Preamble of the Constitution of 1945; (2) to retain the Unitary State of the Republic of Indonesia; (3) to reaffirm the presidential government system; (4) to incorporate the Elucidation to the Constitution of 1945 containing normative matters into the articles; and (5) to conduct the amendment by means of addenda.[31]

However, there is a fairly tough debate related to the perennial norm in Article 37 paragraph (5) of the 1945 Constitution that has to be settled in Working Team (Draft Team) and Lobby Team. Chairman of Commission A at Annual Session of 2002, Jakob Tobing, in the A Commission Meeting on August 8, 2002, states: "As information, I just want to convey that in the end, Lobby Team have agreed with the established formulas in the slide earlier. With a careful consideration and it does take a very long conversation, all of us finally decided ... It is an assertion that states by several speakers as attitudes which are incorporated herein reflect our will this time. As unamendable articles that

[29] Luthfi Widagdo Eddyono, "Mohammad Natsir: Sang Penggagas "Negara Demokrasi Islam," *Majalah Konstitusi*, January 2015, p. 63.
[30] Arief Hidayat, "Foreword of Compilation UUD 1945 and Constitutional Court Law", p. iv.
[31] *Ibid*.

are also known in the practice of other democratic countries. But the important thing is it's already an existing agreement".[32]

C. Discourse "Unamendable Constitutional Provision"

The existence of the eternal norms in the Constitution that often called as "an unamendable constitutional provision" for some experts considered being very disturbing for the journey of a nation state administration. Since there is such an obstacle to change a constitutional norm and this can be seen as contrary to the principles of republicanism[33] and democracy. However, if the norm that considered as the spirit of the constitution has changed, it will change not only the structure of the Constitution but also the constitutional system of the state, so that is the primary reason we need obstacles to change it.

In the context of Indonesia, the unamendable constitutional provision has two meanings. *First*, the norms explicitly state so there is a substantial obstacle that can not be interpreted differently. *Second*, although there are some significant barriers, there were no procedural barriers to transforming the perennial norm.

According to Yaniv Roznai, if unamendable provisions are non-self-entrenched, unamendable principles or rules may be amended in a double amendment procedure.

> "The first stage is to repeal the provision prohibiting certain amendments through an amendment, an act that is not in itself a violation of the constitution. The second stage is to amend the previously unamendable principle or provision, which is no longer protected from amendments. This approach finds supporters in the French, Norwegian, and American debates."[34]

Article 37 UUD 1945 after a complete amendment of the Constitution reads,

1. A proposal to amend the Constitution may be placed on the agenda of a session of the People's Consultative Assembly if it is proposed by not less than one-third of the total number of members of the People's Consultative Assembly.

[32] Minutes of Meeting of Committee A MPR, August 8, 2002.

[33] According to [http://www.merriam-webster.com/dictionary/republicanism], republicanism means adherence to or sympathy for a republican form of government and the principles or theory of republican government.

[34] Yaniv Roznai, "Amending 'Unamendable' Provisions", [http://constitutional-change.com/amending-unamendable-provisions/].

2. Each proposal to amend the Constitution shall be submitted in writing and shall clearly show the parts which are proposed to be amended, with reasons.
3. In order to amend the Constitution, not less than two-thirds of the total number of members of the People's Consultative Assembly must be present at the session.
4. Decisions to amend the Constitution shall be made with the agreement of not less than fifty percent plus one member of the entire membership of the People's Consultative Assembly.
5. Provisions relating to the form of the unitary state of the Republic of Indonesia may not be amended.

Based on these norms, there is no differentiation procedure to change the Article 37 paragraph (5) of the 1945 Constitution and other provisions of the Constitution. When People's Consultative Assembly want to modify the shape of the country, they only need to change Article 37 paragraph (5) of the 1945 Constitution first. Thus, it is appropriate to say that the provision of Article 37 paragraph (5) of the 1945 Constitution is only a moral message.

III. CONCLUSION

After the amendments of the 1945 Indonesian Constitution, on Chapter XVI about Amendments to the Constitution, the originators created Article 37 paragraph (5) that stated, the form of the unitary state of the Republic of Indonesia may not be amended. Meanwhile, based on original intent, the Preamble also implicitly unamendable.

Before the amendments between 1999 and 2002, there is no article and provision like that on Constitution, in particular on the original 1945 Constitution. There are two important points related to this new rules. *First*, the originator still afraid of separatism based on experience in 1950's when federalism occurred in Indonesia. *Second*, the procedure to amend the articles of the 1945 Constitution shows that the originators only wants to strengthen the important system of unitary state because there is no differences process in amending articles of the 1945 Constitution. That is why the support of unamendable provisions such as

states in Article 37 paragraph (5) of the 1945 Constitution may be amended in a double amendment procedure.

As Yaniv Roznai states, "unamendable provisions tie the past, present, and future, and carry out expressive functions serving as important symbols for the policy", the provisions of Article 37 paragraph (5) of the 1945 Constitution act as a "moral message" and also offer a record of the memories and hopes of their originators.

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Architecture of Indonesia's Checks and Balances

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Abstract

Research on "checks and balances" in legal studies often raises high quality questions such as, is the checks and balances a doctrine, principle, or legal theory, or maybe precisely the formula of power in politics. History has been recorded that in any discussions regarding the formation of the constitutional separation, division and smelting power is something that is popular to be discussed before and even after becoming the constitution. Therefore, the casting of checks and balances into the constitution is an interesting study to determine the portion and posture. This study used using legal normative methodology. In addition, comparative studies on constitution was conducted using classic and modern constitutional law literature. Several approaches were used on this research such as, historical, political, economical approach on understanding the practice on checks and balance which stated in constitutions in some countries.

Keywords: Checks and Balances, Separation Power, Politics, Constitution.

I. INTRODUCTION

One of the Parliament chamber of in the United States Congress has the power to veto the naturalization policy, even if the candidate is eligible objective to become an American citizen.[1] The Constitutional Court in Germany may have an obligation to issue laws that regulate abortions more stringent.[2] In Indonesia, the structure of the chamber in the parliament has a function that is not balanced in the oversight the executive.[3] Does such things were found and

[1] Peter Gerangelos, *The Separation of Powers and Legislative interference in Judicial Process: Constitutional Principles and Limitations*, (New York: Hart Publishing, 2009), p. 3.
[2] C. Mouffe, *The Democratic Paradox* (London/New York: Verso, 2000), p. 18.
[3] Denny Indrayana, *Indonesian Constitutional Reform 1999-2002: An Evaluation of Constitution-Making in Transition*, (Dissertation at pada Faculty of Law, University of Melbourne, 2005) p. 272.

give you a series of questions, such as Does an institutional mechanism that kind is acceptable? Does it defined as the application of *checks and balances*?

When we start initiate discussions on *checks and balances*, Lord Acton's word, "*Power tends to corrupt, and absolute power corrupts absolutely*" is something that is popular with respect to the underlying.[4] That kind of shaft that later gave birth to the atomic nucleus of the idea of constitutionalism, which is then not only inspire western mindset of management powers then inspire also in eastern mindset regarding the same.[5] C. H. Mcllwain,[6] T.R.S Allan[7] and Andrew Haywwod[8] did make a long debate about the factors within the social subsystem that saw actors in the country as the orbit of power, Based on the description, the government with the more concentrated will power tends to corrupt. The only way to eliminate corruption is to give the dispersal of power. Therefore, the constitution must divide power among the various elements of the government so that they can check each other.[9] One solution might eventually need to be found to share power in the state, he built a method of checks and balances in the constitution. For some doctrinal stated that the real constitution has aims to create a balance of power between different parts of government so that they can inspect and supervise each other. Checks and balances are the essence of constitutionalism.[10] But the question is, does checks and balances is just a doctrine, principle, or theory in the field of jurisprudence, or precisely the formula of power doctrine in politics. History records that in any talks regarding the formation of the constitutional separation, division and smelting power is something that is popular to be discussed before and even after becoming constitution. Therefore, the casting of checks and balances into the constitution and how Indonesia concept of checks and balances fit into political life and rule of law is the main reason of this paper.

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[4] John Emerich Edward Dalberg Acton, *Lectures on the French Revolution* (1910 ed.), p. 13.
[5] Carl. J. Friedrich, *Constitutional Government and Democracy*, (Harvard: Blaisdell Publishing: 1968) p. 133.
[6] C. H. Mcllwain, *Constitutionalism and Changing World*, (London: Cambridge University Press, 1939) p. 219.
[7] T.R.S Allan, *Dworkin and Dicey: The Rule of Law as Integrity*, (Oxford: Journal of Legal Studies, 1988), p. 2.
[8] Andrew Heywood, *Political Ideologies*, (Oxford: Mcmillian Publishing, 1978) p. 310.
[9] T.R.S. *Op. Cit*, p. 5.
[10] N. Krisch, *Beyond Constitutionalism* (Oxford: Oxford University Press), p. 69-103.

II. DISCUSSION

A. Checks and Balances: Does it Checks to Make Balance?

Discussion about the checks and balances is still an ambiguous order, considering whether the checks a nd balances the principles, theories, concepts, or even just the methods in managing and regulating power. For C.J. Ville, checks and balances correlate closely related to the doctrine of separation of powers.[11] Separation of powers doctrine reflecting the views of John Locke and Baron de Montesquieu, the forerunner of the origin of the constitutional equilibrium theory (theory of balanced Constitutions). The theory is itself a philosophical approach of the concept of mixed government.[12]

Checks and Balances has pattern and doctrinal formation is closely related to the formation of separation of powers doctrine which built with with the intention of power inspiring an ongoing. The concept of limitation of the power itself becomes something natural because of all the people, from the smallest to the biggest, weakest to strongest though, from the primitive to the most advanced will always be the possibility of a fundamental difference between the ruler and the ruled.[13] This means that no power is not regulated.[14] Maurice Duverger tell that every society existing power arrangements, there is a law surounded, as stated by Cicero (106-43 BC) who said "*ibi societas ibi ius*", where there are people there is a law.[15] In Islam, the ones who ruled as the holder of power, tend to abuse power, especially when the power is gathered in one hand or body. Then, the truth of it is informed in the Qur'an: "*Nay! Verily, man does transgress all bounds (in disbelief and evil deed, etc.). Because he considers himself self-sufficient.*"[16] If people feel themselves sufficiently powerful, military enough, has mass support, quite a treasure, and strong usually plagued with smugness. History has recorded a lot of evidence about the rulers who exceeded the limit

[11] C.J. Ville, *Constitutionalism and Separation of Powers*, (Indianapolis: Liberty Funds, 1989) p. 211.
[12] *Ibid*, p. 212.
[13] Both of these groups refers to political society or the state and the people. [Maurice Duverger, *Teori dan Praktek Tata Negara*, (Jakarta: PT. Pustaka Rakyat, 1961) p. 5].
[14] *Ibid.*
[15] Muhammad Alim, *Trias Politica dalam Negara Madinah*, (Jakarta: Sekretariat Jenderal MKRI, 2008) p. 2.
[16] QS Al Alaq,/96: 6-7.

for himself as self-sufficiency as an example is the pharaoh who declared himself as a god, as mentioned in the Qur'an that: "and Pharaoh said: "*"O chiefs! I know not that you have an ilah (a god) other than me, so kindle for me (a fire), O Haman, to bake (bricks out of) clay, and set up for me a Sarhan (a lofty tower, or palace, etc.) in order that I may look at (or look for) the Ilah (God) of Musa (Moses); and verily, I think that he [Musa (Moses)] is one of the liars.*""[17]

Iniquity exceeded conducted by the Pharaoh to regard him as a god, at a lower level, also conducted by King Lois XIV (1638-1715) who identified himself as state. when he said, *"L'Etat c'estz moi"*. Therefore, the power in the state should be limited to be divided or separated or smelted.[18] The separation of powers is often encountered in the state system in many countries, even though the division limitation was not too perfect, sometimes one another is not completely separate, even on interplay situation.[19] The separation of powers doctrine actually teach about the state and law although ultimately explains the formulation of the separation of powers for positioning balanced between the rule of law. It was then taught by John Locke[20] and Montesquieu[21] about divide and separate the functions of state power. Montesquieu thought on the separation of powers is due to the principle of freedom which is defined by which "*a right doing whatever the laws permit, and if a citizen could do what they forbit he would be no longer possed of liberty, Because all his fellow citizen would have the same power*",[22] The principle of separation of powers proposed by Montesquieu, indicating the establishment of democratic political life, freedom and independence to actualize all the potentials of individuals and groups can freely do. Therefore any form of rights of each individual and group can be expressed in various forms, hence the need for guidelines to regulate traffic so that the needs and interests of all parties can be met and served. the principle of separation of powers are proposed by Montesquieu is the embodiment of the principle of "*rule of law*".[23]

[17] QS Al Qhashash,/28: 38.
[18] Ismail Sunny, *Pembagian Kekuasaan Negara*, (Jakarta: Aksara Baru, 1985) p 1-4] and [Muhammad Alim, *Op.Cit*, p 5, footnote 9].
[19] C.S.T. Kansil, *Op. Cit*, p. 76.
[20] John Locke, *Two Treatise on Civil Government,* (Cambridge UK: Cambridge University Press,1998) p 162-164.
[21] Charles de Secondat Baron de Montesquieu, *The Spirit of Law*, (Canada: Batoche Books, 2001) p 173.
[22] Charles de Secondat Baron de Montesquieu. *Op. Cit,* p 153.
[23] Jimly Asshiddiqie, *Pengantar Hukum Tata Negara jilid 1,* (Jakarta: Konpress), p 124.

In the teachings of Islam's own concept of dispersal of power has occurred when the Prophet Muhammad established the state of Medina. The functions of the executive, legislative, and judicial branches have showed existence in state through the word of Allah Almighty: "*Indeed We have sent Our Messengers with clear proofs, and revealed with them the Scripture and the Balance (justice) that mankind may keep up justice. And We brought forth iron wherein is mighty power (in matters of war), as well as many benefits for mankind, that Allah may test who it is that will help Him (His religion), and His Messengers in the unseen. Verily, Allah is All-Strong, All-Mighty.*" [24]

Muhammad Alim give his opinion, that the Prophet Muhammad whose job conveying the laws of Allah SWT symbolizes the executive, All books symbolize the Law (legislative), and the balance symbolizes justice (judiciary).[25] Hasbi Ash Shiddieqy wrote in his explanation of the word of Allah, namely: "Religion will not be straight with strong and victorious, but with tangible and erect three cases, namely: the Book, Balance Sheet, and Iron (or: legislation), (government have legislation), the power of the judiciary and military power to defend the religion. Kitab (laws and regulations), for guidance. Balance, to uphold justice. Iron, to uphold and protect the Book (laws and regulations).[26]" However, the signs of dispersal of power in a state that has not been implemented by the Prophet Muhammad horizontally. It is due to Allah's command, among others: "*And We have not sent you (O Muhammad) except as a giver of glad tidings and a warner to all mankind, but most of men know not.*"[27] According to Muhammad Alim word of God has clearly provides for the executive branch to Rasulullah SAW. The words of Allah: "*What Allah gave as booty (Fai') to His Messenger (Muhammad) from the people of the townships, - it is for Allah, His Messenger (Muhammad), the kindred (of Messenger Muhammad), the orphans, Al-Masakin (the poor), and the wayfarer, in order that it may not become a fortune used by the rich among you. And whatsoever the Messenger (Muhammad) gives you, take it, and whatsoever he forbids you, abstain (from it) , and fear Allah. Verily,*

[24] QS Al Hadiid,/57: 25.
[25] Muhammad Alim, *Op.Cit*, p. 63.
[26] Teungku Muhammad Hasbi Ash Shiddieqy, *Pedoman Shalat,* (Semarang: Pustaka Rizki Putra, 1999) p. 281-282.
[27] QS Saba, /34: 28.

Allah is Severe in punishment."[28] On delegation of authority, Muhammad Alim argued that the Prophet Muhammad also acts as a legislator. Then in another verse: "*But no, by your Lord, they can have no Faith, until they make you (O Muhammad) judge in all disputes between them, and find in themselves no resistance against your decisions, and accept (them) with full submission."*[29] Those provisions clearly provide the authority to hear the Prophet, thus functioning as a judiciary.[30] Although the Prophet focused himself against the three functions of power, namely the executive, legislature and judiciary does not mean intends to misuse of power, but to carry out Allah's command. This was disclosed by the following verse: "*Indeed in the Messenger of Allah (Muhammad) you have a good example to follow for him who hopes in (the Meeting with) Allah and the Last Day and remembers Allah much.".*[31]

The concept of the principle of separation of powers and checks and balances in practical terms, is put into a state principle in the United States, and the debates that took place during the preparation of the United States Constitution is the culmination point of its application checks and balances into practical norms. James Madison in Federalist position as opinions on many popular are:

> *"But the great security against a gradual concentration of the powers in the same Several departent Consist in giving to Reviews those who administer each department the Necessary constitutional means and personal motives to resist encroachment of the others ... .ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place ... if men were angels, no government would be Necessary. If angels were to govern men, neitherexternal or internal controls on government would be Necessary. In framing a government, the which is to be administered by men over menm the great difficulty lies in this: you must first enable the government to control the governed; and in the next place, oblige it to control itself. "*[32]

Conception which was launched in forming constitution originally desired by the United States to divide the power of the state is considered to provide

[28] QS Al-Hasyr, /59: 7.
[29] QS An-Nisaa, /4: 65.
[30] Muhammad Alim, *Op.Cit,* p. 64-66.
[31] QS Al Ahzab,/33: 21.
[32] Gary Wasserman, *The Basics of American Politics*, (Pearson: Longman, 2007) p. 25.

a checks and balances each other.[33] *The first rule* that the legislative power, the power to make the law given to Congress; *The second rule* that the executive power, the power to implement the law, which was given to the President; *the third* power of the judicial authorities, which is given to the Supreme Court. This idea was started by the idea of Federalist supporters of the idea that evolved in the formation of the norm in the United States Constitution. In the debate over drafting the constitution, their expectations of the process of the rule of law and state power that offset each other and watched.[34]

Checks and balances are combined conception of power that wants the three branches of state power to limit each other. Checks are functions to control the power with other powers and functions which is useful to create a balance against other powers. Principles of the doctrine gives the constitutional power to offset the power functions with one another. Mutual monitoring and balancing function integrated in the legislative, executive, and judiciary, which then provides three power offset three other powers that serve to dominate one another.[35]

At the level of the application of the doctrine in the Constitution, the United States has implemented a policy based on the law. In the conception of the separation of powers, the President was given the power to apply for and hold a special session in Congress and some judicial power such as forgiveness (pardon).[36] The President also has the power of veto which represents the chief executive to reject a bill that is not approved to become law. But on the other hand, the Congress has the power to balance the power of the veto by a 2/3 voting members of Congress. In addition, the Senate granted executive power and judicial power.[37] In addition, Congress may refuse to grant the proposed state budget for the implementation of the activities of the executive branch nor the other, this shows the power of implementation of the relationship between

[33] *Ibid.*, p. 26.
[34] *Ibid.*, p. 27.
[35] *Ibid.*, p. 27.
[36] Clinton in 1998 had undergone impeachment trial accused for misconduct that is involved in a sex scandal. President Clinton declared his innocence but was not dismissed from his tenure as president at the time.
[37] Which is the power no to confirm as President Bush Found out when Democratic senators held up his appoinment of a federal judge [*Ibid*].

the branches in the United States grappled with each other to offset each other and watched.

Theories and concepts of separation of powers and checks and balances in the pattern of politics in America today is considered the most solid in both the theoretical building, as well as the level of constitutional convention. Gary Wesserman even praised the conception formed by the American constitution because it was gifted power through constitutional balance the types and other forms of power that no other power is branched.[38] An example is the Congress split into two institutions, and the two institutions must be mutually approve any bill to be discussed before the law applies. Restrictions on the power with the power usage patterns through the method of checks and balances to make every state power are correlated to not be too strong between the power with power. MP's in general, by convention, will be selected for a maximum of two terms; to members of the Senate have a longer tenure of the six years which is actually selected by the state of origin; for president, has a term of four years with a maximum of two periods were selected through elections conducted by the general electorate is not popular elections that usually do before the electoral vote is done. Regarding the judicial authority, Supreme Court justices are appointed by the President after approval by Parliament of the Senate, which was then sworn to independent and free from the influence of other powers in deciding each case.

State power Construction such of it, what result of the division of powers is and mixing separate state agency that in practice divide and disperse the entire power of the state to govern. Most power is used and implemented to run the state government, while others run for offsetting and supervise other powers. But the pattern formed on the basis of the concept of checks and balances is not intended to create a pattern of governance, which in essence is efficient to run, so the logical consequence that the existence of stagnation or often referred to as political "gridlock".[39] But Garry Wasserman declare him "*to control the*

[38] *Ibid.*, p. 28.
[39] Carl Becker, *The Declaration of Independence*, (Ithaca: Cornell University, 1999) p. 189.

abuses of government"[40] and meant that the government can control himself. Even historians like Richard Hofstadter called the checks and balances in the United States as "*a harmonious system of mutual frustration*".[41]

In France the development of the concept of checks and balances grow along with the concept of separation of powers since the nineteenth century. In medio, there is then argued that in the absence of separation of powers so that's where not freedom in those kind of state. French constitutional system which basically originated from an empire that put the kingdom as sentrum state power today transformed in such a way since the end of the 1875 constitution, because the constitution is the last time that France introduced a system of cabinet. Especially since General De Gaulle apply the Fifth Republic Constitution in 1959, then that's when the republican system in which the concept of checks and balances applied by the different designs compare to United States of America.[42] Conception of the separation of powers and checks and balances provide a clear objective on which to maintain balance and direction of government which was about to be directed to social purposes. Herman Finner further explain that the doctrine of separation of powers and checks and balances is highly dependent on the design of social background.[43]

The pattern of third world governments, especially in parts of Asia and Africa have a view directly opposite is actually worried that the checks and balances would cause excessive turbulence, most gridlock, jams, and even civil war.[44] Actually, the design of checks and balances will be very dependent on the desired design. When a system of checks and balances is poorly designed, it does not mean there can lead to disastrous results. But when it was designed, not to cause excessive anxiety then almost all countries that have had a steady political system of checks and balances based on the pattern of its own flavor. Power and the only alternative to de-concentrated concentrated power, which,

[40] Gary Wasserman, *Op. Cit*, p. 30.
[41] Richard Hofstadter, *The American Political Tradition*, (Ithaca: Cornell University, 1948), p. 88.
[42] Alexis de Tocqueville, *Democracy In America: Historical-Critical Edition of De la de´mocratie en Ame´rique,*(Indianapolis: Liberty Funds, 1989), p. 516.
[43] Herman Finner, *The Theory And Practice of Modern Government,* (New York, L. MacVeagh, The Dial press, 1932), p. 34.
[44] Pietro Costa, *The Rule of Law: History, Theory, and Criticism*, (New York: Springer, 2006) hlm. 411.

as has been observed, always eventually leads to the oppressive rule, which is much worse than a political debate.

Constitutional design can effectively minimize turbulence and maximize protection against government corruption and arbitrary. There are several different ways to divide power between the branches of state power. For one thing, different constitution making different governmental actors. Some of the constitution gives the president the power of government to others, gives power to the prime minister and several others combine executive and legislative power in Parliament, so some states do not position the form of the kingdom except single government authority granted to the president or prime minister. Some constitutions in some countries recognize the government that is single without having board representation and most other countries do not. Some constitutions make two legislative chambers while other countries apply a single room, and in some countries consists of the legislative chambers. In a different constitutional system will produce different patterns with the order of the corresponding social subsystem that supports the pattern adopted.

In some ways, though the constitution determines the laying of power to a branch of the same powers. Some constitutions in some countries are also able to disperse power to the patterns and formulas are different. In America, for example, according to the constitution the President has the power to veto parliamentary initiative in making the legislation[45], but in Indonesia the President has no such power, but has the same formulation in strong design. In the UK, the upper house has the power to make recommendations binding to the lower house in the formation of bill, and even has the power to reject the proposed norm of the lower house[46], while in Indonesia, People Consultative assembly (MPR) has a position to function parallel to House of Representatives (DPR).[47] In terms of vertical power sometimes low governmental power has greater autonomy than the provinces, but sometimes the opposite is true where the

[45] Carl Becker, *Op. Cit*, p. 201.
[46] J.L.De Lolme , *Constitution of England, or An Account of The English Government; In Which It Is Compared, Both with The Republican Form of Government, and The Other Monarchies In Europe*, (London: Robinson Publishing, 1997) p. 55.
[47] Jimly Ashiddiqie, *Pengantar..Op. Cit*, p. 71.

provincial governments control more than the lowest and the local government provides even more pressure on the central government.[48]

Constitutional design in the most countries experiences how to divides the powers of the central government into three parts - the legislative, executive, and judicial power. Such constitution gives each of these powers to a different person or group of people. Some of this constitution are trying to divide this power hermetically, ie there should be no overlap between the branches of state. Some provide some overlap, for example, the president has executive power but also legislative veto.[49] This method divides the power of so-called classic separation of powers. In addition, some of the constitution divides power between the central government and regional or provincial governments. Because of this division is the division of constitutional, the central government may not interfere into the sphere of the state. The state government can not dissolve the state government, or maybe it was trying to take for himself one nation guaranteed strength.[50] In fact, some states even have their own design of constitution, and they usually have the legislative, judiciary and executive, as the central government.[51] This method is called federalism. Another pattern is when all the legitimate constitution divides power between the government and society to protect the rights of individuals. Some of these rights are personal, such as the right to marry. But some are political, such as the right to protest or to form political associations. By using this right, citizens can check their government. This method of power sharing power on the basis of human rights.[52] Those patterns are all advanced democratic constitution divides power between government and citizens by holding a leadership succession. In a democracy, the people have all the authority and the same political rights; government serving them, not vice versa. But people can not perform activities of government because it is the impossibility of it. Therefore, the constitution gives the power of government officials to carry out their duties, within the scope of that suit them, as representatives of the people.

[48] Carl. J. Friedrich, *Constitutional Government and Democracy*, (Harvard: Blaisdell Publishing: 1968) p. 137.
[49] Carl. J. Friedrich, *Constitutional Government….Op. Cit*, p. 137.
[50] *Ibid.*, p. 138.
[51] Herman Finner, *The Theory And Practice….Op. Cit* , p. 34.
[52] *Ibid.*, p. 38.

B. Indonesia's Version of Checks and Balances

In terms of the state's leadership in general to know some of the terms of the authority of government, some of which we know the concept King and Queen, *Amir* (The Ruler), Chairman, President, and Prime Minister. The concepts are sundry usually adjusted to the official language used in the countries concerned.[53] For example, in some muslim major countries, the term King is sometimes called the Sultan as it is practiced in Brunei Darussalam and Malaysia. In the neighborhood communist countries, such as the China, known as the term to refer to the position of Chairman of the Head of State. While in Germany and Austria, the Head of Government called the Chancellor. The term is often used because the executives more flexibility in understanding.[54] C.F Strong itself split into two meanings executive understanding that:[55]

1. Executive in the broad sense, ie the whole body of ministers, civil service, police and even the military.
2. The Executive in the narrow sense, which means the highest leadership of executive power.

The use of the word "executive" means the following Heads of Government ministers are generally called a cabinet, or in other words, the state agency authorized by the constitution to carry out the laws that have been approved by the legislature submiting the policy. However, in modern practice, the executive who formulate most of the policies and submitted to the legislature for approval.[56] Executive agency is an institution that must exist in any state, especially in the modern state. It is caused by the modern state associated with large national community that requires heads of government who holds wide powers anyway. Some important powers held executive in a constitutional state, among other:[57]

1. Diplomatic power, which is associated with the implementation of foreign relations
2. Administrative power, which is associated with the implementation of the law and public administration.

[53] Jimly Asshiddiqie, *Op, Cit*, p. 198.
[54] *Ibid.*, p. 198-199.
[55] C. F Strong, *Konstitusi-Konstitusi Politik Modern: Kajian Tentang Sejarah & Bentuk-Bentuk Konstitusi Dunia*, (Jakarta: Nusamedia, 2004) p. 328.
[56] *Ibid.*, p. 12.
[57] *Ibid.*, p. 328.

3. Military power, which is associated with the organization of the armed forces and the conduct of the war
4. Judiciary, which involves the provision of forgiveness (pardon), reprieve, and so the inmates or criminals.
5. Legislative, which is associated with the drafting of legislation and regulate the enactment into law.

In this world there are three types of government systems and are used in practice, namely (1) presidential system, (2) parliamentary system and (3) mixed system. In the system of government that a presidential system, where the presidency is very important. The definition of the presidential institution is an institution or an organization comprising two office positions, namely the President and Vice President. Some traits that are important in a presidential government system, among others:[58]

1. Chief Executive or the President and/or Vice President has a certain period of time (fixed terms office), eg 4 years, 5 years, 6 years or 7 years. So the President and the Vice President can not be dismissed amid tenure because of political reasons. In some countries, the period of tenure is usually restricted to the firm, for example, only one more term or tenure of only two times in a row;
2. President and Vice President is not accountable to specific political institutions commonly known as a parliament, but directly responsible to the people.[59] President and Vice President shall be removed from office for reasons of unlawful legal conduct that are usually restricted to cases of certain criminal acts which if left unchecked can lead to serious legal problems such as treason, inconstitutional conduct and so forth;
3. Therefore, usually the President and/or Vice President is determined directly elected by the people (directly elected) or through certain intermediary mechanisms that do not permanently representation as the nature of parliamentary institutions. In a parliamentary system, a prime minister though also elected through general elections but the election as the Prime Minister not because the people directly, but rather because he was elected a member of parliament who control a majority of seats certain amount;

[58] Jimly Asshiddiqie, *Op, Cit,* p. 204-205.

[59] In US Constitution a criminal offense is limited only by four ways, namely (i) Treason, (ii) bribery, (iii) high crimes, and (iv) misdemeanors. whereas in the Constitution of the Fifth Republic of France only two (2) types of criminal acts, namely, (i) Treason, and (ii) bribery.

4. In conjunction with the parliament, President and/or Vice President is not subject to the parliament, can not dissolve parliament, and *vice versa* Parliament can not impose the President and / or Vice President and dismiss the cabinet as well as in the practice of parliamentary system;
5. In a presidential system, it is not known distinction between the functions of head of state and head of government. While in the parliamentary system, the distinction and separation of the two offices and even heads of state and government of the norm and it is a necessity;
6. The responsibility rests with the government of the President, and therefore the executive branch, in principle, authorized to form a government, a cabinet, appoint and dismiss ministers and public officials that the appointment and dismissal made by political appointment.
7. In Indonesia there has been a fundamental change in the executive power after the change of the 1945 Constitution is in accordance with the principle of the beginning of the 1945 changes, especially concerning the executive realm, namely to reinforce the presidential system and was followed by the separation of the branches of state power major with the principle of checks and balances , then identifying the fundamental changes in 1945 also resulted in a change in the field of executive power in Indonesia, namely:[60]
    1. The President as the holder of executive power [vide Article 4 (1) The 1945 Constitution] no longer holds the power to make laws (laws) that have been shifted into the hands of the House of Representatives [vide Article 20 (1)], it is only entitled to propose draft legislation (bill) to the House of Representatives [vide article 5, paragraph (1)], provides mutual agreement with the Parliament and pass the bill into law [vide article 20 paragraph (2) and (4)];
    2. The President and the Vice President is no longer elected by the Assembly, but elected by the people directly in pairs of candidates nominated by political parties (vide Article 6A);
    3. The term of office of the President for 5 (five) years strictly limited to only two periods (see Article 7);
    4. it determines the conditions in more detail to be president and vice president (see chapter 6);
    5. it determines the mechanism of impeachment against the President and/or Vice President of involving Parliament, the Constitutional Court, and People's Consultative Assembly (vide Article 7A and 7B);
    6. The assertion that the president can not dissolve the House of Representatives (vide Article 7C);
    7. The exercise of the prerogative of the president as head of state must be with the consent or consideration of the Parliament;

[60] Abdul Mukhtie Fadjar, *Hukum Konstitusi & Mahkamah Konstitusi*, (Yogyakarta: Citra Media, 2006) p. 54-55.

8. Appointment of public officials, a case member of the state's financial examiner body (vide Article 23F), supreme court justice [vide Article 24A paragraph (3)], a member of the judicial commission [vide Article 24B paragraph (3)] need the approval of Parliament;
9. The President is authorized to form the consultative council (vide article 16) as a replacement for Consultative Board to be abolished;
10. In the establishment, alteration, and the dissolution of the ministry should be regulated in the Act [vide Article 17 paragraph (4)], not free as before.

Branches of legislative power is a branch of power that first of all reflect the people's sovereignty.[61] Miriam Budiardjo stated that the legislative body that holds the state legislature is a body that reflects one of the agency's functions, namely legislate, or make laws. According to Miriam Budiardjo, another name that is often used is the Assembly that prioritizes elements of "gathering" (*to discuss public issues*) and other names are Parliement, which is a term that emphasizes the element of "talk" (*parler*) and negotiate.[62] Another term priority to representation or representation of its members and the so-called People's Representative Body or the House of Representatives. Changes in the system of representation and legislative powers after a constitutional reform to bring renewal legislative power in Indonesia, following a system of representative and institutionally legislastive power and its authority:

People's Consultative Assembly (MPR)

a. No longer serves as the highest state institution implementing fully the sovereignty of the people [vide article 1, paragraph (2)];
b. Its membership consists of all members of the DPR and DPD selected through election [vide article 2, paragraph (1)];
c. Authority only establish and amend the constitution, inaugurating the President and Vice President [vide Article 3, paragraph (1) and (2)], dismiss the President and Vice President by the constitutional provision [vide article 3, paragraph (3) jo. Article 7A and Article 7B], choose a Vice President from the candidates nominated by the President in case of vacancy Vice President [vide Article 8 paragraph (2)], and elect the President and Vice President if both remains incapacitated simultaneously [vide Article 8 paragraph (3)].

[61] Jimly Asshiddiqie, *Op. Cit*, p. 32.
[62] Miriam Budiarjo, *Ilmu Politik*, (Jakarta: Gramedia, 2008) p. 91.

House of Representatives (DPR)

a. Members are elected by popular vote [vide Article 19 paragraph (1)]
b. Holds the power to make laws [vide Article 20 (1)];
c. Has a legislative function, the function of budget and oversight [vide Article 20A paragraph (1)];
d. Has the authority to: propose the dismissal of the President and/or Vice President to the Assembly through the Constitutional Court [vide Article 7 paragraph (1)], to give approval of the Act together with President [vide Article 20 (2)], a declaration of war, make peace and agreement with other countries as appointed by the President (vide article 11), giving approval of nominees to the proposal of the Judicial Commission, the approval of the appointment of a member of the Judicial Commission, giving consideration to the President on the appointment of an ambassador [vide article 13 paragraph (2)], receive placement ambassadors of other countries [vide article 13 paragraph (3)], and the granting of amnesty and abolition [vide article 14 paragraph (2)]. Choosing a candidate member of the State's Financial Examiner Body [vide Article 23F Paragraph (1)], and proposed three candidates for constitutional judges to the President [vide Article 24C paragraph (3)].

Regional Representatives Council (DPD)

a. Members represent each province were selected through an election [vide Article 22C paragraph (1)] and all its members automatically are members of the Assembly [vide article 2, paragraph (1)], the number of members of each of the same province and keseluuruhan must not be more than one third of members DPR [vide article 22 paragraph (2)]
b. Has the authority to: propose to Parliament [vide Article 22D paragraph (1)] and participate in the discussion [vide Article 22D paragraph (2)] bill relating to regional autonomy, the central and local relations, formation and sensitization as well as the merging of regions, resource management natural and other economic resources, as well as related to the financial balance between the center and the regions, giving consideration to the Parliament on Budget bill and the bill relating to taxes, education and religion [vide article 22D paragraph (2)], as well as the election of members of the State Financial Examiner Body [vide article 23F paragraph (1)], and supervise over the implementation of the law on regional autonomy, the formation, expansion and merger of regions, central and local relations, management of natural resources and other economic resources, the implementation of the state budget, tax, education, and religion [vide section 22 D paragraph (3)].

Thus, according to the representative system and the legislative authority has been very significant changes occur as follows:[63] (i) No longer is the supremacy of the assembly, but the tendency of the theory espoused trias politica with the principle of checks and balances system; (ii) to shift from a unicameral system to semi-bicamereal with DPD despite a very limited role, and the loss of functional representation system with the abolition of group representatives in the Assembly; (iii) Shifting power to make laws from the President to the Parliament. Associated with a branch of judiciary, the Indonesian constitution laid the judicial power as a third pillar in the system of state power more modern Indonesia. In the modern state system, judicial branches of power according to the power branch is organized separately.[64] John Alder and Peter English states, "The principle of separation o powers is particularly important for the judiciary."[65] Even Montesquieu was a judge in France, so he wants the importance of the separation of powers is extreme among the branches of the legislative, executive, and especially the judiciary.[66]

There are two very basic principles that are considered in the judiciary, namely (i) the principle of judicial Independence, and (ii) the principle of Impartialy. Both of these principles are recognized as a fundamental prerequisite system in all modern constitutional state or a modern constitutional state. Principles of Independence itself, among others is to be realized in the attitude of the judges in examining and deciding cases that it faces. In addition, independence is also reflected in the various arrangements on matters relating to the appointment, employment, career planning, payroll, and dismissal of judges.[67] In the Indonesian context, there is a period of history that shows that law enforcement judicial power can not be qualified as an Independent. Indications on it can be argued from a variety of the following, namely:[68]

1. In the era of colonialism, the judge in *Hoogerechtsthof and Raad van Justitie* is separate from government employees, while the chairman Landraad in Java and Madura and disebagian outside Java and Madura

[63] Abdul Mukhtie Fadjar, *Op. Cit*, p. 54.
[64] *Ibid.*
[65] John Alder and Peter English, *Constitutional and Administrative Law*, (London:Mcmillan, 1989) p. 267.
[66] Jimly Asshiddiqie, *Op. Cit*, p. 45.
[67] Jimly Asshiddiqie, *Op. Cit*, p. 52.
[68] Bambang Widjojanto, *Op. Cit*, p. 134-135.

are government employees who usually arriving under the Ministry of Justice;

2. At the time of the old order, the judiciary is placed as a legal revolution to meet the demands for social justice, article 19 the 1964 Principles of Judicial Power Law, stated "For the sake of the revolution, the honor of the State and Nation can participate or intervene about--hand in the matter of the court ". So is the case with the authorities of other law enforcement agencies;[69]
3. In the old order era, the President put the Chief Justice as a Cabinet Minister with three (3) positions, namely: Minister of Presidential Legal Adviser, Ministry of Justice, and also served as Chairman of the Supreme Court.[70]
4. In the New Order, the President no longer placing the chief justice under the rule of President but the terms of a judge to be appointed and dismissed have stipulated by Act and in the legislation referred to no authority of the President to determine the judge in question.[71]

Post reformation constitution on 1999-2002, there is a fundamental change, especially the birth of the Constitutional Court and the Judicial Commission. So that the field of judicial power (Judiciary system) have regulated matters as follows:

1. The assertion of the independence of the judicial power in the articles of the Constitution NRI 1945 [vide paragraph 24 (1)], whereas previously only in the explanation (as a consequence of the abolition of the explanation of the 1945 Constitution);
2. Judiciary power is no longer a monopoly of the Supreme Court (MA) and judicial bodies who are below, but also by the Constitutional Court (MK) [vide Article 24 paragraph (2) Constitution NRI 1945];
3. The existence of an independent Judicial Commission, which is authorized to propose the appointment of justices and have other authorities in order to maintain the dignity and behavior of judges (see article 24B);
4. The presence of the Constitutional Court with nine (9) constitutional judges (three of the Parliament's suggestions, three proposals MA, and three of the President's proposal) that has 4 (four) authority and one (1) obligation (vide Article 24C):

[69] In Article 14 paragraph (2) the 1964 on the Basic Principles of Judicial Power Law, stated: "In order to enforce the law as an instrument of revolution and/or to fulfill public justice, Prosecutor are entitled to ask ... about case Certain crimes defined in the Act."

[70] Philippus M. Hadjon, *Lembaga Tertinggi dan Lembaga-Lembaga Tinggi Negara Sesuai Undang-Undang Dasar 1945: Suatu Analisa Hukum Dan Kenegaraan,* (Surabaya: PT Bina Ilmu, 1992) p. 69.

[71] Article 8, paragraph (1), paragraph (2), and paragraph (3) the 1985 Supreme Court Law stated: "(1) The Chief Justice was appointed the President as Head of State of a list of candidates proposed House of Representatives to President as Head of State after hearing the opinion of the House of Representative's Supreme Court and the Government; and (3) the Chairman and Vice-Chairman of the Supreme Court appointed by the President as Head of State among the justices proposed by the House of Representatives."

a. Reviewing laws against the Constitution;
b. Determining disputes over the authorities of state institutions whosepowers are given by this constitution;
c. Deciding over the dissolution of political party;
d. Deciding over disputes on the results of a general election;
e. Authority to issue a decision over a petition concerning alleged violation by the President and/or the Vice President as provided by the constitution.

III.CONCLUSION

As illustrated in the last part, there are many ways to divide power. Some constitutions use different types of division; others only a few uses. There is no single correct way to share power for all countries at all times. Instead, the crucial point for the purpose of this is that the different ways of sharing power have different effects. Because of checks and balances is the heart of constitutionalism constitutionalist has devoted a long time to research, the focus of research on the effects of different ways to divide power, both alone and in combination. But there is no constitutional system does everything well; there is always a trade-off, or the choice to be made. Some of the constitutional system are made, for example, tends to cause very inclusive but rather has a pattern of offending politically; others will lead to a little more exclusive, but also more stable in the political system. Some systems give rise to constitutional politics focuses on ideology but not local interests; others have focused on the interests of local politics but not ideologies, and so on. All the systems have advantages and disadvantages as well.

On the basis as described then, a different system will work better for different countries. For example, some countries have a cultural tendency to centralize the power of just one person, to the executive, who then try to collect all of the rest of the power for himself. For those countries, it is very important to weaken the executive to give more power to the legislative and judicial branches. Perhaps there is a downside: a country with a weak executive sometimes can not respond

quickly to changing world events. But on balance, for the kind of country, inverse avoid tyranny exceeds downside slower reaction time. Constitutional design as an art of norm consists of adjusting the constitution of certain countries in this way

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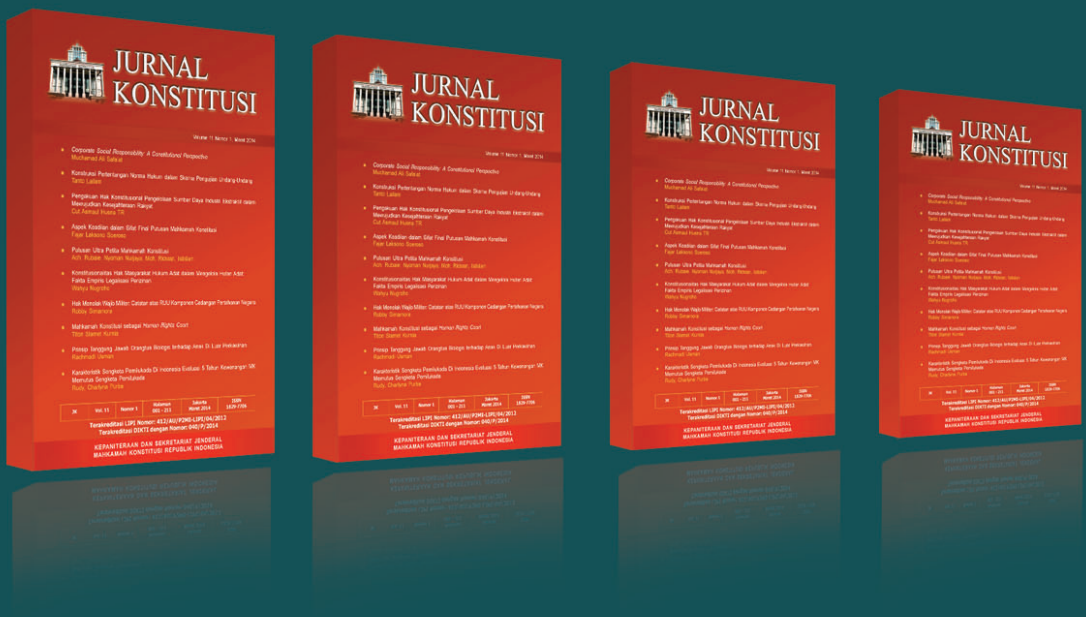


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