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TEH CONSTITUTIONAL COURT OF
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Note From Editors

Constitutional Review (CONSREV) Journal is an international law journal published by Center for Research and Case Analysis and Library Management of the Constitutional Court of the Republic of Indonesia. The fundamental aim of this journal is to disseminate research, conceptual analysis, and other writings which focus on constitutional issues. Articles published by CONSREV cover various topics on constitution, constitutional courts, constitutional courts decisions and issues on constitutional law in any country.

In this first edition of Year 2018, six articles are presented by legal and constitutional scholars from various universities. The first article is written by Simon Butt. The author tries to identify the function of judicial dissent in the Indonesia's Constitutional Court. The explanation of the article is preceded by providing literature related to the judicial dissent. Then, the author shows some weaknesses and followed by ways how the Court employs dissents.

The second article written by Tim Lindsey discusses the Indonesia's Constitutional Court and the review of regulation in a split jurisdiction. He argues that the Court should follow the Korean Constitutional Court to prevent the possibility of constitutionalism being subverted by unconstitutional subordinate regulations.

The next author is Giri Ahmad Taufik. He provides an article about the dissolution of one of societal organizations in Indonesia, namely *Hizbut Tahrir Indonesia* (HTI). The explanation of the topic uses a proportionality test in interpreting the limitation clause and applies it to the questions of HTI and broader issues to evaluate recent moves of Indonesian government in amending the Law Number 17 Year 2013 on Societal Organization.

The following article is written by Desi Hanara. The focus of her article is about human rights in the Asian judiciary. She proposes that any court's consideration should encourage judicial independence, recommend human rights incorporation into judicial discussions and decisions, suggest the establishment of a platform to enhance human rights expertise of the judiciary, and provide a platform for the development of binding human rights instruments and the establishment of an Asian Human Rights Court.

The fifth article focuses on liberal democracy and Asian values in contemporary Indonesia written by Muhammad Bahrul Ulum and Nilna Aliyan Hamida. The authors examined the complex and contentious relationship between constitutionalism and integralism in the Indonesian government including the criticism of democratization within the contemporary state. In the end of the article, it is proposed that the adoption of human rights and liberal democracy by Indonesian government is often challenged by the spirit of integralism.

The last article is written by Putra Perdana Ahmad Saifulloh. He suggests that the Indonesia's Constitutional Court should be given an additional authority to give a consideration during the dissolution process of societal organization by the government. He argues that the Court as a neutral judicial institution should have the authority to consider whether a societal organization should be dissolved.

Finally, the editors expect that this issue might give some new insight, judgement, and understanding on constitutions, constitutional court decisions, and constitutional issues in broader nature to our readers.

Editors

The Function of Judicial Dissent in Indonesia's Constitutional Court

Simon Butt

Constitutional Review, Vol. 4, No. 1, May 2018, pp. 001-026

Indonesian judges are permitted to issue dissenting opinions. Constitutional Court judges regularly hand them down. However, neither judges nor academics have outlined the purposes of dissenting opinions in Indonesia. This article aims to promote discussion about what these purposes are, or should be, in Indonesia, with a view to increasing the utility of dissents. It begins by considering the international scholarly literature details some purposes recognised in other countries, such as increased transparency and accountability, but also some disadvantages, such as the perceived weakness of a divided court. It then considers how the Constitutional employs dissents, before exploring some of the uncertainties and unanswered questions about dissents and their use in Indonesia.

Keywords: Constitutional Court, Indonesia, Judicial Dissent

Filling the Hole in Indonesia's Constitutional System: Constitutional Courts and the Review of Regulations in a Split Jurisdiction

Tim Lindsey

Constitutional Review, Vol. 4, No. 1, May 2018, pp. 027-044

The Indonesian constitutional system contains a serious flaw that means that the constitutionality of a large number of laws cannot be determined by any court. Although the jurisdiction for the judicial review of laws is split between the Constitutional Court and the Supreme Court, neither can review the constitutionality of subordinate regulations. This is problematic because in Indonesia the real substance of statutes is often found in implementing regulations, of which there are very many. This paper argues that that is open to the Constitutional Court to reconsider its position on review of regulations in order to remedy this problem. It could do so by interpreting its power of judicial review of statutes to extend to laws below the level of statutes. The paper begins with a brief account of how Indonesia came to have a system of judicial constitutional review that is restricted to statutes. It then examines the experience of South Korea's Constitutional Court, a court in an Asian civil law country with a split jurisdiction for judicial review of laws like Indonesia's. Despite controversy, this court has been able to interpret its powers to constitutionally invalidate statutes in such a way as to extend them to subordinate regulations as well. This paper argues that Indonesia's Constitutional Court should follow South Korea's example, in order to prevent the possibility of constitutionalism being subverted by unconstitutional subordinate regulations.unconstitutional subordinate regulations.

Keywords: Constitutional Court, Constitutional Review, Judicial Review, Supreme Court

Proportionality Test in the 1945 Constitution of the Republic of Indonesia Constitution: Limiting Hizbut Tahrir Freedom of Assembly

Giri Ahmad Taufik

Constitutional Review, Vol. 4, No. 1, May 2018, pp. 045-076

In May 2017, Jokowi's administration announced the intention to dissolve Hizbut Tahrir Indonesia (HTI). HTI is an Islamic organization that aspires to establish caliphate government based on the claim of Islamic teaching. The Government considers HTI as a threat to Pancasila. The announcement has created controversy. It has divided Indonesian into pro and contra camp. The dissolution pro camp argues HTI ideology is against Pancasila, Indonesia political ideology. Furthermore, they pointed out HTI's idea of Caliphate that based on religion would disintegrate the nation. Conversely, the cons argues the government move is against the constitutionally guarantee freedom of association as stipulates in the 1945 Constitution of the Republic of Indonesia (hereafter the 1945 Constitution). The move would create precedent that threatens freedom of assembly if the government failed to enact due process procedure and provide justifiable reason for the action. This controversy is not new to human rights and democratic discourse. Karl Popper describes the debate as a paradox of tolerance, democracy, and freedom in an open society. This paper examines how 1945 Constitution can be utilized to resolve the paradox. This paper argues that Article 28 J par.2 of the 1945 Constitution requires the balance between human rights protection and limitation in its proportion. Thus, the limitation clause should be used as a parameter to solve HTI issue. This paper explores the use of proportionality test in interpreting the limitation clause and applies it not only to the question of HTI issue but also broader issues to evaluate recent government moves in amending the Law Number 17 Year 2013 on Societal Organisation. This paper employs a doctrinal method in its analysis.

Keywords: Article 28 J par.2, Dissolution, Hizbut Tahrir, Indonesian Constitution, Proportionality Test, Societal Organisation Law

Mainstreaming Human Rights in the Asian Judiciary

Desi Hanara

Constitutional Review, Vol. 4, No. 1, May 2018, pp. 077-110

Human rights protection in Asia is hindered by the absence of binding human rights instruments and enforcement mechanisms, including the lack of human rights mainstreaming into the works of relevant stakeholders, notably the judiciary. Judiciary plays key roles in the realization and protection of human rights. As the guardian of the Constitution, the Indonesian Constitutional Court ('the Court') is mandated to protect the human rights of the citizens. This paper argues that the Court, which previously served as the President of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC), has the potential to play a leading role in mainstreaming human rights in the region. Using normative and comparative legal research methodologies, the paper identified the Court's mandates on human rights at the national, regional and international levels; assessed the need for human rights mainstreaming in the Asian judiciary; and examined the significant potential of the AACC to house the mainstreaming project. Finally, it proposes several recommendations for the Court's consideration, namely to encourage judicial independence, recommend human rights incorporation into judicial discussions and decisions, suggest the establishment of a platform to enhance human rights expertise of the judiciary, as well as facilitate a platform for the development of binding human rights instruments and the establishment of an Asian Human Rights Court.

Keywords: AACC, Asian Human Rights Court, Indonesian Constitutional Court, Judiciary, Judicial Independence

Revisiting Liberal Democracy and Asian Values in Contemporary Indonesia

Muhammad Bahrul Ulum and Nilna Aliyan Hamida

Constitutional Review, Vol. 4, No. 1, May 2018, pp 111-130

This paper aims to examine the complex and often contentious relationship between constitutionalism and integralism in the Indonesian government and provides a criticism of democratization within the contemporary state. Integralist state portrays the relationship between the state and the people as analogous to a family, with the state as a father and the people as children (the Family Principle). Those that adhere to this view, with regard to contemporary Asian politics, claim that Asian values are inherently integralist, that Asia's particular history and values different considerably from the West's, and that Pancasila, Indonesia's state philosophy, is utilized to establish romanticized relations between the ruler and the ruled. The data presented in this paper was collected from relevant articles on Indonesian democracy and Asian values. It also demonstrates how Pancasila, as Indonesia's core guiding philosophy, has influenced debates over how the constitutional should be applied and interpreted. As the research shows, during the regimes of Sukarno and Suharto, Pancasila was manipulated in order to promote the goals of the state, and that a reliance on integralism during Indonesia's founding years severely diminished human rights and Indonesia's capacity for an efficient democracy. By continually putting the priorities of the state above those of the people, the Indonesian government has contradicted its adoption of human rights and liberal democracy is often challenged by the spirit of integralism.

Keywords: Asian Values, Indonesia, Liberal Democracy

The Obligation of the Constitutional Court of Indonesia to Give Consideration in The Process of Dissolution of Societal Organizations

Putra Perdana Ahmad Saifulloh

Constitutional Review, Vol. 4, No. 1, May 2018, pp. 131-156

The government efforts to dissolve the societal organizations must be carried out in accordance of stages and processes stipulated in the Law on Societal Organizations. Persuasive efforts must be done first before the imposition of administrative sanctions. Administrative sanctions in the form of warning letters and temporary suspensions of activities need to be done before the Government dissolves the societal organizations after a court decision was obtained from the permanent legal force. The writer considered that the dissolution of societal organizations by the Government was urgent for the present, but the Government before dissolving societal organizations should seek consideration from the Constitutional Court of Indonesia as the guardian and the interpreter of Pancasila. Thus, the Constitutional Court of Indonesia as a neutral judicial institution shall have the authority to consider whether a societal organization will be dissolved.

Keywords: Constitutional Court of Indonesia, Dissolution of Societal Organizations, Pancasila

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The Function of Judicial Dissent in Indonesia's Constitutional Court

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Abstract

Indonesian judges are permitted to issue dissenting opinions. Constitutional Court judges regularly hand them down. However, neither judges nor academics have outlined the purposes of dissenting opinions in Indonesia. This article aims to promote discussion about what these purposes are, or should be, in Indonesia, with a view to increasing the utility of dissents. It begins by considering the international scholarly literature details some purposes recognised in other countries, such as increased transparency and accountability, but also some disadvantages, such as the perceived weakness of a divided court. It then considers how the Constitutional employs dissents, before exploring some of the uncertainties and unanswered questions about dissents and their use in Indonesia.

Keywords: Constitutional Court, Indonesia, Judicial Dissent

I. INTRODUCTION

The judgments of Indonesia's Constitutional Court often contain 'dissenting opinions' (*pendapat berbeda*). In them, one of more judges writes reasons indicating why they would have decided the case differently to the way a majority of the Court decided it. However, there is, to my knowledge, no consensus amongst Indonesian judges and academics about the significance and purpose of dissents. In one sense, this is unsurprising: publishing dissenting opinions alongside majority or other opinions in a single judgement document have long been a feature of the common law tradition. Yet Indonesia is a civil law country. And while there appeared to be good reasons to introduce dissenting opinions into the Indonesian legal system after the fall of Soeharto in 1998, they were introduced very quickly, as part of broader reforms prompted by foreign donors.

There was very little accompanying discussion in Indonesia about what dissents were and what they could achieve.

Yet despite the lack of discussion about their significance and purpose, dissenting judgements (or *pendapat berbeda* as they are sometimes called in Indonesia) are now entrenched parts of judicial practice in Indonesia. All Indonesian judges accept that they have the freedom and authority to issue dissents. However, they appear to be rarely issued by most Indonesian courts. The main exception of the Constitutional Court, which appears to issue them in roughly 13% of cases. Yet even here, dissents are not always used for the same purposes as they are used for in courts of other countries, particularly common law countries, but also some civil law countries. In this article, the author aims to demonstrate how the Constitutional Court uses dissents and how it could use them to further enhance the transparency and accountability of its decision-making.

In setion 1, the discussion is begun by explaining the common law's approach and the civil law tradition's general aversion to dissenting judgments, noting the movement in many civil law countries towards allowing dissents. The author also examines some of the scholarly literature that covers perceived advantages and disadvantages of dissents. Furthermore, in section 2, the circumstances behind the introduction of dissenting opinions in Indonesia are outlined, first in the commercial courts (*pengadilan niaga*), then in the ordinary courts and, of course, the Constitutional Court. Finally, in section 3, the author considers how the Indonesian Constitutional Court uses dissenting opinions and highlights two fundamental but unanswered questions: what is the weight of a dissenting opinion and when should the Constitutional Court consider itself to be 'split'?

II. DISCUSSION

2.1. Dissents in the Civil Law Tradition and the Literature

The main purposes of dissents, expressed in legal scholarship, are numerous, though how they are used in a particular country, if at all, is often a matter of legal tradition and legal practice.

Of course, dissenting judgments derive from the English common law tradition, and are deeply ingrained in countries following that tradition, like Australia, Malaysia and the United States. Dissenting opinions developed in the English courts from the end of the 16th century and then spread to other common law countries.[1] In these places, it is virtually inconceivable for judge to be prevented from expressing their own views if they differ from other judges on the bench. Most common law judges previously worked as barristers, most of who will have built a successful career by making their own legal arguments and being fiercely independent, so being forced to 'conform' feels deeply inappropriate, perhaps even dishonest. Common law judges demand that they must feel free to express their opinions about – say, the identification of the relevant law, the interpretation of that law, and the relevant facts – if they differ from other judges on the panel. Of course, dissents do not create binding precedent, but they have important functions, discussed below, including forming the basis for future legal change.

By contrast, countries following the civil law tradition, including Indonesia, have traditionally prohibited dissents. Some countries even consider it 'unethical' for a judge to openly disagree with other members of the Court.[2] This seems to follow French views on the law and the role of judges in applying it. During the Napoleonic period, a Civil Code was developed that was thought to be so perfect and complete, and so easy to apply, that it resulted in only one answer to a legal problem. Judging was conceived as a mathematical process that could be performed by a relatively low-ranked administrator. According to the theory, because case outcomes were inevitable, disagreement on the bench was inconceivable, and so judges did not need to be able to give dissenting opinions. So, to borrow the words of Ginsburg, former Justice of the United States Supreme Court, many civil law courts: issue a collective judgment, cast in stylised, impersonal language. The author of the judgment is neither named

[1] Andrew Lynch, "Is Judicial Dissent Constitutionally Protected?," *Macquarie Law Journal* 4 (2004): 81–104.

[2] John Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America.*, 2nd ed (Stanford California: Stanford University Press, 1985), 121.

nor otherwise identifiable. Disagreement, if it exists, as it sometimes does, is not disclosed.[3]

Obviously, if judges eschew doubt or controversy and 'speak with one voice',[4] it is easier to maintain the ideal that judges are instruments or 'mouths' of the law and are merely espousing the single true application of the Code.

Of course, these civil law views of codes and courts are now quite old and most civil law countries now recognise that codes are not perfect, and that judging is not a simply mechanical process. Accordingly, many countries have considered giving judges power to issue dissents, at least in some of their courts. Yet even in these courts, disagreements are not always 'visibly displayed in the published decision'.[5] There are some exceptions, however: notably the Constitutional Courts of Germany and Spain, and some courts in South America.[6]

2.1.1. Scholarly Literature about Dissents

As mentioned, the scholarly literature identifies various advantages and disadvantages of permitting judicial dissents.

2.1.1.1 Transparency and Legitimacy

If judges can dissent, then they will not usually be required to follow a majority view they think is incorrect. Judges can, therefore, 'do their job', which is to impartially apply the law. As Lynch describes it:

> While certainly 'identification of the applicable law, followed by an application of that law' can occur with unanimity, the reality is that it very often does not – and to no particularly ill effect. This is because there is much legitimate scope for disagreement over the law. As Ginsburg has stated, '[d]isagreement on the law or its proper application nowadays is almost universally admitted to be inevitable some of the time'. The presence of dissenting judgments provides assurance that the judges are conducting a *legal* debate in fulfilling their tasks of identification and

[3] Ruth Bader Ginsburg, "The Role of Dissenting Opinions," *Minnesota Law Review* 95(1) (1999): 2.

[4] Erhard Blankenburg, *Dutch Legal Culture*, 2nd rev. and enl. ed. (Deventer; Boston: Kluwer Law and Taxation Publishers, 1994), 75.

[5] Markesinis, "Conceptualism, Pragmatism and Courage: A Common Lawyer Looks at Some Judgments of the German Federal Court," *American Journal of Comparative Law* 34 (1986): 349–50.

[6] Carl Beudenbacher, "Some Remarks on the Method of Civil Law," *Texas International Law Journal* 34 (1999): 333.

> application of the law. In short, the possibility of dissenting opinions ensures that judicial power is in fact – and is seen to be – exercised with an appropriate focus upon the law, rather than being simply a smokescreen for decisions based upon morality, economics or public policy.[7]

Any divisions in the court are not hidden from the public, who can see who disagrees with what, why there is disagreement, and the extent and depth of that disagreement.[8] As one Australian High Court Judge has expressed it:

> [t]he determination in accordance with the judicial process of controversies as to legal rights and obligations and as to the legal consequences attaching to conduct is vital to the maintenance of an open, just and free society. Quite apart from the public's right to know what matters are being determined in the courts and with what consequences, open and public proceedings are necessary in the public interest because secrecy is conducive to the abuse of power and, thus, to injustice.[9]

Some scholars argue that this transparency function is more important for Constitutional Courts in particular, because their function is highly political.[10] This means Constitutional Courts might be expected to provide more compelling and explanatory decisions that seem to take account of competing views.

Related benefits appear to be judicial independence, or at least an enhanced perception of independence. Again, Lynch points out:

> The presence of dissenting judgments is one factor which provides reassurance that the courts are staffed by judges beholden to nothing more powerful than their own individual appreciation of the state of the law. If the judges are prepared to disagree with each other on occasion, then it seems reasonable to presume they will have no qualms about disagreeing with the executive and legislature as well when the need arises.[11]

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7 Lynch, "Is Judicial Dissent Constitutionally Protected?".
8 RF Blomquist, "Dissent, Posner-Style: Judge Richard A Posner's First Decade of Dissenting Opinions, 1981-1991 – Toward an Aesthetic of Judicial Dissenting Style," *Missouri Law Review* 69 (2004): 77.
9 *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 496-7, per Gauldron J.
10 Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000).
11 Lynch, "Is Judicial Dissent Constitutionally Protected?".

2.1.1.2 Enhanced Judicial Accountability

Many scholars argue that dissents perform an important accountability function too.[12] In many common law countries, judges circulate draft decisions for other judges to read before they are finalised. Many judges say that this process forces majority judges to better justify their decisions before they issue them.[13]As former Ginsburg puts it:

> My experience teaches that there is nothing better than an impressive dissent to lead the author of the majority opinion to refine and clarify her initial circulation. An illustration: the Virginia Military Institute (VMI) case, decided by the Court in 1996, held that VMI's denial of admission to women violated the Fourteenth Amendment's Equal Protection Clause.8 I was assigned to write the Court's opinion. The final draft, released to the public, was ever so much better than my first, second, and at least a dozen more drafts, thanks to Justice Scalia's attention-grabbing dissent.[14]

Justice Ginsburg continues:

> On occasion—not more than four times per term I would estimate—a dissent will be so persuasive that it attracts the votes necessary to become the opinion of the Court. I had the heady experience once of writing a dissent for myself and just one other Justice; in time, it became the opinion of the Court from which only three of my colleagues dissented.[15]

2.1.1.3 Basis for Legal or Interpretative Change

Dissents are sometimes used as a basis for legal change in common law countries. This might happen if a court in a later case uses or adopts the reasons contained in a dissent from an earlier case.[16] In these types of cases, a majority discusses the previous dissent and then explains why it is better than the majority decision in the previous case.

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[12] Ugo Mattei, "Why the Wind Changed: Intellectual Leadership in Western Law," *American Journal of Comparative Law* 42 (1994): 206.

[13] RF Blomquist, "Dissent," 77.

[14] Ginsburg, "The Role of," 2.

[15] *Ibid*.

[16] A. J Jacobson, "Publishing Dissent," *Washington and Lee Law Review* 62, no. 4 (2005): 1631; RG Simmons, "The Use and Abuse of Dissenting Opinions," *Louisiana Law Review* 16 (56 1955): 404–6; RB Stephens, "The Function of Concurring and Dissenting Opinions in Courts of Last Resort," *University of Florida Law Review* 5 (1952): 498.

Cole provides some examples of this in the context of the United States:

> Justice John Marshall Harlan's lone dissent in Plessy v. Ferguson in 1896, proclaiming that the Constitution is "colour-blind," was vindicated 58 years later in Brown v. Board of Education, which declared segregated schools unconstitutional. Louis Brandeis's 1928 dissent in Olmstead v. United States, declaring a "right to be let alone," led the court, years later, to recognize privacy rights not only in the specific setting presented by that case — wiretapping — but also with respect to the rights to contraception and abortion. Modern First Amendment doctrine can be traced to a pair of dissents penned by Oliver Wendell Holmes Jr. and Brandeis in the early part of the 20th century. Furthermore, Justice Harry Blackmun's compelling articulation of privacy principles in refusing to join the Supreme Court's upholding of a Georgia law making homosexual sex a crime became the law of the land 17 years later, when a majority of the court reversed Bowers v. Hardwick in Lawrence v. Texas.[17]

In some cases, the legislature has also adopted reasoning contained in a dissenting opinion.[18]

2.1.1.4 Disadvantages of Dissent

Dissent also brings with it several consequences which, in many countries – both civil and common law – are considered disadvantages. Perhaps the most significant problem is that it indicates a divided court, with some commentators taking this to mean that the Court is weak or that its decisions lack authority, or at least appears to be.[19] By contrast, unanimous courts can create an impression of strength and stability, and security in the law interpreted and even created by that court.[20] In courts where dissent is permitted and is commonly employed, unanimous decisions can be used to 'make a statement' – about an important area of law or to resolve long-standing uncertainty, for example – simply because all of the judges agree with it. Even though this view is commonly associated with the

[17] David Cole, "The Power of a Supreme Court Dissent," *Washington Post*, October 29, 2015, https://www.washingtonpost.com/opinions/the-power-of-a-supreme-court-dissent/2015/10/29/fbc80acc-66cb-11e5-8325-a42b5a459b1e_story.html?utm_term=.b392c62038be.

[18] Claire L'Heureux-Dube, "The Dissenting Opinion: Voice of the Future?," *Osgoode Hall Law Journal* 38(3) (n.d.): 495–512.

[19] Michael Wells, "French and American Judicial Opinions," *Yale Journal of International Law* 19, no. 1 (1994): 98.

[20] Ginsburg, "The Role of," 2.

civil law tradition, many courts in the common law world also see value in unanimity. Perhaps most famously, decisions of the United States Supreme Court under Chief Justice John Marshall were usually unanimous.

2.2. History of Dissents in Indonesia

In the lead-up to dissenting opinions being permitted in Indonesia in commercial courts (from 2000 and more generally from 2004), there was relatively little advocacy or discussion about the utility of allowing dissents. Dissenting opinions were proposed in the Supreme Court blueprint, produced during the Reformation (*Reformasi)* era, as a method to help improve judicial accountability and transparency.[21] According to the Blueprint, judges could not 'hide behind the Panel', which would make it easier to monitor or supervise the quality of individual judges.[22] In a piece arguing for the introduction of dissenting opinions, a respected Indonesian lawyer suggested that dissenting opinions might help Indonesian judicial reform in several ways.[23] For example, they would help scholars and lawyers to better analyse the logic behind each ruling. Introducing dissents might also help develop the careers of dissenters, if their personal legal opinions could become more widely known.[24] It was also claimed that dissents might reduce opportunities for bribery of judges.

However, the Blueprint expressed some concerns about dissents. One related to sensitive cases involving race and religion, suggesting that in some cases it might be preferable to keep any minority decisions confidential, to avoid conflict or the impression that some of the judges 'sided' with or was biased against parties for religious, ethnic or racial reasons.[25]

For example, for one case related to *adat* inheritance in Padang, there is a panel consisting of a person from Padang and two from Java. The two judges

[21] Mahkamah Agung, *Blueprint for the Reform of the Supreme Court of Indonesia* (Jakarta: Supreme Court of Indonesia, 2003), 202.
[22] *Ibid*., 204.
[23] Erman Rajagukguk, "Judicial Reform: A Proposal for the Future of the Commercial Court," in *Indonesia: Bankruptcy, Law Reform & the Commercial Court: Comparative Perspectives on Insolvency Law and Policy*, ed. Tim Lindsey (Sydney: Desert Pea Press, 2000), 57.
[24] *Ibid*., 58.
[25] Mahkamah Agung, Blueprint for the Reform of the Supreme Court of Indonesia, 204.

from Java find that the part of the woman is half of the part of the estate, whereas the Padang judge issues a dissenting opinion that is known to the public. In this case, it is possible that those who feel defeated (Padang) will say that because the majority of judges are Javanese, their case was defeated (regional sentiment emerges).[26]

It was also predicted that the paternalistic tradition whereby junior judges agree with the opinions of senior judges and Associate Justices routinely follow the Chief Justice would impede the 'take up' of dissenting judgments in Indonesia's courts and undermine their utility. This concern was echoed by another commentator, who also highlighted that the potential for disagreement on the bench might not be well received by the public, because it gave the impression of inconsistency in judicial decision-making and must undermine the legitimacy of the courts.[27]

Before 2000, judges in some Indonesian courts could disagree with their brethren, but this disagreement was not included in the judgment itself. The dissenting opinion could be noted in a special book, held by the Chief Justice of the relevant court.[28] Given that these 'special books' have not been publicly released, it is impossible to know whether many dissenting opinions, if any, were recorded in them. Dissenting opinions were first permitted to be included in the judgments of the commercial courts, under Supreme Court Regulation 2 of 2000 on Amendments to Supreme Court Regulation 3 of 1999 on Ad Hoc Judges. However, given the title of the Regulation, there was some confusion about whether this Regulation applied only to ad hoc judges or to all commercial court judges. On the one hand, most of the Regulation appeared directed towards ad hoc judges in the commercial courts, but, on the other, the provisions dealing with dissenting opinions (Articles 9-11) were cast in general terms and could be interpreted as applying to all judges in the commercial courts. Some interpreted

[26] Mahkamah Agung, Blueprint for the Reform of the Supreme Court of Indonesia, 204.

[27] Raymond Ali, "Perlukah Dissenting Opinion Di Mahkamah Agung?," *Pemantau Peradilan*, April 7, 2003, http://www.pemantauperadilan.com/detil/detil.php?id=68&tipe=opini.

[28] Supreme Court Chief Justice Decision No KMA/039/SK/X/1994 related to Memberlakukan Buku III Pedoman Pelaksanaan Tugas dan Administrasi Pada Mahkamah Agung RI (translation: The Enacting of Book III about Guideline for Duties and Administration at the Supreme Court of the Republic of Indonesia).

this as indicating that non-ad hoc judges – that is, career judges – were still expected to side with each other, but that 'outside' judges had freedom to diverge from the career judge opinion.[29]

However, any uncertainty about whether career judges could issue dissenting opinions was dispelled a few years later. In 2004, a new Judicial Power Law[30] was enacted, as were amendments to the 1985 Supreme Court Law.[31] Articles 19(2), (3) and (4) of the Judicial Power Law and Articles 30(3), (4) and (5) of the Supreme Court provide for what are often referred to as dissenting opinions. Both laws contain almost identical provisions on this issue.[32]

(4) During their deliberations, each judge must convey his or her written opinion about the case being heard. This becomes an inseverable part of the decision.
(5) If the deliberations do not yield unanimous agreement, the judges' differing opinions must be included in the decision.
(6) Further matters relating to Articles 19(4) and (5) are to be regulated by the Supreme Court.

These laws extended the ability to dissent to all Indonesian judges. However, these statutes did not explain the rationale for doing so. There was, therefore, very little context for these reforms: while judges knew they could dissent, they did not necessarily know why this reform had been made and why it might be important. This might help explain why so few Indonesian courts tend to issue dissents, at least on a regular basis.

2.2.1 Indonesia Dissent Data

There is very limited data about the rate of dissents in Indonesian courts, but it seems clear that they are generally rare, except in Constitutional Court. For example, the only available study where non-constitutional court dissent data could be obtained indicated that, in Yogyakarta District Court from 2004 until 2010, only one dissenting judgment was issued in 615 civil cases, and

[29] Ali, "Perlukah Dissenting"
[30] Law 3 of 2009 on Judicial Power.
[31] Law 5 of 2004 on Amendments to Law 14 of 1985 on the Supreme Court.
[32] The main difference is numbering of the sections. The Supreme Court Law also refers to Supreme Court judges and the Judicial Power Law applies to judges in general.

one in 2256 criminal cases.[33] In Sleman District Court over the same period, no dissents were issued in 892 civil cases, and two in 2871 criminal cases.[34]

By contrast, judges of the Constitutional Court have issued many more dissenting decisions, at least relative to the number of cases they hear.

Table 1. Dissents in the Constitutional Court[35]

Year	Number of dissenting opinions	Number of cases decided per year	Percentage of dissents
2004	8	35	23
2005	15	28	54
2006	11	29	38
2007	10	27	37
2008	10	34	29
2009	8	51	16
2010	14	61	23
2011	3	94	3
2012	7	97	7
2013	8	110	7
2014	7	131	5
2015 (as of mid year)	14	157	9
Total	115	854	13

As can be seen, a relatively larger number of decisions contained dissents from 2004-2008, with a few less from 2008-2010, and the number of dissents fell dramatically from 2011.

These figures seem to support observations that under Asshiddiqie, the Court was more academic in its decision-making. Not only was it more discursive, but perhaps also more encouraging of differences of opinion in the Court. It could be argued that such diversity of views on the bench was

[33] Tata Wijayanta and Hery Firmansyah, *Perbedaan Pendapat Dalam Putusan Pengadilan* (Yogyakarta: Pustaka Yustisia, 2011), 86.

[34] *Ibid*., 88.

[35] http://www.mahkamahkonstitusi.go.id/index.php?page=web.RekapPUU&menu=5; Veri Junaidi, Adelline Syahda, and Adam Mulya Bunga Mayang, *Tiga Belas Tahun Mahkamah Konstitusi Dalam Memutus Pengujian Undang-Undang* (Jakarta: Kode Inisiatif, 2016), 22.

not as strongly supported by Mahfud, who might have been more interested in the Court providing more decisive solutions to the matters brought before it. But this is mere conjecture. What appears certain is that in the past several years the rate of dissents has dropped significantly, though the reasons for this are not known.

2.3. How the Constitutional Court has Used Dissents

The Indonesian Constitutional Court appears to use dissents very effectively to make its decisions more transparent and legitimate. Judge seem free to make their own decisions, and can explain the reasons for them. This enables the public to see who agrees with what, and shows the losing side that the court seriously considered at least some of their arguments. This signifies that the court understands that functions are particularly important and that it has enormous responsibilities –including to interpret the constitution and to judge compliance by a democratically elected legislature. Constitutional interpretation is highly contested, and subject to change over time, and so the Court realises the importance of giving air to different views. Further, other Indonesian courts can point out that their decisions do not formally create law, and argue that accountability and transparency mechanisms are, therefore, less critical for them because their decisions affect only the parties. By contrast, Constitutional Court decisions are binding – not just on the parties before the Court, but on all Indonesian citizens, entities and government institutions.

But there is one feature of the Constitutional Court's decision-making that seems to reduce some of the transparency benefits from dissents. A dissenting judge can request that his or her dissent not be included in the decision (Article 32(6) of Constitutional Court Regulation No. 6 of 2005). This has happened in a few cases. For example, in the *Manoppo* case,[36] two judges believed that the applicant had no legal standing to bring the case because his constitutional rights were not damaged by the operation of the law. The names of these two judges were not mentioned in the decision. When the press asked Jimly who

[36] Constitutional Court Decision 069/PUU-II/2004.

the judges were, he responded, 'That is secret'.[37] This approach undermines the transparency and accountability rationale for dissenting opinions.

The use of dissents for judicial accountability is arguably less clear in Indonesia. This is because the majority and minority very rarely mention each other's arguments when making their own. So, for example, a dissenting Constitutional Court of the Republik of Indonesia (*Mahkamah Konstitusi* or MK) judges will not even refer to – let alone rebut – the majority's argument. Nor will the majority address any minority argument. There is, therefore, not the exchange of judgements that seems to occur in other countries, as discussed by Ginsburg, above. The Court has not explained why it has adopted this approach. However, it is possible to speculate that MK judges are struggling with the concept of confronting other members of the bench in their decisions. In a 2003 edition of *Berita Mahkamah Konstitusi*, Marzuki stated that he thought that it would be unethical for a dissenting judge to comment on the majority opinion, and for a majority decision to comment on a dissenting opinion.

However, there are some indications that the Court may be willing to adopt the reasoning of minority judgments in previous cases, at least in some limited circumstances. This appears to have happened in one case – the *Simultaneous Election case* (2003)[38] – but the observation can only be tentatively made, given that the majority that appeared to adopt some of the reasoning of the minority did not refer directly to that minority decision. I now turn to discuss the *Simultaneous Election case* (2003) and the case it appeared to follow – the *Saurip Kadi case* (2008).

2.3.1 Simultaneous Presidential and Legislative Election Case[39]

Since 2004, Indonesia's presidents and vice-presidents have been directly elected, in elections held around three months after national legislative elections. This practice has been hotly contested in the Constitutional Court, which has been asked to review the constitutionality of holding legislative

[37] "Kontroversi Sebutir Pertimbangan," *Tempo Interaktif*, February 21, 2005, http://www.tempointeraktif.com/hg/mbmtempo/arsip/2005/02/21/HK/mbm.20050221.hk1.id.html.

[38] Constitutional Court Decision 14/PUU-XI/2013.

[39] The following discussion draws on Simon Butt, *The Constitutional Court and Democracy in Indonesia* (Brill, 2015).

and presidential elections separately. The first case to squarely address the constitutionality of non-simultaneous elections was the *Saurip Kadi case* (2008).[40] There, the applicants challenged various provisions of the 2008 Presidential Election Law, including Article 3(5), which states that 'The election of the President and the Vice-President is to be conducted after the election of members of the People's Representative Council (*Dewan Perwakilan Rakyat* or DPR), the Regional Representative Council (*Dewan Perwakilan Daerah* or DPD) and Regional People's Representative Council (*Dewan Perwakilan Rakyat Daerah* or DPRD). They pointed to Article 6A(2) of the Constitution, which requires that presidential candidates be nominated by political parties before the general election.

A six-judge majority decided that holding presidential elections after legislative elections had developed as state practice or 'convention'. Under Article 3(2) of the Constitution, the People's Consultative Assembly (Majelis Permusyawaratan Rakyat or MPR) inaugurates (*melantik*) presidents and vice presidents. Because the MPR comprises DPR and DPD members, the DPR and DPD elections had been held first in order to constitute the MPR that would inaugurate the president. According to the Court, this practice had 'ultimately replaced legal provisions' – something that regularly occurred in Indonesia and other countries. Article 3(5) of the Law was consistent with this practice and hence was neither illegal nor unconstitutional, even though it admitted that this practice had established what it described as an 'illogical order' (though the Court did not explain this).[41]

Justices Fadjar, Siahaan and Mochtar issued a joint dissent. They pointed to various previous decisions of the Court, including the *Independent candidate's case* (2008)[42] and the *Parliamentary Threshold case* (2009).[43] In those decisions, the Court had endorsed particular methods of constitutional

[40] The issue was raised in the first case lodged with the Court in the *Fathul Hadie case* (Constitutional Court Decision 001/PUU-II/2004), but the Court did not consider the merits of the argument, holding that the applicants lacked standing.

[41] *Saurip Kadi case*, 2008, (Op.Cit) para [3.16.5]. *Saurip Kadi* case, 2008, para [3.16.5].

[42] Constitutional Court Decision 56/PUU-VI/2008.

[43] Constitutional Court Decision 3/PUU-VII/2009.

interpretation, including 'textual meaning' and 'original intent'. Referring to these cases and applying these methods, the dissenters would have upheld the application, requiring that presidential and general legislative elections be held simultaneously.

Their reasoning was as follows. Article 6A(2) of the Constitution requires that presidential candidates be nominated by political parties 'before the general election'. The meaning of 'general election' in Article 6A(2) should be determined by reference to Article 22E(2), which states that 'general elections are conducted to elect members of the DPR and DPD, the President and Vice President, and members of the DPRD'. In other words, 'general election' means a single election administered by the General Election Commission (*Komisi Pemilihan Umum* or KPU), encompassing both presidential and legislative elections.[44]

The minority also rejected the argument finding that holding separate elections had become convention. For the minority, convention could not be established if only practiced once. (As mentioned, direct presidential elections were held for the first time in 2004.) The dissenting judges also appeared to attack the basis upon which this convention was said to have developed: that DPR and DPD elections needed to be held first because the MPR inaugurated the president and vice president. According to the minority, DPR and DPD members could be installed, and the MPR then constituted, immediately before the president and vice president were inaugurated. Holding separate elections for them was therefore unnecessary. Finally, the dissenters also referred to the efficiency gains and cost savings that would be achieved by holding elections simultaneously. Nevertheless, the minority judges stated that they would not have insisted on simultaneous elections until 2014 due to time constraints and the KPU having already commenced organisation of the 2009 elections.

The Court revisited its decision in *Saurip Kadi* four years later in the *Simultaneous Election case* (2013). This challenge was brought by Professor

[44] *Saurip Kadi case*, 2008, (Op.Cit) p. 191. *Saurip Kadi* case, 2008, page 191.

Effendi Gazali, noted communications expert and University of Indonesia academic, who is known for his political parodies. Like the applicants in *Saurip Kadi* (2008), he argued that the Constitution required that presidential and general legislative elections be held simultaneously. In particular, he argued that both Articles 3(5) and 112 of the 2008 Presidential Election Law were unconstitutional. Article 112 specifically requires that the Presidential and Vice-Presidential elections be held within three months of the general election results being announced.

A majority of the Court overruled the majority decision in *Saurip Kadi* (2008), although it did not explicitly acknowledge doing so. As mentioned, in *Saurip Kadi*, the Court held that holding separate elections had become convention, which could 'replace law'. In the *Simultaneous Elections* case (2013),[45] the Court reached the opposite conclusion, explaining that in *Saurip Kadi* the majority had made a 'choice of interpretation based on the context at the time the decision was made'.[46] Contrary to its previous decision, the majority held that the constitutionality of holding the presidential and legislative elections separately could not be determined by reference to convention, which was not equivalent to a constitutional provision. Convention was not even legally enforceable, having only 'moral' weight.[47] Breaking it might be constitutionally inappropriate, but it was not unconstitutional. Echoing the minority in *Saurip Kadi*– although not explicitly referring to it – the majority declared that even presuming convention could develop such authority, it could not emerge after being practiced only once.

Having established that it was bound by neither the convention it had recognised in *Saurip Kadi* nor the *Saurip Kadi* case itself, the majority held that having separate presidential and legislative elections was unconstitutional. The majority gave three primary justifications, as follows.

[45] Constitutional Court Decision 14/PUU-XI/2013.
[46] *Simultaneous Election* Case, 2013, para [3.16].
[47] The Court observed that in some common law countries, convention is neither enforceable in the courts nor binding upon its judges.

The first was the strong presidential system the amended Constitution had established. While the Constitution gives the president significant power, it imposes various checks and balances upon its exercise, beginning with the way the president is chosen and maintains office. The president relies primarily upon public support for legitimacy, being directly voted in by the people. He or she is neither selected by the winning party from amongst its own members, as occurs in parliamentary systems, nor able to be removed by parliament, at least without the Constitutional Court finding him or her guilty of a serious offence. However, this does not mean that the president can ignore the political parties represented in parliament. On a practical level, the president and parliament will often find it convenient to cooperate with each other, to make government run smoothly (though parliament might be reluctant to follow the direction of a president who becomes unpopular, fearing loss of support from the electorate in forthcoming general elections).

Furthermore, potential presidential and vice presidential candidates cannot stand without nomination by political parties, which often emerges after negotiation between the candidate and the party. However, this negotiation process was problematic. For the majority, the Article 6A(2) nomination requirement was aimed at encouraging parties to form stable coalitions. If parties merged or consolidated, this would simplify the party system, and encourage the president and the parties nominating him or her to work together in the interests of the nation.[48] However, in practice the primarily purpose of the negotiation process had become short-term strategic advantage. Parties would form a coalition purely to support a particular candidate and then fracture after disagreeing about other issues. In the majority's assessment, the system, therefore, had failed to encourage political parties who might otherwise be natural allies from merging or coming together in coalition. In short, holding separate legislative and presidential elections did not promote the checks and balances or the system of government that the Constitution sought to establish.

[48] *Simultaneous Election* case, 2013, p. 81.

The majority's second justification was that the Constitution stipulated that presidential and legislative elections must be held simultaneously. This was clear from the 'original intent' of the drafters of the Constitutional amendments. The Court pointed to statements made by Slamet Effendy Yusuf, a member of Ad Hoc Committee I of the MPR Working Group that prepared the draft amendments to the 1945 Constitution. The Court cited transcripts of debates in which Mr Yusuf said: 'what is intended by 'election' is election for the DPR, DPD, president and vice president, and the DPRD. So they fall within a single election regime'. The Court referred to another of Mr Yusuf's statements indicating that general elections would have five boxes. 'Box 1 would be the DPR box, box 2 would be the DPD box, box 3 would be the president/vice president box, box 4 would be the DPRD box, and box 5 would be the county/city box'.[49] According to the Court, this original intent was consistent with Article 22E(2), which defines general elections to include presidential elections. Article 6A(2)'s reference to 'general elections' therefore referred to both legislative and presidential elections.

Finally, the Court justified requiring simultaneous elections by reference to efficiency and cost savings, emphasising that if elections were held together, then more money would be available to meet the core objective of the state – improving public welfare.[50] Voters could also make a more informed about which party to vote for in legislative elections, because parties would need to disclose, before the elections took place, which presidential candidates they supported.

Despite holding that separate presidential and legislative elections were unconstitutional, the Court did not require that elections be held simultaneously in 2014, fearing that this would cause disruption. The KPU had already begun organising separate elections. Perhaps more importantly, Article 22E (6) of the Constitution required that election rules be established

[49] *Simultaneous Election* case, 2013, p. 83, citing *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia tahun 1945: Latar Belakang, Proses, dan Hasil Pembahasan, 1999-2002 - V: Pemilihan Umum*, Revised edition (Jakarta: Sekretariat Jenderal dan Kepaniteraan, Mahkamah Konstitusi, 2010), 602.

[50] *Simultaneous Election* case, 2013, p. 84

by statute, meaning that the KPU could not bring the Court's decision into effect by issuing regulations. Yet new legislation would undoubtedly take significant time and, if insisted upon by the Court, would likely delay forthcoming elections. Pointing to previous cases in which it had postponed the implementation or limited the legal consequences of its decisions,[51] the Court declared that its decision would not come into operation until after the 2014 elections had been completed.

Justice Maria Farida Indrati issued a sole dissent. Her primary argument appeared to be that Article 22E(6) of the Constitution delegated power to parliament to regulate how elections, including presidential elections, would be carried out. This was an 'opened legal policy', that gave parliament significant discretion, including to determine the timing of the elections. She also criticised the majority's reliance upon 'original intent', which had led to the opposite decision in the *Saurip Kadi* case (2008). She appeared to disapprove of using original intent as a method of constitutional interpretation, stating that it 'was not everything' and pointing out that 'initial ideas can completely change after being formulated as a norm, so in my view, original intent is not always appropriate to use in the interpretation of the norms of the constitution'.[52]

These cases demonstrate that the Court may consider adopting a previous dissent as the majority view. However, the Court's decisions could be clearer if they employ dissents to capture more of the transparency and accountability advantages, described above. This would have probably involved the majority in *Simultaneous Election* referring more explicitly to the reasoning of the minority of *Saurip Kadi*, and more clearly justifying its departure from the majority view in *Saurip Kadi*. As it stands, the departure was far from convincing because the Court did not explain how the context

[51] The Court referred to its decision in the *Anti-corruption Court* case (Constitutional Court Decision 012-016-019/PUU-IV/2006) (3 year deadline) and in the *Budget cases* (Constitutional Court Decision 43/PUU-X/2012; Constitutional Court Decision Constitutional Court Decision 013/PUU-VI/2008; Constitutional Court Decision 024/PUU-IV/2007; Constitutional Court Decision 026/PUU-IV/2005; Constitutional Court Decision 012/PUU-III/2005), where it limited the legal consequences of the MK's decision.

[52] *Simultaneous Election case*, 2013, p. 90.

surrounding the decision had 'changed' in the four years that passed between the two decisions.

For example, directly engaging with the reasoning of Indrati's dissent, and the majority and minority in *Saurip Kadi*, may have helped the majority in *Simultaneous Election* clarify and sharpen its reasons and reasoning. In establishing 'original intent', the Court referred only to the recorded statements of one member of the drafting committee. Without more explanation, this could not possibly represent the views of all MPR members, or even a majority of them, as the Court appeared to accept. Further, resort to original intent was strictly unnecessary, because the words of Article 6A(2) viewed in light of Article 22E(2) were clear. Indrati's critique of the use of 'original intent' in this way was incisive and far more convincing than the majority's application of it. Yet because the majority and minority did not engage, the majority was able to 'get away with' this. The judicial accountability purpose of dissents was not taken advantage of.

2.3.2 Unanswered Questions About Dissents in the Constitutional Court; What is the Weight of a Dissent?

Instinctively it is tempting, particularly from a common law perspective, to consider that the 'strength' of a majority judgment is diluted the more dissenting opinions that are issued against it. While this issue is considered fundamental in many countries, there has been no discussion, let alone agreement, in Indonesia about the relative weight or authority of unanimous decisions compared with split decisions. Indeed, in some cases previous dissents have been given no weight.

For example, does a four-judge dissent, such as in the *Bali Bombing case* (2003),[53] have more persuasive force than a single-judge dissent, such as that in the *Simultaneous Elections* case? Do dissenting opinions merely represent a forum in which dissenting judges can highlight their views, or are they intended to assist in the 'development of the law' by being adopted by a

[53] Constitutional Court Decision 013/PUU-I/2003.

majority in the future? For example, the *Bali Bombing* minority judgment – almost twice the length of the majority judgment – is as detailed and as well-considered as any Constitutional decision. Did the minority judges intend their decision to have no tangible impact and slip into obscurity, or did they, in fact, harbour hope that their reasoning would be applied in future cases?

A related question is whether the strength of a majority judgment is diluted by dissenting opinions, and, if so, whether a majority decision becomes less authoritative depending on the number of judges who dissent. So, for example does the *Bali Bombing* five-judge majority decision carry less weight – and is it, therefore, less likely to be followed in the future – than a majority decision against which only one judge dissents, or indeed a unanimous decision? More specifically, if *pertimbangan hukum* can create binding legal rules is the strength of the rule diluted by one or more minority decisions? Again, these questions have not been answered in Indonesia.

2.3.3 When should the Constitutional Court consider itself 'split'?

Two Constitutional Court cases issued in 2017 – *City/county Perda* case and the *Provincial Perda* case[54] – raise important questions about the functions of dissents in the Constitutional Court, and how the Court handles cases where it is 'split' – that is, because one judge is 'missing', there are four judges in the majority and four in the minority. To explain this case, and its significance, I first provide some background.

As is well known, decentralisation reforms enacted following the fall of Soeharto gave local governments unprecedented powers to govern their own affairs, including by issuing bylaws, commonly called Perda (*peraturan daerah*).[55] These powers were entrenched in the 1945 Constitution with its second amendment in 2000. Article 18(2) states that:

[54] Constitutional Court Decisions 137/PUU-XIII/2015 and 56/PUU-XIV/2016.

[55] Simon Butt, "Regional Autonomy and the Proliferation of Perda in Indonesia: An Assessment of Bureaucratic and Judicial Review Mechanisms," *Sydney Law Review* vol 32(2) (2010): 177; Simon Butt and Nicholas Parsons, "Reining in Regional Governments? Local Taxes and Investment in Decentralised Indonesia," *Sydney Law Review* 34, no. 1 (2012): 91–106.

> Provincial, county and city governments regulate and administer matters of government themselves under the principles of autonomy and assistance [to other tiers of government] (*pembantuan*).

Articles 18(5) and (6) read:

> (5) Regional governments are to exercise wide-ranging autonomy, except in matters that national legislation reserves for the Central Government.
> (6) Regional governments have power to enact regional regulations (Perda) and other regulations in the exercise of their autonomy and assistance.

From the outset, the designers of regional autonomy recognised that provincial, county and city lawmakers would need help to draft Perda. After all, these lawmakers had very few skills or experience in formulating policy, let alone drafting laws to give legal effect to it. The 1999 Law therefore required subnational governments to send their Perda after enactment for 'evaluation'. This practice was retained in the 2004 Law and in the 2014 Law, which requires that bills be sent for review within seven days of a local government finishing its deliberations, and the legislature and regional head agreeing to it. City and county governments must send their Perda to their provincial governor for review (Article 242(4) 249(3)); and provincial governments must send their Perda to the Ministry of Home Affairs (Article 242(3), 249(1)). The criteria by which the governor or Minister assesses Perda are: conflict with a higher-level law, the public interest or morality (Article 250(1)).

In two decisions issued in early-mid 2017, the Constitutional Court invalidated these provisions in the 2014 Law under which provincial governors and the central government had been able to review and invalidate Perda after their enactment. The first case was brought by over 40 county governments and the Indonesian Association of County Governments.[56] One of the reasons for the invalidation was that this form of 'executive review' was essentially

[56] Constitutional Court Decision 137/PUU-XIII/2015.

a judicial function that should be performed by the Supreme Court using its 'judicial review' powers.[57]

However, the decision-making process in both the *City/county Perda* case was rather controversial, although this seemed to go largely unnoticed in Indonesia's legal community.[58] This is because the Court appeared to be evenly split at key points during the process. Included on the nine-judge panel hearing the City/County Perda case was Patrialis Akbar, formerly a Minister for Justice. Akbar also participated in a judge's meeting about the case on 20 August 2016. However, by the time the court met on 2 February 2017 and 30 March 2017 to discuss the case again, he had been suspended from office and was being prosecuted for taking a bribe to fix the outcome of another Constitutional Court case.[59] Yet without him and his vote, the Court was split four judges to four.

If the Court had considered itself to be 'split' (as I think perhaps it should have), the chief justice should have the casting vote.[60] Yet, in this case, Chief Justice Arief Hidayat was in the minority.

Similar issues arose in the *Provincial Perda case*. This time, Akbar's replacement, Saldi Isra, was not appointed until after the Court had finished hearing the case but the decision states that he participated in the sole judges' deliberation meeting. Again, this raises questions about whether judges must participate in hearings and the judicial deliberations where the decision is made if they are to have their vote count. The case seems to indicate that judges do not need to be present at both. Yet, once again, if Isra's vote was excluded, then the Court would have been split four judges to four.

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57 For a full discussion of the Court's reasoning, see Simon Butt and Tim Lindsey, *Indonesian Law* (Oxford: Oxford University Press, 2018).

58 Simon Butt, "Constitutional Court Lets Local Governments off the Leash," *Indonesia at Melbourne*, July 4, 2017, http://indonesiaatmelbourne.unimelb.edu.au/constitutional-court-lets-local-governments-off-the-leash/.

59 Patrialis Akbar was removed on 27 January 2017: From <http://jakartaglobe.id/news/patrialis-akbar-dismissed-constitutional-court/>.

60 Article 45 (8) of Law No. 24 of 2003 on the Constitutional Court as amended by Law No. 8 of 2011.

III. CONCLUSION

Dissenting opinions can, if properly employed, assist to improve judicial transparency and accountability, and can help shape future judicial decisions. While introducing them into Indonesia's judiciary, including its Constitutional Court, has undoubtedly been beneficial for its transparency-enhancing benefits, its utility as a means to ensure the accountability of judges vis-à-vis other judges in terms of judicial reasoning, is less clear. Further, there remain some important unresolved problems about the significance of dissents within the Indonesian judicial system. These types of issues could be considered as the Constitutional Court forges ahead with further reforms in the future.

BIBLIOGRAPHY

Ali, Raymond. "Perlukah Dissenting Opinion Di Mahkamah Agung?" *Pemantau Peradilan*, April 7, 2003. http://www.pemantauperadilan.com/detil/detil.php?id=68&tipe=opini.

Beudenbacher, Carl. "Some Remarks on the Method of Civil Law." *Texas International Law Journal* 34 (1999): 333.

Blankenburg, Erhard. *Dutch Legal Culture*. 2nd rev. and enl. ed. Boston: Kluwer Law and Taxation Publishers, 1994.

Blomquist, RF. "Dissent, Posner-Style: Judge Richard A Posner's First Decade of Dissenting Opinions, 1981-1991 – Toward an Aesthetic of Judicial Dissenting Style." *Missouri Law Review* 69 (2004): 73.

Butt, Simon. "Constitutional Court Lets Local Governments off the Leash." *Indonesia at Melbourne*, July 4, 2017. http://indonesiaatmelbourne.unimelb.edu.au/constitutional-court-lets-local-governments-off-the-leash/.

———. "Regional Autonomy and the Proliferation of Perda in Indonesia: An Assessment of Bureaucratic and Judicial Review Mechanisms." *Sydney Law Review* vol 32(2) (2010): 177.

———. *The Constitutional Court and Democracy in Indonesia*. Brill, 2015.

Butt, Simon, and Tim Lindsey. *Indonesian Law*. Oxford: Oxford University Press, 2018.

Butt, Simon, and Nicholas Parsons. "Reining in Regional Governments? Local Taxes and Investment in Decentralised Indonesia." *Sydney Law Review* 34, no. 1 (2012): 91–106.

Cole, David. "The Power of a Supreme Court Dissent." *Washington Post*, October 29, 2015. https://www.washingtonpost.com/opinions/the-power-of-a-supreme-court-dissent/2015/10/29/fbc80acc-66cb-11e5-8325-a42b5a459b1e_story.html?utm_term=.b392c62038be.

Ginsburg, Ruth Bader. "The Role of Dissenting Opinions." *Minnesota Law Review* 95(1) (1999).

Jacobson, A. J. "Publishing Dissent." *Washington and Lee Law Review* 62, no. 4 (2005): 1607–36.

Junaidi, Veri, Adelline Syahda, and Adam Mulya Bunga Mayang. *Tiga Belas Tahun Mahkamah Konstitusi Dalam Memutus Pengujian Undang-Undang*. Jakarta: Kode Inisiatif, 2016.

"Kontroversi Sebutir Pertimbangan." *Tempo Interaktif*, February 21, 2005. http://www.tempointeraktif.com/hg/mbmtempo/arsip/2005/02/21/HK/mbm.20050221.hk1.id.html.

L'Heureux-Dube, Claire. "The Dissenting Opinion: Voice of the Future?" *Osgoode Hall Law Journal* 38(3) (n.d.): 495–512.

Lynch, Andrew. "Is Judicial Dissent Constitutionally Protected?" *Macquarie Law Journal* 4, (2004): 81–104.

Mahkamah Agung. *Blueprint for the Reform of the Supreme Court of Indonesia*. Jakarta: Supreme Court of Indonesia, 2003.

Mahkamah Konstitusi. *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses, dan Hasil Pembahasan, 1999-2002 - V: Pemilihan Umum*. Revised edition. Jakarta: Sekretariat Jenderal dan Kepaniteraan, Mahkamah Konstitusi, 2010.

Markesinis. "Conceptualism, Pragmatism and Courage: A Common Lawyer Looks at Some Judgments of the German Federal Court." *American Journal of Comparative Law* 34 (1986): 349.

Mattei, Ugo. "Why the Wind Changed: Intellectual Leadership in Western Law." *American Journal of Comparative Law* 42 (1994): 195.

Merryman, John. *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America.* 2nd ed. Stanford California: Stanford University Press, 1985.

Rajagukguk, Erman. "Judicial Reform: A Proposal for the Future of the Commercial Court." In *Indonesia: Bankruptcy, Law Reform & the Commercial Court: Comparative Perspectives on Insolvency Law and Policy*, edited by Tim Lindsey. Sydney: Desert Pea Press, 2000.

Simmons, RG. "The Use and Abuse of Dissenting Opinions." *Louisiana Law Review* 16 (1956): 497.

Stephens, RB. "The Function of Concurring and Dissenting Opinions in Courts of Last Resort." *University of Florida Law Review* 5 (1952): 394.

Stone Sweet, Alec. *Governing with Judges: Constitutional Politics in Europe*. Oxford: Oxford University Press, 2000.

Wells, Michael. "French and American Judicial Opinions." *Yale Journal of International Law* 19, no. 1 (1994): 81–133.

Wijayanta, Tata, and Hery Firmansyah. *Perbedaan Pendapat Dalam Putusan Pengadilan*. Yogyakarta: Pustaka Yustisia, 2011.

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Filling the Hole in Indonesia's Constitutional System: Constitutional Courts and the Review of Regulations in a Split Jurisdiction

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Abstract

The Indonesian constitutional system contains a serious flaw that means that the constitutionality of a large number of laws cannot be determined by any court. Although the jurisdiction for the judicial review of laws is split between the Constitutional Court and the Supreme Court, neither can review the constitutionality of subordinate regulations. This is problematic because in Indonesia the real substance of statutes is often found in implementing regulations, of which there are very many. This paper argues that that is open to the Constitutional Court to reconsider its position on review of regulations in order to remedy this problem. It could do so by interpreting its power of judicial review of statutes to extend to laws below the level of statutes. The paper begins with a brief account of how Indonesia came to have a system of judicial constitutional review that is restricted to statutes. It then examines the experience of South Korea's Constitutional Court, a court in an Asian civil law country with a split jurisdiction for judicial review of laws like Indonesia's. Despite controversy, this court has been able to interpret its powers to constitutionally invalidate statutes in such a way as to extend them to subordinate regulations as well. This paper argues that Indonesia's Constitutional Court should follow South Korea's example, in order to prevent the possibility of constitutionalism being subverted by unconstitutional subordinate regulations.

Keywords: Constitutional Court, Constitutional Review, Judicial Review, Supreme Court

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> So, if a law be in opposition to the Constitution, if both the law and the Constitution apply in a particular case so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.
>
> United States Supreme Court, *Marbury v. Madison*, 5 US 137 (1803)

I. INTRODUCTION

The Indonesian constitutional system contains a serious flaw that means that the constitutionality of a very large number of laws cannot be determined by any court. This is because although jurisdiction for the judicial review of laws is split between the Constitutional Court (*Mahkamah Konstitusi*) and the Supreme Court (*Mahkamah Agung*), neither can review the constitutionality of subordinate regulations, that is, laws that rank below the level of statutes (*undang-undang*) produced by the DPR (*Dewan Perwakilan Rakyat*, People's Representative Assembly), the national legislature.

1.1 The Constitutional Court's Review Jurisdiction

Article 24C(1) of Indonesia's 1945 Constitution (as amended) grants the Constitutional Court the power to review the constitutionality of DPR statutes. In several decisions, the Court has held that its constitutional review powers extend to *Perppu*,[1] that is, interim emergency laws produced by the president, on the grounds that these are equivalent in effect to statutes.[2] The Constitutional Court has, however, declined to review the constitutionality of 'lower level' laws used in Indonesia, that is, any law ranked below the level of statute in the formal hierarchy of Indonesian laws as specified by Article 7 of Law 12 of 2011 on Lawmaking.[3] This applies even to subordinate regulations made pursuant

[1] *Perppu*, *Peraturan Pemerintah Pengganti Undang-undang*, Regulation in Lieu of Law. These are interim emergency statutes issued by the president. They must be confirmed as statutes or rejected by the DPR at its next sitting. They are ranked at the same level as statutes in the hierarchy of Indonesian laws described in footnote 3.

[2] Cases where the Indonesian Constitutional Court has reviewed *Perppu* include Decisions 3/PUU-III/2005; 138/PUU-VII/2009; and 1-2/PUU-XII/2014.

[3] The hierarchy is as follows: (a) the 1945 Constitution (*Undang-undang Dasar 1945*); (b) MPR Decision (*Ketetapan MPR*); (c) Statutes/interim emergency laws (*Undang-Undang/Peraturan Pemerintah Pengganti Undang-Undang*, also known as Government Regulations in Lieu of Laws); (d) Government Regulations (*Peraturan Pemerintah*); (d)

to a statute or in order to enforce a statute. The Court has, in fact, rejected applications in which it has been asked to engage in constitutional review of implementing regulations.

1.2 The Supreme Court's Review Jurisdiction

Article 24A(1) of the Constitution grants the Supreme Court power to review laws below the level of statutes produced by the DPR, to ensure that they comply with higher level laws.[4] It can invalidate a legal instrument below the level of statute if it conflicts with a higher legislative instrument; or if the process by which it was enacted did not conform to legislative requirements.[5] Unfortunately, it is well-established that these powers do not extend to allow the Supreme Court to review the constitutionality of lower level laws. This is because constitutional review is the exclusive remit of the Constitutional Court, which enjoys 'first and final' jurisdiction in this regard, under Article 24C(1) of the Constitution. In fact, the Supreme Court has not had any power to conduct constitutional review of laws since 1950, and even then, the power was highly restricted, as is explained later in this paper.

The Supreme Court's already limited jurisdiction for review of regulations is, in practice, further restricted by its apparent lack of enthusiasm for reviewing them against higher-level laws. It usually takes a very formalistic approach, focused on the process by which a regulation was made. In its judgments in many such cases, the court does not discuss the substance of the law under review, the arguments of the parties, or even whether the law contradicts any higher laws.[6] In other words, the Court has been reluctant to openly consider the 'merits' of the case. In fact, it sometimes seems to seeking reasons to avoid dealing with the merits.[7]

Presidential Regulations (*Peraturan Presiden*); (e) Provincial Regional Regulations (*Peraturan Daerah Propinsi*); and (f) Regency/City Regional Regulations (*Peraturan Daerah Kabupaten/Kota*). None of these categories of law may conflict with any law higher in the hierarchy. For example, the substance of a presidential regulation must not conflict with the substance of a government regulation. Likewise, a higher-level regulation can amend or overrule a law lower than itself in the hierarchy – for example, the DPR can pass legislation to override a presidential regulation.

4 See also Law 4 of 2004 on the Judiciary (Article 11(2)(b)); and Law 14 of 1985 on the Supreme Court (Article 31(1)).

5 Article 31(2) of Law 14 of 1985 on the Supreme Court.

6 See, for example, Indonesian Supreme Court Decisions Nos 03 G/HUM/2002, 06 P/HUM/2003 and 06 P/HUM/2006.

7 See generally, Chapter Simon Butt and Tim Lindsey, *Indonesian Law,* Oxford, Oxford University Press (in press,

1.3 The Gap in Indonesia's Review System

The result of this situation is a gap in Indonesia's system for the judicial review of laws, with no judicial mechanism available to deal with the constitutional review of laws below the level of statute, of which there are very many.[8] There is therefore no way an Indonesian affected by the unconstitutionality of a lower level law can obtain relief, unless the national legislature, the DPR can be persuaded to legislate to overrule the regulation. This would usually not be a realistic alternative to constitutional review because a DPR decision would be based on political reasons rather than legal ones, and, in any case, the DPR is notoriously very slow in working through its legislative agenda.[9]

The absence of a judicial mechanism for the constitutional review of laws below the level of statute matters a great deal in Indonesia because, as Damien and Hornick have explained, the real substance of any statute is often only to found in its implementing regulations:

> [statutes] function more as policy declarations than as statutory schemes. Implementation usually depends on the enactment of subsequent legislation and the promulgation of special implementing regulations. Until such implementing rules are established, the 'basic' law operates mostly as a statement of national intention.[10]

This problem has become all the more serious since the Constitutional Court in two decisions in 2017[11] struck down provisions allowing the Ministry of Home Affairs to annul enacted Regional Regulations (*Peraturan Daerah*, *Perda*), finding that to do so usurped the power of the judicial branch. These decisions yet further restrict the avenues available for citizens to take action

2018), Chapters 2 and 3. For a discussion of some of these issues, see Simon Butt and Nicholas Parsons, "Judicial Review and the Supreme Court in Indonesia: A New Space for Law?," Indonesia 98 (April 2014): 97. See also Simon Butt, "Regional Autonomy and the Proliferation of Perda in Indonesia: An Assessment of Bureaucratic and Judicial Review Mechanism," Sydney Law Review 32, No. 2 (2010): 177.

[8] See, for example, Tim Lindsey, *Islam, Law and the State in Southeast Asia* (London: I.B Tauris, 2012), 365.

[9] Dani Prabowo, "Ini 40 RUU dalam Prolegnas Prioritas 2016," *Kompas*, January 22, 2016, http://nasional.kompas.com/read/2016/01/22/13450911/Ini.40.RUU.dalam.Prolegnas.Prioritas.2016?page=all>; 'Sepanjang 2016, 22 RUU Telah Sah Jadi UU' *Hukumonline* (27 December 2016) <http://www.hukumonline.com/berita/baca/lt5862593001f54/sepanjang-2016--22-ruu-telah-sah-jadi-uu.

[10] Eddy Damian and Robert Hornick, "Indonesia's Formal Legal System: An Introduction," American Journal of Comparative Law 20 (1972): 492.

[11] Indonesian Constitutional Court decisions 137/PUU-XIII/2015 and 56/PUU-XIV/2016. See also Kompas. 'Putusan MK Cabut Kewenangan Mendagri Batalkan Perda Provinsi', *Kompas* (14 June 2017) http://nasional.kompas.com/read/2017/06/14/22392261/putusan.mk.cabut.kewenangan.mendagri.batalkan.perda.provinsi

against inappropriate regulations. The only place this can now be done is the Supreme Court, which, as mentioned, is a reluctant reviewer of regulations at best and, in any event, can never consider their constitutionality.

Soeharto's 'New Order' regime promulgated a large number of unconstitutional laws and regulations but nothing could be done about that until after his New Order regime collapsed in 1998 because there was no means by which a court could review the constitutionality of any legislation until the Constitutional Court was established in 2003.[12] The result was, to use the words of the United States Supreme Court with which this paper began, that, under Soeharto, courts could only 'decide cases conformably to the law, disregarding the Constitution'. The establishment of the Constitutional Court did not, however, fully remedy the situation because, again, it cannot do anything about unconstitutional regulations. As matters stand, if a future government with a majority in the DPR decided to deliberately subvert the Constitutional Court by adopting New Order practice and issuing unconstitutional regulations there is nothing that could be done to repeal them. As will be shown below, this has, in fact, happened at least once in the post-Soeharto era, and that leaves Indonesians vulnerable to the possibility of unconstitutional rule.

In this paper, I argue that it is open to the Constitutional Court to reconsider its position on review of regulations in order to fill the hole in Indonesia's system of constitutional law. It could do so by interpreting its power of judicial review of statutes to extend to cover laws below the level of statutes.

More specifically, I will argue, first, that a split jurisdiction for judicial review, like that in Indonesia, should not necessarily be seen as a creating two 'siloed' jurisdictions, one for statutes and one for regulations, such that a constitutional court should be excluded from reviewing lower level laws. Second, I will argue that the power to review statutes should always extend by implication to

[12] As Soeharto controlled the legislature, which became little more than a 'rubber-stamp' for his regime's legislative program, the absence of a court of constitutional review mean there was effectively no means of restraining his government from passing unconstitutional laws. See Todung Mulya Lubis, 'The *Rechsstaat* and Human Rights' in Tim Lindsey (ed), *Indonesia: Law and Society*, 1st edition, Annandale: Federation Press (1999): 171-85; *A Nation in Waiting: Indonesia in the 1990s*, Boulder: Westview Press, (1994): 272; and Patrick Ziegenhain, *The Indonesian Parliament and Democratization*, Singapore: Institute of Southeast Asian Studies (2008): 45.

regulations made under them. To support these arguments, I will refer briefly to the experience of constitutional courts outside Indonesia.

Before doing so, however, I offer a brief account of how Indonesia came to have a system of judicial constitutional review that is restricted to statutes, showing that the current hole in the system may not have been intended - or even anticipated - by those who created it.

II. DISCUSSION

2.1. The Development of Constitutional Review in Indonesia

In the course of debate in the BPUPKI[13] or Investigating Committee for the Preparation of Independence, in the lead-up to independence in 1945, Muhammad Yamin proposed that a Supreme Court be established with the power to review the constitutionality of laws.

This proposal was opposed by Professor Soepomo, a supporter of authoritarianism who became the lead drafter of the current 1945 Constitution, for two reasons. First, Soepomo rightly saw constitutional review as an intrinsic part of liberal democracy and the concept of separation of powers, both of which were concepts he opposed, arguing instead for an authoritarian 'Integralistic' state, modelled on Nazi Germany and imperial Japan.[14] Second, Soepomo believed that, given the lack of lawyers and judges in the nascent republic, a court of constitutional review was simply not viable.[15] Accordingly, the 1945 Constitution he drafted was promulgated on 18 August without provision for judicial review of the constitutionality of laws.

A limited form of judicial review was, however, adopted four years later in the short-lived Federal Constitution of 1949. Article 130(2) of the Federal Constitution made it clear that federal laws could not be reviewed (*tidak dapat diganggu gugat*) but other laws, including laws of the federation's constituent states,

[13] *Badan Penyelidik Usaha-usaha Persiapan Kemerdekaan Indonesia*, BPUPKI.

[14] For a brief account of these debates and Soepomo's views, see Simon Butt and Tim Lindsey, *The Constitution of Indonesia: A Contextual Analysis*, *(Oxford: Hart Publishing, 2012), 9-12.*

[15] Saafroedin Bahar and Nannie Hudawati. *Risalah Sidang Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan Indonesia (BPUKI), Panitia Persiapan Kemerdekaan Indonesia (PPKI), 28 Mei 1945-22 Agustus 1945*, (Jakarta: Sekretariat Negara Republik Indonesia, 1998), 183-306.

could be reviewed by the Supreme Court for compliance with the Constitution (Arts 156 to 158). However, even this limited form of constitutional review was removed by the 1950 Provisional Constitution, which replaced the federal system within just a few months. Article 95(2) of this constitution stated bluntly that laws cannot be reviewed.

This remained the position from when Soekarno reinstated the 1945 Constitution in 1959, until some four years after Soeharto came to power in 1966. Judicial review of laws below the level of statute against statutes was then introduced by Law 14 of 1970 on Judicial Powers and Article 26 granted the power to do this to the Supreme Court. It remained the case, however, that no court could review statutes or, for that matter, the constitutionality of any law, until some years after Soeharto fell from power in 1998.

As part of post-Soeharto efforts to rid Indonesia of some of the more egregious laws introduced by his New Order, the MPR (*Majelis Permusyawaratan Rakyat*, People's Consultative Assembly), then the most powerful legislative body in Indonesia, granted itself the power to constitutionally review statutes in its Decision III of 2000 on the Sources and Hierarchy of Laws. Article 5 of this Decree created a split jurisdiction to review laws. The MPR was authorised to review the constitutionality of statutes, while the review of laws below the level of statute against higher level laws (but, again, not against the Constitution) remained in the hands of the Supreme Court.

After the fall of Soeharto, the 1945 constitution was amended four times, once annually in 1999, 2000, 2001 and 2002. The Fourth Amendment of 2002 retained the Supreme Court but established a Constitutional Court, among other things. It also finally conferred the power on the Constitutional Court to review statutes. This was a watershed moment in Indonesian legal history but the debate about Indonesia's courts and their powers of review had, in fact, been revived some years earlier.

In late 1999, with euphoria over the end of the New Order still in the air, several proposals for judicial review of laws were discussed by the MPR Working

Group on amendment of the 1945 Constitution.[16] The first was to extend the Supreme Court's powers to allow it to review *all* forms of laws against the Constitution - both statutes and regulations. Hendi Tjaswadi (military/police faction), Valina Singka Subakti (Golkar or Functional Group faction), and Patrialis Akbar (National Mandate faction and later a Constitutional Court judge)[17] all argued that the Supreme Court should be given this wide power of review.

Dahlan Ranuwihardjo, a member of the Expert Team (*Tim Ahli*) appointed to advise the MPR on this issue, argued that it should be the MPR, not the Supreme Court, that reviewed statutes. Ranuwihardjo, adopting classic New Order arguments, reasoned that the Supreme Court should be seen as being on the same level as the president and the DPR, so should not be able to annul the statutes they produce. The MPR, on the other hand, had a higher position and was therefore better suited to review law. Ranuwihardjo further argued that judicial review of statutes was 'American', and not suitable for Indonesia. The MPR, he said, was the 'Indonesian answer'.[18]

Ranuwihardjo's proposal was rejected by the Expert Team. Instead it proposed that a new Constitutional Court should be established and authorised to review the constitutionality of *all* laws. Jimly Asshiddiqie, another member of the Expert Team and later the founding Chief Justice of that court, argued:

> The Supreme Court is authorised to decide cases in relation to justice for the citizens, while the Constitutional Court is to guard the laws, to maintain law and order, to harmonise the constitution and all other regulations below the basic law. Therefore, judicial review should be in one court. All the reviews should be conducted by the Constitutional Court. Currently, the Supreme Court has the authority to review regulations below statute ... this authority should be moved the Constitutional Court. This Court is the one to maintain the order of laws. Not only below statute, but all laws below the constitution.[19]

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[16] Sekretariat Jenderal dan Jenderal dan Kepaniteraan Mahkamah Konstitusi, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses dan Hasil Pembahasan 1999- 2002 (Buku VI Tentang Kekuasaan Kehakiman)*, (Edisi Revisi), Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi (2010).

[17] *Ibid*, 43 – 49. Before he could complete his first term, Patrialis Akbar was discharged from the court as a result of corruption allegations. In September 2017, he was convicted at first instance by the Jakarta Anti-corruption Court and jailed for eight years.

[18] *Ibid*, 81 – 82. All translations are the author's.

[19] *Ibid,* 507.

This proposal of the Expert Team was, unfortunately, dismissed by the MPR Working Committee, without much explanation.[20] Instead, the current split jurisdiction for review of laws was created by the Fourth Amendment, which introduced Article 24C into the 1945 Constitution. This provides, as mentioned, that the Constitutional Court has the power to review the constitutionality of statutes, while Article 24A authorised the Supreme Court to review laws below the level of statute for compliance with higher level laws (but not for compliance with the Constitution).

It seems clear that the resulting situation by which the constitutionality of lower level laws cannot be tested in any Indonesian court was not properly anticipated during the amendment debates. Not only was it not discussed but no one even raised the issue. It seems, in fact, to have been an oversight. This is all the more surprising given the issue had certainly arisen in other countries well before Indonesia began amending its Constitution in 1999, as I show below.

2.2. Constitutional Courts and Review of Regulations

As a preliminary point, I emphasise that the power to review subordinate regulations is not an exclusive feature of common law systems, as Ranuwihardjo implied, and as is still sometimes suggested in Indonesia. Certainly, courts of common law countries such as the United States, Australia, and Canada do routinely constitutionally review regulations, and strike them down when they contravene constitutional protections, or otherwise exceed constitutional power. That is also true, however, for many constitutional courts in civil law countries, for example, Germany, Japan, Taiwan and Korea.

Likewise, while review of subordinate regulations is standard in jurisdictions with an apex court of mixed constitutional and appellate or general jurisdiction,[21] the power to review regulations is also found in some jurisdictions where judicial review is divided between two apex courts, as in Indonesia, that is, where a specialised constitutional court sits alongside an appellate court or court of

[20] *Ibid.*

[21] In the US context see, for example, the survey of recent US Supreme Court practice in Erica Newland, "Executive Orders in Court," *Yale Law Journal* Vol. 124 (2015): 2026.

general jurisdiction. Examples include the constitutional courts of Korea and Germany, with the latter commonly seen as the archetype of divided judicial review. Constitutional courts in many such jurisdictions have either been granted the power to review regulations, as in Germany, or have implied it as inherent to the power to review statutes, as in Korea.

In fact, Korea's Constitutional Court - a constitutional court in an Asian civil law country with a split jurisdiction for judicial review of laws - offers an excellent point of comparison in assessing Indonesia's very similar system of judicial review of laws.

2.3. The Constitutional Court of Korea

The Constitutional Court of Korea, like the Constitutional Court of Indonesia, is, as mentioned, a specialised constitutional court that sits alongside a Supreme Court. The Korean Supreme Court was explicitly assigned the power to adjudicate the constitutionality of administrative regulations, while the Korean Constitutional Court was not.

Specifically, Article 107 of the Constitution of the Republic of Korea splits the jurisdictions of the Courts as follows:

> (1) When the *constitutionality of a law* is at issue in a trial the courts shall request a decision of the *Constitutional Court,* and shall judge according to the decision thereof.
> (2) *The Supreme Court* shall have the power to make a final review of the *constitutionality or legality of administrative decrees, regulations* or actions, when their constitutionality or legality is at issue in a trial. [Emphasis added]

In other words, the power conferred on the Korean Constitutional Court is to review laws or statutes, while the Supreme Court has the power to review laws below that level, that is, administrative decrees, regulations or actions.

Despite these seemingly clear provisions, the Korean Constitutional Court has been able to expand its powers to constitutionally invalidate subordinate regulations. It has done this in two ways.

First, it has restrictively interpreted the primary legislation such that it constitutionally invalidates sub-regulations. In other words, it has held that when provisions in a statute are struck down, administrative regulations made under those provisions will now longer have any legal basis and so must necessarily also be void. As well as having compelling legal logic, this position reflects the fact that, as a matter of practicality, many subordinate regulations lose all coherence once terms, definitions, procedures or institutions in the statute they are intended to apply fall away.[22]

2.4. The Scriveners' Case: Implied Jurisdiction

Second, and more significantly for the Indonesian case, the Korean Constitutional Court has asserted an implied jurisdiction over administrative regulations, with the implication arising from its clear power to review statutes.

In a landmark decision in the *Rules Implementing the Certified Judicial Scriveners Act Case*[23] of 1990, the Court held that it had an implied jurisdiction to constitutionally review rules and regulations, at least where rules and regulations directly infringe people's basic rights in principle, and irrespective of actual implementation or enforcement. The Court describes this as the "direct infringement by law" requirement:

> The requirement of "direct infringement by law" means that the complainant's rights and freedoms are directly infringed by the law itself of which he/she complains, not by any specific executive action taken to implement it. [Even if] a law is expected to be implemented by further administrative action, if the law by itself has directly changed people's legal rights and duties or already determined people's legal status before any specific act has taken place to implement it, thereby irrefutably concluding people's legal rights and duties to the extent that such rights and duties cannot be changed by

[22] As Ginsburg observes, discussing the jurisprudence of the Constitutional Court of Korea, 'The question of the constitutionality of an administrative regulation frequently requires interpretation of the relevant statutory text. [For example, a] restrictive interpretation of a statute will tend to void on constitutional grounds any administrative action taken under it, where those actions rely on a broad reading on the statute'. Tom Ginsburg, 'The Constitutional Court and the Judicialization of Korean Politics' in Andrew Harding and Pip Nicholson (eds), *New Courts in Asia*, Abingdon, Routledge (2009): 153.

[23] South Korean Constitutional Court: *Rules Implementing the Certified Judicial Scriveners Act Case* (1990) 89 Hun-Ma 178. Judicial scriveners are a kind of legal professional found in Japan and South Korea, who assist clients in commercial and real estate registrations and in preparing documents for litigation.

> any further administrative action, the requirement of directness is regarded to be fulfilled.[24]

This aspect of the Court's reasoning to justify an implied jurisdiction to review subordinate regulation rests on several bases. Most importantly, it considered that Article 107(2) of the Constitution, properly read, did not *exclusively* assign the constitutional review of *all* administrative action (including regulations) to the Supreme Court but only that "at issue in a trial". Because only implemented or enforced regulations could be put at issue in trial, the Supreme Court's constitutional review jurisdiction was not available for persons whose rights had been directly infringed – that is, infringed by the fact of regulation, rather than its implementation or, in other words, infringed in principle. That such persons merited constitutional review and relief was made plain, the Court held, by provision for individual constitutional complaints alleging violations of basic rights.

The Court therefore concluded that constitutional review of administrative action other than action "at issue in trial" must be within the jurisdiction of the Constitutional Court. Were Article 107(2) read otherwise, there would be a jurisdictional vacuum, in that there would be no possibility of constitutional review or remedies for individuals whose rights were directly infringed by a subordinate regulation.

This is, of course, precisely the problem that has arisen in Indonesia, where the Constitutional Court has jurisdiction to determine constitutional rights (but not to review regulations), while the Supreme Court deals with appeals from trials (and has not power of constitutional review), so there is no possibility of constitutional review or remedies for individuals whose rights are directly infringed by subordinate regulation.[25]

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[24] South Korean Constitutional Court: *Prior Review of Broadcast Advertisements Case* (2008) 2005 Hun-Ma 506.

[25] Further, and less relevant to the Indonesian situation, the Korean Constitutional Court interpreted its jurisdictional statute, the Constitutional Court Act, which renders "governmental power" subject to its constitutional adjudication, as necessarily referring to *all* governmental powers including legislative, judicial and administrative powers.

2.5. Responses to the *Scriveners' Case*

As would undoubtedly be the case if a similar decision was made by the Indonesian Constitutional Court, the *Scriveners' Case* decision proved immediately controversial in Korea. The Korean court's reading of Article 107(2) received a mixed academic response and there was even some discussion of impeaching Justice Byun, who issued the Court's judgment.[26] Unsurprisingly, the Korean Supreme Court vigorously objected to what it saw as a usurpation of its jurisdiction, issuing a "statement … condemning the Constitutional Court decision, and saying that it had 'gone beyond its domain."[27]

However, this controversy quickly abated and the judgment in the *Scriveners' Case* was complied with. The Supreme Court, despite its protests, did ultimately conduct the judicial scriveners' licensing examination as the Constitutional Court had found it should.[28] What is more, the Constitutional Court has since continued to assert jurisdiction over rules and regulations with little of the pushback seen in the immediate aftermath of the *Scriveners' Case*. It now appears well-settled in the jurisprudence of the Korean Constitutional Court that it can exercise jurisdiction over subordinate regulations where the "direct infringement of law" requirement is met, that is, where a regulation in principle infringes the Constitution, regardless of whether it has been implemented.

For example, in the *Billiard Hall Entry Restriction* case,[29] the Korean Constitutional Court struck down subordinate regulations issued under the *Installation and Utilization of Sports Facilities Act* that required billiard halls to post signs prohibiting the entry of minors. The Court held that the rules were beyond the scope of the primary statute, violated the Constitutional right of equality by discriminating against billiard hall operators, and, by barring a significant proportion of billiard hall clientele from entry, violated

[26] Constitutional Court of Korea, *The First Ten Years of the Korean Constitutional Court,* Constitutional Court of Korea, Seoul: Republic of Korea (2001).
[27] Tom Ginsburg, "The Constitutional Court and the Judicialization of Korean Politics," in New Courts in Asia, ed. Andrew Harding (New York: Routledge, 2009), 154.
[28] Constitutional Court of Korea, *The First Ten Years of the Korean Constitutional Court*: 53.
[29] (1993) 92 Hun-Ma 80; *Ibid*: 202.

the constitutional right to freedom of occupation. The Ministry of Culture and Sports complied by amending the rules, and eliminated the signage requirement.

More recently, in the *Prior Review of Broadcast Advertisements Case*,[30] the Court struck down an enforcement decree and a regulation under the *Broadcasting Act* that prohibited a broadcaster from broadcasting an advertisement without prior review by a review board on the basis that the prior review amounted to constitutionally prohibited censorship.

III. CONCLUSION

There are four conclusions to draw from the experience of the Korean Constitutional Court that are relevant to Indonesia's system of constitutional review. First, while the constitutional review of subordinate regulations is well within the jurisdiction of apex courts with mixed jurisdiction constitutional and appellate jurisdictions, such as Australia, the United States, Canada and, in Asia, Japan, it also not uncommon among specialist constitutional courts. This is true even in systems, including civil law systems, where judicial review is divided between constitutional and generalist courts, as in Germany, Taiwan and Korea. In fact, the Constitutional Court of Indonesia's failure to review subordinate regulations puts it out of step with some of the most effective constitutional courts in the region, such as those in Taiwan, South Korea, and Japan.

Second, the Korean Constitutional Court's view that the power to review a law must necessarily include subordinate regulations issued under that law is a logical and persuasive one. It also has the virtue of preventing a situation arising where a government can pre-empt the consequences of a statute being struck down by simply passing a similar regulation, thus defeating the whole purpose of constitutional review.

In fact, as indicated earlier, something like this has happened before in Indonesia.[31] In 2005, the Constitutional Court struck down the Law 20 of 2002

[30] (2008) 2005 Hun-Ma 506.

[31] As is discussed in more detail in Simon Butt and Tim Lindsey, "Economic reform when the Constitution matters: Indonesia's Constitutional Court and Article 33", *Bulletin of Indonesian Economic Studies*, Vol 44, No. 2, (2008): 239-261.

on Electricity[32] and the Yudhoyono government responded by issuing a regulation two months later that was 'not much different'[33] to the Law and was, in fact, described at the time as a re-enactment of it 'in new clothes'.[34] Likewise, when the Court began hearings began in relation to Law 7 of 2004 on Water Resources, the government, apparently concerned that the court might strike it down, issued a Government Regulation that had a very similar effect to a significant part of the Law.[35] In the end, the court did not invalidate provisions of the Water Resources Law in its decision but the government seems to have issued the regulation as form of 'regulatory insurance'. If this tactic was used more often by governments to exploit the absence in Indonesia of judicial review of the constitutionality of regulations, it could, as suggested earlier, render the judicial review of statutes futile, and thus render the Constitution if not meaningless, at least of greatly diminished importance.

Third, the example of Korea effectively demonstrates that apparent constitutional barriers to the constitutional review of regulations by the Constitutional Court may be overcome through a principled but pragmatic approach to the interpretation of jurisdictional divisions in the Constitution. While there are differences between the relevant Korean and Indonesian jurisdictional provisions, the broad outlines of the interpretative approach adopted by the Constitutional Court of Korea may be transferable: a constitutionally *split* jurisdiction need not be read as creating two *exclusive* jurisdictions – it could, rather, be seen as *dual*, bifurcated system, where both courts can review regulations, one against higher level laws and the other against the Constitution.

Instead, the current narrow reading of the jurisdictional split in Indonesia has, as mentioned, created a jurisdictional vacuum that, in important cases, limits the availability to citizens of constitutional review, and thus, constitutional rights. It is open to Indonesia's Constitutional Court to follow the example of

[32] Indonesian Constitutional Court Decision 001-021-022/PUU-I/2003.
[33] Fultoni, Secretary of the National Legal Reform Consortium (*Konsorsium Reformasi Hukum Nasional)* cited in Butt and Lindsey, "Economic reform when the Constitution matters: Indonesia's Constitutional Court and Article 33": 259.
[34] Hotma Timpul, a Jakarta Lawyer, cited in *Ibid*: 259.
[35] Government Regulation 16 of 2005 on the Development of a Drinking Water Availability System. See also Indonesian Constitutional Court Decisions 058-059-060-063/PUU-II/2004 and 008/PUU-III/2005.

Korea's court and fill that hole, by implying a right to constitutionally review regulations, thus providing a remedy for individuals whose constitutional rights are infringed by subordinate regulation. Then, at last, Indonesian courts might be able to 'determine cases' involving regulations 'conformably to the Constitution' and not be obliged to follow regulations even if they are 'in opposition to the Constitution', as is currently the case.

Fourth, the example of Korea indicates that although implying a right to review subordinate regulation as inherent in the power to review statutes can be expected to be immediately controversial it may be politically viable in the longer term. In Korea, initial sharp criticisms were not sustained. The Korean case suggests that it is reasonable to expect that the consistent and principled assertion by a Constitutional Court of a broader review jurisdiction that extends to regulations may eventually be complied with, and coalesce into accepted jurisdictional reality.

BIBLIOGRAPHY

Bahar, Saafroedin and Nannie Hudawati. *Risalah Sidang Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan Indonesia (BPUKI), Panitia Persiapan Kemerdekaan Indonesia (PPKI), 28 Mei 1945-22 Agustus 1945*. Jakarta: Sekretariat Negara Republik Indonesia, 1998.

Butt, Simon and Tim Lindsey. "Economic reform when the Constitution matters: Indonesia's Constitutional Court and Article 33", *Bulletin of Indonesian Economic Studies,* Vol 44, No. 2, (2008): 239-261.

Butt, Simon."Regional Autonomy and the Proliferation of Perda in Indonesia: An Assessment of Bureaucratic and Judicial Review Mechanisms", *Sydney Law Review,* Vol 32(2), (2010): 177.

Butt, Simon and Tim Lindsey. *The Constitution of Indonesia: A Contextual Analysis*, Oxford: Hart Publishing (2012).

Butt, Simon and Tim Lindsey. *Indonesian Law,* Oxford: Oxford University Press (in press, 2018)

Butt, Simon and Nicholas Parsons. "Judicial Review and the Supreme Court in Indonesia: A New Space for Law?" *Indonesia* (2014): 97

Constitutional Court Decision on Electricity Law, No: 001-021-022/PUU-I/2003 (The Constitutional Court of the Republic of Indonesia 2003).

Constitutional Court Decision on Water Law, No. 058-059-060-063/PUU-II/2004 (The Constitutional Court of the Republic of Indonesia 2004).

Constitutional Court Decision on Water Law, No. 008/PUU-III/2005 (The Constitutional Court of the Republic of Indonesia 2005).

Constitutional Court Decision on Review of Perppu, No. 3/PUU-III/2005 (The Constitutional Court of the Republic of Indonesia 2005).

Constitutional Court Decision on Review of Perppu, No. 138/ PUU-VII/2009 (The Constitutional Court of the Republic of Indonesia 2009).

Constitutional Court Decision on Review of Perppu, No.1-2/PUU-XII/2014 (The Constitutional Court of the Republic of Indonesia 2014).

Constitutional Court Decision on Government Review of Regional Regulations, No. 137/PUU-XIII/2015 (The Constitutional Court of the Republic of Indonesia 2015).

Constitutional Court Decision on Government Review of Regional Regulations, No.56/PUU-XIV/2016 (The Constitutional Court of the Republic of Indonesia 2016).

Constitutional Court Decision on *Rules Implementing the Certified Judicial Scriveners Act Case* (1990), 89 Hun-Ma 178 (The Constitutional Court of Korea).

Constitutional Court Decision on *Billiard Hall Entry Restriction* case (1993), 92 Hun-Ma 80 (The Constitutional Court of Korea).

Constitutional Court Decision on *Prior Review of Broadcast Advertisements Case* (2008), 2005 Hun-Ma 506 (The Constitutional Court of Korea).

Constitutional Court of Korea. *The First Ten Years of the Korean Constitutional Court,* Constitutional Court of Korea, Seoul: Republic of Korea (2001).

Damian, Eddy and Robert Hornic. "Indonesia's Formal Legal System: An Introduction", *American Journal of Comparative Law* Vol. 20 (1972): 492.

Ginsburg, Tom. "The Constitutional Court and the Judicialization of Korean Politics." In New Courts in Asia, edited by Andrew Harding, 145-157. New York: Routledge (2009).

Hukumonline. "Sepanjang 2016, 22 RUU Telah Sah Jadi UU" *Hukumonline* (27 December 2016) <http://www.hukumonline.com/berita/baca/lt586259300 1f54/sepanjang-2016--22-ruu-telah-sah-jadi-uu>

Kompas. "Putusan MK Cabut Kewenangan Mendagri Batalkan Perda Provinsi", *Kompas* (14 June 2017) http://nasional.kompas.com/read/2017/06/14/22392261/putusan.mk.cabut.kewenangan.mendagri.batalkan.perda.provinsi.

Lindsey, Tim. *Islam, Law and the State in Southeast Asia: Vol. I. Indonesia*, London: I B Tauris 2012.

Lubis, Todung Mulya. "The Rechsstaat and Human Rights." In Indonesia: Law and Society, edited by Tim Lindsey, 171-85. Annandale: Federation Press, 1999.

Newland, Erica. "Executive Orders in Court." Yale Law Journal 124 (2015): 2026.

Prabowo, Dani. "Ini 40 RUU Dalam Prolegnas Prioritas 2016" *Kompas* (22 January, 2016) http://nasional.kompas.com/read/2016/01/22/13450911/Ini.40.RUU.dalam.Prolegnas.Prioritas.2016?page=all.

Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi. *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses Dan Hasil Pembahasan 1999- 2002 (Buku VI Tentang Kekuasaan Kehakiman)*, (Edisi Revisi). Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2010.

Schwarz, Adam. *A Nation in Waiting: Indonesia in the 1990s*, Boulder: Westview Press, 1994.

Supreme Court Decision. No. 03 G/HUM/2002 (The Supreme Court of the Republic of Indonesia).

Supreme Court Decision. No. 06 P/HUM/2003 (The Supreme Court of the Republic of Indonesia).

Supreme Court Decision. No. 06 P/HUM/2006 2003 (The Supreme Court of the Republic of Indonesia).

Ziegenhain, Patrick. *The Indonesian Parliament and Democratization*, Singapore: Institute of Southeast Asian Studies, 2008.

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Proportionality Test in the 1945 Constitution: Limiting Hizbut Tahrir Freedom of Assembly

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Abstract

In May 2017, Jokowi's administration announced the intention to dissolve Hizbut Tahrir Indonesia (HTI). HTI is an Islamic organization that aspires to establish caliphate government based on the claim of Islamic teaching. The Government considers HTI as a threat to Pancasila. The announcement has created controversy. It has divided Indonesian into pro and contra camp. The dissolution pro camp argues HTI ideology is against Pancasila, Indonesia political ideology. Furthermore, they pointed out HTI's idea of Caliphate that based on religion would disintegrate the nation. Conversely, the cons argues the government move is against the constitutionally guarantee freedom of association as stipulates in the 1945 Constitution of the Republic of Indonesia (hereafter the 1945 Constitution). The move would create precedent that threatens freedom of assembly if the government failed to enact due process procedure and provide justifiable reason for the action. This controversy is not new to human rights and democratic discourse. Karl Popper describes the debate as a paradox of tolerance, democracy, and freedom in an open society. This paper examines how the 1945 Constitution can be utilized to resolve the paradox. This paper argues that Article 28 J par.2 of the 1945 Constitution requires the balance between human rights protection and limitation in its proportion. Thus, the limitation clause should be used as a parameter to solve HTI issue. This paper explores the use of proportionality test in interpreting the limitation clause and applies it not only to the question of HTI issue but also broader issues to evaluate recent government moves in amending the Law Number 17 Year 2013 on Societal Organisation. This paper employs a doctrinal method in its analysis.

Keywords*:* Article 28 J par.2, Dissolution, Hizbut Tahrir, Indonesian Constitution, Proportionality Test, Societal Organisation Law

Less well known is the paradox of tolerance: Unlimited tolerance must lead to the disappearance of tolerance. If we extend unlimited tolerance even to those who are intolerant, if we are not prepared to defend a tolerant society against the onslaught of the intolerant, then the tolerant will be destroyed, and tolerance with them (Karl Popper)[1]

I. INTRODUCTION

The quotation above describes paradox between maintaining open/free society against the tendency to protect openness by adopting ways that against the principle of open society. Popper defines open society as a society in which a person allows to base their decision on the authority of their intelligence. Conversely, closed society is a society that still believes in magical taboo. Thus, individual in closed society take their decision based on authority outside of themselves.[2] The closed society disallows individuals to think freely and to accept every aspect of life as it is, including government policy. Popper equates this type of society with a totalitarian regime.[3] In a political context, an open society allows citizen or individual to evaluate the consequence of government policies critically. The open society protects the right to criticize, and the difference between people on societal policy will be resolved by critical discussion and argument rather by force. In short, open society refers to liberal and democratic society, whereas the closed society relates to the totalitarian society.

The open society embraces rights and freedom of the individual as the fundamental basis of its community. The freedom than formalizes and guarantees through a constitution with the adoption of human rights. The human rights operate within a legal system that embraced the rule of law. The guarantee of freedom creates a paradox when facing with person or organization that wants to destroy the freedom itself.

Indonesia as a young democratic country is also facing similar paradox. This paradox manifests in the existence of *Hizbut Tahrir Indonesia* (hereafter, HTI)

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1 Karl Popper, *The Open Society and Its Enemies* (Frome & London: Buttler & Tanner Ltd, 1945), 226.
2 *Ibid*.
3 Blackburn S, "*The Oxford Dictionary of Philosophy : Open Society/Closed Society*", (Oxford: Oxford University Press, 2016).

movement. HTI is a part of a larger transnational Islamic movement of *Hizbut Tahrir*[4] that advocates the establishment of a caliphate as a form of government. Caliphate model of government is a world imperium government that governs and applies *sharia* laws. HTI rejects democracy and the nation-state in favor of caliphate system of government.[5]

In May 2017, Indonesian's government stated that they would dissolve and prohibit HTI to operate in Indonesia. The government cited three reasons for their decision: first, HTI as a societal organization has not contributed positively to the development of society. Second, there is a strong indication HTI's activities are against with the goals, principles, and character of *Pancasila* and the 1945 Constitution as stipulated in the Societal Organisation Law. Finally, HTI's activities have created friction and brought threat to public order and security as well as jeopardizing the national unity. The HTI dissolution possesses similar to a paradox as describes by Karl Popper. The question rests in the limit of how far a democratic government can use coercion to suppress closed ideology proponents.

This paper focuses on the utilization of the limitation clause in the 1945 Constitution to resolve the paradox. This paper argues that the paradox of tolerance can be resolved by applying a proportionality test in the interpretation of the limitation clause. The argument is based on the proposition that the government have the power to limit freedom of assembly under the limitation clause. The proportionality test requires government in exercising its power to limit freedom of association should be proportional to the threat posed by the organisation in question. Thus, the government measures in limiting freedom of association should be constructed in the spectrum of sanctions, starting from minor sanction such as notification of the breach, revoking grants, limiting organisation activities, administrative supervision, to the ultimate sanction, the dissolution.

It employs doctrinal analysis. The analysis focuses mainly on the interpretation of the primary source of laws that consists of laws and judicial decisions.

[4] In this paper the term of HTI as Indonesia chapter and HT as the transnational affiliation of HTI is used interchangeably.

[5] Burhanuddin Muhtadi, "The Quest for Hizbut Tahrir in Indonesia", *Asian Journal of Social Science* 37 (2009) : 631 - 632

Additionally, it also analyses secondary source, namely, scholarly journal articles, government reports, and other government official report. Thus, this paper gives systematic exposition to the interpretation of the limitation clause based on proportionality test.[6] The aim is to give systematic understanding on the use of the proportionality test in interpreting the limitation clause and how it can be used to solve HTI issue without violating the principle of open society.

This paper consists of five sections. The first section is the introduction that discusses the background and context of HTI dissolution. The second section examines the relevant conceptual, political and historical context of *Pancasila* and HTI's Caliphate ideology. The third section elaborates the incompatibility between *Pancasila* and HTI's Caliphate ideology. The forth section discusses government reasons for dissolving HTI. The fifth section elaborates the idea of applying the proportionality test to the limitation clause in Indonesia constitutional context. Finally, the sixth section summarizes the paper and provides recommendations.

II. *PANCASILA* AND CALIPHATE IDEOLOGY

This section describes the foundational idea of Pancasila and HTI's Caliphate Ideology. Some important historical and philosophical elements of both ideologies are highlighted. Additionally, this section summarizes each key fundamental character of both ideologies.

2.1. *Pancasila,* the "Imagined Order", that Unites Indonesia

Pancasila is Indonesia state ideology that was proclaimed by Soekarno on 1 June 1945. Soekarno introduced *Pancasila* in his speech in front of "Investigative Body for the Preparation of Independent of Indonesia" (*Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan Indonesia* hereafter, BPUPKI).[7] BPUPKI convened between 29 May 1945 – 17July 1945. In the first session of BPUPKI, Soekarno suggested five basic principles that should

[6] Paul Chynoweth, "Legal Research" in *Advance Research Methods in the Built Environment*, ed. Andrew Knight and Less Ruddock (Chichester: Willey-Blackwell, 2008), 30

[7] Saafroedin Bahar, et.al., eds., *Risalah Sidang Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan Indonesia [Minutes of Meeting of Indonesia Independence Attempt Investigation Agency]*, (Jakarta: Indonesia State Secretariat, 1995), 389.

become the foundation (*weltanschauung*) of the Republic of Indonesia to be. They are (1) Indonesian nationalism; (2) internationalism-humanitarianism; (3) unanimous consensus-democracy, (4) societal welfare; and (5) belief in one god. Subsequently, BPUPKI established a small committee (*panitia kecil*) to discuss further related to Soekarno's five principles proposal. The committee consisted of nine members of BPUPKI, namely, Abikoesno Tjokrosoejoso, Kiai Haji Wachid Hasjim, Mr. Muh. Yamin, Soebardjo, Tuan Maramis, Kiai Abd. Kahar Moezakir, Drs. Mohammad Hatta, Hadji Agoes Salim, and Soekarno, himself.[8] The small committee reported their work in the 2nd session of BPUPKI. The small committee produced a constitution draft. In the process, the small committee reformulated Soekarno's five principles.[9] In the final formulation, BPUPKI agreed to a final version that stipulates : belief in one God (*Ketuhanan Yang Maha Esa*), a justice and civilized humanitarianism (*Kemanusiaan Yang Adil dan Beradab*), the unity of Indonesia (*Persatuan Indonesia*), the people governed by wise policies through a process of consultation and consensus (*Kerakyatan yang Dipimpin oleh Hikmat Kebijaksanaan dalam Permusyawaratan/Perwakilan*) and social justice for all the Indonesian people (*Keadilan Sosial bagi Seluruh Rakyat Indonesia*).

There are three important aspects of *Pancasila* related to HTI's issues. First, *Pancasila* has been used to fend off Islamic political aspiration. Second, *Pancasila* aims to unify diverse religions, ethnics, and race within nation state framework. Finally, *Pancasila* is an ideology that put sovereignty to the people.

Since its inception, *Pancasila* has been designed and used to fend off the formalization of Islam into Indonesia state. This conclusion can be found from close reading to the debate between secular camp with political Islam camp on the discussion of the first pillar of *Pancasila,* the belief in one God. The interpretation of the first pillar has always become a contentious debate

8 *Ibid*, 94.
9 *Ibid*, 86.

between Indonesia secular political groups and Islamic political aspiration. The principle of one God is a fundamental proclamation to the religious characteristic of Indonesia. Initially, the principle of belief in one God comes with the stipulation of obligation of *sharia* law for its adherents (Muslim). The stipulation is known as "the seven words" of Jakarta Charter (hereafter, the seven words). The reformulation of belief one God principle that included the seven words had invited opposition from non-Muslim camp. On 11 July 1945, Latuharhary, a prominent non-Muslim leader from Ambon, eastern of Indonesia, objected the stipulation of the seven words.[10] The reason for his objection was that *sharia* law potentially created domination to other laws, especially *adat* law (customary law). Latuharhary elaborates that the stipulation could potentially create conflict between Muslim and Christian in Ambon. He explained in Ambon, Muslims and Christian often come from the same family. The seven words created a problem when amongst member of family with different religion try to split the inheritance property. If Muslim used *sharia* law, it would be refused by their brother of other faith.

Consequently, it potentially creates conflict between them. In addition, the so-called secular Muslim camp also rejected the seven words stipulation. For instance, Wongsonegoro and Hosein Djadjadiningrat pointed out the possibility of creating a religious fanaticism.[11] Another objection from non-Muslim is the potential discrimination that might pose to all minority groups. In the heat of debate, the non-Muslim threatened not to join the Republic of Indonesia if the seven words remain. The result of this debate was the elimination of the wording of the seven words as the first pillar of *Pancasila* and in the Constitutional Preamble. Mohammad Hatta played a substantial role in the omission of the seven words. In private meeting with Ki Bagus Hadikusumo, Wahid Hasjim, Kasman Singodimedjo and Teuku Hasan, Hatta convinced them to discard the clause in favour of the unity of a new

[10] Faisal Ismail, "Islam, Politics and Ideology in Indonesia: A study of The Process of Muslim Acceptance of The Pancasila" (Ph.D. diss, McGill University, 1995), 53, http://digitool.library.mcgill.ca/R/?func=dbin-jump-full&object_id=39924&local_base=GEN01-MCG02.

[11] *Ibid*.

nation that they try to establish.[12] In Hatta's memoirs, he said that one of the Japanese officers delivered a message from his counterpart in eastern part of Indonesia, saying majority of the people refused to join the state to be, if the seven word remain in the constitution.[13]

For some political Islam proponents, despite the disappearance of explicit stipulation on *sharia* obligation for Muslim, the acknowledgment of one God still perceived as an ideological justification for implementing *sharia* in Indonesia.[14] Throughout history, the above context has overshadowed relation between political Islam in Indonesia that advocates the complete formalization of *sharia* and their secular-nationalist opponent that rejected any notion of Islamic morality incorporation to the state, both formally and informally. After 1945, there were several attempts from political Islam camp to incorporate *sharia* into Indonesia legal system. In 1950's, the political Islam proponents tried to formalize through "*Konstituante*". *Konstituante* is an ad hoc organ to formulate definitive constitution to replace the Temporary Constitution of 1950 ("*Undang-Undang Dasar Sementara 1950*"). Soekarno ended this venture with Presidential Decree of 1959.

In the early Soeharto era, the confrontation between *Pancasila's* secular camp and Islamic politic aspiration was high.[15] One of the notable controversies was the application *Pancasila* as "single principle" (*asas tunggal*) to be adopted by all societal organisation in Indonesia. The application of a single principle in societal organisation policy preceded with the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat* hereafter, MPR) Decree Number II/MPR/1978 on Guideline on Comprehension and Implementation of Pancasila (*Pedoman Penghayatan dan Pengamalan Pancasila [Ekaprasetia Pancakarsa]*). The Decree gave an interpretation on the meaning of *Pancasila*. It affirms the exclusion of political Islam aspiration for *sharia* law in its interpretation of the belief in one God principles. It

[12] *Ibid.*, 54.
[13] Mohammad Hatta, *Sekitar Proklamasi* [On The Proclamation], (Jakarta: Tintamas), 1970.
[14] *See* Ismatu Ropi, *Religion and Regulation in Indonesia*, (Singapore: Palgrave Macmillan, 2017), 89.
[15] Jamie Mackie, "Patrimonialism: The New Order and Beyond" in *Soeharto's New Order and its Legacy Essays in honour of Harold Crouch 2,* ed. Edward Aspinall (Canbera: Australian Univesity Press, 2010), 81.

also interprets *Pancasila's* first principle as to guarantee freedom of religion, non-compulsion in the exercise of religion, and emphasize the cooperation among the religious group to obtain harmony in the society.[16] The emphasizes on the freedom of religion, and non-compulsion in the practice of religion is in direct contradiction to political Islam aspiration.

After the Suharto down fall, political Islam once again attempted to formalize sharia during the amendment of Constitution in 2000 – 2010. The aspiration was to return the seven words in to *Pancasila*, the Constitutional Preamble and Article 29 of the Constitution. This venture also met with failure.[17] The second aspect is the status *Pancasila* as Indonesian "imagined order." Youval Harari defines imagined order as a myth that created to enable people to cooperate or united in a polity. The imagined order is shared among people within the polity that believe in certain idea/ideology.[18] *Pancasila* as an ideology has been successful to become the imagined order of Indonesian people. It becomes the unifying narrative for millions of Indonesian people to work together within a polity of Indonesia state. There are several reasons for *Pancasila* success in function as imagined order: first, the success is due to vigorous *Pancasila* proponents in campaigning it.[19] They staunchly defended *Pancasila* as the means of ensuring mutual tolerance and freedom of belief to maintain national unity. The efforts were sustained by intellectual environment and the bureaucracy.[20] One of the key successes of *Pancasila* as unifying narrative was the description of *Pancasila* as indigenous ideology derived from the essence of Indonesian people as opposed to the imported foreign ideology of those western or in HTI context as Arab's ideology. Secondly, *Pancasila* is a consensus ideology, in which elements of Indonesia nation come to agree to overcome differences.

[16] MPR Decision Number II/MPR/1978 on the Guideline on The Observant and Implementation of *Pancasila* (Republic of Indonesia)

[17] Denny Indrayana, *Indonesia Constitutional Reform 1999 - 2002 : An Evaluation of Constitution-Making in Transition*, (Jakarta: Kompas, 2008), 183.

[18] See Yuval Harari. *Sapiens A Brief History of Humankind*, (London : Vintage Books, 2014).

[19] R.E. Nelson, "Nationalism, Islam, 'secularism' and the state in Contemporary Indonesia, *Australian Journal of International Affairs* 64, No.3 (2010) : 329.

[20] *Ibid.*

Furthermore, they also agreed to unite under *Pancasila* banner. The idea of *Pancasila* as unifying ideology is apparent in the phrase of "*Bhinneka Tunggal Ika"* (unity in diversity). This motto has been an essential part of the national emblem (*Garuda Pancasila*). Many Indonesian, especially non-Muslim and secular Indonesian, sees *Pancasila* as unifying narrative because of its success in overcome the narrative of the Islamic group. As a majority group in Indonesia, some Muslims element demanded that the foundation of the state-to-be is Islam. However, the aspiration had been staunchly rejected by secular Muslim and eastern Christian groups, notably, Latuharhary. In the deliberation process, three issues discussed extensively in rejecting Islamic political aspiration, starting from trivial issues such as the title of the preamble of the constitution, in which the Islam politician suggested Arabic word of "*Mukaddimah*" that rejected by the secular camp that prefer a native language of "*Pembukaan*."[21]

The much substantive debate was on the seven word of sharia application for Muslim that resulted in the removing the seven word from the first pillars and Article 29 of the Constitution of 1945. Another important element of non-Muslim rejection toward political Islam aspiration is that the requirement of the President must be Muslim. The stipulation was rejected not only by the Christian elements but also secular muslim citing discrimination to non-Muslim as rejection.[22] Another important aspect of *Pancasila* that relevant to the discussion is the narrative of *Pancasila* was framed within nation state and nationalism. It rejects internationalism and cosmopolitanism that challenged nation state border. Sukarno emphasizes this in his famous speech of 1 June 1945 that the goal of BPUPKI meeting is to establish a nation state country based on nationalism (*kebangsaan*). Borrowing from the famous French historian, Ernest Renan, definition of a nation, Sukarno defined a nation as the unity of people based on the share of fate.[23] Sukarno also attacked Liem Koen Hian that rejected nationalism

[21] Ismail Faisal, *Islam, Politic,* 55.
[22] *Ibid.,* 245.
[23] Saafroedin Bahar, et.al., eds., *Risalah Sidang*, 71.

in favour of cosmopolitanism.[24] Finally, *Pancasila* put people as the centre of its legitimacy. People are sovereign, in which government must be elected and accountable to the people. The people sovereignty was embodied in MPR, in which all of the state organs must answer to MPR.[25] In conclusion, it can be said that the acceptance of *Pancasila* as Indonesian ideology, especially for those of non-Muslim majority in eastern part of Indonesia was primary due to guarantee of equality and non-discrimination from the majority (Muslim). After seeing the BPUPKI and PPKI deliberation, it can be concluded that *Pancasila* and the Constitution of 1945 were designed to deliver such promises. Failed to deliver the equality and non-discrimination promise would mean disintegration to the nation.

2.2. HTI's Goal to Create Islamic Imperium

HTI's ideology is based on the idea of Taqiyuddin an Nabhani. An Nabhani is a Palestinian born cleric. He was born in 1909 from Ottoman's judge's father and Islamic scholar mother. An Nabhani family background came from long line of Ottoman judicial officers and prominent figures in the Ottoman caliphate. An Nabhani grandfather was a prominent judge in the Ottoman state that oversaw judicial matters in Palestine.[26] An Nabhani background potentially impacted profoundly on his preference to Caliphate model of government, where other Islamist ideology are still willing to fight their cause (the application of *sharia*) within the nation state framework.[27] An Nabhani produced a substantial number of books that cover topics related to Islam politics and way of life. One of his greatest works is *Al-Shakhsiyya al-Islamiyah* that consisted of three volumes on Islamic jurisprudence.[28] Nonetheless, the most important book related to the idea of HTI's Islamic state and its ideology can be found in *Dawlyah al-Islamiyah* (The

[24] *Ibid.*, 75.
[25] Article 1 Pre-Amendment Constitution of 1945.
[26] "Sheikh Muhammad Taqiuddin al-Nabhani", Hizb Ut Tahrir Australia, accessed March 20, 2018 http://www.hizb-australia.org/2016/02/sheikh-muhammad-taqiuddin-al-nabhani/,
[27] *See* Noman Hanif, "Hizb ut Tahrir : Islam's Ideological Vanguard", *British Journal of Middle Eastern Studies 39*, No.2 (2012) : 201-225
[28] *Ibid.*

Islamic State), *Muqimat al-Dustor* (Introduction to the Constitution), and *Mahafeem Hizb Ut-Tahrir* (Concepts of *Hizbut-Tahrir*). HTI political goal is to implement An Nabhani idea of an Islamic imperium under a Caliphate leadership. HT ideology importation to Indonesia came with the arrival of Australian-Palestinian, Abdurrahman Al-Baghadi, to Bogor, West Java in 1982. Subsequently, Al-Baghadi managed to spread HT idea to the nearby prominent public university, Bogor Agriculture Institute (*Institut Pertanian Bogor*, IPB).[29] From there, HT spreads to other campuses via campus religious unit and established networks that led to the formation of Indonesian chapter of HT (HTI).[30] One of the distinct characters of HTI's ideology from other Islamist ideology is the transnational character of its movement.[31] HTI aims to establish an *ummah* (single political, economic, and societal society) that unified all Muslim majority countries in the world. In *dawlah al-Islamiyah*, An Nabhani asserts "the point at hand is not establishing several states, but one single state over the entire world".[32]

Burhan Muhtadi summarizes three ideological cores of HTI. First, HTI advocates the re-establishment of a Global Caliphate and *sharia*. Second, HTI also advocates the idea of Islamic State under God's sovereignty. Finally, HTI advocates global world order through caliphate.[33] The Global caliphate is a political-religious state comprising Muslim community and other non-Muslim community under its dominion. The caliphate system is a system that aspire transnational Islamic government under one leadership (the caliphate). As a global imperium, caliphate rejected nation-state and nationalism that they considered as *asabiya* (segregate/disunity).[34] The second HTI ideological core is God's sovereignty. For HTI, the caliphate does not produce any law. The caliphate or government is simply adopting and implementing *ahkaam shari'iyyah* (the divine rules).[35] Consequently, HTI does not accept

[29] Burhanuddin Muhtadi, *The Quest*, 626.
[30] *Ibid.*
[31] Noman Hanif, *Hizb ut Tahrir*, 206.
[32] Taqiuddin an-Nabhani [English Translation], The Islamic State (London: Al-Khalifah Publications, 1998), 2.
[33] *Ibid.*, 629-634.
[34] *Ibid.*, 633.
[35] Hizb ut-Tahrir, "The Draft Constitution of the Khilafah State, accessed March 3, 2018 http://www.hizb.org.uk/wp-content/uploads/2011/02/Draft-Constitution.pdf, Article 3.

democracy since the creation of law in democracy is based on the will of people. Although in its constitutional structure HTI adopted parliamentary institution (*Majlis ul-Ummah*) similar to those of parliamentary democracy and its members are elected by people, the institution only has the power to check *Caliphate* in the form of consultation, without to pass legislation.[36] The power to implement legislation is under the Caliphate, in which theoretically only adopt the divine rule.[37] The idea operates on the proposition that the sovereignty to pass law belongs to *yamlik al-iradah* (the highest will). *Sharia* is the embodiment of the highest will that cannot be decided on majority and minority opinion, it should be grounded upon legal texts (*Quran* and *Sunnah*), since God, not the people who created law.[38]

The third ideological core of HTI is against nation state and nationalism. HTI considers nation state and nationalism as one of the major obstacles to the party's attempt at the establishment of the Caliphate. HTI considered nationalism as "modern *jahiliyah*". *Jahiliyah* is a concept in describing era before the time of Prophet Mohammad. The *jahiliyah* era or the ignorant era is associated with corruption and moral decay. In political aspect, one feature that characterizes *jahiliyah* era is *asabiya*, where the Arab pre-Islamic society was bound by their primordial tie. One of the Prophet Muhammad mission was to unify those fragmented society in one *Ummah* that overcome race, ethnic, cultural, and geographic affiliation. For HTI, nationalism and nation state is *jahil* because it brings back *asabiya* into Muslim community, especially, tribal fanaticism based on geographical affiliation.[39]

Finally, the most important aspect of the HTI's ideology for this paper is the HTI's strategy in advancing its cause. The strategy aspect is important to determine the government measure in limiting HTI's freedom of assembly. Muhtadi outlines three stages of HTI's strategy in establishing Caliphate: culturing stage (*marhalah al-tathqif*), interaction stage (*marhalah tafa'ul*

[36] *Ibid.*, Article 101 – 107.
[37] *Ibid.*, Article 35.
[38] Burhanuddin Muhtadi, *The Quest*, 632.
[39] *Ibid.*

ma'a al-naas), and revolution (*istislam al-hukmi*).[40] The culturing stage is an initial stage in where HTI activist educates a large section of Muslim society by various means. At this stage, HTI actively focuses on recruiting and fostering ideological character of its cadres.[41] On the second stage, HTI expands the movement to interact with other elements of society, especially, of those public officials and state apparatus. Muhtadi describes in this stage HTI members will infiltrate key political institutions, and military/security officers and provoke them to conduct a revolution. Finally, the last stage is to create a momentum, to do actual revolution, in which non-Caliphate regimes are toppled.[42]

In Indonesia, there are compelling evidence that at this stage HTI has entered the second phase of its strategy, that is, the interaction phase. Some evidences have suggested HTI has tried to establish interaction with government institutions, both at local and national government institution, through various means and activities. For instance, HTI activist actively approach local Indonesian military branches, such as in Bogor district or invited other key government elements to their activities, such as, in the opening ceremony of its office.[43] Additionally, Muhtadi indicates that since 2003 many HTI activists have joined Muhammadiyah after leading conservative figure, Din Syamsudin, took the organisation leadership. Furthermore, HTI has also managed to infiltrate to Indonesian Islamic Scholars Council (*Majelis Ulama Indonesia*, MUI), in which one of the prominent members, Al-Khaththath, held a key position in the council.[44] The most recent compelling evidence was HTI activist speech that provokes military to take power from the government.[45]

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40 *Ibid*.

41 *Ibid*.

42 *Ibid*.

43 Vento Saudale, "Ini Jawaban Bima Arya Terkait Peresmian Kantor HTI" [Bima Arya Responses to HTI's Office Opening Ceremony], *Berita Satu*, 11 Februari 2016, http://www.beritasatu.com/nasional/348691-ini-jawaban-bima-arya-terkait-peresmian-kantor-hti.html. See also Wisnu G and Amir, "Dandim Terima Kunjungan Silturahmi Pengurus DPD 2 HTI Kota Bogor" [Bogor Military Commander Accepts HTI Courtesy Call], *Bogorplus*, 2 October 2013, 2018 http://bogorplus.com/index.php/bogor-raya/item/1916-dandim-terima-kunjungan-silaturahmi-pengurus-dpd-2-hti-kota-bogor

44 Burhanuddin Muhtadi, *The Quest*, 632.

45 Editorial Team, "Deretan Kudeta oleh Hizbut Tahrir" [List of Hizbut Tahrir Coup de etat], Kumparan, 02 May 2017, https://kumparan.com/@kumparannews/deretan-upaya-kudeta-oleh-hizbut-tahrir.

III. *PANCASILA* V. CALIPHATE'S IDEOLOGY

This section examines the incompatibility of *Pancasila* as an ideology with Caliphate ideology offered by HTI. Based on the discussion in its previous section, it can be concluded that *Pancasila* and HTI's caliphate ideology are two competing ideologies. The incompatibilities rest in three aspects: first, the pluralistic and inclusive nature of *Pancasila* ideology as opposed to monolithic and exclusive nature of HTI's ideology. Second, *Pancasila's* popular sovereignty as opposed to HTI's God's Sovereignty. Finally, the Indonesian nationalism as opposes to HTI's trans-nationalism.

3.1. Incompatibility 1: *Pancasila* Inclusive Society versus Caliphate Exclusive Society

One of the most problematic ideas of HTI's ideology against *Pancasila* is located on the issue of HTI exclusivity. The exclusive nature of HTI's caliphate ideology can be seen as a threat to Indonesian unity, even though it is far away from implementation. It sufficiently creates discontent within Indonesia society and threaten the unification of Indonesia.[46] As discussed previously, the acceptance of *Pancasila* by a large majority of Indonesian as the accepted "imagined order" is due to the pluralistic, inclusive and anti-discrimination promises. The strong pluralistic, inclusive and anti-discrimination commitment reflects in Indonesia motto of unity in diversity (*Bhinneka Tunggal Ika*). In the previous section, it has been explained the promise of pluralistic and anti-discrimination has been designed and reinforced throughout Indonesia modern history starting from BPUPKI decision to reject the seven words to the interpretation of Suharto's *Pancasila* as outlined in the TAP MPR on *Ekaprasetya Pancakarsa*. The idea reflects throughout the pre-amendment of the Constitution of 1945, notably, the Article 29 of the Constitution of 1945 that guarantees freedom of religion without the stipulation of seven words and the Article 6 of the Constitution

[46] Ahmad Khadafi, "Hizbut Tahrir Vs "Pancasila" dan "NKRI"", Tirto, 05 May 2017, https://tirto.id/hizbut-tahrir-indonesia-vs-pancasila-dan-nkri-cn5x.

of 1945 that stipulates that Indonesia President is native Indonesia without mention "Muslim" as its requirement. In recent amendment, to further enforce the inclusive character of Indonesia ideology, the native Indonesia stipulation was removed. Consequently, it allows for non-native Indonesia citizens, such as Chinese Indonesia, Arab Indonesia or any other mix background to become President if he/she was born in Indonesia and never accepted other nationality.[47]

In contrast, HTI's Caliphate ideology promotes exclusivity that based on the religious identity. The discriminatory nature of HTI's ideology can be found in HTI's constitution. For instance, it limits non-Muslim participation in government, non-Muslim cannot be elected as rulers, nor he/she can vote for a ruler or served as judges.[48] Furthermore, HTI's ideology also discriminates women. It limits women in domestic affairs and forbids women to take any official positions.[49]

3.2. Incompatibility 2: *Pancasila's* Popular Sovereignty versus Caliphate's God Sovereignty

As an ideology, *Pancasila* legitimacy is based on popular endorsement. It is the people who hold the sovereignty. Thus, any government form under *Pancasila* ideology is elected by the people and accountable to the people. This idea reflects in the fourth pillar of *Pancasila* that stipulates "the people governed by wise policies through a process of consultation and consensus." Furthermore, the people sovereignty also explicitly affirms in Article 1 par. (2) of the pre-Amendment Constitution of 1945; it stipulates that "the sovereignty is on the hand of people and is implemented fully by MPR". The decision-making process in MPR is done through the majority vote.[50] The people's sovereignty is also still accommodated in the Amendment Constitution of 1945 with some changes. The Article 1 par. (2) of the Amendment Constitution of 1945 stipulates the sovereignty is within the people and implemented

[47] Article 6 Constitution of 1945 Third Amendment.
[48] Hizb U Tahrir, *The Draft* Constitution, Article 67.
[49] *Ibid*, Article 111.
[50] Article 2 Par.3 Pre-Amendment Constitution of 1945 (Republic of Indonesia).

based on the constitution. The revision aims to the acknowledgement that democracy needs to go hand in hand with rule of law. For HTI, democracy and people's sovereignty are a *kufar* (unbeliever) system that replaces God as the highest will (*yamlik al-iradah*). Thus, the adoption itself is considered as forbidden (*haram*). HTI asserts that human should be governed by the divine rules that adopted by the Caliphate. In HTI concept, law does not need people endorsement. It is obvious that HTI's ideology is incompatible with the fourth pillar of *Pancasila*. The idea to replace people sovereignty with God sovereignty is not only subversive, but also abolished the essence of Indonesian government as a Republic, in which the legitimacy of government based on the people approval.[51]

3.3. Incompatibility 3: *Pancasila*'s Nation State *v.* Caliphate's Trans-nationalism

The third incompatibility between *Pancasila* and Caliphate's ideology is on the issues of nationalism and nation state. As an ideology, *Pancasila* puts nationalism as one of its pillars. It explicitly contains in the third pillar of *Pancasila,* the unity of Indonesia. The nation state and nationalism has always been the foundation of Indonesia republic. On 1 June 1945, Sukarno gave speech that urged BPUPKI members to establish Indonesia nation state based on nationalism.[52] Sukarno then continued to define a nation, by citing Ernest Renan, as a unit based on the share of fate.[53] For HTI, the idea of nationalism is similar to that democracy as un-Islamic and *jahil*. HTI sees nationalism and nation state as its manifestation as part of a western conspiracy to undermine the unity of *umma*. Interestingly, HTI accuses Ernest Renan, the same person that Sukarno quote to define nationalism, deliberately conceptualised nationalism that subsequently led to the emergence of a nation-state. For HTI, Renan assertion of nationalism had contributed to the collapse of Ottoman Empire.[54] Furthermore, HTI's trans-nationalism ideology

[51] Article 1 Par.1 Pre-Amendment Constitution of 1945 (Republic of Indonesia).
[52] Saafroedin Bahar, et.al, eds., *Risalah Sidang*, 71.
[53] *Ibid.*, 72.
[54] Burhanuddin Muhtadi, *The Quest*, 633.

subdues Indonesia as a nation to those of Arab identity. This repression is evidence of the use of Arabic as HTI's official organisational language.[55] For Indonesian, "*Bahasa*" is a national identity that signifies Indonesian nationalism. In conclusion, HTI ideology is incompatible with Indonesia's *Pancasila* ideology. The successful of HTI movement in advancing its idea would eventually threaten Indonesia existence as a nation and its promise for the pluralistic society. Therefore, the government concern over HTI as an organisation is reasonably justified.

IV. LIMITING HTI'S FREEDOM OF ASSOCIATION

In the previous section, it has been argued that HTI's ideology is against *Pancasila*. Thus, if it prevails, it will subsequently put an end not only *Pancasila* but also Indonesia as a nation-state. Therefore, there is a reasonable justification for the government to limit the development of HTI in Indonesia. The extent to which the government can limit HTI is bound by the Constitution of 1945. This section evaluates the current government measures in limiting HTI's freedom of association and evaluates the action through the proportionality test interpretation of the limitation clause.

4.1. Government Measures

After the surge of political Islam in recent Jakarta gubernatorial election, Joko Widodo has decided to take affirm measures to the phenomena. Joko Widodo considered the political Islam phenomena in the election as the awakening of radical Islamist to the center stage of Indonesian politic that threaten the unity of the nation.[56] To reduce the political tension caused by political Islam, he creates policy that aims to weaken Islamic hard line societal organisation. One of those societal organisations is HTI. In a press conference, Coordinating Minister for Political, Law and Security Affairs, Wiranto, cited HTI's ideology does not compatible with the 1945 Constitution and Law Number 17 year 2013 on Societal Organisations as a reason for the

[55] Hizb U Tahrir, *The Draft* Constitution, Article 8.

[56] Mawa Kresna, "Pilkada Jakarta Berujung Pemberangusan HTI" [Jakarta Election Resulted in HTI's Dissolution], Tirto, 12 May 2017, https://tirto.id/pilkada-dki-jakarta-berujung-pemberangusan-hti-coxH.

dissolution.[57] However, the Law has a limitation. One of the limitation is a complicated procedure.[58]

Furthermore, further analyses on the Law reveals that government cannot dissolve HTI. The reason for this is because the Law stipulates strict requirement and procedure to act against societal organisation. The government can only give sanctions to societal organisation, if it violates Article 59 of the Law. Article 59 outlines several prohibitions for societal organisation. Based on Government account, HTI potentially violates Article 59(2)c and (4) of the Law. Article 59(2)c stipulates that an organisation prohibits to conduct any separation movement that threatens the territorial integrity of Indonesia. As Article 59(4) stipulates that societal organisation is forbidden to adopt, develop, and disseminate other ideology/teaching that against *Pancasila*. From the two articles, HTI activity cannot be categorized in both prohibitions. First, it is difficult for HTI to categorise violating Article 59(2)c since HTI does not advocate separation of any part of Indonesia territory. Secondly, even if HTI caliphate ideology is against *Pancasila*, but according to the societal organization law, caliphate ideology or any other ideology apart from communism does not consider as against *Pancasila*. The explanatory memorandum of Article 59 (4) only stipulates that the ideology refers to the article is marxism, communism, and atheism.

Furthermore, HTI in its activities is known for adopting peaceful means in disseminating their idea. There are no records that HTI uses any violence, threaten security or disturb public order in doing their activities.[59] The government realizes this hindrance, hence on July 2017, the government passed Government Regulation in Lieu of Law Number 2 Year 2017 on Amendment of Law Number 17 Year 2013 on Societal Organisation (hereafter,

[57] Kristian Erdianto, "Ini Alasan Pemerintah Bubarkan Hizbut Tahrir Indonesia" [Government's Reason in Disbanding Hizbut Tahrir Indonesia], Kompas.com, 08 May 2017, http://nasional.kompas.com/read/2017/05/08/14382891/ini.alasan.pemerintah.bubarkan.hizbut.tahrir.indonesia.

[58] Kristian Erdianto, "Wiranto Sebut Pembubaran HTI Pakai Perppu Tak Langgar Prosedur Hukum" (Wiranto Claimed Using Perppu To Dissolve HTI Does Not Violate the Law), Kompas.com, 17 May 2017, http://nasional.kompas.com/read/2017/05/17/18402491/wiranto.sebut.pembubaran.hti.pakai.perppu.tak.langgar.prosedur.hukum. *See also* Eryanto Nugroho, "Can Hibut Tahrir really be dissolved ?", Indonesiatmelbourne (blog), June 2, 2017, http://indonesiaatmelbourne.unimelb.edu.au/can-hizbut-tahrir-really-be-dissolved/.

[59] Burhanuddin Muhtadi, *The Quest*, 624.

Perpu 2/2017). Perpu 2/2017 has several amendments that overcome the previous law obstacle in dissolving HTI. Those amendements are as follows: first, Perpu 2/2017 has added "Constitution of 1945" phrase in the definition of societal organisation. Second, it has broadened the prohibition clause in Article 59, namely :

a. Prohibiting to adopt flag or emblems that resembles the flag and emblems of Indonesia Republic as official organisation flags or emblems;
b. Expanding the definition of "group" to include government officials; and
c. Expanding the definition of *Pancasila* ideology to incorporate many non-communist ideologies including the Islamist ideologies (explanatory memorandum Article 2c).[60]

Third, Perpu 2/2017 removed all due process in sanctions procedures by removing the role of the court to review the process before the government decided to apply the sanction.[61] Finally, Perpu 2/2017 has included criminal sanction. The penal sanction criminalizes every societal organisation member directly or indirectly involves any offences in prohibitory clauses. The maximum penalty for offences such as promoting and advocating activities that against *Pancasila* is punishable up to 20 years imprisonment.[62] On 24 October 2017, the Parliament approved Perpu 2/2017 to become Law. Perpu 2/2017 has, then, become Law Number 16 Year 2017.

4.2. Government Measures and Proportionality Test

There is no doubt that human rights or any other legal rights always have its limitation. The idea reflects in an English maxim, "you right to swing your arms ends just where the other man's nose begins." This maxim indicates that the claim of individual rights ends when other personal rights exist. Article 29 Universal Declaration of Human Rights (UDHR) stipulates clearly the possibility to limit human rights. The article stipulates:

[60] Explanatory Memorandum of Article 59 par. (4) letter c via Article 1 number 2 Government Regulation in Lieu Number 2 Year 2017 on Amendment of Law Number 17 Year 2013 on Societal Organisation (Indonesia).
[61] Article 62 via Article 1 number 5 Government Regulation in Lieu Number 2 Year 2017 on Amendment of Law Number 17 Year 2013 on Societal Organisation (Republic of Indonesia).
[62] Article 82 A via Article 1 number 5 Government Regulation in Lieu Number 2 Year 2017 on Amendment of Law Number 17 Year 2013 on Societal Organisation (Republic of Indonesia).

> "the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order, and the general welfare in a democratic society".

The Constitution of 1945 limitation clause has a similar tone with the Article 29 UDHR. The Constitution of 1945 limitation clause stipulates:

> "In exercising rights and freedoms, every person shall be subject to limitation as are determined by law solely for securing due recognition and respect for the rights and freedoms of other and of meeting the just requirements of morality, religious values, security, public order, in a democratic society"

Indonesia Constitutional Court affirms the limitation of human rights. In its Decision Number 14/PUU-VI/2008, MK considers the limitation of rights as inevitably, even without the limitation clauses stipulates in the 1945 Constitution.[63]

Nonetheless, the state power to limit human rights is without no limit. One of the prominent documents that extensively discuss this issue is Syracuse Principle developed by the American Association for the International Commission of Jurists (AAICJ). The introductory note to Syracuse Principle highlighted the abuse by many governments in using human rights limitation clause to arbitrary limit human rights. Thus, the AAICJ developed nine principles in which state can limit human rights under the human rights limitation clause.[64] The principle emphasizes the "necessary"[65] aspect in limiting the rights. The "necessary" wording implies that the limitation, among others, the need to be proportionate to the aim of limitation.[66] Another important document is Human Rights Commission General Comments No. 31 of 2004 that stipulates the state restriction to any rights under International Convention on Civil and Political Rights (ICCPR) "must demonstrate their necessity and only take such measures as *are proportionate*

[63] Indonesia Republic Constitutional Court Decision Number 14/PUU-VI/2008 on Judicial Review Article 310 par. (1) and (2), Article 311 Par.(1), Article 316 and Article 207 Indonesia Criminal Court with respect to Constitution of 1945 (Republic of Indonesia), p.278 – 279.

[64] *Ibid.*

[65] Article 12 Par. 3 International Covenant on Civil and Political and Rights (UN Treaty).

[66] American Association for the International Commission of Jurists, "The Siracusa Principle on The Limitation and Derogation Provision in the International Covenant on Civil and Political Rights", *Human Rights Quarterly* 7, *No.1*, (1985), 3-14.

[emphasis added] to the pursuance of legitimate aims to ensure the continued and effective protection of Covenant rights."[67]

Likewise, the limitation clause in the Constitution of 1945 also gives similar account for the state in limiting rights. The limitation clause outlines two aspects of state power in limit the human rights, namely, the procedural limit and substantive limit. The procedural limit requires that the human rights limitation should be prescribed by law. In Indonesian legal system, law is a type of regulation that needs to be approved by the Parliament (*Dewan Perwakilan Rakyat,* DPR).[68] The substantive limit relates to the government reason to limit human rights. The limitation clause prescribes the basis for limitation that is strictly for the protection of other human rights, the just demand of morality, religious values, security and public order in a democratic society. From that arrangement, the question arises how to create a balance between the need for government to limit rights and the protection of its rights itself. The answer is rests on the wording of "in a democratic society". The democratic society phrase is important to differentiate limitation between those of a totalitarian society (closed society) with limitation within a democratic society. This phrase encourages to conduct comparative research in order to see other jurisdiction applying the limitation clause. One of the most widely used as an approach to limit right in a democratic society is proportionality test.

In constitutional law studies, proportionality test has become a generic constitutional law that commonly used in democratic society to balance between rights and legal limitation of rights. The generic constitutional law defines as "a skeletal body of constitutional theory, practice, and doctrine that belongs uniquely to no particular jurisdiction."[69] The idea of the generic constitutional law indicates that if a theory, practice, and doctrine have been applied in the various jurisdictions, it then becomes a generic constitutional law. The test has been applied in much of civil law and common law countries. Furthermore, it also has been applied by human rights Court in regional level, such as, the

[67] Human Rights Committee, General Comments No.31 (2004) adopted 18th session (UN).
[68] Article 20 Par. (2) Constitution of 1945 (Republic of Indonesia).
[69] David S Law, "Generic Constitutional Law", *Working Paper University of San Diego School of Law*, (2004) : 7.

European Court of Human Rights, the Inter-American Court of Human Rights and the European Court of Justice.[70] The idea behind proportionality test is to balance the means with the end-result. In balancing between means and the end-result, the means should be helpful, necessary, appropriate and most importantly, proportional.[71] Bernhard Schlink gave an example of a disabled man that tries to defend his apples (property) from a child who steals his apple from the tree. The child disregards his shouting not to take his apple. The only means for him is to use a gun that he can reach to shoot the child down. In this example, Schlink elaborates that the means of shooting the child is effective and necessary to protect the man's apples (property). However, to shoot a child for apples is considered as inappropriate or imbalanced because the life of the child is much precious than the value of a couple of apples.[72] Schlink gave a concrete example of a German Federal Constitutional Court case. The Court faced a question of whether the state could extract a defendant's cerebrospinal fluid to determine his/her mental capacity. The court decided that determining mental capacity was a legitimate goal. However, the court recognized that the pain and danger caused by the extraction. Thus, the court sees that the extraction only justifies in a serious case.[73]

In limiting freedom of association, Maina Kiai, a special rapporteur for Human Rights Council, presented a report to the Human Rights Council on 28th session of 21 May 2012. In his report, Kiai outlines several important aspects of freedom of association limitation. The report explains that the suspension and the involuntary dissolution of an association are the severest types of restrictions on freedom of association. Thus, it can only be applied when there is a "clear and imminent danger resulting in a flagrant violation of national law". The suspension and dissolution "should be strictly proportional to the legitimate aim pursued and used only when softer measures would be insufficient".[74] Furthermore,

[70] Juan Coanciardo, "The Principle of Propotionality : The Challanges of Human Rights", *Journal of Civil law Studies* 3, (2010) : 178.

[71] Berhnard Schlink, "Propotionality in Constitutional Law: Why Everywhere But Here?, *Duke Journal pf Comparative & International* Law 22, (2012) : 291 - 293.

[72] *Ibid.*, 293.

[73] *Ibid*.

[74] Maina Kiai, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of Association. In: Rapporteur UNHRCS, editor. New York: United Nation General Assembly 2012, 18.

Kiai highlighted that decision to dissolve an organization, especially labour organization, "should only occur in extremely serious cases, and it needs to be done through judicial decision so that the rights of defense are fully guaranteed".[75] To evaluate the Law on Societal Organisation, it can be approached by classifying the law into two aspects of rights protection: the substantive rights protection and the procedural rights protection. The substantive rights protection refers to the action of Societal Organisation Law that can be sanctioned. In proportionality test, the action that can be sanctioned needs to be recognized by the relevant article of the Constitution of 1945. The procedural rights protection refers to the procedure in which government applying the sanction. It relates to proportionality of government sanction to the violation done by the societal organisation.

Arguably, the Law has partially complied with the parameter defined in the report and proportionality test interpretation on the limitation clause. The partial compliance is due to issues on the substantive rights protection. The Law contains prohibitory clause that prohibits societal organisation to affiliate with communism and marxism ideology. The Law stipulates several prohibit actions that would result in sanction, if societal organisation breach the prohibition clause.[76] The sanctions are administrative sanction starting from notice of breach, revocation of grants, temporary dissolution, and to the severest punishment of permanent dissolution.[77] In Article 59 (4) of the Law prohibits societal organisation to adopt communism as its ideological foundation. This arrangement violates the freedom of consciences that protects under Article 28E (2) of the 1945 Constitution. ICCPR explicitly categorized that the freedom of consciences as non-derogable rights.[78] Apart from sanctioning communism, there are no substantial issues to the other prohibition clauses. The other prohibition clause includes societal organisation involvement in violence,[79] advocating disintegration and involved in the separatist movement,[80] instigating hatred, contempt on races, ethnicity,

[75] *Ibid*.
[76] Article 59 Law Number 17 Year 2013 on Societal Organisation (Republic of Indonesia).
[77] Article 60 Law Number 17 Year 2013 on Societal Organisation (Republic of Indonesia).
[78] Article 4 Par.2 International Convention on Civil and Political Rights (UN Treaty).
[79] Article 59 par.2 Law Number 17 Year 2013 on Societal Organisation (Republic of Indonesia).
[80] Article 59 par.2 letter a Law Number 17 Year 2013 on Societal Organisation (Republic of Indonesia).

and religions,[81] conducting vigilante actions,[82] and involve in political party fund raising.[83]

In procedural protection aspect, the Law has sufficiently given protection to the freedom of association. The law guarantees the rights of defence through the involvement of court in imposing a sanction on societal organisation.[84] This is an essential safeguard from freedom of association protection perspective as highlighted in Kiai report.[85] Furthermore, the Law has put dissolution as a final measure, if any other measures have failed to prevent an organization to breach the prohibition clauses.[86] This procedural process indicates the adoption of proportionality approach in limiting rights. The steps are the manifestation of the spectrum of sanctions that control government from arbitrarily giving the ultimate sanctions to societal organisation.

The Law outlines three steps: The first is to give written notice.[87] The second step, if it continues to conduct the violations, the sanction increases to stop aiding and temporary termination.[88] Finally, dissolution and termination declared by the court.[89] Unfortunately, all those features have been removed by the amendment to the Law. The changes as adopt in the amended Law has breached the limitation clause from proportionality test perspective that requires proportionality between the government measures with the threat posed by the societal organisation. The enactment of the amended law is disproportionate because of three stipulations in the amendment law: first, it broadened definition that could potentially use to silence critics to government officials. Secondly, the removal of due process in societal organisation is sanctioning. Finally, it criminalizes the organisation members based on its membership of the organisation, if the organisation violates the prohibition clause. One of the prohibition clauses in the Law of 2013 is a prohibition for an organisation to conduct any sedition toward races, ethnicities,

[81] Article 59 par.2 letter c Law Number 17 Year 2013 on Societal Organisation (Republic of Indonesia).
[82] Article 59 par.2 letter e Law Number 17 Year 2013 on Societal Organisation (Republic of Indonesia).
[83] Article 59 par.3 Law Number 17 Year 2013 on Societal Organisation (Republic of Indonesia).
[84] Article 60 – 82 Republic of Indonesia Law Number 17 Year 2013 on Societal Organisation
[85] Miani Kai, *Report of the Special*.
[86] Article 61 Law Number 17 Year 2013 on Societal Organisation (Republic of Indonesia).
[87] Article 62 Law Number 17 Year 2013 on Societal Organisation (Republic of Indonesia).
[88] Article 64 Law Number 17 Year 2013 on Societal Organisation (Republic of Indonesia).
[89] Article 70 Law Number 17 Year 2013 on Societal Organisation (Republic of Indonesia).

and groups.[90] The Law constructs the definition of races, ethnicities, and groups within the line of common understanding. In common understanding, those categories refer to the identity of a certain group of people that share a common attribute, such as, political, culture or physical attributes. The Amendment to the Law has broadened the definition of "groups" element to include state officials.[91] This provision can potentially be misused to stifle legitimate criticism to state officials. The protection of criticism to government officials is an essential part of freedom of expression.[92] Furthermore, the sanction itself is disproportionate because it adds severe criminal sanction for the member of the societal organisation, if found guilty of violation to this prohibition clause.

The second problem with the Amendment Law of 2017, it has removed all the procedural safeguards existed in the previous Law. The main important feature of societal organisation is a procedural safeguard that is the involvement of judiciary in the sanctioning process (*ex-ante process*). The societal amendment law shifted this approach to *post-factum* process. In *post-factum* process, the government dissolves the organisation first then the organisation can challenge the decision in the court. The shifted mechanism is a serious violation of the human rights principle, where in the severest punishment for rights, due process must be put in place before any government decision can be given. Finally, the most important objection to the Amendment Law is the criminal sanction. The formulation of criminal sanction is vague. It does not meet the standard and criteria of *lex certa. Lex certa* principle requires that criminal sanction need to be defined as accurate, specific and precises as possible. The definition of criminal actions in the law has failed the *lex certa* principle. It is notable in the use of "indirect involvement" category as a criminal element in the formulation of the criminal actions. Potentially, such formulation could result in the arbitrary punishment to a member of the organisation that leads to arbitrary mass prosecution to the member of the societal organisation.

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[90] Article 59 par (1) letter a Law Number 17 Year 2013 on Societal Organisation (Republic of Indonesia).

[91] Article 59 par (3) letter a via Article 1 Number 2 Government Regulation in Lieu Number 2 Year 2017 on Amendment of Law Number 17 Year 2013 on Societal Organisation (Republic of Indonesia).

[92] Reem Segev, "Freedom of Expression : Criticizing Public Officials," *Amsterdam Law Forum* [Online], Accessed March 20, 2018 http://amsterdamlawforum.org/article/view/113/204.

On July 2017, the government announced HTI dissolution. HTI dissolution is based on the Amendment Law.[93] Arguably, the dissolution is potentially unlawful because it is based on law that its constitutionality is questionable. The enactment of the Law made Indonesia fall to the paradox democracy, in which the government uses undemocratic measures to constrain the development of anti-democracy political force. In a democratic society, the government ought to use democratic approach to limit rights that are to apply proportionality test in limiting freedom of association. The government concern to HTI movement is reasonable and justifiable. The application of proportionality test dictates that government response should be proportionated with HTI's level of threat. Thus, the government needs to focus and assess HTI's action and strategy.

As it has been discussed above, HTI defines its strategy into three stages, in which HTI has entered the second stages. The second stage is interaction and infiltration stage where HTI's activist interact and influence key government and societal organisation.[94] This phenomenon has amplified the level of HTI threat. However, it has not significantly posed "clear and imminent danger" to apply the severest sanction that is the dissolution. Other administrative measures need to be conducted before it can be applied to dissolve HTI as an organisation, such as, limiting HTI activities to interact with key government institutions, or prohibiting HTI to accesses government support including prohibiting the use of public utilities for its activities. The severest form of limitation, such as, the permanent dissolution can only be done, if the government has substantial indication that HTI is about to enter its stage three, that is the revolution.

V. CONCLUSION

HTI as political-ideological movement is, indeed, against *Pancasila*. The incompatibility between HTI's ideology and *Pancasila* situates in three aspects: HTI's exclusivity against *Pancasila's* inclusivity; HTI's God Soverignty against

[93] Ambaranie Nadia Kemala Movanita, "HTI Resmi Dibubarkan Pemerintah" [Government Officially Disbanded HTI], Kompas.com, 19 July 2017, https://nasional.kompas.com/read/2017/07/19/10180761/hti-resmi-dibubarkan-pemerintah.

[94] Burhannudin Muhtadi, *The Quest*, 629.

Pancasila's People Sovereignty; and HTI's trans-nationalism against *Pancasila* nationalism (nation-state). All of the three aspects are important elements of Indonesia existence and integration. For instance, the inclusive character of *Pancasila* is based on agreement from Indonesian founders to establish a state that overcomes the primordial spirit of groups. Thus, the state should not be based on majority nor minority identity. This idea has become the Indonesian consensus that unified Indonesian. Any attempt to replace the consensus, especially, toward the more exclusive state would result in Indonesian disintegration. Furthermore, the trans-nationalism character of HTI's ideology would result in the elimination of the most important essence of Indonesia as a state that is Indonesia nation (*kebangsaan Indonesia*). The HTI's trans-nationalism ideology eliminate Indonesia nation identity under the domination of another foriegn identity that is the Arab through the imposition of Arab language as the official language of HTI's state-to-be. The incompatibility of HTI's ideology and *Pancasila* is sufficient to raise justifiable concern for government to the danger of HTI's movement.

Nonetheless, no matter how subversive HTI's ideology to *Pancasila*, the government still cannot limit HTI's rights solely based on its incompatibility to *Pancasila*, since HTI's ideology at the level of ideas fall under freedom of conscience protection clause that cannot be derogated under ICCPR. The government action to limit HTI's rights of association is justifiable if HTI has tried to impose its ideology through revolution. The limitation itself should be justified under the limitation clause of the 1945 Constitution. I concluded that the proportionality test application by the interpretation of the limitation clause of the 1945 Constitution is persuasive. This argument is based on the democratic society phrase of the limitation clause, in which many of today democratic society used the approach to interpret it.

The proportionality test dictates that any action against freedom of association or any other rights limitation should be proportional. Thus, the limitation should be constructed within the spectrum of government measures. In the freedom of association context, the limitation should be initiated from minor administrative measure, such as, notification of breach up to the severest form

of limitation that is the dissolution. The dissolution should be used in the strictest form, in which there is "a clear and imminent danger resulting in a flagrant violation of national law." The government measure at this point does not reflect the limitation clause of the 1945 Contitution. The Amendment Law of 2017 reflected the use of totalitarian measures as opposed to democratic society measures. The application of proportionality test confirms the compatibility of the previous Law with the limitation clause but rejects the Amendment Law of 2017. In HTI issues, at the current stage, the proportionality test interpretation requires that government can limit HTI's freedom of association by imposing some restriction in their activities, such as prohibiting the use of public facilities to their activities, prohibiting interaction and cooperation between HTI and key political and government institutions. Additionally, the severest restriction of HTI's dissolution can only be applied if there is a strong indication of HTI is entering its final stage, the revolution.

BIBLIOGRAPHY

Amendment Constitution of 1945 (Republic of Indonesia).

Anderson, Benedict R. O'G. *Imagined Communities: reflections on the origin and spread of nationalism*, London : Verso, 2003.

An-Nabhani, Taqiuddin [English Translation], *The Islamic State*, London : Al-Khalifah Publications, 1998.

American Association for the International Commission of Jurists. "The Siracusa Principle on The Limitation and Derogation Provision in the International Covenant on Civil and Political Rights", *Human Rights Quarterly 7, No.1*, (1985) : 3-14.

Bahar, Saafroedin, et.al. eds. *Risalah Sidang Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan Indonesia [Minutes of Meeting of Indonesia Independence Attempt Investigation Agency]*. Jakarta Indonesia State Secretariat, 1995.

Blackburn, Simon *The Oxford Dictionary of Philosophy Open Societ/Closed Society*. Oxford: Oxford University Press, 2016.

Coanciardo, Juan. "The Principle of Propotionality : The Challanges of Human Rights", *Journal of Civil law Studies* 3, (2010) : 177 – 182.

Constitutional Court Decision Number 14/PUU-VI/2008 on Judicial Review of Law Number 1 Year 1946 on Indonesia Criminal Code.

Constitutional Court Decision Number 138/PUU-VII/2009 on Judicial Review of Government Regulation in Lieu Law Number 4 Year 2009 on Amendment of Law Number 30 Year 2002 on Corruption Eradication Commission (Republic of Indonesia).

Constitutional Court Decision Number 82/PUU-XI/2013 on Judicial Review Law Number 17 Year 2013 on Societal Organisation with respect to Constitution of 1945 (Republic of Indonesia).

Erdianto, Kristian. "Ini Alasan Pemerintah Bubarkan Hizbut Tahrir Indonesia [Government's Reason in Disbanding Hizbut Tahrir Indonesia]", Kompas.com, May 8, 2017, http://nasional.kompas.com/read/2017/05/08/14382891/ini.alasan.pemerintah.bubarkan.hizbut.tahrir.indonesia.

Erdianto, Kristian, "Wiranto Sebut Pembubaran HTI Pakai Perppu Tak Langgar Prosedur Hukum [Wiranto Claims Using Perppu To Dissolve HTI Does Not Violate the Law]", Kompas.com, May 17, 2017, http://nasional.kompas.com/read/2017/05/17/18402491/wiranto.sebut.pembubaran.hti.pakai.perppu.tak.langgar.prosedur.hukum.

Editorial Team, "Deretan Kudeta oleh Hizbut Tahrir" [List of Hizbut Tahrir Coup de etat], Kumparan, May 2, 2017, https://kumparan.com/@kumparannews/deretan-upaya-kudeta-oleh-hizbut-tahrir.

G, Wisnu and Amir. "Dandim Terima Kunjungan Silturahmi Pengurus DPD 2 HTI Kota Bogor [Bogor Military Commander Accept HTI Courtesy Call]," Bogorplus, October, 2, 2013, http://bogorplus.com/index.php/bogor-raya/item/1916-dandim-terima-kunjungan-silaturahmi-pengurus-dpd-2-hti-kota-bogor.

Government Regulation in Lieu Law Number 2 Year 2017 Amendment of Law Number 17 Year 2013 on Societal Organisation (Republic of Indonesia).

Harari, Yuval. *Sapiens A Brief History of Humankind*, London : Vintage Books, 2014.

Hanif, Noman. "Hizb ut Tahrir : Islam's Ideological Vanguard", *British Journal of Middle Eastern Studies 39*, No.2 (2012) : 201-225.

Human Rights Committee, General Comments No.31 (2004) adopted in 18th Session (UN).

Hatta, Mohammad. *Sekitar Proklamasi* [On The Proclamation], Jakarta: Tintamas, 1970.

Hizb ut-Tahrir, "The Draft Constitution of the Khilafah State, accessed March 3, 2018 http://www.hizb.org.uk/wp-content/uploads/2011/02/Draft-Constitution.pdf.

Indrayana, Denny. *Indonesia Constitutional Reform 1999 - 2002 : An Evaluation of Constitution-Making in Transition,* Jakarta: Kompas, 2008.

International Covenant on Civil and Political and Rights (UN Treaty).

Ismail, Faisal. "Islam, Politics and Ideology in Indonesia : A study of The Process of Muslim Acceptance of The Pancasila". Ph.D., McGill University, 1995.

Khadafi, Ahmad. Hizbut Tahrir Vs "Pancasila" dan "NKRI". Tirto, May 05 2017, 2018 https://tirto.id/hizbut-tahrir-indonesia-vs-pancasila-dan-nkri-cn5x.

Kiai, Maina. Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association. In: Rapporteur UNHRCS, editor. New York: United Nation General Assembly 2012.

Knight, Andrew and Les Ruddock (ed). *Advance Research Methods in the Built Environment*, Chichester : Willey-Blackwell, 2008.

Kresna, Mawa, Pilkada Jakarta Berujung Pemberangusan HTI [Jakarta Election Resulted in HTI's Dissolution], Tirto, 12 May 2017, https://tirto.id/pilkada-dki-jakarta-berujung-pemberangusan-hti-coxH.

Law, David S. "Generic Constitutional Law", *Working Paper University of San Diego School of Law*, (2004) :2 – 69.

Law Number 17 Year 2013 on Societal Organisation (Republic of Indonesia).

Mackie, Jamie, "Patrimonialism: The New Order and Beyond*" in Soeharto's New Order and its Legacy Essays in honour of Harold Crouch 2,* ed. Edward Aspinall GF Canbera: Australian Univesity Press, 2010.

MPR Decision Number II/MPR/1978 on the Guideline on The Observant and Implementation of Pancasila.

Movinta, Ambaranie. "HTI Resmi Dibubarkan Pemerintah". Kompas.com, July 19 2017, https://nasional.kompas.com/read/2017/07/19/10180761/hti-resmi-dibubarkan-pemerintah.

Muhtadi, Burhan. "The Quest for Hizbut Tahrir in Indonesia", *Asian Journal of Societal Science 37*,(2009) : 623 – 645.

Nelson, R.E. "Nationalism, Islam, 'secularism' and the state in Contemporary Indonesia, *Australian Journal of International Affairs 64*, No.3 (2010) : 328 - 343.

Nugroho, Eryanto. "Can Hibut Tahrir really be dissolved ?". Indonesiatmelbourne (blog), 2 June 2017, http://indonesiaatmelbourne.unimelb.edu.au/can-hizbut-tahrir-really-be-dissolved/.

Pre-Amendment Constitution of 1945.

Popper, Karl. *The Open Society and Its Enemies*. Frome & London: Buttler & Tanner Ltd, 1945.

Ropi, Ismatu. *Religion and Regulation in Indonesia*. Singapore: Palgrave Macmillan, 2017.

Saudale, Vento. "Ini Jawaban Bima Arya Terkait Peresmian Kantor HTI [Bima Arya Responses to HTI's Office Opening Ceremony]", Berita Satu, February 11, 2016, http://www.beritasatu.com/nasional/348691-ini-jawaban-bima-arya-terkait-peresmian-kantor-hti.html.

Schlinik, Bernhard. "Proportionality in Constitutional Law: Why Everywhere But Here?, *Duke Journal of Comparative & International Law"*, 22, (2012), 291-302.

Segev, Reem "Freedom of Expression : Criticizing Public Officials," *Amsterdam Law Forum* [Online], Accessed March 20, 2018 http://amsterdamlawforum.org/article/view/113/204.

"Sheikh Muhammad Taqiuddin al-Nabhani", Hizb Ut Tahrir Australia, accessed March 20, 2018 http://www.hizb-australia.org/2016/02/sheikh-muhammad-taqiuddin-al-nabhani/.

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Mainstreaming Human Rights in the Asian Judiciary

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Abstract

Human rights protection in Asia is hindered by the absence of binding human rights instruments and enforcement mechanisms, including the lack of human rights mainstreaming into the works of relevant stakeholders, notably the judiciary. Judiciary plays key roles in the realization and protection of human rights. As the guardian of the Constitution, the Indonesian Constitutional Court ('the Court') is mandated to protect the human rights of the citizens. This paper argues that the Court, which previously served as the President of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC), has the potential to play a leading role in mainstreaming human rights in the region. Using normative and comparative legal research methodologies, the paper identified the Court's mandates on human rights at the national, regional and international levels; assessed the need for human rights mainstreaming in the Asian judiciary; and examined the significant potential of the AACC to house the mainstreaming project. Finally, it proposes several recommendations for the Court's consideration, namely to encourage judicial independence, recommend human rights incorporation into judicial discussions and decisions, suggest the establishment of a platform to enhance human rights expertise of the judiciary, as well as facilitate a platform for the development of binding human rights instruments and the establishment of an Asian Human Rights Court.

Keywords: AACC, Asian Human Rights Court, Indonesian Constitutional Court, Judicial Independence, Judiciary

I. INTRODUCTION

Judiciary plays important roles in the realization of human rights and justice. In practice, it has expanded the interpretation of human rights norms, serves as a checks and balances mechanism between the executive and legislative branches,

helps deliver justice to the victims of human rights violations and holds their perpetrators accountable.[1]

Human rights is guaranteed under provision XA of the 1945 Constitution of the Republic of Indonesia (the Constitution). This inclusion reflects Indonesia's commitment in the protection of human rights. As the institution set up to safeguard the implementation of the Constitution, the Court has the mandates to promote and protect human rights in line with the requirement of provision XA of the Constitution, as well as other prevailing human rights instruments at the regional and international level, notably the Universal Declaration of Human Rights (UDHR)[2] and a number of international human rights instruments to which Indonesia is a party, as well as the ASEAN Human Rights Declaration (AHRD).[3]

Since its establishment in 2003, the Court has been considered to act as the guardian of human rights.[4] This is evidenced by, inter alia, the authorization of judicial review through the Constitutional Court to ensure the protection of the rights of citizens,[5] as well as the issuance of several Court's judgments which have indicated its commitment towards the promotion and protection of human rights.[6] At the regional level, it has also played a leading role in setting the direction of Association of Asian Constitutional Courts and Equivalent Institutions (AACC), to which it previously presided for over three years.

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1 See, among others: Fahed Abul-Ethem, "The Role of the Judiciary in the Protection of Human Rights and Development: Middle Eastern Perspective," *Fordham International Law Journal* 26(3) (2003); Ackermann, L.W.H., "Constitutional protection of human rights: Judicial review," *Columbia Human Rights Law Review 21*(1) (1989): 59-71; Eugene Cotran and Adel Omar Sherif, *International Conference on the Role of the Judiciary in the Protection of Human Rights: The Role of the Judiciary in the Protection of Human Rights* (London: Brill, 1997); Frank B Cross, "The Relevance of Law in Human Rights Protection," *International Review of Law & Economics* 19, no. 1 (1999): 87-98; Saldi Isra, "The Role of the Constitutional Court of Indonesia in Strengthening Human Rights in Indonesia. Constitutional Journal," *Jurnal Konstitusi*, accessed March 25, 2018, https://ejournal.mahkamahkonstitusi.go.id/index.php/jk/article/viewFile/33/32.

2 UDHR (adopted 10 December 1948).

3 AHRD (adopted 18 November 2012), accessed April 25, 2018, http://www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf.

4 Isra "The Role of the Constitutional Court of Indonesia"; See also Arif Hidayat, Speech at the 3rd Congress of AACC in Bali, Indonesia, 8 – 14 August 2016, accessed March 25, 2018, http://www.mahkamahkonstitusi.go.id/public/content/infoumum/proceeding/pdf/Proceeding_6_PRECEEDING%20CONGRESS%20AACC.pdf.

5 The Indonesian Constitution 1945, art 24(C)(1) and 24(C)(1).

6 See e.g.: Decision No 011-017/PUU-VIII/2003 regarding the review of law No. 12/2003 on General Elections of the members of Parliament at the national and provincial levels; Decision No 6-13-20/PUU-VIII/20120 regarding the review of Law No 16/2014 on Indonesian Prosecutor; and Decision No55/PUU-VIII/2010 regarding the review of Law No 18/2004 on Plantation.

The existence of the AACC bears significance to the region. It serves not only as the only Asian platform to exchange experience and information and deliberate issues related to constitutional practice and jurisprudence beneficial for the development of constitutional courts and similar institutions in the Asian region,[7] but it also raises an aspiration on the enhancement legal frameworks and mechanisms to protect constitutional rights and human rights of Asian people in general, given the reluctance and inaction of the executive and legislative branches of sub-regional Asian bodies and mechanisms.[8]

As widely noted, legal protection of human rights in Asia has not been adequately guaranteed. Unlike in Europe, America and Africa, Asian regional's responses towards the establishment of a strong regional human rights regime have not been consolidated.[9] This is evident with the absence of a region-wide human rights mechanism with a mandate to oversee human rights protection in Asian region as a whole. In addition, Asian region lacks binding human rights instrument which ensures consistent application of human rights standards and emanates obligations to its states parties to undertake certain legislative or other possible measures to give effect to the rights or freedoms guaranteed under such instrument at the domestic, regional and/or international level.[10] Furthermore, the region also lacks enforcement or adjudicatory mechanisms which have been proven to be the prerequisite of strong mechanisms for human rights protection in the other regions.[11] Authoritative interpretation and obligatory application of human rights standards by a judicial organ are needed, since no right is genuinely assured unless it is safeguarded by a competent court.[12]

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7 AACC, "About AACC," accessed April 25, 2018, https://aacc.mahkamahkonstitusi.go.id/aacc/1.

8 See generally Hsien-Li TAN, *The ASEAN Intergovernmental Commission on Human Rights Institutionalising Human Rights in Southeast Asia* (Cambridge: Cambridge University Press, 2011); Nicholas Doyle, "The AHRD and the Implication of Recent Southeast Asian Initiatives in Human Rights Institutions-Building and Standard Setting," *International and Comparative Law Quarterly* 63(1) (2014): 67-101; SAPA TFAHR, *Report: The Future of Human Rights in ASEAN; Public Call for Independence and Protection Mandates* (Bangkok, 2014); Vitit Muntarbhorn, *Unity in Connectivity? Evolving Human Rights Mechanisms in the ASEAN Region* (Leiden, etc: Brill, 2014); Ben Saul, Jacqueline Mowbray, Irene Baghoomians, "The Last Frontier of Human Rights Protection: Interrogating Resistance to Regional Cooperation in the Asia Pacific," *Australian International Law Journal* 18 (2011): 23.

9 *Ibid*.

10 American Convention on Human Rights (adopted 22 November 1969, entered into force18 June 1979) UNTS 1144 art 2 (ACHR).

11 See e.g.: Muntarbhorn, *Unity*, 106 - 112.

12 OAS, Resolution XXXI on Inter-American Court to Protect the Rights of Man (adopted 1948).

In light of the above, this paper argues that the Court can and should play a leading role in the enhancement of legal protection of human rights in Asia. Using a normative and comparative legal research methodologies, this paper reviews the prevailing legal frameworks at the national, regional and international levels; examines the need for human rights mainstreaming in the Asian Judiciary; identifies human rights protection gaps in Asia based on a comparison with other regions; assesses the developments and the works of relevant mechanisms in Asia, notably the ASEAN Intergovernmental Commission on Human Rights (AICHR); and highlights the potential roles of the AACC in enhancing legal protection of human rights in Asia. Against this backdrop, and taking into account Indonesia's past and present roles in the AACC and in the context of regional human rights cooperation in general, it finally explores the potential roles of the Court in mainstreaming human rights in the Asian Judiciary.

II. DISCUSSION

2.1. Legal Frameworks of Court's Mandates on Human Rights

As the guardian of the Constitution, the Court is mandated among others to protect the human rights of the citizens.[13] The Constitution guarantees human rights under provision XA. This provision consists of 10 articles which regulate the rights of citizen and non-citizen as well as the obligations of the state and individuals. The articles also set the limitation to those rights and guarantee their implementation.[14]

Of those articles, there are 21 clauses that govern general rights of individuals, specific rights of the citizens and the rights of vulnerable groups, namely children[15] and indigenous people.[16] Meanwhile, the obligation of state to enhance and advance the fulfillment of human rights including the obligation of every human being to respect other's rights are governed respectively by articles 28(I)(4) and 28(J)(1) of the Constitution.

[13] Constitution (1945), provision XA; Isra, "The Role of the Constitutional Court of Indonesia".
[14] *Ibid*. arts 28A, 28B, 28C, 28D, 28E, 28F, 28G, 28H, 28I and 28J.
[15] *Ibid*. art 28(B)(2).
[16] *Ibid*. art 28(I)(3).

The Constitution also regulates rights' limitation under articles 28(J) and 28(I)(1) which provide that (i) the enjoyment of human rights and freedoms are constrained by law on the basis of respect to human rights of others as well as other grounds of consideration such as morality, religious norms, security and public order; and (ii) the non-derogability of several human rights, including, freedoms of thoughts and conscience, freedom of religion and right against the slavery at any situations.

In addition, the Constitution also governs the guarantee of human rights implementation, whereby article 28(I)(5) provides a mandate for the law to regulate the implementation of human rights in line with the principles of rule of law and democracy.

Furthermore, at the regional and international level, Indonesia has ratified numerous binding and non-binding human rights instruments. Indonesia is a state party to a majority of core human rights treaties and their optional protocols, namely International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),[17] International Covenant on Civil and Political Rights (ICCPR),[18] International Covenant on Economic, Social and Cultural Rights (ICESCR),[19] Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[20] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),[21] Convention on the Rights of the Child (CRC),[22] Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OP-CRC-AC),[23] Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (OP - CRC - SC),[24] International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW),[25] and Convention on the Rights of Persons with Disabilities

[17] ICERD (adopted 7 March 1966 entered into force 4 January 1969) 660 UNTS.
[18] ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
[19] ICESCR (adopted 16 December 1966, entered into force 3 Janquary 1976) 993 UNTS 3.
[20] CEDAW (adopted 18 December 1979, entered into force 3 September 1981) 2131 UNTS.
[21] CAT (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.
[22] CRC (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS.
[23] OP – CRC - AC (adopted 25 May 2000, entered into force 12 February 2002) 2173 UNTS.
[24] OP-CRC-SC (adopted 25 May 2000, entered into force 18 January 2002) 2171 UNTS.
[25] ICRMW (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS.

(CRPD).[26] As one of the main organs of the judiciary, the Court is among the key stakeholders responsible to support the domestication and implementation of the commitments stipulated under these instruments.[27]

Similarly, being the member of the United Nations (UN) and the Association of Southeast Asian Nations (ASEAN), Indonesia is also bound by human rights commitments enshrined in the UDHR as well as the AHRD. Despite the fact that the two documents are not formally binding, they entail provisions that have been recognized as a customary international law and have a *jus cogens*[28] characters and therefore could be considered as binding under international law, including those pertain to the prohibition of torture, arbitrary detention and slavery.[29]

2.2. Human Rights in Asia and the Role of the Judiciary; the Need for Human Rights Mainstreaming in the Asian Judiciary

The deterioration of human rights situation in Asia has been subject to a serious concern. Southeast Asia countries such as Cambodia, Lao PDR, Malaysia, Singapore, Vietnam and Thailand have seen governmental suppression to freedom of expression, association, opinion, peaceful assembly, press and political participation.[30] In Myanmar, Rohingya minority has faced longstanding prosecution

[26] See OHCHR, "Status of Ratification," accessed April, 25 2018, http://indicators.ohchr.org/.

[27] Pursuant to art 31 of the Vienna Convention on the Law of Treaties (VCLT), Indonesia's ratification indicates that Indonesia has consented to be bound by the terms of the ratified treaties and to perform them in good faith.

[28] *Jus cogens* is a rule or principle in international law that is of utmost fundamental and it binds all states and does not allow any exceptions. Since late 1990s, there has been an increased acceptance of this concept in doctrine, the case laws of international courts and tribunals and the works of International Law Commission (ILC). Article 53 of the VCLT considers that any treaty contradicting *jus cogens* norms is null and void. The article also perceives *jus cogens* norms as non-derogable and can be modified only by a subsequent norm of general international law having the same character. See e.g.: Raham Gooch and Michael Williams, *Oxford Dictionary of Law Enforcement* (Oxford: Oxford University Press, 2007); Christian Tomuschat and Jean-Marc Thouvenin, *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Leiden: Brill, 2006); Erika de Wet, "*Normative Evolution, Ch.23 Jus Cogens and Obligations Erga Omnes,"* in Dinah Shelton (ed), *the Oxford Handbook of International Human Rights Law*, (Oxford: Oxford Scholarly Authorities on International Law, 2013); L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Developments, Criteria, Present Status* (Helsinki: Finnish Lawyers, 1988).

[29] A state is in violation of international law when it is found to practice, encourage and condone those rights, see James Crawford, *Brownlie's Principles of Public International Law* (Oxford: Oxford University Press, 2012) 642.

[30] See e.g: Human Rights Watch, "World Report 2018," accessed April 27, 2018, https://www.hrw.org/sites/default/files/world_report_download/201801world_report_web.pdf; Related statement of ASEAN Parliamentarians for Human Rights (APHR) on human rights issues in the region, accessed April 27, 2018, http://www.aseanmp.org; Yuyun Wahyuningrum, "Ahead of 10th Birthday, ASEAN Rights Body Fails to Evolve," *Jakarta Post,* February 6, 2018, http://www.thejakartapost.com/academia/2018/02/06/ahead-of-10th-birthday-asean-rights-body-fails-to-evolve.html.

within Myanmar and has been increasingly deprived of a number fundamental rights and freedom, including being deprived by their Myanmar citizenship.[31] The situation significantly deteriorated with the initiation of "clearance operations" by Myanmar's security forces which was described as "a textbook example of ethnic cleansing" by the UN High Commissioner for Human Rights, Zeid Ra'ad Al Hussein.[32] In the Philippines, aside from restriction, harassment and killing of journalists, grave concerns have also been raised over President Duterte's war on drugs that have allegedly killed over 12,000 people over the last two years. In Indonesia, discrimination and intimidation to minorities and vulnerable groups continue to occur in many parts of the country.[33]

Similarly, countries in South Asia, including Afghanistan, Bangladesh, India, Pakistan and Sri Lanka have signaled similar attitudes on human rights issues. Based on the record of the Amnesty International in 2017, CSOs have been subject to harassments and forced closure, press has been suppressed, government critics has been subject to crude colonial-era laws, minorities and other vulnerable groups have been threatened, new laws have been invoked against online critics and brutal treatments have occurred in the conflicts-affected areas.[34]

Furthermore, as highlighted in the World Report of Human Rights Watch, China has imposed an anti-rights agenda in multinational forums and forged stronger alliances with repressive governments.[35] Further, the report also highlights a number of serious human rights issues, including attacks to human rights defenders, suppression to freedom of expression, discrimination against religious

[31] High Commissioner for Human Rights, "Opening Statement to the 36th session of the Human Rights Council, 11 September 2011," accessed April 27, 2018, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?LangID=E&NewsID=22044; see also OHCHR, "Brutal attacks on Rohingya meant to make their return almost impossible – UN human rights report, 11 October 2017," para. 10, accessed 27 April, 2018, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?LangID=E&NewsID=22221.

[32] See e.g. OHCHR, "Brutal," paras. 1-3; OHCHR, "Mission report of OHCHR rapid response mission to Cox's Bazar, Bangladesh, 13-24 September 2017, 11 October 2017," 1, accessed 27 April, 2018, http://www.ohchr.org/Documents/Countries/MM/CXBMissionSummaryFindingsOctober2017.pdf; Human Rights Watch, "Crimes against Humanity by Burmese Security Forces Against the Rohingya Muslim Population in Northern Rakhine State since August 27, 2017, 26 September 2017," accessed 27 April, 2018, https://www.hrw.org/sites/default/files/supporting_resources/burma_crimes_against_humanity_memo.pdf.

[33] See e.g.: Human Rights Watch, "World"; Wahyuningrum, "Ahead of 10th".

[34] Biraj Patnaik, "Human Rights Violations Endemic in South Asia," accessed April 27, 2018 https://www.amnesty.org/en/latest/news/2017/02/human-rights-violations-endemic-in-south-asia/.

[35] Human Rights Watch, "World".

minorities and other vulnerable groups, as well as denial of rights of refugees and asylum seekers.[36]

Meanwhile, Asian governmental approach and position towards fundamental issues concerning the interpretation and implementation of human rights have indicated limited political will and commitments.[37] At the global level, the status of Asian countries' ratifications and reservations reveals a relatively modest acceptance towards international human rights instruments that include strong monitoring procedures or pose political sensitivities to Asian countries' domestic situations.[38] Although many Asian countries have mostly ratified the less politically sensitive instruments, i.e.: CEDAW, CRC and CRPD, their commitments are still greatly limited by their reservations and declarations. In addition, a majority of Asian countries have yet to ratify most of the OPs to these three instruments, particularly OP - CEDAW, OP - CRC on a communication procedures and OP - CRPD, all of which embody the communication procedures.[39] Furthermore, the status of Asian countries' ratifications of and reservations towards other core human rights treaties, including their OPs, has revealed even a lower level of observance by Asian countries.[40] Moreover, there exists an example of a serious discrepancy between the ratifications of international human rights instruments, notably the ICCPR, and the state of implementation of human rights obligations protected under those instruments.[41]

Ideally, if Asian countries have rendered low observance towards the global human rights framework, every attempt shall be made to address such gaps

[36] *Ibid*.

[37] OHCHR, "Status of Ratification", See also: Natalie Baird, "To Ratify or Not to Ratify? An Assessment of the Case for Ratification of International Human Rights Treaties in the Pacific," *Melbourne Journal of International Law* 12, no. 2 (2011): 249-289; Mathew Davies, "States of Compliance? Global Human Rights Treaties and ASEAN Member States," *Journal of Human Rights* 13, no. 4 (2014): 00; Li-ann Thio, "Implementing Human Rights in ASEAN Countries: "Promises to Keep and Miles to Go before I Sleep"," *Yale Human Rights & Development Law Journal* 2 (1999): 1-215.

[38] *Ibid*.

[39] *Ibid*.

[40] *Ibid*

[41] See e.g.: Oona A Hathaway, "Do Human Rights Treaties Make a Difference?," *The Yale Law Journal* 111, no. 8 (2002): 1935-2042; UNHRC Working Group on the UPR Sixth Session (18 September 2009) UN Doc A/HRC/WG.6/6/KHM/2; UPR, 'Cambodia,' accessed April 27, 2018 https://www.upr-info.org/en/review/Cambodia/Session-18---January-2014; APHR, "Report: Death Knell for Democracy; Attacks to Lawmakers and the Threat to Cambodia's Institutions," accessed 27 April, 2018, https://aseanmp.org/cambodia-mps-report/.

through a different level of mechanism, i.e. regional mechanism. Regional framework supplement international mechanisms as different regions may entail regional particularities that cannot always be effectively solved by global instruments and mechanisms.[42] Regional human rights mechanisms and standards in Europe, Americas and Africa have contributed to safeguarding human rights and the fundamental freedoms of their people. Those regional frameworks have stronger monitoring and enforcement mechanisms as compared to universal treaties.[43] Those institutions have enhanced the legitimacy of rights within and across the regions, ensured the balance of power politics and shaped states' behavior.[44]

In light of the above, this section seeks to provide a comparative review on the status of legal protection of human rights by the international and the regional mechanisms so as to assess the gaps in the existing legal frameworks and mechanisms in Asia. In addition, the second half of the section will seek to highlight the need for the Judiciary to take the lead given the reluctance and inaction of the legislative and executive branches of sub-region bodies and mechanisms in Asia. Among the key strategies to advance human rights protection is the mainstreaming human rights into the works of relevant stakeholders. Human rights is cross cutting in nature and it requires concerted efforts from various stakeholders to take part in its realization. Judiciary is deemed as one of the key players responsible in the realization of human rights and is therefore obliged to ensure that human rights are not compromised or encroached.[45]

2.2.1. The State of Legal Protection of Human Rights in Asia; a Comparative Outlook

The fundamental revisions to the pre-Second World War order were prompted by the atrocities of the Second World War and the concern to prevent a recurrence

[42] Dinah Shelton, "The Promise of Regional Human Rights Systems," in BH Weston and SP Marks (eds), *The Future of International Human Rights* (New York: Transnational, 1999) 353.

[43] Hathaway, "Do Human Rights Treaties".

[44] A number of studies have shown the impact of international and regional institutions on state behaviours in the area of human rights, see e.g. Andre Cortell & James Davis, "How Do International Institutions Matter? The Domestic Impact of International Rules and Norms," *International Studies Quarterly* 40, no. 4 (1996): 451-478.

[45] Anifah Aman, Speech at the AICHR Judicial Colloquium on the Sharing of Good Practices regarding International Human Rights Law, which was convened on 13 – 15 March 2017 in Kuala Lumpur, Malaysia.

of the catastrophes associated with Axis power policies.[46] These had urged the world leaders to undertake initial steps towards the modern international human rights law.[47] Universal commitment to codify human rights and fundamental freedoms were evidenced by the inclusion of human rights under the UN Charter, which was followed by the adoptions of the International Bill of Rights.[48] Since then, regional and international codification of various binding and non-binding human rights instruments continue to take place.[49]

These standard setting has evolved in parallel with the developments of numerous supervisory and/or enforcement mechanisms at the contexts of the UN and regional mechanisms. Within the UN system, Charter-based bodies were established to fulfill the relevant mandates under the UN Charter.[50] Succeeding the Commission on Human Rights, the Human Rights Council serves as a political platform to discuss, address, decide, make recommendations and report on all thematic human rights issues and situations throughout the world. In addition, it also possesses the mandates to enhance coordination among UN entities on human rights issues and to mainstream human rights within the UN system.[51]

In addition, the treaty-based bodies were also established by their respective international human rights treaties, with the mandates to examine states parties' compliance with their treaty obligations.[52] They are comprised of independent experts, which are working on a *pro-bono* basis and nominated by the states parties. These treaty bodies include: (1) the Human Rights Committee; (2) the Committee on Economic, Social and Cultural Rights; (3) the Committee on the Elimination of Racial Discrimination; (4) the Committee on the Elimination

[46] See e.g.: Crawford, *Brownlie's principles,* 634; Chowdhury, Azizur Rahman, and Jahid Hossain Bhuiyan. *An Introduction to International Human Rights Law*. (Leiden ; Boston: Brill, 2010).

[47] Moeckli, Shah, Sivakumaran, Harris, Moeckli, Daniel, Shah, Sangeeta, Sivakumaran, Sandesh, and Harris, David. *International Human Rights Law*. Second Edition, Impression 2. ed. (New York: Oxford University Press, 2014), 28.

[48] The International Bills of Rights consist of UDHR, ICCPR and ICESCR.

[49] Moeckli, *International Human Rights Law*, 28 – 32.

[50] See Miloon Kothari, *"From Commission to the Council: Evolution of UN Charter Bodies."* in Dinah Shelton, *The Oxford Handbook of International Human Rights Law*, (Oxford: Oxford University Press, 2013).

[51] *Ibid*.; See also UNGA Res 60/251 (3 April 2006) Un Doc A/RES/60/251.

[52] *Ibid*.; See Schermers, H.G. *International Institutional Law*. 2nd Ed.]. ed. (Alphen Aan Den Rijn [etc.]: Sijthoff & Noordhoff, 1980), 443 – 446; Alston, Crawford, Alston, Philip G, and Crawford, James. *The Future of UN Human Rights Treaty Monitoring*. (Cambridge [etc.]: Cambridge University Press, 2000); OHCHR, "What are Treaty Bodies?," accessed April 28, 2018, http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx.

of Discrimination against Women; (5) the Committee against Torture; (6) the Committee on the Rights of the Child; (7) the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families; (8) the Committee on the Rights of Persons with Disabilities; and (9) the Committee on Enforced Disappearance.[53]

Furthermore, in the context of regional mechanisms in Europe, Americas and Africa, various supervisory and enforcement organs had also been created to enhance legal protection of human rights in the respective region. In Europe, the Council of Europe has played significant roles in setting the European human rights norms and in establishing the supervisory and enforcement mechanisms, notably the European Court of Human Rights.[54] In Americas, the Inter-American human rights system was created by the Organization of American States (OAS),[55] which has led the development of human rights standard setting as well as the establishment of supervisory and enforcement mechanisms in the region, notably the Inter-American Commission and the Inter-American Court on Human Rights. In Africa, the Organization of African Union (OAU) and its successor, the African Union (AU) has played a leading role in setting the regional human rights norms and in the development of supervisory and enforcement mechanisms in the region, notably the African Commission and Court on People's and Human Rights.

Asian region had been a passive actor of these developments. Despite the participation of Asian countries in the ratification of international human rights instruments, as well as in the reporting procedures under the charter-based and treaty-based systems, there has been no intergovernmental effort to set up regional human rights mechanisms in Asia. Moreover, some intergovernmental

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53 *Ibid*.

54 See Steven Greer, "*Europe,*" in Moeckli, *International Human Rights Law*, 416 - 440; Jo Pasqualucci, "*The Americas,*" in Moeckli, *International Human Rights Law,* 398 - 415; Christop Heyns and Magnus Killander, "*Africa,*" in Moeckli, *International Human Rights Law,* 441 – 457; Viljoen, Frans. *International Human Rights Law in Africa*. 2nd ed. (Oxford [etc.]: Oxford University Press, 2012); Sionaidh Douglas-Scott, "The European Union and Human Rights after the Treaty of Lisbon," *Human Rights Law Review* 11, no. 4 (2011): 645-82; Harris, Livingstone, Harris, David John, and Livingstone, Stephen, *The Inter-American System of Human Rights*, (Oxford [etc.]: Clarendon Press, 1998).

55 Pasqualucci, "The Americas," 398; Livingstone, *The Inter-American System of Human Rights*.

organizations in Asia, such as South Asian Association for Regional Cooperation (SAARC), Asia Pacific Economic Cooperation (APEC), Pacific Island Forum (PIF), or Shanghai Cooperation Organization (SCO) do not place a particular attention to a regional human rights cooperation. Although a number of non-governmental movements are notable, including the adoption of an Asian Human Rights Charter by the Asian Human Rights Commission, the development of a draft Pacific Charter on Human Rights by the Law Association of Asia Pacific, the development of the Asian Charter, Commission and Court by the Law Association of Asia and Pacific; as well as the establishment of the Council of Asia and the Pacific by the International Commission of Jurist, however it is to be highlighted that Asian states as the main duty bearers of human rights were not involved in the process.[56]

In the context of sub-regional organization in Asia, a positive development was notable in 2009 when the leaders of the Association of Southeast Asian Nations (ASEAN) established the ASEAN Intergovernmental Commission on Human Rights (AICHR).[57] The Commission possesses the mandate to be the overarching institution responsible for the promotion and protection of human rights in ASEAN. While the Terms of Reference (TOR) of the AICHR tasked the Commission to develop ASEAN conventions and other instruments dealing with human rights, however, the TOR does not stipulate any mandates on the development of supervisory and/or enforcement mechanism.[58]

In 2012, the ASEAN Human Rights Declaration (AHRD) and the Phnom Penh Statement on the Adoption of the AHRD (Phnom Penh Statement) was adopted as a significant milestone in human rights standard setting development in the Asian region. This instrument codifies basic human rights and fundamental freedoms of ASEAN people.[59] However, this development is only exclusive to the ten member countries of ASEAN as ASEAN's agreements do not represent the

[56] See e.g.: Saul, "The Last Frontier".

[57] See e.g.: Tan, *The ASEAN Intergovernmental Commission on Human Rights;* Doyle, "The AHRD"; SAPA TFAHR, *Report.*

[58] TOR of the AICHR (adopted in July 2009), accessed 30 April, 2018, http://hrlibrary.umn.edu/research/Philippines/Terms%20of%20Reference%20for%20the%20ASEAN%20Inter-Governmental%20CHR.pdf.

[59] AHRD.

Asian region as a whole. Moreover, at the level of ASEAN, there has been no significant progress on the development of ASEAN conventions and other specific instruments on human rights. In addition, the absent of legal framework for supervisory and enforcement mechanism has also appeared to be a significant gap in human rights protection in the region. Similarly, the mainstreaming of human rights into the works of other ASEAN stakeholders also remains to be seen.[60] To date, the AICHR only engaged the judiciary in one of its activities, namely at the AICHR Judicial Colloquium on the Sharing of Good Practices regarding International Human Rights Law, which was convened on 13 – 15 March 2017 in Kuala Lumpur, Malaysia.[61]

2.2.2. Why Judiciary?

The Judiciary is a key stakeholder in the implementation of human rights at the domestic level.[62] It possesses an inherent duty to protect the universal, inalienable and indivisible rights of the peoples, in line with the prevailing domestic law.[63] Within its independent function, the judiciary is authorized to effectuate the provisions of law. It also has a substantial responsibility to safeguard human rights protection and realization so as to ensure that the citizens are treated equally and the other branches of government function effectively.[64]

The equitable decisions of judiciary will set an important precedent for future resolution of disputes between individuals or between state and individuals. Such judicial process will not only allow an effective implementation of law in line with the spirit of human rights protection of the individuals and groups, but will also set an ideal standard for subsequent enforcement of law.[65]

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60 Tan, *The ASEAN Intergovernmental Commission on Human Rights*; Doyle, "The AHRD"; SAPA TFAHR, *Report*.

61 AICHR, "AICHR Judicial Colloquium on the Sharing of Good Practices Regarding International Human Rights Law, 13-15 March 2017," accessed April 29, 2018, http://aichr.org/press-release/press-release-aichr-judicial-colloquium-on-the-sharing-of-good-practices-regarding-international-human-rights-law-13-15-march-2017/?doing_wp_cron=1499607858.8917760848999023437500.

62 OHCHR, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, 2003, 4-5.

63 Aman, Speech at the AICHR Judicial Colloquium.

64 Abul-Ethem, "The Role of the Judiciary".

65 *Ibid*.

In addition, judiciary is equally responsible in the realization of human rights, democracy and rule of law. The rule of law is an integral requirement of human rights protection, since a functioning rule of law is required to nurture respect for human rights. The rule of law and human rights are begun with an effective and accessible legal system.[66]

Furthermore, the strengthening of judicial system and the rule of law with due regards to human rights remains high in the universal development agenda. This is evidenced with the dedication of the UN's Sustainable Development Goals (SDGs) 16 towards the promotion of peaceful and inclusive societies for sustainable development, the provision of access to justice for all, and building effective, accountable institutions at all levels.[67]

2.3. AACC's Potentials and the Pertinent Outcomes of its 3rd Congress

Formally established in 2010, the AACC carries out the constitutional jurisdiction for the development of constitutional courts and similar institutions in Asia.[68] Presently, the AACC has 16 member countries, namely Afghanistan, Azerbaijan, Indonesia, Kazakhstan, Kyrgyztan, Malaysia, Mongolia, Myanmar, Pakistan, the Philippines, Russia, South Korea, Tajikistan, Thailand, Turkey and Uzbekistan.[69] Since its establishment, the AACC has built inter-members cooperation in the forms of an international symposium, international conferences, short courses and exchange of human resources.[70] Externally, the AACC has cooperated with the advisory body of the Council of Europe, namely the Venice Commission, which has enabled opportunity for database sharing among constitutional courts of the associations.[71] In addition, the AACC has also signed a Memorandum of Understanding (MoU) with the Conference of Constitutional Jurisdiction of Africa (CCJA) with a purpose to provide a framework

66 Aman, Speech at the AICHR Judicial Colloquium.
67 United Nations, "Goal 16 of the SDGs," Accessed April 30, 2019, http://www.un.org/sustainabledevelopment/peace-justice/. See also Aman (2016: 11).
68 AACC, "About the AACC".
69 *Ibid.*
70 *Ibid.*
71 See Mr. Gianni Buquicchio, Speech at the 3rd Congress of the AACC in Bali, Indonesia, on 8 – 14 August 2016.

for cooperation in the field of constitutional law, democracy, rule of law and human rights.[72]

To date, the AACC has convened three congresses, namely in Seoul (2012), Istanbul (2014) and Bali (2016).[73] The third congress was particularly relevant to the discussion at hand as it was themed *The Promotion and Protection of Citizen's Constitutional Rights*. The congress deliberated three main topics, namely: (1) Mechanism for the Promotion and Protection of Citizens Constitutional Rights: Different Perspectives from Countries; (2) the Regulatory Frameworks for the AACC for the Protection of Citizens' Constitutional Rights through their Landmarks Decisions; and (3) the Current Challenges and Future Direction for Strengthening Promotion and Protection of Citizen's Constitutional Rights.[74]

The third congress issued an important outcome, namely Bali Declaration on the Promotion and Protection of Citizens' Constitutional Rights. Bali Declaration reflects that the promotion and protection of human rights is an integral part of the AACC's objectives along with the implementation of rule of law and the guarantee of democracy. It acknowledges AACC's instrumental role in properly guaranteeing people's sovereignty by protecting human rights and constitutional principles for the maintenance of the democratic system of government. It also recognizes the important collaboration of regional cooperation for the protection of democracy, the rule of law and human rights. Despite being a political document without stipulating any mechanism for implementation, this commitment is timely and requires political will in term of its follow up. It can also serve as a basis for the AACC to impose its member states' commitments through the development of binding human right instrument requiring legal compliance from its states parties.

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[72] See AACC, "MoU between the AACC and CCJA," accessed April 30, 2018, https://aacc.mahkamahkonstitusi.go.id/mkri/public/fileupload/document/MOU%20AACC-CCJA%20(English%20ver.).pdf.

[73] AACC, "About the AACCC".

[74] See "Proceeding Congress AACC," 85-97, accessed April 30, 2018, http://www.mahkamahkonstitusi.go.id/public/content/infoumum/proceeding/pdf/Proceeding_6_PRECEEDING%20CONGRESS%20AACC.pdf.

2.4. Future Directions; Potential Roles of the Constitutional Court of the Republic of Indonesia in its Capacity as the Members of the AACC

Indonesia has been very keen on the discussions related to the development and the future of constitutional adjudication in the Asian region. In fact, it was closely involved in the establishment of AACC which was marked by the issuance of Jakarta Declaration.[75] At the second congress in Istanbul, in 2014, the Chief Justice of the Court was elected as the President of the AACC for the period of 2014 – 2016.[76] Appreciating the Court's success in hosting the 3rd Congress in August 2016, Indonesia's term of presidency was extended for another one year.[77] At the Board of Members Meeting which was conducted in Solo on 8 August 2017, the presidency was handed over to Malaysia.[78]

In the sector of regional human rights cooperation, it is noteworthy that Indonesia has also been progressive in advancing regional acceptance and incorporation of human rights. The drafting history of the ASEAN Charter shows that Indonesia was among those who defended the inclusion of human rights under the charter.[79] During the process of the establishment of an ASEAN human rights body, Indonesia also co-proposed the establishment of a mechanism involving only member-countries who were ready for the development.[80] After the AICHR was established, Indonesia continues to play a leading role in the development of directions and operational procedures of the commission. In fact, Indonesia is among the progressive member countries who had led and institutionalised key activities of the AICHR namely those related to mainstreaming of human rights into the works of key stakeholders and institutionalization of AICHR's engagements and dialogues with ASEAN Sectoral Bodies, the Government of

[75] Hidayat, Speech at the 3rd Congress of the AACC.
[76] AACC, "About the AACCC".
[77] Bali Declaration.
[78] See: Hukum Online, "Malaysia was Chosen as the President of AACC," accessed April 30, 2018, http://www.hukumonline.com/berita/baca/lt5989758cdf838/malaysia-terpilih-jadi-presiden-aacc.
[79] Tommy Koh, Tommy T. B. Manalo, Rosario G. Woon, Woon, Walter C. M, and ASEAN. *The Making of the ASEAN Charter* (Singapore ; Hackensack, NJ: World Scientific Pub., 2009).
[80] See Working Group for the Establishment of ASEAN Human Rights Mechanism, Rountable Discussion on Human Rights in ASEAN: Challenges and Opportunities for Human Rights in a Caring and Sharing Community – Summary of Proceedings, Jakarta, 18 – 19 December 2006, accessed April 30, 2018, http://www.aseanhrmech.org/conferences/summary_of_proceedings_final.pdf.

ASEAN Member States as well as Civil Society Organisations.[81] Indonesia has also undertaken various thematic activities, among others, human trafficking, freedom of expression, migrations as well as SDGs and Human Rights.[82]

Despite that the Court is no longer serving as the President of the AACC, the Court still has the potential to play its leading roles. The Chief Justice of the Court remains in the Board of Members which serves as a central decision-making body of the AACC.[83] Article 23 of the Statute of the AACC provides a number of competences to the Board of Members, among others, to take decisions on matters related to the association not specified in this statute.[84]

Thus, sustaining Indonesia's leading roles in the AACC and in the regional human rights cooperation in general, and taking into account the above legal frameworks and the potentials of the AACC to mainstream human rights in the Asian Judiciary, the Court may consider proposing the following recommendations for the consideration by the Board of Members:

1. *Encourage Judicial Independence*

As previously done in the Bali Declaration, the AACC needs to consistently encourage the practice of judicial independence among its member countries and consider necessary intervention when a threat to judicial independence occurs in any of its member countries. A truly independent and impartial judiciary has the potential to effectively guarantee the protection of the constitutionally promised human rights. It also has the potential to counter infringements of human rights by the other branches of government.[85] These potential roles have been acknowledged by legal scholars, political scientists, international organizations and human rights activists.[86] The link between the independence of the judiciary and human rights has been emphasized

[81] This observation is based on writer's professional service with the ASEAN Secretariat during the period of July 2012 – January 2017.

[82] See AICHR Website, April 30, 2018, www.aichr.org.

[83] The Statute of the AACC, arts 12 and 13, accessed April 30, 2018, https://aacc.mahkamahkonstitusi.go.id/fileupload/document/statute_aacc_en.pdf.

[84] *Ibid*. art 13.

[85] Keith, Linda Camp. "Judicial Independence and Human Rights Protection around the World." *Judicature* 85, no. 4 (2002): 195-200.

[86] Abul-Ethem, "The Role of the Judiciary"; Ackermann, "Constitutional Protection"; Cotran, International Conference; Cross, "The Relevance of Law"; Isra, "The Role of the Constitutional Court of Indonesia".

in the UDHR and the ICCPR. Both instruments consider the independent judiciary as one of the essential elements to safeguard human rights.[87]

The UN, which consistently plays a role in establishing systems of justice, has built standards for achieving an independent judiciary through its basic principles on the independence of the judiciary, which were adopted by the UN General Assembly in 1985. Despite the non-binding nature of the principle, the UN has considered this principle as a standard model and encouraged every lawmaker to adopt them in their respective constitutions.[88]

The principles prescribe that the independence of the judiciary are to be guaranteed by the State and to be enshrined in the Constitution or the law of the country. It also requires: (1) The decisions of matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason; (2) the conferment of jurisdiction of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law; (3) the avoidance of any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision; (4) the granting of rights of everyone to be tried by ordinary courts or tribunals using established legal procedures; (5) the guarantee that judicial proceedings are conducted fairly and that the rights of the parties are respected; and (6) the fulfillment of the duty of each member state to provide adequate resources to enable the judiciary to properly perform its functions.

In addition, the office of United Nations High Commissioners for Human Rights has appointed a Special Rapporteur on the Independence of Judges and Lawyers to help monitor the progress of implementing these principles.[89]

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87 Keith, "Judicial Independence".

88 *Ibid.*

89 For the activities and reports of the Special Rapporteur, see http://www.ohchr.org/EN/Issues/Judiciary/Pages/IDPIndex.aspx.

Furthermore, in 2002, the Judicial Group on Strengthening Judicial Integrity adopted the Bangalore Principles of Judicial Conduct. These principles are intended to set standards for ethical conduct of judges. They are developed to provide guidance to judge and to serve as a framework for regulating judicial conduct by the Judiciary. They are also designed to help members of the executive and the legislature, lawyers as well as the general public to enhance their understanding and support to the judiciary. These principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct which bind the judge.[90]

2. Facilitate a Platform for the Development of Binding Human Rights Instruments and of the Establishment of Asian Human Rights Court

Having briefly compared Asia with the other regions, it could be assessed that Asian region lacks binding human rights instruments as well as enforcement and supervisory mechanisms, including a human rights court, a communication mechanism and reporting procedures. These gaps have significantly hindered the progress of legal protection of human rights in the region, as described above.[91]

In the context of ASEAN, it is noted that since the adoption of the AHRD and the Phnom Penh Statement in 2012, the AICHR has been relatively active in the dissemination and implementation of the two documents. In terms of dissemination activities, the AICHR has conducted numerous activities in line with the AHRD and interacted with relevant ASEAN stakeholders to mainstream the AHRD into their respective works. For instance, the AICHR has conducted a dialogue with the ASEAN Community Councils on the AHRD and the Phnom Penh Statement on 25-26 May 2015. The objective

[90] Bangalore Principles of Judicial Conduct, adopted in 2002, accessed April 30, 2018, http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf.

[91] See generally: Tan, *The ASEAN Intergovernmental Commission on Human Rights;* Doyle, "The AHRD"; SAPA TFAHR, *Report.*

of the dialogue was to identify means to mainstream human rights and values stipulated in the two documents into the works of the three pillars of ASEAN Community.[92]

In addition, the AICHR has also initiated two consultation workshops on the feasibility of developing legal instruments on human rights with relevant ASEAN Sectoral Bodies. The two workshops marked an important step by the AICHR in providing platform to identify common concerns and explore means to develop potential processes towards this endeavor.[93]

In terms of the development of specific ASEAN human rights instruments, a progress in the regional standard settings have been relatively promising in the area of commonly ratified human rights instruments, namely, CEDAW, CRC and CRPD. This is greatly contributed by the active works of relevant ASEAN Sectoral Bodies and Committee, notably, the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC), ASEAN Committee on Women (ACW) and ASEAN Senior Officials Meeting on Social Welfare and Development (SOMSWD).

For instance, in the area of the rights of persons with disabilities, ASEAN has made substantial progress in setting the standard for the rights of persons with disabilities, notably the Bali Declaration on the Enhancement of the Role and Participation of the Persons with Disabilities in ASEAN Community.[94] In addition, the ASEAN leaders have also adopted the ASEAN Declaration on Strengthening Social Protection[95] that guarantees equitable access to social protection of vulnerable groups, including persons with

[92] AICHR, "The AICHR Dialogue with ASEAN Community Councils on the AHRD and the Phnom Penh Statement on the Adoption of the AHRD,' accessed April 30, 2018, http://aichr.org/press-release/press-release-the-aichr-dialogue-with-asean-community-councils-on-the-asean-human-rights-declaration-ahrd-and-the-pnom-penh-statement-on-the-adoption-of-the-ahrd-25-26-may-2015-jakarta-indones/.

[93] AICHR, AICHR Annual Report 2016, accessed April 30, 2018, http://aichr.org/report/the-aichr-annual-report-2016/; AICHR, "The Philippines Hosts 2nd AICHR ASEAN Legal Human Rights Instrument Workshop," accessed April 30, 2018, http://aichr.org/press-release/press-release-the-philippines-hosts-2nd-aichr-asean-legal-human-rights-instrument-workshop/.

[94] Bali Declaration on the Enhancement of the Role and Participation of the Persons with Disabilities in ASEAN Community (adopted on 17 November 2011), accessed April 30, 2018, http://www.asean.org/storage/images/2013/resources/publication/2013%208.%20aug%20-%20bali%20declaration%200n%20persons%20with%20disabilities.pdf.

[95] ASEAN Declaration on Social Protection (adopted on 8 October 2013), accessed April 30, 2018, http://www.fao.org/fileadmin/templates/rap/files/meetings/2014/141208_4_ASEAN_Declaration_on_SP.pdf.

disabilities. Since 2015, the AICHR has initiated the establishment of a task force on the Mainstreaming of the Rights of Persons with Disabilities in the ASEAN Community. The task force is working on the development of the Regional Action Plan on Mainstreaming the Rights of Persons with Disabilities in ASEAN.[96]

Having noted those developments, it is to be highlighted that the available human rights instruments and mechanisms currently agreed by the ten member countries of ASEAN are more of general political commitment by nature. The instruments have not been enforced with monitoring and reporting procedures.[97] The process towards the development of general ASEAN convention on human rights also seems to be slowly progressing.

To date, the AICHR is not mandated to receive communication or to establish supervisory mechanisms. It has not embarked significantly on its protection mandates.[98] More fundamentally, it is also widely understood that the enhancement of legal protection of human rights in ASEAN is constrained with "domestic political security concerns, internal circumstances, the differing views of Asian values, the debate over an ASEAN human rights mechanism, the principle of non-interference[99] and the ASEAN Way".[100] This has been considered to have resulted in a growing gap between proponent countries who tend to attempt rethinking or even changing of traditional

[96] See: AICHR Press Releases pertaining to Task Force on the Mainstreaming of the Rights of Persons with Disabilities in the ASEAN Community. http://aichr.org.

[97] Phan, Hao Duy. "A Blueprint for a Southeast Asian Court of Human Rights." *Asian-Pacific Law & Policy Journal* 10, no. 2 (2009): 384-433; See also generally: e.g.: Tan, *The ASEAN Intergovernmental Commission on Human Rights;* Doyle, "The AHRD"; SAPA TFAHR, *Report.*

[98] TOR of the AICHR.

[99] ASEAN has adopted non-interference as its guiding principle since its establishment in 1967. This is evidenced in the Bangkok Declaration establishing ASEAN which provides that "...that they are determined to ensure their stability and security from external interference in any form or manifestation in order to preserve their national identities...". This cardinal principle is central to the conduct of ASEAN relations. Although some viewed that there has been positive development in the understanding and interpretation of this principle, however this principle remains the fundamental rule of ASEAN conducts as it is enshrined in the preamble of the ASEAN Charter.

[100] Jurgen Haacke (2003) defines ASEAN Way as "a code of conduct and set of diplomatic and procedural norms that have fundamentally guided interactions among regional states for a very long time". He is of the view that the ASEAN Way is decomposed into six elements: sovereign equality, quiet diplomacy, non-recourse to use or threat to use of force, non-involvement in bilateral disputes, non-interference and quiet diplomacy. Meanwhile, Hiro Katsumata (2003) and Beverly Loke (2005) mentioned that there are generally four characters of the "ASEAN Way", namely (1) respects for the internal affairs of other members; (2) non-confrontation and quiet diplomacy; (3) non-recourse to use or threat to use of force; and (4) decision making through consensus.

norms, and the opponent countries who consistently try to preserve the status quo in favor of their national interests.[101]

The human rights norms and institutions building experiences of the other regions have revealed that political instruments cannot establish a regional court which is empowered to issue binding judgements. On the other hand, it has to be established by a treaty concluded in accordance with Vienna Convention on the Law of Treaties.[102] The European Convention for the Protection of Human Rights and Fundamental Freedoms[103] established the European Court of Human Rights. The American Convention on Human Rights[104] established the Inter-American Court on Human Rights. The African Court on Peoples and Human Rights was created with the adoption and entry into force of the African Charter[105] and its Additional Protocol.[106] Asian Human Rights Court is therefore envisioned to be established by a legally binding human rights instrument agreed by Asian countries, beyond the ten member countries of ASEAN.

The Joint Communique of the 3rd Congress of the World Conference on Constitutional Justice included the proposal of President Park Han-Chul to promote discussions on international cooperation on human rights, including the possibility of establishing a human rights court in Asia.[107] Given the reluctance and inaction of other executive and legislative branch of Asian bodies and mechanisms, and being the only Asian platform whose mandate is closely related to the realization of human rights, the AACC

[101] Hao Duy, A Blueprint; Tan, *the ASEAN Intergovernmental Commission on Human Rights.*

[102] Hao Duy Phan mentioned in his above-cited article that the VCLT requires: (i) The founding treaty shall have binding force and be performed by all parties to it in good faith (art 26); (ii) member states cannot invoke their domestic laws as a justification for their failure to implement the treaty (art 27); (iii) prior to the entry into force of the founding treaty, those states that have signed shall refrain from acts which may defeat its object and purpose (art 18); articles within the treaty shall be interpreted in accordance with the ordinary meaning and in light of its object and purpose.

[103] The European Convention on Human Rights (adopted on 4 November 1950, entered into force on 3 September 1953, as amended by Protocols Nos. 11 and 14 and supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13) (ECHR).

[104] American Convention on Human Rights (adopted on 22 November 1969, entered into force 18 June 1978) UNTS 1144 (ACHR).

[105] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter).

[106] Protocol on the African Court (adopted 10 June 1998 entered into force 25 January 2004).

[107] WCCJ, "The 3rd Congress of the World Conference on Constitutional Justice Ends Success," accessed April 30, 2018, http://english.ccourt.go.kr/cckhome/eng/introduction/news/newsDetail.do?bbsSeq=18.

may wish to consider taking the liberty to lead the process. The AICHR, the Council of ASEAN Chief Judges (CACJ), which is recognized as an Entity Associated with ASEAN under Annex II of the ASEAN Charter, as well as other relevant mechanisms in Asia shall be consulted and engaged to realize the vision. As the initial stage, the outcome of the aforementioned AICHR Judicial Colloquium to establish an inter-sectoral expert or working group on human rights and the Judiciary could be adopted.[108] This Body of Expert shall be tasked to come up with concrete steps to develop binding human rights instrument and to assess the feasibility of the establishment of Asian Human Rights Court. Academics that have undertaken in depth studies on the subject matter may be involved in the working group, notably Mr. Hao Duy Phan, who had written a comprehensive study on a blueprint for a Southeast Asian Court of Human Rights.[109]

3. ***Recommend Human Rights Incorporation into Judicial Discussion and Decisions.***

Among the strategy to mainstream human rights in the judiciary is by way of integrating human rights law into domestic law and various other branches of law. In his article regarding the potential roles of the International Court of Justice in mainstreaming human rights, Judge Bruno Simma highlighted that the Court can render human rights arguments more readily acceptable to international law generalists by interpreting and applying substantive provisions of human rights treaties in a state-of-the-art way, compared, for instance, to the reading given to such provisions by certain General Comments issued by UN human rights treaty bodies, all too often marked by a dearth of proper legal analysis compensated by an overdose of wishful thinking. Further, he mentioned that the Court is singularly capable of devising solutions for practical, more technical, legal problems which arise at the interface between human rights and more traditional international law, thus paving the way for the acceptance of human rights

[108] AICHR, "AICHR Judicial Colloquium".
[109] Hao Duy, A Blueprint.

arguments and, more generally, supporting and developing the framework of human rights protection.[110]

4. Suggest the Establishment of Platform to Enhance Human Rights Expertise of the Judiciary

Judiciary's responsibility to implement human rights obligations requires the members of these legal professions to be well-informed about the international human rights instruments that have been ratified by their respective countries.[111] To address this need, the Court may bring to the attention of Members of the Board of the AACC on the recommendation of the aforesaid AICHR Judicial Colloquium to set up an institution in the form of regional resource center to provide technical expertise and assistance to policymakers, judges and lawyers. This idea is consonant with the areas of works intended for AACC's Permanent Secretariat of Research and Development (SRD) in Seoul, which is currently in progress. At the AACC Board of Members Meeting on 8 August 2017, H.E. Mr. Jinsung Lee, Justice of the Constitutional Court of the Republic of Korea mentioned that the areas of works of the SRD included fundamental rights.[112] The intended regional resource center may hence be established under the auspices of the SRD.

Furthermore, cooperation with the Office of High Commissioner on Human Rights (OHCHR) could also be established, bearing in mind that the OHCHR has developed a Manual on human rights for judges, prosecutors and lawyers. The manual comprehensively covers the substantive issues of human rights, the overview of core human rights instruments as well as regional and international mechanisms. More importantly, it also covers practical guidance on the application of human rights at the domestic courts and elaborates thoroughly on (1) the independence and impartiality of judges, prosecutors and lawyers; (2) Human Rights and Arrests, Pre-trial

[110] Bruno Simma, "Mainstreaming Human Rights: The Contribution of the International Court of Justice." *Journal of International Dispute Settlement* 3, no. 1 (2012): 7-29.

[111] Aman, Speech at the AICHR Judicial Colloquium.; OHCHR, *Human Rights in the Administration of Justice.*

[112] AACC, Minutes of Meeting; Board of Members Meeting of the AACC, Solo, Central Java, 8 August 2017, accessed April 30, 2018, https://aacc.mahkamahkonstitusi.go.id/mkri/public/fileupload/document/MOM%20BOMM%208%20AUGUST%202017%20ANNEX.pdf.

Detention and Administrative Detention; (3) the Right to Fair Trial (covering investigation, trial and final judgement); (4) International Legal Standards for the Protection of Persons Deprived from Liberty; (5) the Use of Non-Custodial Measures in Administration of Justice; (6) the Rights of Women and Children in Administration of Justice; (7) the Rights to Equality and Non-Discrimination in Administration of Justice; (8) the Role of the Court in Protecting Economic, Social and Cultural Rights; (9) the Protection and Redress for Victims of Crimes and Human Rights Violations; and (10) the Administration of Justice during the States of Emergency.[113]

III. CONCLUSION

Legal protection of human rights in Asia will only be effectively guaranteed with binding human rights instruments, enhanced by independent and human rights-friendly judiciary, and enforced by a regional Human Rights Court.

The significant gaps of legal protection of human rights in Asia and the reluctance and inaction of the executive and legislative branches of sub-regional bodies and mechanisms in Asia makes it timely for the Court to play a leading role in the mainstreaming of human rights into the works of Asian Judiciary. Not only that the Court bears the mandates from the Constitution, but it is also obliged by a number of binding and non-binding human rights instruments mentioned above, particularly in terms of supporting their domestication, incorporation and implementation at the domestic level.

The aforementioned theme of the third congress of the AACC, as well as its outcome; the Bali Declaration on the Promotion and Protection of Citizens' Constitutional Rights, have clearly indicated AACC's commitment to safeguard constitutional rights and human rights of Asian people in general. As the active member of the association, it is pertinent for Indonesia to help concretely follow up those decisions, by proposing to the Board Members of the AACC to (1) issue more declarations which encourage the practice of judicial independence and maximum incorporation of human rights into Judiciary's discussions and decisions;

[113] See OHCHR, *Human Rights in the Administration of Justice*.

(2) establish a platform to enhance human rights expertise of the Judiciary; as well as (3) take lead in the establishment of an inter-sectoral expert or working group on human rights and the Judiciary to concretize the endeavors to develop a binding human rights instrument and establish an Asian Human Rights Court.

BIBLIOGRAPHY

AACC, 'About AACC': https://aacc.mahkamahkonstitusi.go.id/aacc/1.

AACC, Minutes of Meeting; Board of Members Meeting of the AACC, Solo, Central Java, 8 August 2017, accessed April 30, 2018, https://aacc.mahkamahkonstitusi.go.id/mkri/public/fileupload/document/MOM%20BOMM%208%20AUGUST%202017%20ANNEX.pdf.

AACC, "MoU between the AACC and CCJA," accessed April 30, 2018, https://aacc.mahkamahkonstitusi.go.id/mkri/public/fileupload/document/MOU%20AACC-CCJA%20(English%20ver.).pdf.

AACC, Proceeding Congress AACC. Retrieved from http://www.mahkamahkonstitusi.go.id/public/content/infoumum/proceeding/pdf/Proceeding_6_PRECEEDING%20CONGRESS%20AACC.pdf.

Abul-Ethem, Fahed. "The Role of the Judiciary in the Protection of Human Rights and Development: Middle Eastern Perspective," *Fordham International Law Journal,* 26(3) (2003).

Ackermann, L.W.H., "Constitutional protection of human rights: Judicial review," *Columbia Human Rights Law Review, 21*(1) (1989).

African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter).

AICHR, AICHR Annual Report 2016, accessed April 30, 2018, http://aichr.org/report/the-aichr-annual-report-2016/.

AICHR, "AICHR Judicial Colloquium on the Sharing of Good Practices Regarding International Human Rights Law, 13-15 March 2017," accessed April 29, 2018, http://aichr.org/press-release/press-release-aichr-judicial-colloquium-on-the-

sharing-of-good-practices-regarding-international-human-rights-law-13-15-march-2017/?doing_wp_cron=1499607858.8917760848999023437500.

AICHR Press Releases pertaining to Task Force on the Mainstreaming of the Rights of Persons with Disabilities in the ASEAN Community. http://aichr.org.

AICHR, "The AICHR Dialogue with A SEAN Community Councils on the AHRD and the Phnom Penh Statement on the Adoption of the AHRD,' accessed April 30, 2018, http://aichr.org/press-release/press-release-the-aichr-dialogue-with-asean-community-councils-on-the-asean-human-rights-declaration-ahrd-and-the-pnom-penh-statement-on-the-adoption-of-the-ahrd-25-26-may-2015-jakarta-indones/.

AICHR, "The Philippines Hosts 2nd AICHR ASEAN Legal Human Rights Instrument Workshop," accessed April 30, 2018, http://aichr.org/press-release/press-release-the-philippines-hosts-2nd-aichr-asean-legal-human-rights-instrument-workshop/.

Alston, Crawford, Alston, Philip G, and Crawford, James. *The Future of UN Human Rights Treaty Monitoring*. (Cambridge [etc.]: Cambridge University Press, 2000).

Aman, Anifah, Speech at the AICHR Judicial Colloquium on the Sharing of Good Practices regarding International Human Rights Law, which was convened on 13 – 15 March 2017 in Kuala Lumpur, Malaysia.

American Convention on Human Rights (adopted on 22 November 1969, entered into force 18 June 1978) UNTS 1144.

APHR, Related statements on human rights issues in the region, accessed April 27, 2018, http://www.aseanmp.org.

APHR, "Report: Death Knell for Democracy; Attacks to Lawmakers and the Threat to Cambodia's Institutions," accessed 27 April, 2018, https://aseanmp.org/cambodia-mps-report/.

ASEAN (Bangkok) Declaration (adopted on 8 August 1967).

ASEAN Declaration on Strengthening Social Protection (adopted on 8 October 2013).

ASEAN Human Rights Declaration (adopted on 18 November 2012).

Baird, Natalie. "To Ratify or Not to Ratify? An Assessment of the Case for Ratification of International Human Rights Treaties in the Pacific," *Melbourne Journal of International Law* 12, no. 2 (2011).

Bali Declaration on the Enhancement of the Role and Participation of the Persons with Disabilities in ASEAN Community and Mobilisation Framework of the ASEAN Decade of Persons with Disabilities (2011 – 2020) (adopted on 17 November 2011).

Bali Declaration on the Promotion and Protection of Citizens' Constitutional Rights (issued on 12 August 2016).

Bangalore Principles of Judicial Conduct, adopted in 2002.

Basic Principles on Independence of the Judiciary (adopted and endorsed in 1985).Biraj Patnaik, "Human Rights Violations Endemic in South Asia," accessed April 27, 2018 https://www.amnesty.org/en/latest/news/2017/02/human-rights-violations-endemic-in-south-asia/.

Buquicchio, Gianni, Speech at the 3rd Congress of the AACC in Bali, Indonesia, on 8 – 14 August 2016

Chowdhury, A., and Bhuiyan, J. (2010). *An Introduction to International Human Rights Law*. Leiden: BRILL.

Constitutional Court of Republic of Indonesia, "Proceeding Congress AACC," 85 – 97, accessed April 30, 2018, http://www.mahkamahkonstitusi.go.id/public/content/infoumum/proceeding/pdf/Proceeding_6_PRECEEDING%20CONGRESS%20AACC.pdf.

Constitution of Afghanistan.

Constitution of the Philippines.

Constitution of the Republic of Indonesia.

Constitution of the Republic of Turkey.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted on 10 December 1984, entered into force on 26 June 1987) 1465 UNTS 85 (CAT).

Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 2131 UNTS (CEDAW).

Convention on the Rights of Persons with Disabilities (adopted on 13 December 2006, entered into force on 3 May 2008) 2525 UNTS (CRPD).

Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS (CRC).

Cortell, Andre & James Davis. "How Do International Institutions Matter? The Domestic Impact of International Rules and Norms," *International Studies Quarterly* 40, no. 4 (1996): 451-478.

Cotran, Eugene and Adel Omar Sherif. *International Conference on the Role of the Judiciary in the Protection of Human Rights: The Role of the Judiciary in the Protection of Human Rights* (London: Brill, 1997).

Crawford, James. *Brownlie's Principles of Public International Law* (Oxford: Oxford University Press, 2012).

Cross, Frank B Cross. "The Relevance of Law in Human Rights Protection," *International Review of Law & Economics* 19, no. 1 (1999).

Decision No 011-017/PUU-VIII/2003 regarding the review of law No. 12/2003.

Decision No 55/PUU-VIII/2010 regarding the review of Law No 18/2004 regarding Plantation.

Decision No 6-13-20/PUU-VIII/2012 regarding the review of Law No 16/2014.

Davies, Mathew. "States of Compliance? Global Human Rights Treaties and ASEAN Member States," *Journal of Human Rights* 13, no. 4 (2014): 00.

De Wet, Erika. *"Normative Evolution, Ch.23 Jus Cogens and Obligations Erga Omnes,"* in Dinah Shelton (ed), *the Oxford Handbook of International Human Rights Law*, (Oxford: Oxford Scholarly Authorities on International Law, 2013).

Douglas-Scott, Sionaidh. "The European Union and Human Rights after the Treaty of Lisbon," *Human Rights Law Review* 11, no. 4 (2011): 645-82.

Doyle, Nicholas. "The AHRD and the Implication of Recent Southeast Asian Initiatives in Human Rights Institutions-Building and Standard Setting," *International and Comparative Law Quarterly* 63(1) (2014).

European Convention on Human Rights (adopted on 4 November 1950, entered into force on 3 September 1953, as amended by Protocols Nos. 11 and 14 and supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13).

Federal Constitution of Malaysia..

Gooch, Raham and Michael Williams. *Oxford Dictionary of Law Enforcement* (Oxford: Oxford University Press, 2007).

Harris, Livingstone, Harris, David John, and Livingstone, Stephen. *The Inter-American System of Human Rights*, (Oxford: Clarendon Press, 1998).

Hathaway, Oona A. "Do Human Rights Treaties Make a Difference?," *The Yale Law Journal* 111, no. 8 (2002): 1935-2042.

Hidayat, Arif, Speech at the 3rd Congress of AACC in Bali, Indonesia, 8 – 14 August 2016, accessed March 25, 2018, http://www.mahkamahkonstitusi.go.id/public/content/infoumum/proceeding/pdf/Proceeding_6_PRECEEDING%20CONGRESS%20AACC.pdf.

Hukum Online, "Malaysia was Chosen as the President of AACC," accessed April 30, 2018, http://www.hukumonline.com/berita/baca/lt5989758cdf838/malaysia-terpilih-jadi-presiden-aacc.

Human Rights Watch, "Crimes against Humanity by Burmese Security Forces Against the Rohingya Muslim Population in Northern Rakhine State since August 27, 2017, 26 September 2017," accessed 27 April, 2018, https://www.hrw.org/sites/default/files/supporting_resources/burma_crimes_against_humanity_memo.pdf.

Human Rights Watch, "World Report 2018," accessed April 27, 2018, https://www.hrw.org/sites/default/files/world_report_download/201801world_report_web.pdf.

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966 entered into force 4 January 1969) 660 UNTS (ICRD).

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted on 18 December 1990, entered into force on 1 July 2003) 2220 UNTS (ICRMW).

Isra, Saldi. "The Role of the Constitutional Court of Indonesia in Strengthening Human Rights in Indonesia. Constitutional Journal," *Jurnal Konstitusi*, accessed March 25, 2018, https://ejournal.mahkamahkonstitusi.go.id/index.php/jk/article/viewFile/33/32.

Koh, Tommy, Tommy T. B. Manalo, Rosario G. Woon, Woon, Walter C. M, and ASEAN. *The Making of the ASEAN Charter*, (Singapore ; Hackensack, NJ: World Scientific Pub., 2009).

Kothari, Miloon. *"From Commission to the Council: Evolution of UN Charter Bodies."* in Dinah Shelton, *The Oxford Handbook of International Human Rights Law*, (Oxford: Oxford University Press, 2013).

L. Hannikainen. *Peremptory Norms (Jus Cogens) in International Law: Historical Developments, Criteria, Present Status* (Helsinki: Finnish Lawyers, 1988).

Linda Camp, Keith. "Judicial Independence and Human Rights Protection around the World." *Judicature* 85, no. 4 (2002): 195-200.

Moeckli, Shah, Sivakumaran, Harris, Moeckli, Daniel, Shah, Sangeeta, Sivakumaran, Sandesh, and Harris, David. *International Human Rights Law*. Second Edition, Impression 2.. ed. (New York: Oxford University Press, 2014), 28.

Muntarbhorn, Vitit. *Unity in Connectivity? Evolving Human Rights Mechanisms in the ASEAN Region* (Leiden, etc: Brill, 2014).

OHCHR, "Brutal attacks on Rohingya meant to make their return almost impossible – UN human rights report, 11 October 2017," para. 10, accessed 27 April, 2018, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?LangID=E&NewsID=22221.

OHCHR, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, 2003.

OHCHR, "Mission report of OHCHR rapid response mission to Cox's Bazar, Bangladesh, 13-24 September 2017, 11 October 2017," 1, accessed 27 April, 2018, http://www.ohchr.org/Documents/Countries/MM/CXBMissionSummaryFindingsOctober2017.pdf.

OHCHR, "Status of Ratification," accessed April, 25 2018, http://indicators.ohchr.org/.

OHCHR, Website of the Special Rapporteur on the Independence of Judges and Lawyers, see http://www.ohchr.org/EN/Issues/Judiciary/Pages/IDPIndex.aspx.

OHCHR, "What are Treaty Bodies?," accessed April 28, 2018, http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx.

Optional Protocol to Convention on the Rights of the Child on the involvement of children in armed conflict (adopted on 25 May 2000, entered into force 12 February 2002) 2173 UNTS (OP to CRC on Children in Armed Conflict).

Optional Protocol to Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (adopted on 25 May 2000, entered into force 18 January 2002) 2171 UNTS (OP to CRC on Sale of Children).

Organisation of American States (OAS), Resolution XXXI on Inter-American Court to Protect the Rights of Man (adopted 1948).

People of the Philippines *v.* Duero (1981) from the United States Supreme Decision in Miranda v. Arizona (1961).

Phan, Hao Duy. "A Blueprint for a Southeast Asian Court of Human Rights." *Asian-Pacific Law & Policy Journal* 10, no. 2 (2009): 384-433.

Protocol on the African Court (adopted 10 June 1998 entered into force 25 January 2004).

SAPA TFAHR, *Report: The Future of Human Rights in ASEAN; Public Call for Independence and Protection Mandates* (Bangkok, 2014).

Saul, Ben, Jacqueline Mowbray and Irene Baghoomians. "The Last Frontier of Human Rights Protection: Interrogating Resistance to Regional Cooperation in the Asia Pacific," *Australian International Law Journal* 18 (2011): 23.

Schermers, H.G. *International Institutional Law*. 2nd Ed.]. ed. (Alphen Aan Den Rijn [etc.]: Sijthoff & Noordhoff, 1980).

Shelton, Dinah. "The Promise of Regional Human Rights Systems," in BH Weston and SP Marks (eds), *The Future of International Human Rights* (New York: Transnational, 1999) 353.

Statute of the AACC.

Tan, Hsien-Li. *The ASEAN Intergovernmental Commission on Human Rights Institutionalising Human Rights in Southeast Asia* (Cambridge, etc: Cambridge University Press, 2011).

Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights (adopted in July 2009).

Thio, Li-ann. "Implementing Human Rights in ASEAN Countries: "Promises to Keep and Miles to Go before I Sleep"," *Yale Human Rights & Development Law Journal* 2 (1999): 1-215.

Tomuschat, Christian and Jean-Marc Thouvenin. *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Leiden: Brill, 2006).

UN Charter (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119.

UNGA Res 60/251 (3 April 2006) Un Doc A/RES/60/251.

UNHRC Working Group on the UPR Sixth Session (18 September 2009) UN Doc A/HRC/WG.6/6/KHM/2;

United Nations, Goal 16 of the SDGs. Retrieved from: http://www.un.org/sustainabledevelopment/peace-justice/.

United Nations, "Goal 16 of the SDGs," Accessed April 30, 2019, http://www.un.org/sustainabledevelopment/peace-justice/.

Universal Declaration of Human Rights (adopted 10 December 1948) (UDHR).

UPR, 'Cambodia,' accessed April 27, 2018 https://www.upr-info.org/en/review/Cambodia/Session-18-January-2014.

Vienna Convention on the Law of Treaties (adopted 23 Mei 1969, entered into force 27 January 1980), 1155 UNTS (VCLT).

Viljoen, Frans. *International Human Rights Law in Africa*. 2nd ed. (Oxford [etc.]: Oxford University Press, 2012).

Wahyuningrum, Yuyun. "Ahead of 10th Birthday, ASEAN Rights Body Fails to Evolve," *Jakarta Post,* February 6, 2018, http://www.thejakartapost.com/academia/2018/02/06/ahead-of-10th-birthday-asean-rights-body-fails-to-evolve.html.

WCCJ, "The 3rd Congress of the World Conference on Constitutional Justice Ends Success," accessed April 30, 2018, http://english.ccourt.go.kr/cckhome/eng/introduction/news/newsDetail.do?bbsSeq=18.

Working Group for the Establishment of ASEAN Human Rights Mechanism, Rountable Discussion on Human Rights in ASEAN: Challenges and Opportunities for Human Rights in a Caring and Sharing Community – Summary of Proceedings, Jakarta, 18 – 19 December 2006, accessed April 30, 2018, http://www.aseanhrmech.org/conferences/summary_of_proceedings_final.pdf.

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Revisiting Liberal Democracy and Asian Values in Contemporary Indonesia*

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Abstract

This paper aims to examine the complex and often contentious relationship between constitutionalism and integralism in the Indonesian government and provides a criticism of democratization within the contemporary state. Integralist state portrays the relationship between the state and the people as analogous to a family, with the state as a father and the people as children (the Family Principle). Those that adhere to this view, with regard to contemporary Asian politics, claim that Asian values are inherently integralist, that Asia's particular history and values different considerably from the West's, and that Pancasila, Indonesia's state philosophy, is utilized to establish romanticized relations between the ruler and the ruled. The data presented in this paper was collected from relevant articles on Indonesian democracy and Asian values. It also demonstrates how Pancasila, as Indonesia's core guiding philosophy, has influenced debates over how the constitutional should be applied and interpreted. As the research shows, during the regimes of Sukarno and Suharto, Pancasila was manipulated in order to promote the goals of the state, and that a reliance on integralism during Indonesia's founding years severely diminished human rights and Indonesia's capacity for an efficient democracy. By continually putting the priorities of the state above those of the people, the Indonesian government has contradicted its adoption of human rights and liberal democracy is often challenged by the spirit of integralism.

Keywords: Asian Values, Indonesia, Liberal Democracy

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I. INTRODUCTION

1.1. Background

Over the last seven decades, Indonesia has experienced the slow establishment of democracy, from the birth of state in 1945, five decades of authoritarian regimes to the wave of democratic movements in the late 20th century. It is undeniable that such shifts in political regimes were the result of the severe policies of Guided Democracy (*Demokrasi Terpimpin*) and Pancasila Democracy.[1] During the period when authoritarian regimes controlled the national economic and political interests,[2] corruption was rampant and widespread throughout the bureaucracy, which eventually led to Indonesia suffering significantly during the Asian financial crisis.[3] This condition led to unrest that resulted in what is now known as the Reformation (*Reformasi*). In particular, the *Reformasi* brought about a constitutional transformation with which made the Indonesian constitution more comprehensive and included the specified enumeration of citizen's rights and the limitation of the powers of tripartite constitutional bodies.[4]

One of the major forces behind the *Reformasi* was the adoption of a so-called "illiberal democracy." In the words of Fareed Zakaria, an illiberal democracy is a governmental system opposed to liberal democratic principles as commonly held in the West, but which is nonetheless a democracy marked by democratic election, the rule of law, the separation of powers, and the protection of property rights and the right to freedom of speech and assembly.[5] In the Indonesian context, the concept of an illiberal democracy has been proffered as a means by which to

[1] The adoption of Guided Democracy was followed by chaotic situations, such as the rebellion against the central government, of them were affiliated to Masyumi Party. Donald K. Emmerson, *Indonesia Beyond Suharto: Polity, Economy, Society, Transition* (New York: M.E. Sharpe, 1999), 42. Such rebellion, however, was strongly motivated by the dissatisfaction of authoritarian style of government practiced by Sukarno. Marcus Mietzner, *Military Politics, Islam, and the State in Indonesia: From Turbulent Transition to Democratic Consolidation* (Singapore: Institute of Southeast Asian Studies, 2009), 78.

[2] Jayati Ghosh, "Coercive Corporatism: The State in Indonesian Capitalism," *Social Scientist* 24, no. 11/12 (November 1996): 37, https://doi.org/10.2307/3520101.

[3] Monique Nuijten and Gerhard Anders, *Corruption and the Secret of Law: A Legal Anthropological Perspective* (Farnham: Ashgate Publishing, Ltd., 2007), 54.

[4] Adnan Buyung Nasution, "Towards Constitutional Democracy in Indonesia" in *Adnan Buyung Nasution Papers on Southeast Asian Constitutionalism*. (Southeast Asian Constitutionalism, Melbourne: Asian Law Centre, Melbourne Law School, The University of Melbourne, 2011), 35.

[5] Fareed Zakaria, "The Rise of Illiberal Democracy," *Foreign Affairs*, 1997, 22.

preserve and include with certain local or indigenous values,[6] while still affirming the principles of democracy. It is often asserted that any Indonesian system of democracy must conform to Pancasila, (literally "The Five Principles"; the basic guiding principles of the Indonesian state) as it is claimed that Pancasila embodies the heart of Indonesian character and philosophy. Among the principles espoused by Pancasila is avoidance of contest or struggle between the ruling government and opposition,[7] for the sake of establishing and maintaining a strong state in the spirit of *gotong-royong* (mutual help).[8] However, as one might expect, such a principle can easily be an interpretation as a justification of integralism in all aspects of the relationship between the state and society.[9]

In a broader context, such an interpretation of Pancasila's principles through and the integralist lens is in keeping with similar historically "Asian" values. These values draw from Asia's long-held reliance on paternalistic relationships and respect for strong authority figures who try to rule in a manner reminiscent of the romanticized ideal family structure. Singapore, for instance, justifies "Asian" values as the main reason for the adoption of culturally relativistic stance, and argues that Asian cultures have backgrounds which are distinctly different from the West, which includes cultural precedence for the exemption from the adoption of universal human rights.[10] As interpretation matters, Indonesia's constitutional practices reflected cooperation among the various constitutionally created bodies, specifically between the administrative and representative branches. However, in the absence of constitutional limitations on the President's tenure,[11] and the

[6] It is extensively extracted from Supomo's integralist idea. As one of the influential members of the Investigatory Committee for the Effort for the Preparation of the Independence of Indonesia (BPUPKI), he argued that there was no required the separation between people and government as if it is rooted from the Javanese mystical belief of *manunggal kawula gusti* (the unity of people and God). This term is frequently justified as being essential in Javanese philosophy which puts the unity of man and God, following the unity of the ruled and ruler. David Bourchier, *Illiberal Democracy in Indonesia: The Ideology of the Family State* (New York: Routledge, 2014), 3.

[7] M. C. Ricklefs, *A History of Modern Indonesia Since C. 1300 to the Present* (London: Macmillan Education UK, 1981), 239, https://doi.org/10.1007/978-1-349-16645-9.

[8] Eka Darmaputera, *Pancasila and the Search for Identity and Modernity in Indonesian Society: A Cultural and Ethical Analysis* (Leiden: BRILL, 1988), 181.

[9] Bourchier, *Illiberal Democracy in Indonesia*, 2.

[10] Michael D. Barr, "Lee Kuan Yew and the 'Asian Values' Debate," *Asian Studies Review* 24, no. 3 (2000): 309.

[11] The absence of the limitation of president's tenure, however, took Sukarno and Suharto to assume the power up to 23 and 32 years respectively. Therefore, the constitutional amendment responded it as mentioned in Article 7 by emanating the restriction with two terms of presidential tenure. Tim Lindsey, "Indonesian Constitutional Reform: Muddling Towards Democracy," *Sing. J. Int'l & Comp. L.* 6 (2002): 249.

dependence of the President's power on the People's Consultative Assembly (*Majelis Permisyawaratan Rakyat* or MPR),[12] compromises were made regarding the extent to which the Indonesian government could fully implement an integralist model in order for Suharto to cement his power.[13]

This paper seeks to revisit the relationship between constitutionalism and integralism within the Indonesian state, and in particular as it relates to Indonesia's previous authoritarian regimes. To this end, the paper will also examine how Pancasila has been utilized and interpreted to serve as an ideological tool by the Indonesian government. While sacred Pancasila had been introduced along with Pancasila Democracy, it took Suharto to enjoy Indonesia's longest presidential tenure. As this paper will argue, it is important to understand Pancasila as it is understood in contemporary Indonesia has been manipulated as a tool of the government to build and strengthen an authoritarian regime.

1.2. Research Questions

This paper will focus on three main questions. First, it will enquire as to the extent that constitutionalism, specifically regarding Pancasila, is the state's sole ideology. Second, it will explore the relationship between Indonesian democracy and Asian values related to family principle. Third, it will examine the possibility of the reemergence of authoritarianism the post-Reformation era. It primarily concerns Prabowo's proposal to the reinstate the original version of 1945 Constitution during the 2014 Presidential campaign and his opponent's response in issuing regulations on Indonesian civil society organizations.

1.3. Research Method

The information presented in this paper was collected from relevant articles on Indonesian democracy and Asian values. The data has been compiled to examine how Pancasila has been contested and utilized to interpret, and affect alterations to the Indonesian constitution, and how integralism affects debate over the role of the constitution.

[12] Adnan Buyung Nasution, "Relasi Kekuasaan Legislatif Dan Presiden Pasca Amandemen UUD 1945: Sistem Semi Presidensial Dalam Proyeksi," *Jurnal Hukum IUS QUIA IUSTUM* 12, no. 28 (2005): 3.

[13] Denny Indrayana, *Negara Antara Ada Dan Tiada: Reformasi Hukum Ketatanegaraan* (Jakarta: Kompas, 2008), 17.

II. DISCUSSION

2.1. Integralist State: A Historical Overview

Integralism attitudes can be traced back to the very beginning of the modern Indonesian state. During the forum which resulted in the drafting of the 1945 Constitution (known as the BPUPKI), there was a serious debate as to what political philosophy would prevail: integralism, authoritarianism, liberal democratic values, or Islamic teaching.[14] Supporters of an integralist state demanded that Indonesia develop a strong state by uniting the nation and people as one organic entity. These integralists argued that a strong state would result from leadership by a charismatic ruler who incorporated an understanding of indigenous culture and historical experiences into the government.[15] Supomo, one of the dominant figures during the BPUPKI, introduced this idea by proposing that Indonesia's government structure needed to conform to the ancient Indonesian society, and stressed the importance of unified people and government.[16] In other words, the government structure should embody family principles and mirror the familial relationship of the son and the father.[17] However, this 'unification' of the government and people in a manner resembling a family implies the absence of certain basic rights, specifically political rights.

These ideas were immediately challenged by some other members of the forum. Maria Ulfah Santoso, a member of BPUPKI strongly protested against the absence of citizen's rights in the initial drafts of the constitution.[18] However, Supomo dismissed her complaint on the grounds that the Indonesian notion of popular sovereignty *(kedaulatan rakyat)* viewed the government as the manifestation of popular democracy.[19]

These contentious viewpoints resulted two major divisions during the drafting of Indonesia's first constitution; the Supomo-Sukarno side which supported

[14] Simon Butt and Tim Lindsey, *The Constitution of Indonesia: A Contextual Analysis* (Portland: Bloomsbury Publishing, 2012), 4.
[15] Butt and Lindsey, 4.
[16] Butt and Lindsey, 4.
[17] Butt and Lindsey, 4.
[18] Bourchier, *Illiberal Democracy in Indonesia*, 75.
[19] Bourchier, 75.

integralist thoughts and the Hatta-Yamin side espoused social democratic ideals. The Hatta-Yamin faction advocated the need for the adoption of human rights as a means to oblige the government to take responsibility for its people and to protect against authoritarianism regimes in the future.[20] They proposed that three fundamental rights which were included in the constitution are the right to express opinion, the right to organize and the right to free association.[21] Opposition to this, Supomo-Sukarno argued against the entire concept of human rights.[22] Hatta, in a final defense, stated that though it was important to create unity, it should not be created at the expense of the citizen's right to express themselves and to form organizations.[23]

Indonesia's constitution is the world's second shortest constitution, containing only 37 articles and this may be a result of the fact that there was little discussion on the adoption of human rights articles. Sukarno discredited human rights and alleged them to be the source of catastrophe during Indonesia's colonial period.[24] In rejecting human rights articles, he argued in favor of a so-called Greater East Asian ideology.[25] This ideology is based on Confucianism, and can be a witness in the political philosophy adopted by Singapore, which has led to a *de facto* single-party system which stresses communalism over individualism and which essentially generated a dictatorship, contrary to the very meaning of democracy.[26]

This rejection of human rights allowed authoritarianism to flourish in through the Old Order's chaotic policy of Guided Democracy, which integrated the power of the President with the state itself.[27] It inherently imitated the style of patrimonial politics in practice during the era of the pre-colonial Javanese monarchs.[28] This can be seen through the issuance of a Presidential Decree on

[20] David Bourchier and Vedi Hadiz, *Indonesian Politics and Society: A Reader* (New York: Routledge, 2014), 240.
[21] Bourchier and Hadiz, 240.
[22] *Ibid*.
[23] Bourchier, *Illiberal Democracy in Indonesia*, 76.
[24] Bourchier, 76.
[25] *Ibid*.
[26] Damien Kingsbury and Leena Avonius, eds., *Human Rights in Asia: A Reassessment of the Asian Values Debate*, 1st ed (New York: Palgrave Macmillan, 2008), 7.
[27] Butt and Lindsey, *The Constitution of Indonesia*, 7.
[28] Harold Crouch, "Patrimonialism and Military Rule in Indonesia," *World Politics* 31, no. 4 (July 1979): 573, https://doi.org/10.2307/2009910.

5 July 1959, a response to the drawn-out constitutional drafting process under Indonesia's first legitimate constitutional drafting organization, *Konstituante*.[29] This presidential decree accommodated the reinstatement of the 1945 Constitution, which had originally been intended only as an interim constitution.[30]

It is essential to note the reasons for Sukarno's reinstatement of the 1945 Constitution. First, it was argued at the time that Indonesia was experiencing a compelling situation which required reinstatement as the only solution.[31] Second, Sukarno was trying to emphasize the greater symbolic meaning inherent within the 1945 Constitution.[32] By claiming that the 1945 Constitution was the manifestation of national ideology, Sukarno argued that reinstatement would once again unite all the people of Indonesia.[33] Third, he believed that reinstatement would bring about an effective government.[34] Moreover, finally, that reinstatement was a legitimate possibility under the prevailing Indonesian constitutional order.[35]

As a consequence, Sukarno was able to establish a life-long presidency, which, necessarily, severely threatened democracy's future in Indonesia. As far as this article is concerned, the concept espoused by Supomo that the president is the manifestation of popular democracy rendered the very essence of democracy under threat of uncontrolled executive powers. The issuance of this presidential decree indicated the monopoly on the power of constitutional alteration held by the president at that time. However, from an administrative context, it was understood that the President did not have any power to create or change the constitution.

After Sukarno's removal, the Suharto administration utilized integralist concepts in establishing and strengthening a new authoritarian order. Suharto

[29] Adnan Buyung Nasution, *Aspirasi Pemerintahan Konstitusional di Indonesia: Studi Sosio-Legal Atas Konstituante 1956-1959*, 1995, 352.
[30] Mahkamah Konstitusi Republik Indonesia, *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 (Jakarta: Sekretariat Jenderal dan Kepaniteraan MK, 2010), 10, http://www.mahkamahkonstitusi.go.id/public/content/infoumum/naskahkomprehensif/pdf/naskah_Naskah%20Komprehensif%20Buku%2010.pdf.
[31] Nasution, *Aspirasi Pemerintahan Konstitusional di Indonesia*, 319.
[32] Nasution, 319.
[33] *Ibid*.
[34] *Ibid*.
[35] *Ibid*.

is so-called 'New Order,' which was supported by the military, silenced political oppositions through a series of killings and politically motivated detentions from 1965 to 1966.[36] In addition, it introduced 'Pancasila Democracy' the sole interpretation of Pancasila, and it introduced a two-week indoctrination program for civil servants, called P4 Courses (Upgrading Course on the Directives for the Realization and Implementation of Pancasila).[37] Within this environment, an integralism was infused into the prevailing political and legal ideologies of the state as a means of promoting the principle of national unity.[38]

2.2. Illiberal Democracy and Asian Values: A History of Integralism in Indonesia

Indonesia's adopting the principles of illiberal democracy is a result of the practices and policies of periods under Sukarno and Suharto. By ruling form a cultural relativist perspective, these two leaders, and their administrations, created a national identity based around Pancasila as derivative of indigenous values.[39] Pancasila, therefore, became an expansionary paradigm amidst a period of international ideological conflict. Pancasila was gradually used as a tool through which to assert and affirm the validity of democracy practiced through a lens of Indonesian familial values, a tool that could be used to limit the western-democratic movement. In other words, democracy was morphed to conform to Asian values by stressing the people's reliance on the strength of Indonesian tradition and culture.[40]

Supomo claimed that the appropriate model for Indonesia was one which was the derivative of indigenous values to the Indonesian archipelago. However, such a view requires further clarification: in practice it conformed more to the values of Nazi Germany and Imperial Japan,[41] rather than traditional Indonesian

[36] Butt and Lindsey, *The Constitution of Indonesia*, 7.
[37] Michael Morfit, "Pancasila: The Indonesian State Ideology According to the New Order Government," *Asian Survey* 21, no. 8 (August 1981): 838, https://doi.org/10.2307/2643886.
[38] Butt and Lindsey, *The Constitution of Indonesia*, 7.
[39] Edward Aspinall, "Democratization and Ethnic Politics in Indonesia: Nine Theses," *Journal of East Asian Studies* 11, no. 2 (2011): 312.
[40] Surain Subramaniam, "The Asian Values Debate: Implications for the Spread of Liberal Democracy," *Asian Affairs: An American Review* 27, no. 1 (January 2000): 25, https://doi.org/10.1080/00927670009598827.
[41] Nasution, *Towards Constitutional Democracy in Indonesia*, 14.

values. The establishment of a strong central state, authoritarian in nature, was justified as a return to the Indonesian principles of communalism, cooperation, and family values.[42] In this system, individuals are seen an important component of the family and, therefore, of the state, but a state still retains sole and absolute powers. This system promoted the establishment of a strong state with uncontrolled powers invested in the executive body which adversely impacts to the guarantee of personal political rights.[43] However, referencing 'family principles,' such a system becomes much more suited to gaining widespread acceptance and support within many Asian countries, including Indonesia.

Ethnic diversity was used as justification in the push to promote democracy rooted in Asian values and was interpreted as part of Pancasila's goal of strengthening the political system.[44] Accordingly, the promotion of a multicultural society was an instrument argument in favor of granting the President with unlimited power during the introduction of Guided Democracy.

During the Suharto's era, freedom of expression and association were significantly restricted, and political parties were merged as the way of suppressing the resistance.[45] The New Order used Pancasila as the basic ideological weapon in order to one overarching national principle. Pancasila, being derived from Indonesia' Asian values that reflect the social awareness and togetherness, was the perfect vehicle for promoting a regime like the New Order which stressed the government's oversight to society as a means to strengthen the leader's hegemony. In the name of promoting economic development, Suharto's authoritarianism was legitimated through its guarantee of social and economic prosperity for all.[46]

Relatively stable progress and welfare drove the continuation of the New Order dictatorship and price stability became the primary tool. To this end, Pancasila was used by the New Order's to remind the populace that its policies

[42] Nasution, 14.
[43] Richard Robison, "The Politics of ?Asian Values?," *The Pacific Review* 9, no. 3 (January 1996): 310–11, https://doi.org/10.1080/09512749608719189.
[44] Harold Crouch, "Democratic Prospects in Indonesia," *Asian Journal of Political Science* 1, no. 2 (December 1993): 82, https://doi.org/10.1080/02185379308434026.
[45] Ariel Heryanto and Vedi R. Hadiz, "Post-Authoritarian Indonesia: A Comparative Southeast Asian Perspective," *Critical Asian Studies* 37, no. 2 (January 2005): 267, https://doi.org/10.1080/14672710500106341.
[46] Robison, "The Politics Of ?," 316.

were in keeping with the spirit of Pancasila. Therefore, it was considered as a tool to advance the political society and an indicator that Indonesian democracy was working.

The creation of a strong centralized government fostered the existence of the New Order era dictatorship. The central government was without transparency and was not held accountable for the corruption which was rife at all levels of government.[47] Economic growth was exploited to generate a personal wealth, rather than to achieve social and economic prosperity. Democracy was hijacked by the interests of the integralist state, a complete abuse of the liberal democratic system. However, due to this widespread corruption and the ensuing economic crisis, the conflict between political interests and the congestion of the political system brought about the New Order regime's destruction.[48] Due to the government reserving business opportunities only for family, friends, and fellow cronies, Indonesia experienced a weak economic system following the economic collapse of the 1998 Asian financial crisis.[49] Student-initiated demonstrations brought to light the lies of the government and manner by which it had hijacked Asian values for its own gain. This led to the fall of the Suharto regime, otherwise known as the Reformation.

However, the application Pancasila based democracy which conformed to Asian values for 32 years shares similarities with the Singapore's application and adoption of said Asian values as a major component of its governing philosophy. In terms of the leadership, both have adhered to the concept of cultural relativism concerning the introduction of a democratic idea from the West.[50] In Singapore, Asian values were promoted by Lee Kuan Yew as the moral values which should influence the development of the state, and claimed that individuals are naturally

[47] Philip Eldridge, "Human Rights in Post-Suharto Indonesia," *The Brown Journal of World Affairs* 9, no. 1 (2002): 129–30.

[48] Donald E. Weatherbee, "Indonesia: Political Drift and State Decay," *The Brown Journal of World Affairs* 9, no. 1 (2002): 25.

[49] Louay Abdulbaki, "Democratisation in Indonesia: From Transition to Consolidation," *Asian Journal of Political Science* 16, no. 2 (August 2008): 158, https://doi.org/10.1080/02185370802204099.

[50] Chang Yau Hoon, "Revisiting the Asian Values Argument Used by Asian Political Leaders and Its Validity," *The Indonesian Quarterly* 32, no. 2 (2004): 155, https://works.bepress.com/changyau_hoon/4/download/.

on each other and therefore a parental state was justifiable.[51] The leadership in Singapore has claimed that economic growth is the result of authoritarianism modeled on Asian values. These values, it is argued, encourage a balance of the state's political branches. They are also claimed to have brought about Singapore's success in good governance rankings and as the reason behind Singapore's reputation Asia's most transparent country.[52] Singapore which is arguable the most developed country in Southeast Asia, relies on Asian values, whereas the majority of the developed world is oriented around democracy thought.

Asian values have helped Singapore become a developed country with significant, economic growth and, socio-political harmony. Singapore is not obsessed with personal freedoms which occupy much of modern democratic ideology. However, though Singapore and Indonesia have established authoritarian governing systems based on these Asian values, it should be noted that there are some differences between them. Lee's authoritarianism has resulted in a prosperous country with little obvious corruption. Suharto's Pancasila Democracy, on the other hand, eschewed economic progress in favor of authoritarianism with little regard for the people's welfare.[53]

It is important to clarify that, since the 1998 collapse, Indonesia has constructed a democracy which is much more in accordance with the western notion of democracy, including the adoption of separation of powers, human rights protections, and checks and balances among the branches of the government. According to western democratic principles, separation of powers is necessary in order to too much power not being invested in one government entity. The power of the executive is strictly limited so that it cannot control other institutions and it can be controlled to some degree by other branches of government such as the House and the Courts.[54]

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[51] Michael D. Barr, "Lee Kuan Yew and the 'Asian Values' Debate," *Asian Studies Review* 24, no. 3 (2000): 310.

[52] Heryanto and Hadiz, "Post-Authoritarian Indonesia," 256.

[53] Mark R Thompson, "Pacific Asia After Asian Values: Authoritarianism, Democracy, and Good Governance," *Third World Quarterly* 25, no. 6 (September 2004): 1084, https://doi.org/10.1080/0143659042000256904.

[54] Michelle M. Taylor-Robinson and Joseph Daniel Ura, "Public Opinion and Conflict in the Separation of Powers: Understanding the Honduran Coup of 2009," *Journal of Theoretical Politics* 25, no. 1 (January 2013): 114, https://doi.org/10.1177/0951629812453216.

Conversely, the absence of such restrictions on power leads to authoritarianism, as is clear given the examples of the Sukarno and Suharto regimes. The ideological justifications for Sukarno's Guided Democracy and Suharto's Pancasila Democracy threatened the very nature of democracy and personal rights in Indonesia.[55] The examples of these two regimes make it clear power without adequate control mechanism is a threat to democracy and the establishment of democratic society within Indonesia.

By examining the emergence of authoritarianism as practiced in the periods of Sukarno and Suharto, it is clear that integralism, as a model for the development of the state, should be evaluated and reconsidered; including the purported equation to Asian values. It should be clear that the rejection of human rights in order to promote economic growth and infrastructure development cannot be sustained in a democracy, but only in an autocracy.

2.3. Democracy After Two Decades of Reformation: A Struggle towards Liberal Democracy

After the fall of Suharto's authoritarian regime, democracy in Indonesia emerged through a series of constitutional amendments which took place from 1999 to 2002. As part of reformation agenda, these amendments were driven by constitutionalist principles an attempt to make constitutionalism the prevailing doctrine in Indonesia, something which the 1945 Constitution failed to offer, leading to generations of suffering by Indonesian citizens. These amendments reasserted the national commitment towards promoting a working of democracy, through the scope of the changes were limited by the constitution itself (constitutional democracy).

The Reformation can be best described as the resurgence of democracy after decades of authoritarianism justified by the need to protect and defend the national values enshrined in Pancasila. Accordingly, the Reformation, as a backlash against consecutive authoritarian regimes, sought to ensure that

[55] Mark R. Thompson, "Whatever Happened to Asian Values?," *Journal of Democracy* 12, no. 4 (2001): 156, https://doi.org/10.1353/jod.2001.0083.

government institutions fulfill the duties reserved to them by the constitution and that none of them exceed the powers given to them.

One of the most interesting inclusions in the amendment to the Indonesian constitution during the Reformation was the enumeration of powers and rights granted to the government. This was, as Denny argues, the most substantial aspect of constitutional limitation of state power taken in order to protect basic human rights.[56] Therefore, in lieu of human rights violations which had occurred in the past, it was determined that the process of constitutional examination was required, and that the court should possess some power of judicial review regarding matters of constitutional disputes.

It is also important to note that freedom of the press has increased since the fall of Suharto. The transitional administration of President Habibie paved the way for this greater freedom by ensuring that the press was allowed to operate without fear and free of government surveillance. In addition, the first democratic election after the Reformation was conducted in 1999, with Abdurrahman Wahid winning the election. This election was followed by the presidency of Yudhoyono in 2004. However, Abdurrahman Wahid was impeached due to conflicts between his administration and the House of Representative (*Dewan Perwakilan Rakyat*).

There are two important lessons from Indonesia's early elections after the Reformation. First, Indonesia had successfully introduced the Constitutional Court and granted it the power to legally remove a sitting president, and the powers to conduct constitutional litigation, disband political parties, settle disputes between branches of government, and settle disputes regarding electoral results. Second, direct elections which replaced presidential appointment by parliament, positively impacted political stability in Indonesia. This shift has successfully generated a series of smooth successions from the president to the president since the beginning of the Reformation, which has resulted in more political stability. In other words, the changes to the electoral framework have altered the political symbiosis between the People's Consultative Assembly (MPR) and the President that the office of the President is no longer subject to the Assembly.

[56] Denny Indrayana, *Amandemen UUD 1945: Antara Mitos dan Pembongkaran* (Mizan Pustaka, 2007), 124.

Since the Reformation, democracy has flourished following the human rights guarantees outlined in the constitution. This is an indicator of the success of the Reformation and of the constitutionalist ideas which inspired it. Furthermore, it should be noted that an economic boom followed the success of the political transition of the Reformation, which has spurred rapid economic development in Indonesia. For instance, during the Yudhoyono era, the fragile economy recovering in the wake of the economic collapse of 1998 was transformed and quickly rebounded due to effective economic policies as the result of political stability.[57] During the Jokowi presidency, Indonesia's economic performance similarly improved, as made evident by the implementation of a large infrastructure program. Through a series of infrastructure projects, Jokowi laid the groundwork for rapid economic development in the near future.[58] Irrespective of political stability influencing economic growth as the result of Reformation, there are some critical notes on the future of Indonesian democracy. It is exemplified by the idea to reinstate the 1945 Constitution and the regulation in lieu of law (*Perppu*) to disband civil society organizations (CSOs). Regarding the idea of reverting to the original version of the 1945 Constitution, it was frequently reiterated by Prabowo Subianto, the presidential candidate from Gerindra Party.[59] He argued that the current issues faced by Indonesia's democratic system be a result of liberal democracy. In other words, the principles of liberal democracy which prevailed after the Reformation contradict the ideas or the spirit of Indonesian people, as outlined in the original constitution. Therefore, return to that document, as he argued, would be a means by which to steer Indonesia in a right direction.[60]

Prabowo's political views are often considered outdated; counter to the spirit of the Reformation. The re-adoption of the original version of the constitution is unlikely to result in a strengthening of the democratic process, as can be surmised given the tumultuous experiences of the Sukarno and Suharto eras.

[57] The Jakarta Post, "The SBY Years: A Legacy of Lackluster Economy," The Jakarta Post, accessed August 5, 2017, http://www.thejakartapost.com/news/2014/09/29/the-sby-years-a-legacy-lackluster-economy.html.
[58] The Jakarta Post, "Infrastructure Development on Track: Jokowi - Business - The Jakarta Post," accessed August 5, 2017, http://www.thejakartapost.com/news/2017/05/03/infrastructure-development-on-track-jokowi.html.
[59] Edward Aspinall, "Oligarchic Populism: Prabowo Subianto's Challenge to Indonesian Democracy," *Indonesia* 99, no. 1 (2015): 19.
[60] *Ibid, 19*.

Modern Indonesian society would surely be harmed by such a regression, as the democratization process was begun as a means of reforming political and constitutional ideas to bring a democratic state and society which had been lacking under the original constitution. Still, the re-adoption remains a possibility, especially if it is supported by MPR, the only entity with the power to amend and change the constitution.

Additionally, though the rhetoric espoused publicly by Prabowo is inherently nationalistic, his activities show that he is also a pragmatic capitalist. He championed nationalism while simultaneously contributing to Indonesia's poor economic welfare of the support of economic exploitation by foreign powers.[61] He also suggests that strong and charismatic executive leadership of the archipelago is needed to counteract the weak bureaucracy which easily succumbs to corruption.[62] Prabowo's political rhetoric is an indicator that though Indonesia has experienced a Reformation, the spirit of authoritarianism has remained.

Though opposed to Prabowo's desire for a return to the original constitution, the Jokowi administration, has made some recent political blunders too, most notably the issuance of *Perppu* No. 2/2017 that legalizes authoritarian administration to disband CSOs. This law essentially lays the groundwork for more easily silencing CSOs by shifting the authority to disband CSO from the court's process to the executive. The creation of this law is understood to be an effort to silence one CSO in particular the radical religious group *Hizbut Tahrir Indonesia* (HTI). However, it threatens the existence of all CSOs, as according to *Perppu*, if the case can be made that a CSO's activities are counter to the principles of Pancasila, it can be unilaterally disbanded by the executive.

Therefore, the safety of CSOs in Indonesian is now related to the manner in which Pancasila is interpreted and defined. This then begs the question as to whether Pancasila can possess any interpretations besides that which is approved by the government. Furthermore, the questions as to whether the government should even be afforded the power to interpret Pancasila should be examined

[61] *Ibid*.
[62] *Ibid*.

and given considerable weight. Concerning this issue, it should be observed that the creation of *Perppu* sets the precedence of the executive branch possessing a monopoly on administrative powers over other constitutional created bodies such as the House. Through the adoption of *Perppu*, the President has effectively seized power to draft and enact laws, a power formerly the prerogative of the House of Representative, and the power to interpret the law during CSO disbandment cases, a power that was previously reserved for the Court. In short, through the creation of *Perppu*, the President has exercised an overreach of power.

The absence of criteria which outline an "emergency situation" have contributed to the President's overreach through the issuance of *Perppu*. Article 22 of the 1945 Constitution, which deals with the emergency powers of the executive, grants the President the legitimate constitutional power to issue laws like *Perppu*, but it does not specify any parameters regarding when these emergency powers should be enacted. In other words, it does not define what is considered an emergency situation and leaves this issue to the Presidents discretion.

III. CONCLUSION

The state of democracy of Indonesia in the post-reformation era is moving in the right direction. By adopting the limited principles outlined by the constitution, the Indonesian government is improving the separation of powers and working to guarantee human rights provisions, as stipulated in the constitution. However, recent developments show that this trend towards democratic principles is potentially being derailed in an authoritarian direction. This regression may be the result of the continued influence of cultural relativism.

Ironically, the effects of cultural relativism influenced Indonesia's shift towards liberal democracy during the 1998 Asian financial crisis. In the decades since the recovery, however, the struggle to implement democratic principles has given rise questions as to whether or not Indonesia has truly adopted and accepted liberal democracy. In fact, the modern Indonesian state was challenged by Prabowo, as a

result of his emphasis on returning to the original texts of the 1945 Constitution could be better described as a so-called "illiberal democracy." Unfortunately, the administration of Joko Widodo seems to have made a political blunder in issuing *Perppu*. As a result of the monopoly of power which *Perppu* grants to the executive, it poses a threat to freedom of expression and the right to association, those freedoms which Hatta and Yamin were concerned about when proposing the human rights provisions in the early drafts of the 1945 Constitution. In an effort to stem this tide of authoritarianism, political changes, and even constitutional amendments should be enacted to ensure that Indonesia remains on the track towards democratization. Additionally, the extent of the powers granted to the President through *Perppu* needs to be clearly defined. This greater definition is required as a means to ensure that President may only utilize said powers in legal and appropriate situations and to avoid the ever-present threat of abuse of power which causes citizens' rights to be trespassed upon.

BIBLIOGRAPHY

Abdulbaki, Louay. "Democratisation in Indonesia: From Transition to Consolidation." *Asian Journal of Political Science* 16, no. 2 (August 2008): 151–72. https://doi.org/10.1080/02185370802204099.

Aspinall, Edward. "Democratization and Ethnic Politics in Indonesia: Nine Theses." *Journal of East Asian Studies* 11, no. 2 (2011): 289–319.

———. "Oligarchic Populism: Prabowo Subianto's Challenge to Indonesian Democracy." *Indonesia* 99, no. 1 (2015): 1–28.

Barr, Michael D. "Lee Kuan Yew and the 'Asian Values' Debate." *Asian Studies Review* 24, no. 3 (2000): 309–334.

———. "Lee Kuan Yew and the 'Asian Values' Debate." *Asian Studies Review* 24, no. 3 (2000): 309–334.

Bourchier, David. *Illiberal Democracy in Indonesia: The Ideology of the Family State*. Routledge, 2014.

Bourchier, David, and Vedi Hadiz. *Indonesian Politics and Society: A Reader*. New York: Routledge, 2014.

Butt, Simon, and Tim Lindsey. *The Constitution of Indonesia: A Contextual Analysis*. Bloomsbury Publishing, 2012.

Crouch, Harold. "Democratic Prospects in Indonesia." *Asian Journal of Political Science* 1, no. 2 (December 1993): 77–92. https://doi.org/10.1080/02185379308434026.

———. "Patrimonialism and Military Rule in Indonesia." *World Politics* 31, no. 4 (July 1979): 571–87. https://doi.org/10.2307/2009910.

Darmaputera, Eka. *Pancasila and the Search for Identity and Modernity in Indonesian Society: A Cultural and Ethical Analysis*. Leiden: BRILL, 1988.

Eldridge, Philip. "Human Rights in Post-Suharto Indonesia." *The Brown Journal of World Affairs* 9, no. 1 (2002): 127–139.

Emmerson, Donald K. *Indonesia Beyond Suharto: Polity, Economy, Society, Transition*. New York: M.E. Sharpe, 1999.

Ghosh, Jayati. "Coercive Corporatism: The State in Indonesian Capitalism." *Social Scientist* 24, no. 11/12 (November 1996): 36. https://doi.org/10.2307/3520101.

Heryanto, Ariel, and Vedi R. Hadiz. "Post-Authoritarian Indonesia: A Comparative Southeast Asian Perspective." *Critical Asian Studies* 37, no. 2 (January 2005): 251–75. https://doi.org/10.1080/14672710500106341.

Hoon, Chang Yau. "Revisiting the Asian Values Argument Used by Asian Political Leaders and Its Validity." *The Indonesian Quarterly* 32, no. 2 (2004). https://works.bepress.com/changyau_hoon/4/download/.

Indrayana, Denny. *Amandemen UUD 1945: Antara Mitos dan Pembongkaran*. Mizan Pustaka, 2007.

———. *Negara Antara Ada dan Tiada: Reformasi Hukum Ketatanegaraan*. Jakarta: Kompas, 2008.

Kingsbury, Damien, and Leena Avonius, eds. *Human Rights in Asia: A Reassessment of the Asian Values Debate*. 1st ed. New York: Palgrave Macmillan, 2008.

Lindsey, Tim. "Indonesian Constitutional Reform: Muddling Towards Democracy." *Sing. J. Int'l & Comp. L.* 6 (2002): 244.

Mahkamah Konstitusi Republik Indonesia. *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. Jakarta: Sekretariat Jenderal dan Kepaniteraan MK, 2010. http://www.mahkamahkonstitusi.go.id/public/content/infoumum/naskahkomprehensif/pdf/naskah_Naskah%20Komprehensif%20Buku%2010.pdf.

Mietzner, Marcus. *Military Politics, Islam, and the State in Indonesia: From Turbulent Transition to Democratic Consolidation*. Singapore: Institute of Southeast Asian Studies, 2009.

Morfit, Michael. "Pancasila: The Indonesian State Ideology According to the New Order Government." *Asian Survey* 21, no. 8 (August 1981): 838–51. https://doi.org/10.2307/2643886.

Nasution, Adnan Buyung. *Aspirasi Pemerintahan Konstitusional di Indonesia: Studi Sosio-Legal Atas Konstituante 1956-1959*, 1995.

———. "Relasi Kekuasaan Legislatif dan Presiden Pasca Amandemen UUD 1945: Sistem Semi Presidensial Dalam Proyeksi." *Jurnal Hukum IUS QUIA IUSTUM* 12, no. 28 (2005): 1–11.

———. "Towards Constitutional Democracy in Indonesia". In *Adnan Buyung Nasution Papers on Southeast Asian Constitutionalism*: 35. Melbourne: Asian Law Centre, Melbourne Law School, The University of Melbourne, 2011.

Nuijten, Monique, and Gerhard Anders. *Corruption and the Secret of Law: A Legal Anthropological Perspective*. Farnham: Ashgate Publishing, Ltd., 2007.

Ricklefs, M. C. *A History of Modern Indonesia Since C. 1300 to the Present*. London: Macmillan Education UK, 1981. https://doi.org/10.1007/978-1-349-16645-9.

Robison, Richard. "The Politics of ?Asian Values?" *The Pacific Review* 9, no. 3 (January 1996): 309–27. https://doi.org/10.1080/09512749608719189.

Subramaniam, Surain. "The Asian Values Debate: Implications for the Spread of Liberal Democracy." *Asian Affairs: An American Review* 27, no. 1 (January 2000): 19–35. https://doi.org/10.1080/00927670009598827.

Taylor-Robinson, Michelle M., and Joseph Daniel Ura. "Public Opinion and Conflict in the Separation of Powers: Understanding the Honduran Coup of 2009." *Journal of Theoretical Politics* 25, no. 1 (January 2013): 105–27. https://doi.org/10.1177/0951629812453216.

The Jakarta Post. "Infrastructure Development on Track: Jokowi - Business - The Jakarta Post." Accessed August 5, 2017. http://www.thejakartapost.com/news/2017/05/03/infrastructure-development-on-track-jokowi.html.

The Jakarta Post. "The SBY Years: A Legacy of Lackluster Economy." The Jakarta Post. Accessed August 5, 2017. http://www.thejakartapost.com/news/2014/09/29/the-sby-years-a-legacy-lackluster-economy.html.

Thompson, Mark R. "Pacific Asia After Asian Values: Authoritarianism, Democracy, and Good Governance." *Third World Quarterly* 25, no. 6 (September 2004): 1079–95. https://doi.org/10.1080/0143659042000256904.

Thompson, Mark R. "Whatever Happened to Asian Values?" *Journal of Democracy* 12, no. 4 (2001): 154–65. https://doi.org/10.1353/jod.2001.0083.

Weatherbee, Donald E. "Indonesia: Political Drift and State Decay." *The Brown Journal of World Affairs* 9, no. 1 (2002): 23–33.

Zakaria, Fareed. "The Rise of Illiberal Democracy." *Foreign Affairs*, (1997): 22–43.

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The Obligation of the Constitutional Court of Indonesia to Give Consideration in the Process of Dissolution of Societal Organizations

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Abstract

The government efforts to dissolve the societal organizations must be carried out in accordance of stages and processes stipulated in the Law on Societal Organizations. Persuasive efforts must be done first before the imposition of administrative sanctions. Administrative sanctions in the form of warning letters and temporary suspensions of activities need to be done before the Government dissolves the societal organizations after a court decision was obtained from the permanent legal force. The writer considered that the dissolution of societal organizations by the Government was urgent for the present, but the Government before dissolving societal organizations should seek consideration from the Constitutional Court of Indonesia as the guardian, and interpreter of Pancasila. Thus, the Constitutional Court of Indonesia as a neutral judicial institution shall have the authority to consider whether a societal organization will be dissolved.

Keywords: Constitutional Court of Indonesia, Dissolution of Societal Organizations, Pancasila

I. INTRODUCTION

1.1. Background

Article 28 of the 1945 Constitution of the State of the Republic of Indonesia (Hereafter mentioned as the 1945 Constitution) which states that *"freedom of associate and assembly, expulsion of thought orally and written and so on is stipulated by law", is* a constitutional basis for union activities, assembly, and

issues thought both oral and written. On the basis of constitutional basis regarding freedom of association and assembly, human as social beings are given the rights to live in a group whether permanently or temporally which in the 1945 Constitution is given the terms of association or assembly. The fundamental provisions of association form a constitutional basis for establishing organizations in Indonesia. Currently known as socio-political organization and community organization which consist of professional and functional organization also various non-governmental organizations. This modern organization enables the effective and efficient organization of the people's sovereignty.[1]

Freedom of expression is governed in Article 28E paragraph (3) of the 1945 Constitution which states that, each person is entitled to freedom of association, assembly and expression. Freedom of expression includes the rights to seek, receive, and disseminated ideas and information in channelling aspirations. This freedom is a multi-faceted right which shows the breadth and extend of human rights law. This gives consequences that each human action or groups is not unlimited. There should be steps to ensure that freedom of expression does not harm rights and freedoms of others.[2] That one of the implementation of freedom of association and assembly, the Government considers it necessary to draft a law based on the provisions of 1945 Constitution before the reform, namely Law No. 8 of 1985 on Societal Organization, and the current Law No. 17 of 2013,[3] which was passed on July 22, 2013.[4]

Through Law No. 17 of 2013 on Societal Organization, the existence of societal organization obtains a number of restrictions, especially ideology restriction that require Pancasila as the societal organizations ideology to the imposition of sanctions for societal organizations committing certain offences. Societal organizations can be defined generally as a group of people joining on the basis

[1] Nia Kania Winayanti, *Dasar Hukum Pendirian dan Pembubaran Ormas (Organisasi Kemasyarakatan)* (Yogyakarta: Pustaka Yustisia, 2011), 11-28.

[2] Suparman Marzuki, *et.al, Hukum Hak Asasi Manusia* (Yogyakarta: Pusat Studi Hak Asasi Manusia, Universitas Islam Indonesia, 2008), 100-101.

[3] The author wrote this paper when the Law No.17 of 2013 is still a positive law for the regulation of Societal organization.

[4] Pan Mohammad Faiz, "The Protection Of Civil and Political Right By The Constituttional Court of Indonesia", *Indonesia Law Review Journal* 6, no. 2 (May-August 2016): 163.

of a common vision, orientation, and political perception. Those three things give birth to a certain value that commonly referred as "ideology".[5] Ideology is generally a system of beliefs held by society to organize themselves.[6] Ideology also can be regarded as a comprehensive vision, as a way to view something.[7] The ideology is set forth in a constitution of organization known as the Statutes, which are then elaborate in detail in the platform of societal organizations struggles, which are illustrated in the bylaws.[8] Ideology is a collective value that will affect the attitudes and behaviour of members, so that from the position, attitude, and behaviour of a person, should be expected from which organization they were.[9]

One of the reason for the dissolution of societal organizations in Indonesia is if activities of a societal organization strongly indicated against goals, principles, and characteristics that based on Pancasila and the 1945 Constitution. The most recent significant event was when government dissolved a societal organizations named Hizbut Tahrir Indonesia (hereafter mentioned as HTI), because this societal organization was seen not to carry out a positive role in the development process in order to achieve national goals. HTI activities were also strongly indicated had an opposite goals, principles, and characteristics of stated which based on Pancasila and the 1945 Constitution. The Government through the Coordinating Minister of Political, Legal, and Security affairs (Menkopolhukan) Wiranto, on May 12, 2017, stated the Governments' stance that would dissolve a Societal Organization that threatening the existence of the Unitary State of the Republic of Indonesia (NKRI). Any societal organization that intends to threaten the existence of NKRI, including HTI, would be dissolve through legal channels.[10] The Attorney General's Office through Attorney General HM Prasetyo stated that the demands for the dissolution of HTI to the court would be made after receiving all the evidence. Currently all the evidence is said to be still in the Police, the Ministry of Home Affairs, and the Ministry of Justice and Human

5 Indra Perwira, "*Pembatasan Hak Berserikat, dan Berkumpul"* (Paper, Unpublished, n.d), 2.
6 Daniel Bell, *Matinya Ideologi* (Magelang: Indonesia Tera, 2001).
7 Lorens Bagus, *Kamus Filsafat* (Jakarta: Gramedia Pustaka Utama, 2000), 1178.
8 Harun Alrasid, *Naskah UUD 1945 Sesudah Empat Kali Diubah oleh MPR* (Jakarta: Universitas Indonesia (UI-Press), 2007), 150.
9 Indra Perwira,"Pembatasan Hak, 2.
10 Kompas, May 13, 2017, p. 4.

Rights. Regarding this matter, the police have confirmed to have a video proof and documentation that HTI is in conflict with Pancasila, among them was HTI activities in one of campus in West Java.[11]

Discourse around the dissolution of HTI as societal organization was still rolling in the community. As a state of law,[12] the Government should always base its policies on the basis of applicable law,[13] and in its applications, should uphold the state democratic process,[14] because it aims to protect human right.[15] Similarly, in this case, the Governments' efforts to dissolve the HTI societal organization should go through processes and stages in accordance to the applicable law. In Article 60 to Article 82 of Law No. 17 of 2013 stipulates the sanctions for societal organization whose actions are in conflicts with Pancasila, and the 1945 Constitution from the awarding of warning letters up to three times; cessation of assistance; freezing; and dissolution through the judicial mechanism.

However, it will take a long time if the Government comply to the positive law about the dissolution of societal organizations, while the state should not allow any societal organization that act against the Pancasila as the state ideology exists in Indonesia. For these reasons, the author is interested to write about the dissolution of societal organization that fits the concept of democracy legal state, but also prioritize the effectiveness and time efficiency. The author considered that the dissolution of societal organization by the Government was something urgent for now, but before dissolving any societal organization the Government should seek consideration from the Constitutional Court of Indonesia as a guardian and interpreter of Pancasila. Therefore, the Constitutional Court as a neutral judiciary has the authority to consider whether societal organizations will be dissolved or not. Based on the basic description above, the author is interested to write a paper

[11] Media Indonesia, May 15, 2017, p. 8.
[12] Padmo Wahjono, *Indonesia Negara Berdasarkan atas Hukum* (Jakarta: Ghalia Indah, 1986), 1.
[13] Hendra Nurtjahjo (Ed), *Politik Hukum Tata Negara Indonesia* (Jakarta: Pusat Studi Hukum Tata Negara Fakultas Hukum Universitas Indonesia, 2004), 277.
[14] Muhammad Tahir Azhary, *Beberapa Aspek Hukum Tata Negara, Hukum Pidana, dan Hukum Islam: Menyambut 73 Tahun Prof. Dr. H. Muhammad Tahir Azhary, S.H., Akademisi, Praktisi, dan Politisi* (Jakarta: Kencana Prenada Media Group, 2012), 28-29.
[15] Philipus M Hadjon, *Perlindungan Hukum Bagi Rakyat di Indonesia* (Surabaya: Bina Ilmu, 1987), 71.

which entitled "The Obligation of the Constitutional Court to Give Consideration in the Process of Dissolution of Societal Organizations", with the formulation of the problems: (1) Why does the Law on Societal Organizations require every societal organization in Indonesia to comply with Ideology Pancasila, (2) What are the process of sanctioning up to dissolution of Societal Organizations based on in Law No. 17 of 2013 on Societal Organizations; (3) How is the possibility of dissolution of societal organization become the authority of the Government, and the Obligation of the Constitutional Court to give consideration in the Process of Dissolution of Societal Organization becomes new authority for the Constitutional Court.

1.2. Research Method

This research is a normative legal research which uses doctrinal method in analyzing principles and norms of legislation relating to the process of dissolution of societal organization. Normative legal research conceptualize the principles and doctrines as well as a set of norms in the legislation, in this case the norms related to the obligation of the Constitutional Court to give consideration in the process of dissolution of societal organization. There are four approaches used in this study, namely: statute approach, historical approach, case approach and conceptual approach.

Primary legal materials includeL: (1) the 1945 Constitution of the Republic of Indonesia; (2) Law No.17 of 2013 on Societal Organization. Secondary legal materials which include: Minutes of discussion of the amendment of the 1945 Constitution, bill on the Constitutional Court and the its minutes of discussion, bill on the societal organizationand it's minutes of discussion, and the decisions of the Constitutional Court and the decisions of other courts, research papers, law journals, other scholarly works. While tertiary legal materials, namely, among others are dictionaries and encyclopedias.

II. ANALYSIS

2.1. Societal Organization and Pancasila Ideology

In viewing the original intent (means and purposes) establishment, and the discussion process of societal organization law. The author need to examine the political configuration in the minutes of meeting of the formation of the societal organization law, especially the regulation of Pancasila as the only principles for all societal organization in Indonesia.

The concept of the sole principle of Pancasila begins with the speeches of President Soeharto in Pekanbaru, Riau, in the Opening of the National Military Forces' (ABRI) leader meeting on March 27, 1980, and the birthday of the Special Forces Command (Kopassus) 16, 1980. In both speeches President Soeharto wants Pancasila and the 1945 Constitution become the foundation of society life, nation, and state. Therefore, that Pancasila is not abused, and undermined by various forces, both extreme left and extreme right. The Plenary Session of Parliament on August 16, 1980 reaffirmed the necessity of a single principle of Pancasila for social and political forces in Indonesia.[16]

The policy on the single principle of Pancasila in the party system in Indonesia was first published in MPR Decree No. II/MPR/1983 on the Guidelines of the State Policy (GBHN), which state that:[17]

> To strengthen the stability in the political field, efforts must be made to strengthen the unity of the nation, as well as the growth of a constitutional, democratic, and law-based life based on the 1945 Constitution. In this framework, and the preservation, and practice of Pancasila, social political forces particularly Political Parties, and the Working Group (GOLKAR), and Social Organizations must be truly a social-political force that only stipulates Pancasila as the only principle.

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[16] Lili Romli, *Islam Yes Partai Islam Yes: Sejarah Perkembangan Partai-Partai Islam di Indonesia* (Yogyakarta: Pustaka Pelajar dengan Pusat Penelitian Politik LIPI, 2006), 68.

[17] Direktorat Jenderal Pendidikan Tinggi Departemen Pendidikan, dan Kebudayaan, *UUD 1945, P4, GBHN, TAP-TAP MAPR 1983, Pidato Pertanggungjawaban Presiden/Mandataris, Bahan Penataran, dan Bahan Referensi Penataran* (Jakarta: Direktorat Jenderal Pendidikan Tinggi Departemen Pendidikan, dan Kebudayaan, 1984), 107.

That policy explained by President Soeharto as follows:[18]

> If the socio-political forces have used Pancasila as the only principles, in the future, all socio-political forces will compete to offer the best idea, and figures that are as competent to their people in the great race of great development as the practice of Pancasila in order to achieve the national goal. Since all political forces have publicly affirmed Pancasila as the only principle, it would be easily prevented, and avoided to sharpening the opposition of groups in the pursuit of their respective goals which resulting in clashes, endangering unity, and national unity.
>
> With the affirmation of all socio-political forces concerning the only principles of Pancasila they used, on the other hand we will all be free from the remnants of mutual suspicion, and the mutual worry that has grown due to real experiences in the past; and on the other hand, the disappearance of mutual suspicion, and the mutual worry will refresh the growth of Pancasila democracy.
>
> With Pancasila as the only principle, it did not mean that we will ignore or degrade our level in an effort to develop religious life in Indonesia. Instead, we will develop the best relationship between religious life, and political life in Indonesian society.
>
> Religions were a source of motivations, and inspirations to their adherents, to a responsible citizen for imposing their choices on existing social and political forces, all of which used Pancasila as the only principles. Thus, any religion that exists in Indonesia could provide a basis of ethic, and a strong moral to political life.

Thus, the understanding of the policy on the single principles of Pancasila above was the Governments' attempt to eliminate the ideology of societal organization in Indonesia, namely abolish any other principles outside of Pancasila.[19] According to Moh. Mahfud MD, Suharto's steps to emasculate the societal organizations were an attempt by Soeharto to make the New Order become a strong state. The main steps to make the New Order become a strong state were engaged in the Law on Political Party, the Working Group (GOLKAR),[20] and Societal Organization which later regulates and requires every political party, and Societal Organizations in Indonesia to adopt single-based Pancasila.

[18] Suara Merdeka, August 16, 1984, p. 13-14.
[19] Sugeng Priyanto, *Dinamika Ideologi Partai Politik Keagamaan Pada Masa Orde Baru* (Yogyakarta: Magnum Pustaka Utama, 2015), 117.
[20] Moh. Mahfud. M.D, *Politik Hukum di Indonesia* (Jakarta: Rajawali Pers, 2010), 214.

The first Law that requires Pancasila as the sole principle for every political party in Indonesia is Law No. 8 of 1985 on Societal Organizations. It was a proposal from the Government, where in Article 1 No. 2 section (1) states: *"Societal Organization based on Pancasila as the only principle".* To knew why the legislators made Pancasila as the only principles for every political party in Indonesia. The author need to examine the original intent formation, and the discussion process of Law No.8 of 1985. In the First Meeting, the Chairman of the Special Committee on the fifth draft of Law on Politics, Suhardiman said:[21]

> In line with the mandate of MPR Decree No. II/MPR/1983 on the Guidelines of the State Policy (GBHN), Political Parties, and the Working Groups should be based on Pancasila as the only principles. The Special Committee, the Government will not create a new Law about Political Parties, and the Working Group (GOLKAR), and Social Organizations, but want to improve and strengthen the political life structure in Indonesia based on Pancasila as the only principle.

Nurhasan Ibnuhadjar as the representation of the United Development Faction gave his general view states:[22]

> Regarding the matter of principle, our faction believes that there is nothing more to be questioned. In our party congress held in August 1984, the principles of Pancasila as the only principle has been accepted, in which it has been incorporated into the Party's political parties and social organization.

Ibnuhadjar's opinion was strengthened further by Sugandhi Kartosubroto who represented the Development Work Faction. He states *"Organization of socio-political forces is an organization of individual cadres, holding onto Pancasila as the only principle and oriented to the national development program".*[23]

The Military in the Parliament was the most assertive and consistence faction in supporting Pancasila as the only principle as proven by the mini-general view of the faction represented by Harsono by stating: *"The military holds the Pancasila as the only principles for Political Parties. The Working Group, and the*

[21] Dewan Perwakilan Rakyat RI, *Catatan Panitia Khusus Lima Rancangan Undang-Undang Tentang Politik*, Tanggal 10 January 10, 1985 (Jakarta: Sekretariat Jenderal DPR RI, 1985), 2.
[22] *Ibid*, p. 6.
[23] *Ibid*, p. 12.

Societal Organization are a must that cannot be delayed any longer".[24] Given that the three factions in the House of Representatives had approved Pancasila as the only principles, the Indonesian Democratic Party fraction had no choice but to approve what the Government proposed which has been supported by F-PP, F-KP, and F-ABRI. This was demonstrated by the attitude of F-PDI represented by Adipramoto which states *"Political Parties, and the Working Groups (GOLKAR), and Societal Organizations must really become a socio-political force based on Pancasila as the only principle"*.[25]

In the second session, the Government represented by the Minister of the Interior, Supardjo Rustam asserted: "*For the sake of sustainability, and the practice of Pancasila, the social and political forces in Indonesia, especially Political Parties, and the Working Group (GOLKAR), and the Societal Organization must really become socio-political forces that based on Pancasila as the only principle*".[26] Up to the last hearing, in the 5th session of the Political Party Law, the attitude of all factions in the House of Representatives, as well as the Government remained unchange or the current language of the House of Representatives was "*not to the cold*" consistently supportive, and Pancasila as the only principle.[27] The Political Party Law was numbered by the State Secretariat as Law No. 8 of 1985, signed by the President, and included in the State Gazette of June 19, 1985.

After analysing the original intent of the minutes of the establishment of Law No. 8 of 1985, the author concluded that the House of Representatives and the Government agreed to make Pancasila as the sole principle for every political parties in Indonesia. Its purpose is solely for the national stability, i.e. to prevent and to avoid any conflicts between groups in efforts to achieve their respective goals resulting in clashes, endangers national unity.

According to Mahfud MD, the fifth package of Law on Politics was an orthodox/elitist/conservative legal product because the objectives of the New

[24] *Ibid*, p. 27.
[25] *Ibid*, p. 19.
[26] Dewan Perwakilan Rakyat RI, *Catatan Rapat Panitia Khusus Lima Rancangan Undang-Undang Partai Politik*, dan Golongan Karya, February 4, 1985 (Jakarta: Sekretariat Jenderal DPR RI, 1985), 10.
[27] Dewan Perwakilan Rakyat RI, *Catatan Panitia Khusus Lima Rancangan Undang-Undang Tentang Politik*, Tanggal 11 Januari 1985 (Jakarta: Sekretariat Jenderal DPR RI, 1985), 1-12.

Order Government were to create a strong Government that could guarantee the national stability in order to carry out the development that heavily depends on the economy to have a stable political atmosphere. The New Order Government used to control the opposition in a repressive way, but the New Order Government wrapped those repressive measures in a constitutional way through the limitation of political democracy, one of them by uniform the ideology for every Societal Organization in Indonesia.[28]

The obligation of political party to adopt Pancasila as an ideology was a restriction of rights and freedoms in accordance with the principle of rule of law prevailing in Indonesia. In this case, supervision towards the principles of societal organization was one form of constitutional restriction implemented by the state. The ideology of Pancasila was first emphasized as the only principle for Societal Organization in the decree of People's Consultative Assembly (TAP MPR) No. II/MPR/1983 and Law No. 8 of 1985. In the Law of Societal Organization in the reform era, the legislators still consider Pancasila as a plenary ideology for the principles of societal organization.

2.2. Sanctions and Dissolution of Societal Organizations

On July 11, 1945, the investigating Committee for Preparatory Work of Independence (BPUPK) decided to set up a small committee to design a new.[29] The Constitution draft made by the Small Committee on July 13 was presented in a meeting by the chairman of the small committee, Soepomo. In the draft of the Constitution, several rights have been ruled, namely the right of equal status in law and government (Article 28 paragraph (1)), the right to work and a decent live for humanity (Article 28 paragraph (2)), the right of freedom of religion and worship (Article 29), the right to participate in state defence (Article 30 paragraph (1).[30]

[28] Moh. Mahfud. M.D, *Politik Hukum di Indonesia, Op.cit,* p. 225-313.

[29] Saafroedin Bahar, *et.al, (Ed), Risalah Sidang Badan Penyelenggara Usaha Persiapan Kemerdekaan Indonesia (BPUPKI)-Panitia Persiapan Kemerdekaan Indonesia (PPKI) 28 Mei 1945-22 Agustus 1945* (Jakarta: Sekretariat Negara Republik Indonesia, 1995), 222.

[30] *Ibid.*, p. 231.

In a meeting in July 15 1945, two different opinions emerged regarding the urgency of the inclusion of the right to association and freedom of thought. With the approval of freedom of association and assembly the guarantee of rights were enshrined in the 1945 Constitution, namely in Article 27 paragraph (1) and (2) of the 1945 Constitution before the amendments. After the amendments of the 1945 Constitution, guarantees of human rights are regulated and guaranteed more, namely in the Article 28, Article 28A until 28J of the 1945 Constitution. In addition, the independence proclaimed on August 17, 1945 was a reflection of the strong desire of the Indonesian nation to escape the shackles of colonialism. One of the concretizations of the liberation was the recognitions of people rights in the life of society, nation, and state. The rights known to the public was the active participation of the people in certain activities, for example people can gather in a political party, labour union, and societal organization.[31]

Such participations are essentially an implementation of human rights both in a context of constitution as well as within a scope of profession. Human rights in a scope of profession can be realized in a freedom of association, for example the development and protection of tangible in the form of political parties. Furthermore, both human rights in a context of constitution as well as within the context of profession, are in fact based on the same value, regulated in the Article 28 of the 1945 Constitution about freedom of association and assembly. In a context of participation, further interpretation of the meaning of participation is that each citizen has a voice in the formulation of decision, either directly or through intermediation of levitate institutions representing their interests. This participation is built based on a freedom of association and participate constructively.[32]

In a context of history, human rights are not simply and easily obtained, but it should be achieved through long struggle and tortuous paths. This means that the path taken to achieve the recognition of human rights cannot be separated

[31] Nia Kania Winayanti, "Makna Pasal 28 UUD 1945 terhadap Kebebasan Berserikat dalam Konteks Hubungan Industrial," *Jurnal Konstitusi* 8, no.6 (Desember 2011): 1.

[32] Riant D. Nugroho, *Kebijakan Publik, Formulasi, Implementasi dan Evaluasi* (Jakarta: Elex Media Komputindo, 2003), 219.

from the beginning of the growth of the idea of human rights it self, as an important phase in the history of state administration.[33] Although the nature and notions of human have emerged and coloured the nation lives for centuries, but concretely the manifestations have only begun since Magna Charta in 1215. This Magna Charta Charter, brought the revolution in English and the recognition of the rights for each people without exception.[34] Thus, the concept of human rights arose from the struggle between the elite interests within the state and the community within the state concerned. This means that the history of human rights begins with the demands of liberations from the arbitrary acts of a state against its people. According to John Locke, the concept of human rights is naturally existed and privately owned, namely: the right to life, the right of freedom, the right to property, and the right to own something.[35]

Freedom of association was born from the basic human tendency to organize their life. In the view of John Locke and J.J Rousseau, the organizational tendency arises to meet the common needs and interests of individuals to achieve common goals based on equality of thought and consciences. Therefore, the development of freedom of association become one of the fundamental freedoms of human being recognized universally as a part of human rights with the terms of freedom of association. According to Richard H. Pildes, without the freedom of association, the dignity of humanity can be reduced because by itself one cannot express their opinions according to their belief and conscience.[36]

The international recognition on freedom of association is confirmed in Article 20 of Universal Declaration of Human Rights, Article 21 and 22 of The International Covenant on Civil and Political Rights, and Article 5 d (ix) of The Covenant on the Eradication of Racial Discrimination. Freedom of association is increasingly important as it relates with the recognition of political rights such

[33] Soewargo Kartodihardjo, *Asas-Asas Hukum Tata Negara* (Yogyakarta: Fakultas Hukum Universitas Gajah Mada, 1983),181.
[34] SM Amin, *Demokrasi Selayang Pandang* (Jakarta: Pradnya Paramita, 1976), 44.
[35] Soehino, *Ilmu Negara* (Yogyakarta: Liberty, 1980), 108.
[36] Muchamad Ali Safa'at, "*Pembubaran Partai Politik di Indonesia (Analisis Pengaturan Hukum dan Praktik Pembubaran Partai Politik 1959-2004)*" (Dissertasion Doctoral Program of Law, 2009), 16.

as the right to vote, the right of association, the right of free speech, and the right to political equality.[37]

Article 28 of the of the 1945 Constitution states *"freedom of associate and assembly, expulsion of thought orally and written and so on is stipulated by law".* For implementing this provision, the Government considers that it is necessary to draft a law based on the provisions of 1945 Constitution before the reform, namely Law No. 8 of 1985 on Societal Organization, and the current Law No. 17 of 2013 which was passed on July 22, 2013.

In the normative concept of societal organization, Law No. 17 of 2013 on Social Organization does not regulate the establishment of organization either legal entities, such as associations, foundations, foreign foundations, or non-legal organizations. These legal entities have different set of procedures, requirements, and endorsements. Arrangements on the freezing and dissolution of societal organization are set out in Chapter XVII on sanctions against societal organization that violate the prohibitions set out in the Law No. 17 of 2013.

Prohibition against Societal organization as stipulated in Article 59 of Law No. 17 of 2013 is based on:

a. The prohibitions of the use of flags, emblems, attributes similar to flags, emblems of the Republic of Indonesia, Government agencies, international agencies, forbidden organizations or political parties.

b. The prohibition against committing acts that disturb public securities and public order, including: committing hostile acts against tribes, religions, races, or classes; engaging any separatist activities that threaten the sovereignty of the Unitary State of the Republic of Indonesia; committing acts of violence, disturb public order or tranquility, or damaging public facilities and social facilities.

c. The prohibition to receive donations of any kinds, including the prohibition to raise funds for political parties. Article 20 of the Government Regulation No. 18 of 1986 on the implementation of Law No. 8 of 1985 on Societal Organization explained that societal organizations are prohibited from receiving foreign assistance without central approval and/or providing assistance to foreign parties. The foreign assistance includes financial assistance, equipment, manpower, and facilities.

[37] *Ibid,* p. 16.

d. The prohibition to develop, embraces, and disseminate doctrines or understanding that contradicts Pancasila.

Arrangements on the prohibitions of this societal organization are intended to anticipate various societal organization' activities that sometimes appear not in accordance with the constitution. There was a societal organization that emerged as a form of expression of freedom euphoria by fighting for ideas through anarchist means. There was also societal organization that was formed for a short-term and had an unclear direction of activities and objectives.

Law no. 17 of 2013 was established to provide comprehensive arrangements related to the issues of societal organization. A societal organization should be formed to be a forum in implementing the freedom of association, assembly, and expression of opinions. A societal organization is also formed in order to participate in the development to achieve the goals of the Unitary State of the Republic of Indonesia based on Pancasila. Then problems arise when there is a societal organization of HTI which was dissolved by the Government, because it is not in accordance with the objectives of the formation of societal organization as outlined in Law No. 17 of 2013. HTI's organizations denied this view and assessed that the Government has violated the right to freedom of association.

Regarding this matter, the effort in dissolving the HTI should not be seen as an effort to limit the human rights of association and assembly. Essentially, such efforts should be seen as an effort to protect the state against the other human rights. This matter is stipulated in the Constitution of Indonesia. Article 28J sections (2) of the 1945 Constitution stipulates that in practicing their rights and freedom both individually and collective, each person should respect other human rights and should not be subject to the restrictions prescribed by a law with the sole intent of ensuring the recognition and respect for the rights and freedoms of others and to fulfil fair demands in accordance with the moral consideration, religious values, securities, and public order in a democracy society. Nevertheless, every steps and government policy as an effort to dissolve the HTI is indeed better to remain in the corridor of applicable law. Law enforcement

should be carried out in accordance with the provisions of the law, contained in Law No. 17 of 2013.

Legally, the HTI was considered violating the prohibition as stated in Article 59 paragraph (4) of Law No. 17 of 2013 stating that societal prohibited to embrace, develop, and disseminate doctrines or understandings that contradict with the Pancasila. Similarly, Article 21 of Law No. 17 of 2013 on the obligations of Societal organization stipulates that societal organizations should maintain the unity of the nation and the unity of the Unitary State of the Republic of Indonesia, and should maintain public order and the creation of peace in the society.

In the legal framework of Law No. 17 of 2013, if HTI was deemed to violate the regulation, then the HTI may first be subjected to administrative sanctions, in accordance with Article 60 paragraph (1) of Law No. 17 of 2013. There are several administrative sanctions as stipulated in Article 61 of Law No. 17 of 2013, which includes a written warning, termination of assistance and/or grant, temporary suspension of activities, and/or revocation of registered certificate or revocation of legal entity status. Administrative sanctions in the form of written warnings could be issued up to three times if it is not obeyed by the relevant organizations. If the societal organizations does not comply with the third warning, then the Government may impose sanctions in the form of termination of aid and/or grant, and/or suspension of activities. Law No. 17 of 2013 also determines that before imposing administrative sanctions on the violating organization, the Government needs to make persuasive efforts.

Regarding these steps, the Government through the Home Affairs Minister (Mendagri) Tjahjo Kumolo said that the Ministry of Home Affairs actually has given many warnings to HTI, although this statement was denied by the HTI. The HTI spokesperson Ismail Yusanto admitted that his side had never received any written warning or warning letter from the Government.[38] With regards to the imposition of sanctions on suspension of activities, to a scope of national organizations, the Government should seek legal advice from the Supreme Court, and sanctions for suspension of any activities should be imposed for a maximum

[38] Republika, May 13, 2017, 1.

period of six months. It is explicitly regulated in Article 65 and Article 66 of Law No. 17 of 2013. The administrative sanction process in the form of temporary suspension of HTI activities is still unclear whether it has been implemented by the Government or not. The issues on delaying the implementation of this stage is very crucial and become a question for the judges of the district court if the trial is will be exercised. The non-implementation of sanctions imposed by the Government on the HTI may become a mitigating consideration for the defendant.

Regarding this matter, Asep Warlan Yusuf said that the Government must first follow the stages that regulated in the law before proposing the HTI. Without following the stages of dissolution of the organization according to the procedures, the dissolution may be revoked by the judges. Ideally, the Government may propose the dissolution of HTI to the district court if the HTI does not comply with the sanction of activities suspension. The Government may impose sanctions for HTI on their legal entity status after a court decision that already obtained a permanent legal force regarding the dissolution of a legal entity.[39]

Yusril Ihza Mahendra also argued similarly. The Government could not simply dissolve the HTI unless they have given written warning for three times. If the persuasive steps ignored, then the Government could apply for the dissolution of the Societal organization to the court. Yusril also said that organizations with legal status could be revoked of their legal entity status and its registration or in other words it could be dissolved. But it also should be based on the deep study and strong evidences. If not, then the request for the dissolution filed by the Government could be defeated in a court by the HTI's lawyers.[40]

According to Societal Organization Law before it was amended for organizations with legal status like HTI, the sanction is revocation of legal entity status. The revocation of this status should based on a court decision that has obtained a permanent legal force regarding the dissolution of a legal entity. This revocation should take place within 30 (thirty) days from the date of receiving a

[39] Kompas, May 17, 2017, 4.

[40] "HTI Dibubarkan, Yusril Ihza: Pemerintah Bisa Kalah di Pengadilan", https://nasional.tempo.co/read/news/2017/05/09/078873547/hti-dibubarkan-yusril-ihza-pemerintah-bisa-kalah-di-pengadilan, 22 May 22, 2017.

copy of the decision of the dissolution of the Societal Organization which has obtained a permanent legal force by the Minister of Law and Human Rights (Article 68 of Law No. 17 of 2013). The revocation was announced in the State Gazette of the Republic of Indonesia (Article 69 of Law No. 17 of 2013).

Furthermore, the dissolution of organization with legal status is filed by the Prosecutors to the district court upon written request of the Minister of Law and Human Rights. This request must be accompanied by evidence of administrative sanction imposed by the Government. Application for dissolution of Societal Organizations must be decided by a district court within 60 days from the date of the application recorded. The term can be extended to maximum of 20 days with the approval of the Chief Justice of the Supreme Court. The decision of the district court should be submitted to the applicant, the requested, the Minister of Law and Human Rights within seven days from the date of the decision (Article 72 of Law No. 17 of 2013). The verdict of the district court may be filed for a cassation to the Supreme Court with a period of 14 days.

2.3. New Roles of the Government and the Constitutional Court

2.3.1. Government Authority in Dissolving a Societal Organization

Looking at the complicated and the length of time in the process of dissolving a Societal organization regulated in the Law No. 17 of 2013, the author sees the authority to dissolve the organization should be returned to the Government again. Its dissolution should be given to the Minister of Law and Human Rights for organizations with a legal status, and the Minister of Home Affairs with non-legal status. However, the author constructed that before dissolving Societal organization the government should request consideration from the Constitutional Court as the guardian, and the interpreter of the constitution and Pancasila.

The author assessed that the Law No. 17 of 2013 should be revised related to the arrangement of sanctions, freezing and dissolution. In a limited revision of Law No. 17 of 2013, it also needs to contain the obligation of the Government to take an active role in responding the

organizations that are no longer in line with the national goals and trample on the Law. This needs to be done to affirm the authority and the ability of the State to be able to regulate, reprimand and discipline some organizations that disobey the applicable Law. Nevertheless, in order that the Government's move will not create new problems, then the efforts in dissolving organizations need take strategic, national, and constitutional steps. The important steps that should be done by the Government are: ***First***, review the existence of societal organizations' caution. Consideration of dissolution of Societal organization must be placed on the national interest, and maintain the sovereignty of the nation and the State. Thus, the dissolution can be done to maintain the integrity of Unitary State of the Republic of Indonesia (NKRI), and to maintain the continuity of constitutional democracy. ***Second***, the Government should analyzed the situation quickly, i.e. create a comprehensive database. It is intended to monitor and evaluate the programs of each existing organizations in Indonesia. The existence of a database can be used to review the actions, cases, and policies of the Societal organization during its establishment, so that it could be used as assessment parameters to improve the activities of organizations that are not in line with the national goals and threatens the integrity of the State. Thus, the Government can make changes to give permits and to dissolve of non-compliance organizations based on the mandate of the Law. Nowadays in the past, the Government was not assertive and less serious in threatening organizations that tried to replace the ideology of Pancasila. ***Third***, after the Government is convinced that there is an organization contrary to the Pancasila, before dissolving the societal organizations, the Government must request a prior consideration to the Constitutional Court as a guardian and the interpreter of the Constitution and Pancasila.

2.3.2. Obligation of the Constitutional Court.

The Constitutional Court has four powers and one obligation. Those authorities are to examine Laws against the Constitution, to decide upon the dispute over the authority of state institutions whose authorities are granted by the Constitution, to decide upon the dissolution of political parties, and to decided disputes concerning the result of general elections.[41] Its obligation is to provide a decision on the opinion of the People's Representative Council (DPR) regarding constitutional violation by the Presidents and/or Vice President under the Constitution. In addition, the decision of the Constitutional Courtis It means that there is no other legal efforts could be made.[42]

According to Harjono, there is a fine line of the authority of the Constitutional Court in general which could be divided into major powers and additional authorities. The main authorities included (1) Judicial review of the constitutionality of the law against the Constitution; (2) To decide constitutional complaint; (3) To decide dispute over the authority among state institutions; (4) To decided constitutional questions. The Court also has additional authorities that could be vary between countries with one another.[43] As Harjono said, the author constructs that the obligation of the consideration in the process of dissolution of societal organization can be given additional authority to the Constitutional Court of the Republic of Indonesia.

The 1945 Constitution provides a constitutional basis for the right of freedom of association. Freedom of association is from the human tendency to organize them in order to fight for their rights and interest. Organizational tendencies is to meet the common needs and interest of individuals to achieve common goals based on equality of

[41] Bambang Sutiyoso dan Sri Hastuti Puspitasari, *Aspek-Aspek Perkembangan Kekuasaan Kehakiman di Indonesia* (Yogyakarta: UII Press, 2005), 49-50.

[42] Luthfi Widagdo Eddyono, "Independence of Indonesian Constitutional Court in Norms and Practices", *Constituttional Review Journal* 3, no. 1, (May 2011): 1 72.

[43] Abdul Rasyid Thalib, *Wewenang Mahkamah Konstitusi dan Impilkasinya dalam Sistem Ketatanegaraan Republik Indonesia* (Bandung: PT. Citra Aditya Bakti, 2006), 187.

thought and conscience. In its development, freedom of association becomes one of the universal human rights as a part of human rights. In order to guarantee the establishment of the Constitution as the supreme law of the land, the Constitutional Court was formed as the guardian and the ultimate interpreter of the constitution.[44] Within this framework, the presence of Constitutional Court as an institution that performs judicial functions is necessary to uphold constitutional justice in Indonesia. With the existence of the Constitutional Court, it is appropriate to give the Court an additional authority in the process of social organizations dissolution, because freedom of association through Societal organization is a constitutional right of the citizen guaranteed in the 1945 Constitution. To the deviations from the constitutional rights of the citizens, the Constitutional Court is entitled to carry out an assessment with its function, which is to interpret and guard the Constitution.[45] In other words, the Constitutional Court is in charge to maintain the constitutionality of law concerning the implementation of the right of association by every citizen.

The author drew upon the Constitutional Court's experience in exercising the authority to review the law against the 1945 Constitution. In some of its legal considerations, the laws were not only reviewed against the 1945 Constitution but also Pancasila. The Constitutional Court concluded that the reviewed law directly opposed to Pancasila even though the applicant did not mention this arguments.[46] This standing was reinforced from the statement by the Chief Justice of the Constitutional Court of 2008-2013, Moh. Mahfud MD who stated that the majority of laws were annulled by the Constitutional Court because it violated the Pancasila values.

[44] Jimly Asshiddiqie, dan Ahmad Syahrizal, *Peradilan Konstitusi di Sepuluh Negara* (Jakarta: Konstitusi Press, 2006), 135-152.

[45] A.M. Fatwa, *Potret Konstitusi Pasca AmandemenUUD 1945* (Jakarta: Kompas Media Nusantara, 2009).

[46] In Decision Number 100/PUU-XI/2013, The Constitutional Court states that the Constitutional Court not only serves as the guardian of the Constitution, but also the guardian of ideology, namely Pancasila.

Pancasila is an ideology, philosophy of life,[47] and the crystallization noble views consisting full of ethical and moral values as well as in accordance with the personality of the Indonesia people. Therefore, it is a certainty that the implementation of Pancasila can be carried out in every area in the life of nation and state of Indonesia by formulating a concept of national implementation based on Pancasila.[48] Moreover, in Article 2 of Law No. 12 of 2011 on the Establishment of Laws and Regulation, Pancasila is considered as a *staatsfundamentalnorm* and the source of all legal sources of the State.

The Constitutional Court has a strategic position to institutionalize Pancasila's values through its decisions. This must be done by the Court to safeguard the purity and power of Pancasila. In many decisions, the Constitutional Court had imposed Pancasila's value. Accordingly, the Government may request consideration to the Constitutional Court if the presence of an organization whose actions and ideologies are contrary to the 1945 Constitution. If the consideration of the Constitutional Court states that an ideology of an organization and its work is contrary to Pancasila, the Government must act strictly, to dissolve organization that commit violence, hostilities, and significantly threaten the integrity of the nation and the unity of the nation. Thus, Pancasila would no longer be the only rhetorical-semantic sentences without knowing how to descend to the earth, but could manifest itself in the midst of national and state life as the basic principle and guidance in the organization.

Ideally, dissolving a societal Organization that contrary to the Pancasila shall be done by the Government. The consultation mechanisms that have been initiated by the writers could become concrete steps to realize the quality of the restriction of the independence of the association, and constitutional assembly because its purpose is not only to create a democratic legal state in accordance with the Constitution, but also to

[47] As'ad Said Ali, *Negara Pancasila: Jalan Kemashlahatan Berbangsa* (Jakarta: Pustaka LP3ES, 2009), 15.
[48] Yudi Latief, *Pancasila Sakti*, Jakarta: Gatra, Edition Number. 48 Tahun XVII, October 2011, 106.

put forward the principles of time efficiency. Some important things to be aware of are when the consultation mechanism is executed against the dissolution of organizations, at least some aspects that should be used as references are as follows: ***first***, the consultation mechanism shall be executed before the dissolution of organizations. It is intended to avoid the indirect consequences in the form of the loss in the Government's function to issue a final, individual and concrete decision of the state administration official (KTUN) so that there would be no assumption of reducing the essence of KTUN as an executive product.

Second, the Constitutional Court is limited only to provide views relating to the constitutionality and technical juridical dissolution of Societal organization. This means that the Constitutional Court role is only limited to provide inputs to each question raised by the government. If there is an important dimension that according to the Constitutional Court is needed to be given an input, but not included in the manifest that was consulted to the Constitutional Court, then the Court should not have to answer it. Thus, the Constitutional Court will not go too far in the process of dissolution.

Third, the Constitutional Court opinion on the outcome of the consultation should not have a permanent legal force and not as a form of final legal effort. However, in this case, the Constitutional Court opinions is only a recommendation. This means that the government could still ignore it or comply with it, so the fear of consultation mechanisms could bring its constitutional "label" that had been unified and inherent in the process of Societal organization dissolution could be avoided.

III. CONCLUSION

The obligation of societal organization to ideology Pancasila was a limitation of rights and freedom based on the principles of the applicable law in Indonesia. The legislator still sees Pancasila as a plenary ideology for the principle of societal organization.

Persuasive efforts must be done first before the imposition of administrative sanctions if the Government.

The author constructed the authority of the Government in the dissolution of non-absolute Societal organization as stipulated in Law No. 8 of 1985 where the Government prior to dissolving Societal Organization should request consideration of the Constitutional Court as a guardian and the interpreter of the Constitution and Pancasila.

BIBLIOGRAPHY

Ali, As'ad Said: *Negara Pancasila: Jalan Kemashlahatan Berbangsa*: Jakarta: Pustaka LP3ES, 2009.

Alrasid, Harun: *Naskah UUD 1945 Sesudah Empat Kali Diubah oleh MPR*: Jakarta: Universities Indonesia (UI-Press), 2007.

Amin, SM, *Demokrasi Selayang Pandang*, Jakarta: Pradnya Paramita, 1976.

Asshiddiqie, Jimly, dan Syahrizal, Ahmad, *Peradilan Konstitusi di Sepuluh Negara*: Jakarta: Konstitusi Press, 2006.

Azhary, Muhammad Tahir: *Beberapa Aspek Hukum Tata Negara, Hukum Pidana, dan Hukum Islam: Menyambut 73 Tahun Prof. Dr. H. Muhammad Tahir Azhary, S.H., Akademisi, Praktisi, dan Politisi*: Jakarta: Kencana Prenada Media Group, 2012.

Bagus, Lorens: *Kamus Filsafat:* Jakarta: Gramedia Pustaka Utama, 2000.

Bahar, Saafroedin, *et.al,* (*Ed): Risalah Sidang Badan Penyelenggara Usaha Persiapan Kemerdekaan Indonesia (BPUPKI)-Panitia Persiapan Kemerdekaan Indonesia (PPKI) 28 Mei 1945-22 Agustus 1945*. Jakarta: Sekretariat Negara Republik Indonesia, 1995.

Bell, Daniel. *Matinya Ideologi*. Magelang: Indonesia Tera, 2001.

Eddyono, Luthfi. "Independence of Indonesian Constitutional Court in Norms and Practices." *Constitutional Review Journal* 3, no. 1 (May 2017).

Faiz, Pan Mohamad. "The Protection of Civil and Political Right by the Constitutional Court of Indonesia." Indonesian Law Review Journal 6, no.2 (May-August 2016).

Fatwa, A.M. "Potret Konstitusi Pasca Amandemen UUD 1945." *Kompas Media Nusantara*, 2009.

Hadjon, Philipus M: *Perlindungan Hukum Bagi Rakyat di Indonesia*: Surabaya: Bina Ilmu, 1987.

Indonesia, 1945 Constitution of the State of the Republic of Indonesia.

_____, Law No.8 of 1985 on Societal Organization.

_____, Law No. 17 of 2013 on Societal Organization.

_____, Government Regulation No. 18 of 1986 on the implementation of Law No. 8 of 1985 on Societal Organizations.

Kania Winayanti, Nia: *Dasar Hukum Pendirian dan Pembubaran Ormas (Organisasi Kemasyarakatan):* Yogyakarta: Pustaka Yustisia, 2011.

_____, "Makna Pasal 28 UUD 1945 terhadap Kebebasan Berserikat dalam Konteks Hubungan Industrial." *Jurnal Konstitusi* 8, no.6 (2011).

Kartodihardjo, Soewargo: *Asas-Asas Hukum Tata Negara*: Yogyakarta: Fakultas Hukum Universitas Gajah Mada, 1983.

Latie, Yudi. "Pancasila Sakti." *Gatra*, October, 2011.

Marzuki, Suparman, *et.al: Hukum Hak Asasi Manusia*: Yogyakarta: Pusat Studi Hak Asasi Manusia Universitas Islam Indonesia, 2008.

MD, Moh. Mahfud: *Politik Hukum di Indonesia.* Jakarta: Rajawali Pers, 2010.

"*Memproteksi NKRI*", Media Indonesia, 15 Mei 2017.

Mertokusumo, Sudikno: *Penemuan Hukum: Sebuah Pengantar*: Yogyakarta: Liberty, 2009.

n.d. "HTI DIbubarkan, Yusril Ihza: Pemerintah Bisa Kalah di Pengadilan," *Tempo*, Mei 22, 2017.

nd. "Pemerintah Diadukan ke Komnas HAM." *Republika*, May 13, 2017."

nd. "Pemerintah Tak Akan Kompromi." Kompas, May 13, 2017.

nd. "Pemerintah Harus Ambil Langkah Cepat." *Kompas*, May 17, 2017.

Nugroho, Riant D: *Kebijakan Publik, Formulasi, Implementasi dan Evaluasi*: Jakarta: Elex Media Komputindo, 2003.

Perwira, Indra: *Pembatasan Hak Berserikat, dan Berkumpul*, Article, No Year, and No Publisher.

Priyanto, At. Sugeng: *Dinamika Ideologi Partai Politik Keagamaan Pada Masa Orde Baru*: Yogyakarta: Magnum Pustaka Utama, 2015.

RI, Departemen Pendidikan, dan Kebudayaan, Direktorat Jenderal Pendidikan Tinggi, *UUD 1945, P4, GBHN, TAP-TAP MAPR 1983, Pidato Pertanggungjawaban Presiden/Mandataris, Bahan Penataran, dan Bahan Referensi Penataran*. Jakarta: Direktorat Jenderal Pendidikan Tinggi Departemen Pendidikan, dan Kebudayaan, 1984.

RI, Dewan Perwakilan Rakyat, *Catatan Panitia Khusus Lima Rancangan Undang-Undang Tentang Politik*, Tanggal 10 Januari 1985, Jakarta: Sekretariat Jenderal DPR RI, 1985.

_____, *Catatan Panitia Khusus Lima Rancangan Undang-Undang Tentang Politik*, Tanggal 11 Januari 1985, Jakarta: Sekretariat Jenderal DPR RI, 1985.

_____, *Catatan Rapat Panitia Khusus Lima Rancangan Undang-Undang Partai Politik*, dan Golongan Karya, Tanggal 4 Februari 1985, Jakarta: Sekretariat Jenderal DPR RI, 1985.

Romli, Lili: *Islam Yes Partai Islam Yes: Sejarah Perkembangan Partai-Partai Islam di Indonesia*: Yogyakarta: Pustaka Pelajar dengan Pusat Penelitian Politik LIPI, 2006.

Safaat, Muchamad Ali. "Pembubaran Partai Politik di Indonesia." Ph.D Diss., University of Indonesia, 2009.

Soehino: *Ilmu Negara*: Liberty: Yogyakarta, 1980.

Sutiyoso, Bambang, dan Puspitasari, Sri Hastuti: *Aspek-Aspek Perkembangan Kekuasaan Kehakiman di Indonesia:* Yogyakarta: UII Press, 2005.

Thalib, Abdul Rasyid: *Wewenang Mahkamah Konstitusi dan Implikasinya dalam Sistem Ketatanegaraan Republik Indonesia:* Bandung: PT Citra Aditya Bakti, 2006.

Wahjono, Padmo: *Indonesia Negara Berdasarkan Atas Hukum*: Jakarta: Yudhistira Ghalia Indonesia, 1983.

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AUTHOR GUIDELINE

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