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About

**Prophetic Law Review** is a law journal published by Faculty of Law Universitas Islam Indonesia. The primary purpose of this journal is to disseminate research, conceptual analysis and other writing of scientific nature on legal issues by integrating moral and ethical values. Articles published cover various topics on Islamic law, International law, Constitutional law, Private law, Criminal law, Administrative law, Procedural of law, Comparative law and other law related issues either in Indonesia or other countries all over the world. This journal is designed to be an international law journal and intended as a forum for legal scholarship which discusses ideas and insights from law professors, legal scholars, judges and practitioners.

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# THE PERNICIOUS CONSEQUENCES OF POLITICAL CORRUPTION IN INDONESIA

**Febri Handayani**[1]

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**Abstract**

*Political corruption is an ethical and juridical deviation committed by people with positions of political power. Political corruption has a more structured system than general corruption cases, because political corruption is committed to satisfy the interests of political parties. Political corruption cases are commonplace in a country where political corruption is rampant. This is a normative legal research, using a case approach, conceptual approach, and statutory approach, as well as qualitative analysis. Based on this analysis, it is conclusive that political corruption is an action carried out by political elites or state government officials that has an impact on the country's political and economic situation. People and or parties who have political positions usually commit these acts. Political corruption can be in the form of abuse of authority, granting influence, lobbying, self-enrichment, vote-buying, and election fraud. In terms of effectiveness of the law, the pervasive political corruption in Indonesia is attributed to ineffective law enforcement related to political corruption. In fact, some former corruption convicts may become a corruption recidivist simply because the law enforcement of political corruption fails to have any deterrent effect due to the disharmony between laws and regulations related to political corruption. The rampant political corruption practices result in violations against the principles of good governance.*

**Keywords:** *Legal consequences, political corruption.*

## A. Introduction

As one of the largest democracies in the world, Indonesia is facing the persistent problem of corruption. Conceptually, any democratic country shall always have a small number of corruption cases. However, the implementation of Indonesian democracy seems

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to deviate from the ideal concept of democracy, which has resulted in rampant political corruption. Democracy afflicted by corruption eventually creates high cost and risky politics, but such corrupt political practices are tempting because the perpetrators may reap big. This is a clear explanation why the political stage is never free from political elites despite the fact that many of them are imprisoned for committing political corruption.[2]

Political corruption is one form of corruption[3] stemming from an ethical or juridical deviation committed by parties who hold political power. The study of political corruption in various countries worldwide reveals that political corruption has a more devastating impact than general corruption committed by people with no position of political power. Political corruption is attached to and intertwined with power. Political corruption is commonly committed to maintain and expand power. This tug-of-war between the abuse of power and the need for socio-political order demands a role of equal control over the exercise of power.

Regarding political corruption, The Americana Encyclopedia has an interesting statement: "Political corruption concerns the illegal pursuit or misuse of public office. Electoral corruption includes purchase of votes with money, promises of office or special favors, coercion, intimidation and interference with freedom of election."

This definition delineates political corruption and electoral corruption,[4] where political corruption pays attention to illegitimate livelihoods or misuse of government positions, while electoral corruption or general election corruption involves vote buying with money, promising positions or facilities, special gifts, coercion, intimidation and interference in free election. Even though there is a difference between political corruption and election corruption, both equally have a political impact. This troubled political situation is one element of political corruption.

[2] Donal Fariz, 'Lingkaran Korupsi Politik' (*Indonesia Corruption Watch*, 24 May 2018) <https://antikorupsi.org/id/opini/lingkaran-korupsi-politik> accessed 24 April 2019.

[3] Political corruption is defined as a distortion of the performance of people in the political system, and the purpose of their corrupt behavior is to maintain the grip of power they hold. Therefore, political corruption aims to accumulate wealth, both for personal and group interests to reduce power. This form of corruption always involves two entities that need each other. Some of the bigger and more serious scandals in political corruption include the process of wealth accumulation and financial abuse for public spending used for political purposes. Farida Patittingi and Fajlurrahman Jurdi, *Korupsi Kekuasaan Dilema Penegakan Hukum Di Atas Hegemoni Oligarki* (PT Raja Grafindo Persada, 2016) 63.

Political corruption contains elements of political exploitation in an effort to gain political advantage. As quoted by Menachen Hopnuy in describing political corruption, Joseph Lapalomkara points out that: "behavior by a public servant, whether elected or appointed, which increases a devaluation from his or her public duties because of personal gain to himself or to other private person with whom the public servant is associated". Artidjo Alkostar, *Korupsi Politik Di Negara Modern* (FH UII Press, 2008) 38.

[4] Ibid 16.

Normatively, the Law on corruption eradication has never formally stated the formulation of the term political corruption. However, in the development of law enforcement, this type of political corruption is clearly seen in a number of corruption case decisions as an incriminating matter from a conviction. This will be a problem considering that normative instruments are apparently not enough to eradicate corruption.

Political corruption is defined as the use of political position to improve personal well-being. Public office that should provide public welfare is used to merely increase personal coffers through receiving bribes or other indirect forms of remuneration.[5] There are many cases of corruption in Indonesia, especially those committed by members of political parties who hold political positions in parliament and in government. An example is the corruption case involving 41 of the 45 members of the Malang City DPRD, which was handled by the Corruption Eradication Commission (KPK). The group of suspected corrupt officials was arrested in the bribery case of the 2015 APBD-P discussion on Malang City Government Fiscal Year. Former Chairperson of Malang City DPRD, Moch Arief Wicaksono, became the first person who was sentenced with imprisonment for five years.[6]

The author was encouraged to examine the consequences of political corruption in Indonesia because political corruption has a more structured system than general corruption, because political corruption is committed to satisfy the interests of political parties. The crime of political corruption is controlled and protected by party elites who control all aspects of the state.

Corruption is a universal problem faced by all countries and a complex problem that is hard to eradicate. This is because corruption is not only related to economic problems, but also related to political problems, power, and law enforcement. The fact is that corruption will never disappear in a country with rampant political corruption.

In Indonesia, the problem of corruption has tainted all aspects of Indonesians' lives. Moreover, corruption in Indonesia occurs systematically and extensively so that it not only harms the country's finances, but also violates the social and economic rights of the community at large, thus, it is necessary to eradicate corruption through extraordinary means.[7]

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[5] Harun al-Rasyid, *Fikih Korupsi, Analisis Politik Uang di Indonesia dalam Perspektif Maqashid al-Syari'ah* (Kencana, Jakarta, 2016) 4.

[6] Michael Hangga Wismabrata, 'Kasus Korupsi Massal di DPRD Kota Malang, Ini Sejumlah Faktanya' (*Kompas*, 4 September 2018) <https://regional.kompas.com/read/2018/09/04/15100021/kasus-korupsi-massal-di-dprd-kota-malang-ini-sejumlah-faktanya?page=all> accessed 16 July 2019.

[7] Commentary of Law No. 20 of 2001 on the Amendment of Law No. 31 of 1999 on Eradication of Corruption.

Given the above problem, the researcher formulated the research problem related to the legal consequences of political corruption in Indonesia. This research journal is written to identify and analyze the legal consequences of political corruption in Indonesia.

This study addressed the research problems using normative legal research, namely legal research carried out by examining literature or secondary data.[8] The object of normative legal research focuses on the principles of law, legal systematics, the extent of legal synchronization, the history of law, and comparative law.[9]

The study was conducted using a case study, conceptual, and statutory approaches[10] by studying documents. The collected data were analyzed using qualitative analysis.

## B. Discussion and Result

### 1. Conceptual Framework of Political Corruption

In the new era of globalization, corruption has become a serious crime that affects multilateral international relations. The impact is even worse when the corruption involves political elites than the general corruption cases committed by those who do not hold any political power. Political corruption committed by high officials in a country is commonplace in various countries worldwide. Political corruption has a pernicious impact on state governance and violates the basic rights of the people of the country.

Substantially, the formulation of the political corruption offense is not formally regulated in Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 concerning Amendment to Law Number 31 of 1999 concerning Eradication of Corruption. However, the development of law enforcement of political corruption in Indonesia, based on a number of court decisions, has raised the term political corruption as an aggravating circumstance in the formulation of a criminal offenses, which has been regulated in the Law on the Eradication of Corruption.

Another opinion states that political corruption is an act of corruption by an entity, which happens to be a political party. This is based on the term "other relations" used in Article 20 paragraph 2 of Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 concerning Amendment to Law Number 31 of 1999 concerning Eradication of

[8] Soejono Soekanto and Sri Mamuji, *Penelitian Hukum Normatif Suatu Tinjauan Singkat* (PT. Raja Grafindo Persada, 2010) 13-14.

[9] Ibid 14.

[10] Peter Mahmud Marzuki, *Penelitian Hukum* (11th edn, Kencana, 2011) 94.

Corruption.[11] In defining criminal acts of corruption by entities, or "enterprise" corruption, it is undeniable that political parties are entities that are not business oriented, but are more politically oriented, because political parties are a form of enterprises among many people in an institution. The phrase "other relations" in Article 20 paragraph 2 indicates that there is a relationship between people who commits corruption with a political party, that is, his position within the institution. In this case, it is clear that the alleged perpetrator should be investigated based on the utilization of the corruption assets, whether solely for personal gain of for the interests of his political party, or both.[12]

The following are various laws and regulations related to corruption eradication:

1. MPR Decree No. XI / MPR / 1998 concerning Clean and Corruption, Collusion, and Nepotism Free State Administrators;
2. Law Number: 24 / Prp / 1960 concerning the Investigation, Prosecution and Examination of Corruption;
3. Rule of War Rule Number: Prt / Perpu / 013/1958 dated 16 April 1958;
4. Law Number 3 of 1971 concerning Eradication of Corruption;
5. Law Number: 28 of 1999 concerning State Administrators that are Clean and Corruption, Collusion, and Nepotism Free;
6. Law Number: 31 of 1999 concerning Eradication of Corruption;
7. Law Number: 20 of 2001 concerning Amendment to Law Number 31 of 1999 concerning Eradication of Corruption;
8. Law Number: 30 of 2002 concerning Corruption Eradication Commission;
9. Law Number 07 of 2006 concerning Ratification of the United Nations Convention against Corruption; and
10. Presidential Decree (Keppres) Number 127 of 1999 concerning the Commission for Inspecting the Wealth of State Officials.

To understand the corruption offenses stipulated in the laws on corruption eradication, it is necessary to review the background of the provisions of the offense. In

[11] Article 20 paragraph 2 of Law No. 31 of 1999 in conjunction with Law No. 20 of 2001 on the Amendment to Law Number 31 of 1999 on Eradication of Corruption Crimes "*Corruption is committed by a corporation if the criminal act is committed by persons both based on work relationships and based on other relationships, acting within the corporate environment both alone and together*".

[12] Eko Suwarni, 'Penegakan Hukum atas Korupsi Politik' (2018) 4(3) Seminar Nasional Hukum Universitas Negeri Semarang 956.

general, the corruption offenses in corruption legislation can be divided into 2 (two) main parts, namely:[13]

a. Corruption offense formulated by lawmakers.
   According to various literature, corruption offenses formulated by lawmakers only cover four articles as stipulated in Article 2, Article 3, Article 13, and Article 15 of Law Number 31 of 1999, in conjunction with Law Number 20 of year 2001 concerning Amendment to Law Number 31 of 1999 concerning Eradication of Corruption Crimes. However, by taking a closer look to what is regulated in Article 15 of the law, it is not merely based on the formulation of the legislators, but it takes the concept as stipulated in the Criminal Code.
b. Corruption offense taken from the Penal Code, which is divided into 2 parts as in the followings:
   1) Corruption offense drawn solely from the Criminal Code.
      What is meant by the corruption offenses absolutely taken from the Criminal Code are offenses of the Criminal Code that were transformed into corruption offenses so that the offenses in the Criminal Code are no longer valid. In other words, if someone's actions meet the formulation of the offense, he will be charged with corruption offense as regulated in the law on corruption eradication and no longer be based on the offense of the Criminal Code. Corruption offense drawn absolutely from the Criminal Code is Article 5 to Article 12 of Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning Eradication of Corruption.
   2) The corruption offense that was not solely drawn from the Criminal Code.
      Corruption offenses that are not drawn absolutely from the Criminal Code are offenses taken from the Criminal Code which, under certain conditions related to the examination of corruption, are adopted into corruption offenses, but in other circumstances remain offenses regulated by the Criminal Code. Unlike absolute withdrawal, the provisions of this offense in the Criminal Code still apply and can be used to charge a perpetrator whose actions meet the elements of the statute, but if the action is related with the examination of corruption offenses, the perpetrator will be charged with an offense as regulated under the corruption eradication law. The offenses of corruption which are not drawn absolutely from the Criminal Code are contained in Article 23 of Law Number 31 of 1999 Eradication of Corruption, derived from Article 220, Article 231, Article 421, Article 422, Article 429, and Article 430 of the Criminal Code.

Political corruption is distinguished by the fact that the perpetrator is a person or body that has political power and violates the law. The act invokes legal, political, economic, human rights and moral consequences. Perpetrators of such offenses intend to benefit themselves, other people, or bodies by abusing their authority, opportunities and facilities because of their position or political position.[14]

[13] Nanang T. Puspito et.al. *Pendidikan Anti-Korupsi Untuk Perguruan Tinggi* (Kementerian Pendidikan dan Kebudayaan RI Direktorat Jenderal Pendidikan Tinggi, 2011) 128-130.

[14] Artidjo Alkostar, 'Korelasi Korupsi Politik dan Pemerintahan di Negara Modern (Telaah tentang Praktek Korupsi Politik dan Penanggulangannya)' (DPhil dissertation, Universitas Diponegoro 2007) 35.

Political corruption can take the form of abuse of authority, using influence, lobbying, vote buying, and fraud in elections. Thus, political corruption is essentially the vanishing ability to stay loyal, both to the people, the state, regulations or principles. Such actions commonly result from political temptations and challenges making the perpetrators ignore or betray the trust, the mandate or hope of the people, the state duties, and morality.

According to Heidenheimer, political corruption is corruption that occurs in societies with a nature of patron-client relationships. It is different from the common corruption occurring in societies with familial nature of community relations, which is only characterized by a small bribe or "food allowance." Political corruption has a broad impact in various fields of public service because it is committed by those with high levels of authority.[15]

Political corruption is an action committed by political elites or government officials who have an impact on the political and economic environment of a country. Such acts are commonly committed by people and / or parties who hold political power, such as the president, the heads of government, the cabinet ministers, and members of parliament. These government authorities can use political facilities they possess despite the fact that the misused facilities are entrusted to them by the people.[16]

Political corruption not only adversely impacts politics, but also on the economy. Theoretically, no one is immune from the repercussions of any violations against the law and the dangers of misuse of political power or economic power and political corruption that damages state institutions. A good economic system is closely related to good legal structure. Robert Dahl, an American political expert, stated:

> "The best economic order would help generate a distribution of political resources favorable to the goals of voting equality, effective participation, enlightened understanding, and final control of the political agenda by all adults subject to the laws".[17]

A functioning economic order will help produce a distribution of political resources, effective participation, and well-settle control of the political agenda by all parties who are subject to the law. However, problems arise because Indonesia does not yet have a strong legal basis with which to develop the national economy. Unfortunately, this gap provides opportunities for political corruption with various features such as the abuse of authority or the granting of influence from political offices.

[15] Arnold J. haidenheimer, *Political Corruption, Readings in Comparative Analysis* (Rinechart and Winston, 1970) 15.

[16] Artidjo Alkostar, 'Korelasi Korupsi Politik (n.14) 37.

[17] Robert A. Dahl, *A Preface to Economic Democracy* (University of California Press, 1985) 80.

## 2. Enforcing Laws to Combat Political Corruption

The impact of political corruption is extraordinarily pernicious in Indonesia, especially when the political elites use their offices or influence attached to their positions. Political corruption occurs through various avenues, not only in the many political parties, but also in many individual leaders of political institutions. The government in the reform era has promised to consider corruption as a serious problem, but in fact, until now, it has been hard to eradicate.

It is possible to observe the development of prosecution related to political corruption in Indonesia from several cases of corruption. Political corruption can be in the form of abuse of authority, granting influence, illegal lobbying, enrichment, vote buying, and fraud in elections.

One example of political corruption is illustrated in Decision No. 1195 K / Pid.Sus / 2014 Corruption Case in the name of the defendant Lutfi Hasan Ishaaq. In that case, the court found that Defendant Luthfi Hasan Ishaaq was proven legally and convincingly guilty of committing the crime of "Corruption and Money Laundering." As a result, the Defendant was sentence to imprisonment for 18 (eighteen) years fined of Rp1, 000,000,000.00 (one billion rupiah) provided that if the fine is not paid, it is replaced with imprisonment for 6 (six) months The Defendant’s right to be elected to a public office was also revoked.

Incriminating matters in Lutfi Hasan Ishaaq's decision included:

1. The criminal act committed by the Defendant as a member of the Republic of Indonesia DPR which undermined the public’s trust in the House of Representatives;
2. The Criminal Act of the Defendant as the President of the Prosperous Justice Party (PKS) which undermined the pillars of democracy through Political Party Institutions;
3. Defendants as State Administrators and Political Party Officials should be a role model to the public who behave honestly in reporting their assets in the State Organizers' Asset Report (LHKPN) and report any emolument enrichment that they have received. However, the Defendant has done acted contrary to the ideal goal of realizing a State Institution that is clean and free of Collusion, Corruption, and Nepotism;

Another example is PN Decision Number: 72 / Pid.Sus-TPK / 2018 / PN Jkt.Pst Date. December 3, 2018. This corruption case against the defendant Zumi Zola Zulkifli who was sentenced to six years in prison plus a fine of Rp. 500 million in three months’ confinement. He was proven to have violated Articles 12 B and 5 Paragraph 1 letter (a), Act Number 31 of 1999, as amended by Law Number 20 of 2001 concerning Eradication of Criminal Acts in conjunction with Article 55 Paragraph 11 of the Criminal Code Article

65 Paragraph 1 of the Criminal Code. The Panel of Judges found Zumi to have given and promised something to civil servants or state administrators with the intention to get the Jambi Province RAPBD (regional budget) approved for Fiscal Year 2017 and 2018. The panel of judges also imposed additional penalties in the form of revocation of the right to be elected in public office for 5 years after serving the criminal sentence. The incriminating matter is that Zumi's actions were contrary to government programs that are aggressively aimed at eradicating corruption and his actions harmed people's trust as a state administrator.

Political corruption is also illustrated by PN Decision Number: 112/Pid.Sus/TPK/2016/PN.Jkt.Pst dated February 20, 2017. This Corruption Case is was against defendant Irman Gusman related to a state organizer who received a gift or promise even though it was known or should be suspected that the gift or the promise was given as a quid pro quo to do something or to refrains from doing something based on his official position, contrary to his obligations related to the management of imported sugar quotas given by Bulog to CV Semesta Berjaya in 2016.

The Panel of Judges found that Irman Gusman was legally and convincingly proven to violate Article 12 letter b of Law Number 31 of 1999 as amended in Law Number 20 of 2001 concerning Eradication of Corruption. It imprisoned Irman Gusman for four years and six months and a fined him Rp 200 million, provided that if he did not pay, he would be imprisoned for three more months. Besides being sentenced to prison, Irman was deprived of his political rights for three years as an additional sentence. Some considerations that incriminated Irman were the fact that he did not carry out his mandate as Chairman of the DPD, not supporting the government’s program in eradicating corruption, and not being frank in admitting mistakes.

Based on some descriptions of the corruption case above, we can understand the importance of law enforcement of political corruption related to the abuse of authority, granting influence and enrichment characterizes the pattern of political corruption committed by the political elite in Indonesia. Imprisonment penalties and fines imposed on the defendants also varied. In addition to imprisonment and fines, additional penalties were also imposed for revocation of political rights in accordance with Article 18 paragraph 1 letter d of the Law on corruption eradication.

Imposing additional punishment in the form of revocation of the political right to run in an election aims to protect the public or community from the possibility that these

corruption convicts will be re-elected and occupy a public office, such as a member of the MPR, DPR, DPD, and DPRD or other public offices. This is harmful because members of the MPR, DPR, DPD, and DPRD are representatives of the people who shall accommodate people's aspirations. Therefore, the members of the MPR, DPR, DPD, and DPRD should not behave in a corrupt manner.

The incriminating matter in the political corruption ruling had a clear adverse impact on state administration. Political corruption leads to state administration that benefits only certain groups and provides opportunities for the growth of political corruption. To create a state that is clean and free of corruption, it is necessary to apply general principles of state administration, which include legal certainty, orderly state administration, public interest, openness, proportionality, professionalism, and accountability in a consistent manner.

These principles are realized by requiring state officials to disclose and report their assets before taking office during their tenure, as a preventive and prophylactic effort against political corruption. It also aims to ensure the state officials' compliance with the provisions of general principles of state administration, the rights and obligations of State Administrators, and other provisions. Compliance with the general principles will strengthen institutional, individual, moral, and social norms as mandated by Law of the Republic of Indonesia Number 28 of 1999, concerning the Organization of a state that is clean and free of corruption, collusion and nepotism.

### 3. The Legal Consequences of Political Corruption in Indonesia

Corruption is a commonplace problem in Indonesia and should be addressed as a serious problem because it has penetrated all walks of life in a systematic way. History revels that corruption has existed a long time ago, both before and after independence. It was rampant during the old order era, rampant in the new order era, and persists in the reform era.[18]

The currently pervasive corruption has increasingly devastated the nation, since it is a type of social disease, which inevitably will drive the country to the brink of bankruptcy. The massively practiced corruption in all lines of government agencies and even in law enforcement agencies has turned into a corrupt system that make people deem the phenomenon as something normal. This shared belief, in consequence, will make the

[18] Rudi Pardede, *Proses Pengembalian Kerugian Negara Akibat Korupsi* (Genta, 2016) 1.

perpetrators no longer be ashamed in committing corruption. Even worse, they may take pride in the assets of corruption.[19]

Jhon S.T. Quah, a corruption eradication expert, identified three patterns of corruption eradication initiatives in Asian countries. The first pattern is that the state has an applicable corruption eradication law but does not have an independent corruption eradication body. In the second pattern, the state has a corruption eradication law with many corruption eradications bodies. In the third pattern, the state has a corruption eradication law with an independent corruption eradication body. He argues that the third pattern is the most effective model of corruption eradication because an independent body that solely focuses on eradicating corruption will not be deflected by other priorities.[20] However, adopting the third pattern alone cannot guarantee the success in eradicating corruption. As seen from various cases in Hong Kong and Singapore, political support is very important in supporting corruption eradication bodies with adequate resources, competent staff, and extensive authority to investigate and reveal corruption cases.[21]

Corruption eradication policies must also be supported by the principles of good governance and the principles of sustainable development. This can be done through the following steps or conditions:[22]

1. A regular inspection on the executive, legislative, and judicial powers;
2. A clear line of accountability between political leaders, the bureaucracy and the people;
3. An open political system involving active civil society;
4. An impartial legal system, criminal justice and public order that upholds fundamental political and civil rights, protects personal security and provides consistent, transparent rules for transactions needed in modern economic and social development;
5. Professional, competent, capable and honest public servants that work within an accountable and governing framework with rules and in principles of merit and prioritizing the public interest;
6. Capacity to carry out fiscal plans, expenditures, economic management, financial accountability systems and evaluation of public sector activities;
7. Attention not only to the institutions and processes of the central government but also to the attributes and capacities of sub-national and local government authorities and issues of political transfer and administrative decentralization; and
8. Every effective anti-corruption strategy must recognize the relationship between corruption, ethics, good governance and sustainable development.

[19] Harun al-Rasyid, (n.5) 114-115.

[20] Vishnu Juwono, *melawan Korupsi sejarah pemberantasan korupsi di Indonesia 1945-2014* (Kepustakaan Populer Gramedia, 2018) 13.

[21] Ibid.

[22] Andi Hamzah, *Pemberantasan Korupsi Melalui Hukum Pidana Nasional dan Internasional* (PT Raja Grafindo Persada, 2005) 251-252.

Corruption eradication policies that are not supported by the principles of good governance and the principles of sustainable development will lead to the emergence of political corruption with various modes of corruption.

The parameters of the legal consequences of political corruption as one of the factors inhibiting the eradication of corruption in Indonesia, is apparent from the Corruption Perception Index and the National Law Enforcement Index of corruption.

**1. Corruption Perception Index**

Political corruption is a type of corruption, which contains elements of political exploitation in an effort to gain political advantage. The perpetrators are people who have political power and occupy a position in government. The table below shows the top rank of political position with the highest number of political corruptions.

**Corruption Crimes Based on Profession/Position**

| POSITION | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | Amount |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Member of DPR and DPRD | 0 | 0 | 0 | 2 | 7 | 8 | 27 | 5 | 16 | 8 | 9 | 19 | 23 | 20 | 61 | 205 |
| Head of Institution/Minister | 0 | 1 | 1 | 0 | 1 | 1 | 2 | 0 | 1 | 4 | 9 | 3 | 2 | 0 | 0 | 25 |
| Ambassador | 0 | 0 | 0 | 2 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 4 |
| Commissioner | 0 | 3 | 2 | 1 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 7 |
| Governor | 1 | 0 | 2 | 1 | 1 | 2 | 1 | 0 | 0 | 2 | 3 | 3 | 1 | 1 | 1 | 19 |
| Major/Regent and Vice | 0 | 0 | 3 | 6 | 6 | 5 | 4 | 3 | 3 | 3 | 12 | 4 | 9 | 13 | 16 | 87 |
| Echelon I / II / III | 2 | 9 | 15 | 10 | 22 | 14 | 12 | 15 | 8 | 7 | 2 | 7 | 10 | 43 | 15 | 190 |
| Judge | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 2 | 2 | 3 | 2 | 3 | 1 | 3 | 1 | 18 |
| Attorney | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 3 | 1 | 0 | 7 |
| Police | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 1 | 0 | 0 | 0 | 0 | 0 | 2 |
| Lawyer | 0 | 2 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 2 | 1 | 0 | 3 | 10 |
| Private Parties | 1 | 4 | 5 | 3 | 12 | 11 | 8 | 10 | 16 | 24 | 16 | 18 | 28 | 28 | 22 | 204 |
| Others | 0 | 4 | 1 | 2 | 3 | 4 | 8 | 1 | 2 | 8 | 8 | 3 | 21 | 13 | 7 | 85 |
| Corporation | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 3 | 4 |
| Total Number | 4 | 23 | 29 | 27 | 55 | 45 | 65 | 38 | 49 | 59 | 61 | 62 | 99 | 123 | 129 | 867 |

The data indicates that since 2004-2018 the professions/positions of DPR and DPRD members ranked as the profession with the highest level of corruption, followed by private parties and echelon I / II / III were followed in sequence. This means that corruption

committed by members of the DPR and DPRD is related to their political powers/positions.

In the context of state administration, DPR and DPRD members should represent the interests of the people and protect the people. However, in fact, they are the group with the most frequent arrests for bribery/ enrichment cases. Top echelon officials who should be responsible for the effectiveness and efficiency of government projects, in fact, become one of the largest numbers of group to receive bribery/ enrichment, and thus hampering the efficiency and effectiveness of the project.[23]

**2. National Law Enforcement Index**

The National Law Enforcement Index illustrates the effectiveness of the Law Enforcement on political corruption. Law enforcement measures are said to be effective when the number of political corruptions revealed from time to time decreases and even leads to zero cases. However, the facts say that the quantity of corruption increases from day to day. One of the following cases of political corruption is evidence that corruption law enforcement has not been effective, and thus has led to many cases of political corruptions with various modes.

A noteworthy case is the political corruption in the city of Malang, East Java, which suddenly became a national concern, because of the mass corruption involving 41 out of 45 members of DPRD of Malang City, who were named as corruption suspects by the KPK. These 41 local parliament members were allegedly receiving bribes from the Malang Mayor (non-active) Moch Anton, who was also a suspect. The bribes worth IDR 12.5 million to IDR 50 million for each member were intended to facilitate the approval of the 2015 Malang City Budget changes. The mass corruption committed by the representatives of the people of Malang is ironic and concerning. The DPRD members, who should monitor the executive work have collaborated with the executive to commit corruption. This event not only affected Malang City, but also led to people's distrust in almost all regional parliaments. Unfortunately, such mass corruption involving multiple DPRD members is not the first time to happen in history. In April 2018, the KPK named 38 North Sumatra DPRD members as corruption suspects. In addition to the Corruption

[23] Jonasmer Simatupang, 'Analisis Hukum Fenomena Tindak Pidana Korupsi Massal Anggota Dewan dan Pertanggung Jawaban Pidana' (2019) 5(1) Seminar Nasional Hukum Universitas Negeri Semarang 83-92.

Eradication Commission, the prosecutor's office has also assigned the status of corruption suspects to 44 members of the West Papua provincial DPRD for the 2009-2014 period.[24]

There are at least five modes of corruption that commonly committed by DPRD members. First, accepting bribes to facilitate the accountability reports of regional heads or the approval of the Regional Budgets (APBD). Bribes in this way are often called "ketok palu" (money to influence decision making). In this way, to prevent rejection from the legislature, the regional head must issue bribes to the leaders as well as all members of the DPRD. Second, illegally increasing the income of members and leaders of the House through the DPRD budget process. Third, inserting a project or special allocation through the budget proposed by the government. Fourth, APBD fund users are not in accordance with the allocation and without supporting evidence. Fifth, bribery in the process of drafting and ratifying a regional regulation.[25]

In addition, the high political costs in Indonesia is also potential to cause political corruption. An example of this was the corruption case in Malang. Out of 41 Malang DPRD members who were named as suspects, 20 people ran again in the 2019 election. To fund their political campaigns, for example, each party must spend billions of rupiah. This is the driving factor why government officials and DPR or DPRD members are corrupt. No wonder after winning the office, they will have to earn money to recoup the costs for their campaigns. The only way to do this is by trading their political power for profit, such as through the budgeting processes that involves the DPR or the government, or the appointment of governors and regents that always require money politics. These appointed executive officials, in turn, will seek money illegally[26] when elected to the board or active in the government. A repeated pattern of corruption arising from several cases now being handled by the KPK or other law enforcement agencies is by way of giving bribes or enrichment indirectly to the related party of the authority or gift intended to the closest circle of the authority. This close relationship with the authority is expected by the bribe giver to influence the authority to do or not do something in his authority that benefits the bribe giver in a quid pro quo. It is in this context that influence trading occurs.[27]

[24] Ibid.
[25] Ibid.
[26] Ibid.
[27] Donal Fariz et.al. *Kajian Implementasi Aturan Trading in Influence Dalam Hukum Nasional* (Indonesia Corruption Watch, 2014) 27-28.

In addition, the consequences of political corruption when viewed from the effectiveness of the law in eradicating corruption in Indonesia can be measured from the extent to which the rule of law regarding corruption is obeyed or disobeyed. According to Soerjono Soekanto, legal effectiveness is determined by the level of community compliance with the law, including law enforcers, so that it is possible to assume that, "a high level of compliance is an indicator of a functioning of a legal system. And the functioning of the law is a sign that the law has achieved the sociological goal of defending and protecting the community in the association of life."[28]

Furthermore, according to Soerjono Soekanto, the effectiveness of the law is closely related to the efforts made so that the law truly lives in society, in the sense that it applies philosophically, juridically, and sociologically. Philosophically applicable means that the law is valid as desired or that aspired by the existence of the law. Applied legally means that it applies according to what has been formulated and applied sociologically means that the law is obeyed by the community members.[29]

Referring to the effectiveness of the law according to Soerjono Soekanto, the facts indicate that the deterrent effect has not yet been achieved in the enforcement of political corruption law and there is a disharmony between laws and regulations related to political corruption. An example of this is discriminatory and unjust rules; non-explicit certifications (*non-lex certa*), or vague and ambiguous laws that lead to multiple interpretations; and contradictions and overlap with other regulations (both equal and superior). Other examples are sanctions that do not redress the violations or that are not on target and are considered too light or too heavy; the use of different concepts for the same case, all of which allows a regulation to be incompatible with the existing condition making it not functional or unproductive and experience resistance. Many legal products are a place for the struggle for legitimacy of various political power interests to maintain and accumulate power.[30]

A clear example of this is the debate about the Supreme Court Decision (MA) which abrogated KPU Regulation Number 20 Year 2018 regarding the candidacy requirements for the DPR, DPRD, Provincial/Regency DPRD, which explicitly prohibits the nomination of those convicted drug cases, sexual crimes against children and corruption. The Supreme Court stated that the prohibition of ex-convicts in corruption cases from becoming

[28] Soerjono Soekanto, *Efektivitas Hukum dan Peranan Saksi* (Remaja Karya, Bandung, 1985) 7.
[29] Soerjono Soekanto, *Kesadaran Hukum dan Kepatutan Hukum* (Rajawali, 1982) 43.
[30] Ibid. 41-42.

legislative candidates in KPU Regulation Number 20 of 2018 is contrary to Law Number 7 of 2017 concerning Elections.

Technically the prohibition of those convicted of corruption from running for office in the DPR and Provincial and/or City DPRDs is regulated in PKPU Number 20 of 2018 concerning the Nominations of Members of the House of Representatives, the Regional House of Representatives and the Regency/City People's Representative Council, in Article 4 paragraph (3) which states; “In the selection of prospective candidates in a democratic and open manner as referred to in paragraph (2), excluding former drug traffickers, sexual crimes against children and corruption convicts.” The provisions of Article 4 paragraph (3) PKPU No. 20 of 2018 then become the basis for legal arguments for the KPU and the Provincial and District/City KPUs to ban former corrupt officials from the ballot for legislative candidates (DPR, Provincial and Regency/City DPRD). Whereas, Law Number 7 Year 2017 concerning Elections, Article 240 paragraph (1) letter g states; “Prospective members of the DPR, Provincial DPRD and Regency/City DPRD are Indonesian citizens and must meet the requirements; g. have never been imprisoned based on a court decision that has obtained permanent legal force due to a criminal offense threatened with imprisonment of 5 (five) years or more, unless openly and honestly telling the public that he was a former convict.”

This decision immediately triggered piercing criticism of the Supreme Court, which was considered to distance itself from progressive law, no longer upholding the principle of justice, and “approving" the return of corrupt officials to legislative bodies. However, despite this particular ruling, the Supreme Court remains consistent and persistent in eradicating corruption in Indonesia. The Supreme Court is of the opinion that it is only to straighten out for the sake of the law according to its content that a lower regulation must not conflict with a higher one. However, when viewed from the logic of the law, the substance of the law also contradicts the principles of justice, which currently strive to eliminate corruption that is increasingly pervasive. The example of disharmony between the laws and regulations above results in the legal ideals of the law enforcement goals of political corruption and the deterrent effect that has not been achieved because various interpretations arise between related regulations and even recidivists of political corruption.

As written in the ICW release by Tribunnews.com, it is illustrated that the deterrent effect of political corruption has not been achieved, citing recidivist political corruption

officials, including:[31] Abdul Latif (Regent of Hulu Sungai Tengah) who, on January 4, 2017, was arrested in a KPK sting operation (OTT) over the bribery case of the Damanhuri Regional Hospital construction project. He was suspected of receiving bribes of IDR. 3.6 billion. Previously, while serving as an entrepreneur in 2005-2006, Abdul Latif was involved in a corruption case of the construction of a New School Unit (USB) for State Senior High School 1 Labuan Amas Utara with a budget of IDR. 711 million. On June 8, 2008, the Barabai District Court sentenced Abdul Latif one year to six months in prison and fined IDR 50 million and 2 months' imprisonment, and ordered paid restitution of Rp 37,636,500. At the appeal and cassation level, the verdict was upheld. Another political corruption recidivist, Mochammad Basuki (Chairperson of East Java DPRD) was appointed as suspect of bribery case related to budgeting and revision of regional regulations (perda) in East Java Province in 2017 by the KPK on 6 June 2017. He was the Chairman of Commission B of the East Java DPRD Gerindra Party Faction. Basuki was said to receive bribes from several Head of Office (Kadis) of the Government of East Java Province (East Java). The legal process against M. Basuki still continues at the KPK. Earlier in 2002, Basuki while serving as Chair of the Surabaya Regional House of Representatives had been involved in a corruption of health benefits and the operational costs of the Surabaya Regional House of Representatives, which cost the state Rp. 1.2 billion in 2002. The Surabaya District Court sentenced Basuki one year to five months in prison and a fine of Rp. 20 million in one month's allowance and to pay a replacement money of Rp. 200 million. However, the sentence was reduced to 1 year in prison and a fine of Rp 50 million in one-month imprisonment after filing an appeal. Basuki was released from prison on 4 February 2004.

Another recidivist political corruption figure is Aidil Fitra (Chair of KONI Samarinda). In 2016, he was named by the Attorney General's Office (AGO) as a suspect in a case of misuse of the Samarinda V/ 2014 Provincial Sports Week (Porprov) funds. On 5 May 2017, the Banjarmasin Corruption Court sentenced 1 year in prison and paid a replacement money of Rp. 772 million. Not satisfied with the light sentence, the Prosecutor appealed to the East Kalimantan High Court and was granted by the panel of judges by adding Aidil's sentence to five years in prison. Earlier in 2010, Aidil Fitri while serving as a member of the Samarinda DPRD had been involved in corruption of social assistance funds (bansos) from the Samarinda APBD to the Persisam Putra soccer club in

[31] Donal Fariz (n.2).

2007–2008, which cost the state finances up to Rp 1.78 billion. And most recently Kudus Regent, Muhammad Tamzil was arrested in a sting operation (OTT) for being allegedly involved in bribery transactions related to the sale and purchase of positions within the Kudus Regency Government. Tamzil, who was also the regent of Kudus in the period 2003 - 2008, was once entangled in a corruption of aid funds and educational facilities for the Kudus Regency 2004-2005. The corruption crime was carried out by Tamzil along with former Head of the Kadispora Kudus Ruslin and PT Ghani & Son Director Abdul Ghani. In February 2016, Tamzil was convicted by the Semarang Corruption Court and sentenced to 22 months in prison for a fine of Rp 100 million in three months' imprisonment. Tamzil was proven to have violated Article 3 of Law Number 31 of 1999, which was amended by Law Number 20 of 2001, concerning Eradication of Corruption.

The government must prioritize resolving corruption cases because the problem of corruption is always related to the basic economic and economic life of the nation. There must be a joint commitment in the spirit to eradicate corrupt behavior between the community and the government, both on national and international scope to overcome the problem. There should be a priority to pay attention to corruption handling because it may disrupt and inhibit the development of nations, hinder the achievement of national goals, undermine the optimal use of national resources, threaten the entire social system, damage the fostering of state apparatus and clean and authoritative government and damage the trustworthiness and authority of the nation environmental quality.[32]

Corruption by politicians always hides behind the cover of official policy that inhibits the process of democratization. Political corruption is an abuse of public trust for private gain or related to the interests of perpetuating power. This is due to a sense of obligation to pay back to the party and its supporters who have served to position themselves in the power elite.

## C. Conclusion

Based on the given description, it is concluded that political corruption is an action carried out by the political elite or government officials of the State that has an impact on the political and economic situation of the State. This act is usually carried out by people and or parties who have political positions or power. The political corruption pattern may take the form of abuse of authority, granting influence, lobbying, enrichment, vote buying,

[32] Barda Nawawi Arief, *Bunga Rampai Hukum Pidana* (Alumni, 1992) 133.

and election fraud. The legal consequences of political corruption in Indonesia can be seen from the achievement of legal effectiveness related to political corruption. In fact, there are former corruption convicts who repeat the political corruption crime since they do not receive any deterrent effect of law enforcement for political corruption. In addition, there remains a disharmony between the laws and regulations related to political corruption. The rampant political corruption practices result in violations of the principles of good governance.

It is necessary to reinforce the laws, and regulations related to political corruption because the existing legal instruments regarding corruption are not yet able to provide a deterrent effect for corruptors. Therefore, we need to consistently implement the principles of good governance.

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# REVIEW OF INDONESIAN CONSTITUTIONAL COURT DECISION NUMBER 21-22/PUU-V/2007 BASED ON THE INCLUSIVE LEGAL THEORY

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**Abstract**

*This Sovereignty and liberalization are often considered opposites. This resistance is caused by differences in the interests of the two instruments. The object of this research is the Constitutional Court Decision Number 21-22/PUU-V/2007 about judicial review of the UUPM. This study aims to review the Constitutional Court Decision based on The Inclusive Legal Theory. It addresses the research question: What is relevance of The Inclusive Legal Theory in analysing the Constitutional Court's Decision? This study uses normative legal research, which examines the Constitutional Court Decision and the UUPM. The results show that the Constitutional Court sought, in its decision, to bridge the gap between liberalization and sovereignty by returning to the interpretation of the 1945 constitution. The mechanism of legal proceedings in the Constitutional Court is still relevant to elements of the Inclusive legal theory.*

**Keywords**: *Constitutional Court, Investment, The Inclusive Legal Theory.*

## A. Introduction

Today, in many developing countries, state sovereignty and liberalization in investment is a subject of continuous debate. Stephen D. Krasner said, "sovereignty in developing countries is undermined, weakened, marginalized, or transmuted by globalization."[2] Globalization is a product of liberalization, accelerating liberalization in trade including investment. The combination of the two forces greatly influences the desire of the state to provide freedom of entry for foreign companies, the right of

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[2] Stephen D. Krasner, 'Globalization and Sovereignty' in David A. Smith, Dorothy J. Solinger and Steven C. Topik (eds), *States and Sovereignty in the Global Economy* (First published, Routledge 1999) 34.

establishment, and national treatment, as well as freedom for international financial transactions, deregulation, and privatization.[3]

The main problem in developing countries is that they find it difficult make investment laws that match the country's economic goals.[4] The country is confronted with two alternative legal choices in setting investment regulations: First, the state allows investment with the principle of liberalism; or Second, the state restricts investment to protect state sovereignty. Indonesia as a developing country, experiencing the same thing in investment law-making, which can be seen from the lawsuit for judicial review of Law Number 25 of 2007 concerning investment, before the Constitutional Court.[5]

UUPM is the main investment regulation in Indonesia.[6] The Constitutional Court decision examined several articles in the UUPM that were considered to conflict with the 1945 Constitution. However, overall the UUPM was considered to be constitutional. The decision of the Constitutional Court needs to be evaluated to make people understand this Court's holding. The Constitutional Court's holding is limited to determining the UUPM Articles' constitutionality but does not examine their compatibility with other instruments. This judicial review by the Constitutional Court is only based on arguments presented by the parties, witnesses, and judges' considerations on the implementation in the field.[7]

For this reason, this study tries to provide a supplementary understanding of this problem using the analysis of the Inclusive Legal Theory. This theory is a new legal theory that uses several elements in analysing problems, especially investment studies. These include openness with nonlinearity, fairness, freedom, religious aspects, international law studies, and is guided by the protection of marginal society.[8]

The research problem in this research is: What is the relevance of Inclusive Legal Theory to analysis of the Constitutional Court's Decision Number 21-22/PUU-V/2007?

[3] United Nations Conference on Trade and Development, *Globalization and Liberalization: Development in The Face of Two Powerful Currents* (Report of The Secretary-General of Unctad To The Ninth Session of The Conference, 1996) 13.

[4] Erman Rajagukguk, 'Welfare State: Foreign Capital Controversy' paper presented at *Kritik Atas Arah Kecenderungan Supremasi Hukum Paska 1998 Terkait dengan Modal* (2008) 1.

[5] *Judicial Review of Law No 25 of 2007 on Investment in the Indonesian Constitution of 1945* (2007) 21-22/PUU-V/2007 232.

[6] Law No. 25 of 2007 on Investment.

[7] Erman Rajagukguk, Loc. Cit., 1.

[8] Ben Senang Galus, *Mazhab Tamsis: Pemikiran Prof. Jawahir Thontowi, SH, Ph.D, tentang Hukum Inklusif Berkeadilan* (Pohon Cahaya 2016) xix-xxii.

## B. Research Method

This study uses the concept of normative legal research with a statutory and philosophical approach. This study was carried out by analysing UUPM and Constitutional Court Decision Number 21-22/PUU-V/2007 concerning judicial Review of UUPM. This study also uses a philosophical approach in exploring the norms and decisions of the Constitutional Court with philosophical instruments namely ontology, epistemology, and axiology of state sovereignty and investment.

## C. Discussion and Result

The discussion in this study justifies the research methodology. This study uses conceptual analysis to answer this research question. This study will address several issues, including:

### 1. The Inclusive Legal Theory

The inclusive legal theory was established by Jawahir Thontowi. This theory intends to fill the gap of the study of law from the perspective of problematic solutions. The Inclusive Legal Theory seeks to support the development of national law by critically analysing legal norms that contain elements of injustice. The injustice which originates from legal positivism makes justice "impossible to be implemented on earth."[9] Justice is one of the objectives of the law, in addition to legal certainty and utility of the law, among which objectives the purpose of justice is the most important of these ideals.[10] So far, legal positivism has established axiology in legal certainty, by observing formal sources, namely regulations.[11] Legal certainty cannot reflect justice in people's lives, even though justice is a necessity that never dies.

Legal positivism with *ius constitutum* takes law far away from the values of justice. In Indonesia, there are three legal systems that apply, namely, the Western legal system, the Islamic legal system, and the customary legal system.[12] This is a type of legal pluralism, where every law has different characteristics but has the same goals, which is justice, certainty, and utility of law. The Inclusive Legal Theory is characterized by incorporation of the existing concept of legal pluralism.

[9] Jawahir Thontowi, 'Towards Equitable Legal Science' speech delivered at the Inauguration of Professor Jawahir Thontowi, SH, Ph.D (Bureau of Academic and Student Affairs UII, 2011) 5.

[10] Muhammad Erwin, *Filsafat Hukum; Refleksi Kritis Terhadap Hukum dan Hukum Indonesia: dalam Dimensi Ide dan Aplikas)* (PT RajaGrafindo Persada 2015) 290.

[11] Shidarta, *Hukum Penalaran dan Penalaran Hukum* (Genta Publishing 2013) 200.

[12] Ibid 227.

The Inclusive Legal Theory has a paradigm that deviates from the current established theory, however. The paradigm of the Inclusive Legal Theory is strongly influenced by the critical legal studies by Talcott Parsons and Roscoe Pound. Talcott Parsons states that law only functions as a means of social control. Talcott Parsons states, "This is where law comes in from a sociological point of view, law is significant, above all, as an institutional instrumentality of (social control)."[13]

Roscoe Pound states that the law controls change in society (law is the tool of social engineering).[14] Roscoe Pound articulates, "In such a conception of judicial decision as part of a larger process of social engineering, in a sense legislation and judicial decision are put on the same basis. Each is or may be creative. Each is and should be governed by principles of social utility."[15]

Based on the influence of this paradigm, the Inclusive Legal Theory sees that law does not only function as a search for legal certainty solely by preventing and controlling members of society from actions that cause violations and crimes and resolving disputes in court but considers it as a legal justice.[16]

The Inclusive Legal Theory aims to return the law to the original idealism of justice, with five (5) frameworks, namely: non-linear, having long tradition of freedom, having religious values, national law is not independent but is subject to international law and the legal ideology, to protect those marginalized in society.[17]

In the early stages, the concept of the Inclusive Legal Theory was known as Fairness Inclusive Legal Theory with five important characteristics, namely: (i) The fairness under the law must be integrated with ontology, epistemology, and praxis; (ii) Fairness under the law must be of an inclusive character; (iii) Fairness under the law must have equality in differences in capacity; (iv) Fairness under the law shall be characterized by transplantation; and (v) Fairness under the law must be in line with special legal conditions.[18]

The Inclusive Legal Theory analysis is grounded in two parallel terms, inclusiveness and fairness. Inclusiveness is derived from the English word "Inclusive" which has the

[13] Talcott Parsons, 'Law as an Intellectual Stepchild'*(*1977) *Sociological Inquiry*, 12.

[14] Linus J. McManaman, 'Social Engineering: The Legal Philosophy of Roscoe Pound' [1958] *St. John's Law Review*, 16-17.

[15] Roscoe Pound, 'The Theory of Judicial Decision. III. A Theory of Judicial Decision for Today' [1923] *Harvard Law Review*, 955.

[16] Jawahir Thontowi, Loc. Cit., 6.

[17] Ben Senang Galus, Loc. Cit., xix-xxii.

[18] Jawahir Thontowi, Loc. Cit., 32-33.

meaning "included in it."[19] Inclusiveness is the antonym of exclusiveness, which means a way of thinking, which is textbook thinking with legal studies based on existing legal norms (linear). The Inclusive Legal Theory is an empirical legal study, which aims to expand the object of legal studies. The law is not static, but dynamically corresponds to the new era.

## 2. Liberalization *versus* Sovereignty

The debate between liberalization versus sovereignty began in the new era of globalization. Globalization supports the growth of liberalization. Liberalization and globalization are part of an economic reform program aimed at shaping new economic directions. Liberalization aims to reduce and eliminate state control over economic activity. Liberalization has two dimensions, internal and external liberalization.[20]

Globalization can thus be defined as "the intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa."[21] Globalization, according to Anthony Giddens, has four dimensions. First is the world capitalist economy. The second is the nation-state system. If the nation-state is the main "actor" in the global political order, the corporation is the dominant agent in the world economy. The third is the world military order and the fourth is the global division of labour or international division of labour.[22]

The dimensions of globalization provide an overview of globalization supported by stakeholder from various backgrounds related to economic liberalization and an enterprise given the role as an agent in the economic order.

Economic liberalization is derived from the preference of liberal democracies.[23] Liberalism in the economic field is an understanding that is built from the concept of individualism, market mechanisms, and a limited role of the state.[24] The economic system of Liberalism originated from the idea of Adam Smith.[25] Adam Smith opined that economic activities are controlled by an "invisible hand." Economic activity is made

[19] Ben Senang Galus, Loc. Cit., 484.

[20] Inakshi Chaturvedi, 'Globalization and Its Impact on State Sovereignty' [2012] *International Political Science Association*, 1.

[21] Anthony Giddens, *The Consequences of Modernity* (Politiy Press 1991) 64.

[22] Ibid 70-71.

[23] Beth A. Simmons and Zachary Elkins, 'The Globalization of Liberalization: Policy Diffusion in the International Political Economy' [2004] *American Political Science Review*, 189

[24] Jonker Sihombing, *Investasi Asing melalui Surat Utang Negara di Pasar Modal* (PT Alumni 2008) 33.

[25] Jonker Sihombing, *Peran dan Aspek Hukum dalam Pembangunan Ekonomi* (PT Alumni 2010) 47.

autonomously by an individual for his own interests so that individuals and society must catch up on their respective interests (self-interest). This economic planning is given to an invisible mechanism, ultimately creating economic development that leads to equilibrium.[26]

Adam Smith's main idea about economics is the free market doctrine. This idea wants restrictions on government interference in regulating trade and is controlled by the laws of supply and demand.[27] The development of globalization[28] provides fertile space for liberalism and capitalism to develop in the world. Liberalism is growing in line with globalization to affect the global economic system. This influence is marked by the growth of free trade/free markets, respect for individual ownership, and world markets dominated by multinational companies.[29]

The practice of investment is controlled by Liberalism, which is the spearhead in promoting Capitalism.[30] The economic system of capitalism wants the function of the state to be limited. The state only functions as a night watchman. The state has a function to maintain and protect economic and social interests based on the principle of *laissez-faire*.[31] Literally, this term means “let go, let go, the world will continue to spin”. This slogan is then interpreted as “let people do as they like without government intervention”.[32]

The greatest influence of liberalization in economic politics is its resistance to the economic system of mercantilism. Mercantilism supports state economic regulations for national interests. Economic mercantilism states that national assets were the amount of gold are owned by the state and the state must restrict import and increase exports to increase gold ownership.[33]

The contradiction between liberalism and state sovereignty heightened in the era of economic nationalism. Economic nationalism emphasized policy arrangements that favour national interests, including international trade arrangements.[34] Theoretically, this debate is illustrated by Theodore H. Moran’s theory about the relationship between economic

[26] Ibid 50-51

[27] H.S. Kartadjoemena, *GATT dan WTO Sistem, Forum dan Lembaga Internasional di Bidang Perdagangan* (UI Press 2002) 24.

[28] Sentosa Sembiring, *Hukum Investasi* (CV Nuansa Aulia 2010) 1.

[29] Ign Gatot Saksono, *Keadilan Ekonomi dan Globalisasi* (Rumah Belajar Yabinkas 2008) 53.

[30] Basu Swastha D.H. and Ibnu Sukotjo W., *Pengantar Bisnis Modern* (Liberty 2001) 8.

[31] Jonker Sihombing, Op. Cit., 31.

[32] Ridwan Khairandy, *Iktikad Baik dalam Kontrak di Berbagai Sistem Hukum* (FH UII Press 2017) 42.

[33] Kenneth J. Vandevelde, ‘Sustainable Liberalism and the International Investment Regime’ [1998] *Michigan Journal of International Law*, 375.

[34] Ibid 378.

development and FDI. First, *the malign model of FDI and Development*.[35] Second, *the benign model of FDI and Development*. [36] Mohammed Al Sewilem added in one relationship model an *integrative school*.[37] A similar opinion was conveyed by Charles Hill, who was quoted by Taylor in giving a categorization of PMA theory. Charles Hill analyses these three theories in terms "*the free market view*" (*Classical Theory*), "*the radical view*" (*Dependency Theory*), and "*pragmatic-nationalism*" (*Middle Path theory*).[38]

The state has the absolute right to independence. It is stated that no country can interfere with the problems that happen in other countries, and no country is allowed to make war with other countries.[39] Therefore, international law is based on the principle of mutual territorial respect among nations, known as "sovereignty." Sovereignty in the traditional conception is divided into several parts. First, internal sovereignty is the highest sovereignty of the country, allowing it to regulate all people, the environment and everything in it to implement the laws and regulations that have been made by the government in the territory.[40] Internal sovereignty makes the country as *legibus soluta.*[41] *Legibus solutus* is derived from the Latin meaning "released from the laws" or in the language defined as 'of the emperor or other designated person not bound by the law.'[42]

Second, external sovereignty is the sovereignty of the state to defend its independence from attacks from other countries. External sovereignty means "As the absolute independence of one state as a whole with references to all other states".[43] External sovereignty begins with the concept of state freedom to engage in relations with other countries without any control from the other country. This aspect of sovereignty comes from the recognition of the independence of a country, giving the independent state its reciprocal sovereignty. Essentially, a state must not interfere in the affairs of other

[35] Theodore H Moran, *Foreign Direct Investment and Development; The New Policy Agenda for Developing Countries and Economies in Transition* (Institute for International Economics 1998) 19.

[36] Ibid 20.

[37] Mohammed Al Sewilem, *The Legal Framework for Foreign Direct Investment in the Kingdom of Saudi Arabia: Theory and Practice* (University of London 2012) 43.

[38] J. Michael Taylor, 'The United States' Prohibition on Foreign Direct Investment in Cuba— Enough Already' [2002] *Law & Business Review of the Americas*, 120.

[39] Huala Adolf, *Aspects of the State in International Law* (PT RajaGrafindo Persada 2002) 39.

[40] Hufron and Syofyan Hadi, *Ilmu Negara Kontemporer Telaah Teoritis Asal Mula, Tujuan dan Fungsi Negara, Negara Hukum dan Negara Demokrasi* (LaksBang Grafika 2016) 112.

[41] F. Isjwara, *Pengantar Ilmu Politik* (Putra A Bardin 1999) 108.

[42] Bryan A. Garner. (ed), *Black's Law Dictionary* (9th Ed., Thomson Reuters 2009) 982.

[43] Nkambo Mugerwa, 'Subjects of International Law' in Max Sorensen (ed), *Manual of Public International Law* (Palgrave Macmillan 1968) 253; C. F. Strong, *Modern Political Constitution an Introduction to the Comparative Study of Their History and Existing Form* (1st Ed., The English Language Book Society and Sidgwick & Jackson Limited 1966) 80.

countries. The state has jurisdiction over the territory exclusively in the form of independence and sovereignty but remains charged with an obligation to international agreements if the country agrees so that the state is bound and submits voluntarily to the agreement.[44]

Third, territorial sovereignty has two aspects. The first aspect is positive sovereignty, means that sovereignty is exclusively sovereign rights, and the state has the sovereign right to exploit and explore its territory. The second aspect is negative sovereignty. Negative sovereignty is the obligation of the state not to interfere with and respect the rights of other countries in carrying out governmental activities independently.[45]

Dusan Pavlovic divides sovereignty theory into two theories. The first theory is the classical theory of sovereignty. The classical theory views sovereignty as unlimited power. The classical view judges that there are three main elements of sovereignty, namely the element of unlimited power, the element of a sovereign is power the source of all rights, and the king is the only authority element as the keeper of sovereignty. The second is the constitutional theory about sovereignty. The constitutional theory views sovereignty as something which is final but must be limited in accordance with the constitution.[46]

The sovereignty of a country is not absolute but is limited with respect to the sovereignty of other countries. International law states that state sovereignty is relative.[47] International law considers that the sovereignty of the state must follow and respect international law, including respecting the sovereignty and territorial integrity of other countries. A contrary opinion was espoused by Hata, regarding the existence of state sovereignty in international law that there was no higher power than the state. This concept explains that the independence of the state to act cannot be limited by international law.[48]

Today, Sovereignty theory remains debatable, even where countries maintain good relationships with one another.[49] The debate about sovereignty has been influenced by globalization which created world integration physically and make individual countries

[44] Jawahir Thontowi and Pronoto Iskandar, *Hukum Internasional Kontemporer* (PT Refika Aditama, 2006) 173.

[45] Huala Adolf, Op. Cit., 114.

[46] Dusan Pavlovic, *Rousseau's Theory of Sovereignty* (Central European University 1997) 5-6.

[47] Suryo Sakti Hadiwijyo, *Aspek Hukum Wilayah Negara Indonesia* (Graha Ilmu 2012) 103.

[48] Hata, *Hukum Ekonomi Internasional IMF World Bank WTO* (Setara Press 2016) 192.

[49] Nandang Sutrisno, *Using World Trade Law to Promote the Interests of Global South: A Study on the Effectiveness of Special & Differential Treatments*, translation by Susi Fauziah, *Pemajuan Kepentingan Negara-Negara Berkembang dalam Sistem WTO: Studi atas Mekanisme Perlakukan Khusus dan Berbeda dengan Referensi terhadap Indonesia* (The Institute for Migrant Rights Press 2012) xvii.

only small parts of the global world. Globalization transcends state boundaries both ideologically and politically due to advances in technology and communication, and transportation, including the international trade system. Globalization has one goal in international trade, namely: organizing nations for a common goal, removing trade barriers to facilitate the movement of trade products both in the form of goods and services, investment, currency, and information.[50]

James Bryce denies the existence of sovereignty theory. He said the theory of sovereignty is a "dusty desert of abstractions."[51] Sovereignty theory is stated as a fictional and imaginary theory. Therefore, sovereignty theory is considered a dangerous concept, giving rise to mere power-based governance, and sovereignty theory is a barrier to the growth of international trade.[52]

### 3. Meeting Point Between Liberalization and State Sovereignty: Implication of The Constitutional Court Decision Number 21-22/PUU-V/2007

The Constitutional Court Decision Number 21-22 / PUU-V / 2007 concerning judicial review of UUPM has tested the existence of UUPM in view of the 1945 constitution. UUPM can be cancelled under the principle that a lower level legal regulation is void if in conflict with a higher level legislation (*lex superiori derogat legi inferiori).*[53] The registration of this judicial review generally was based on the allegations that the UUPM is more applicable to the principle of liberalization than to state sovereignty.

The Constitutional Court began legal considerations by explaining the interpretation of Article 33 of the 1945 Constitution, which became a key article in the implementation of the national economy and social welfare, including foreign investment in Indonesia. Article 33 must be read in its entirety. Understanding of this article must be based on the spirit that the 1945 Constitution is a living constitution. The use of historical context in understanding this article is needed but does not stop at historical facts. More importantly, it aims to find the purpose behind article 33, so that textual interpretation is supported by the contextual interpretation to understand article 33.[54]

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[50] Bernhard Limbong, *Ekonomi Kerakyatan dan Nasionalisme Ekonomi* (Margaretha Pustaka 2013) 151.

[51] Viscount James Bryce, *Studies in History and Jurisprudence* (Oxford University Press 1901) 504.

[52] F. Isjwara, Op. Cit., 106.

[53] Yuliandri. *Asas-Asas Pembentukan Peraturan Perundang-Undangan yang Baik* (RajaGrafindo Persada 2010) 50.

[54] *Judicial Review of Law No 25 of 2007 on Investment in the Indonesian Constitution of 1945* (2007) 21-22/PUU-V/2007 213.

This consideration shows the attitude of the Constitutional Court in support of broad statutory interpretation, namely: the purposes of the law in the future (prescriptive). The non-linear element used by the Constitutional Court justices in this interpretation, by offering interpretations that are not only textual but contextual. Open thought of its implementation is required to make these decisions more meaningful and fulfil the spirit of justice.

Article 33 has the ultimate goal of creating the greatest prosperity of the people. The phrase "the greatest prosperity of the people," in Article 33 the UUD 1945 must be understood, not only in physical context, but also in the dignity of the nation so that it is able to stand in line with other nations and able to become the authority in their own country.[55] Therefore, the state as the holder of the right to control the state is not meant to be owned by the state itself but is bound to the purpose in giving that right, to be used for the greatest prosperity of the people.

The principle of economic democracy in Article 33 which covers the principles of togetherness, fairness of efficiency, sustainability, environmentalism, independence, and the balance of progress and national economic unity must also be interpreted as an economic democracy that continues to change and develop so that economic democracy must not only be bound at a certain time. This interpretation was used by the Constitutional Court in interpreting the articles in the UUPM.

In general, decisions regarding state sovereignty are interpreted broadly, so long as the government is still in control of investment. This statement is proven by regulation, among others, first, "by still taking into account national interests," and second, the state statement determines what is permissible, and not merely the will of the capital owner. Third, there are a number of obligations and responsibilities imposed on investors. Fourth, there is a provision that the Government can stop or cancel the granting and extension of land rights. Fifth, there are provisions in which the Government, based on the law, is possible to carry out acts of nationalization or expropriation of ownership rights. Sixth, there is a provision that the Government can terminate the agreement or contract of cooperation. This is the standard of state sovereignty explained by the constitutional court in its decision.

[55] Ibid 274.

The problems of liberalization and state sovereignty raised in this Constitutional Court decision include equalizing FDI and Domestic Direct Investment (DDI).[56] This regulation is alleged to contain elements of liberalism that emphasize the principle of non-discrimination between FDI and DDI. This equal position, however, is contrary to state sovereignty. Legal considerations related to this equality action are considered by the Constitutional Court not to contradict the UUD 1945 due to several reasons. First, the principle of accountability. This principle that orders companies to be accountable for their business activities, encapsulated in the phrase "keep in mind national interests," the existence of closed or open business field instruments with requirements, obligations and responsibilities of the company, and stopping or cancelling the grant of rights to land, and supported by the principles of economic democracy as a form of state obligation to provide protection for people's rights.[57] Additionally, the Court invoked the principle of equality in business and the principle of economic democracy.[58] This is the contextual interpretation applied by the Constitutional Court, interpreting sovereignty by not being bound in one legal term, but must be considered in its entirety.

Second, the Court considered the freedom to transfer assets,[59] the right to transfer, and repatriation of assets in foreign currencies.[60] These privileges will provide uncertainty in guarantee of employment and continuation of the business.[61] The Constitutional Court believes that protection of human rights is absolutely necessary. The state cannot prohibit the ownership of one's assets, including legal entities. Otherwise, it will conflict with human rights. This provision is controlled by the obligation to report and fulfil the state's rights to taxes and royalties, the implementation of laws that protect creditors' rights, and the implementation of laws to avoid state losses.

Third, all types of businesses are exposed.[62] UUPM is deemed to have the spirit of openness. Thus after that state has made exceptions, the state should regulate, and start to establish businesses.[63] The Constitutional Court held that there is no problem of

[56] Law No 25 of 2007 on Investment, art. 4 (2).

[57] *Judicial Review of Law No 25 of 2007 on Investment in the Indonesian Constitution of 1945* (2007) 21-22/PUU-V/2007 219-220.

[58] Ibid 220-221.

[59] Law Number 25 of 2007 on Investment, art. 8 (1).

[60] Ibid art. 8 (3).

[61] *Judicial Review of Law No 25 of 2007 on Investment in the Indonesian Constitution of 1945* (2007) 21-22/PUU-V/2007 225.

[62] Law No. 25 of 2007 on Investment, art. 12 (1).

[63] *Judicial Review of Law No 25 of 2007 on Investment in the Indonesian Constitution of 1945* (2007) 21-22/PUU-V/2007 230.

unconstitutionality in the formulation of norms for opening business fields because the term “controlled by the state” does not always mean “owned by the state”. An important issue in this problem is the principle of “openness of the business sector”. The government requires a lot of legislation to cover certain business fields including its arrangements in the DNI. Similarly, if the closed principle is prioritized, the government needs a lot of rules to open its markets. The essence of this problem is the mechanism of government oversight of investment. With the open principle, the government does not focus on supervising investments made, but with the principle of “closure”, it will make the government focus more on regulations that opening its markets to foreign investment. This regulation of openness and closure also has an impact on state sovereignty as stated in the Constitution of 1945, even though the Constitutional Court states that it is not.

Fourth, the Court considers the facilitation of FDI.[64] The state should provide convenience to the people who are engaged in the real sector who carry out the social economy. The state must provide protection for the rights of marginalized groups.[65] The Court argued that the arguments given did not show evidence that these norms could cause a loss of protection for marginal communities, But the arguments gave only statements or assumptions. Even though other articles support the protection of the people, the Court stated that this article was not in conflict with the Constitution of 1945.

The provision of facilities created by the government aims to attract a lot of investment into this country. Provision of facilities is considered reasonable because it will get multiple advantages. The provision of facilities should not eliminate the spirit of competing in a healthy manner of creating a dignified business. Provision of facilities is reasonably considered good if it does not exceed and damage the principle of business competition. Even though it does not contradict the Constitution of 1945, the provision of facilities made by the government on investment should not hurt the feelings of the people who should obtain and need these facilities. The principle of protection of marginal communities must be a record in the provision of facilities to investors.

Fifth, ease of service for land rights.[66] Provision of land rights is longer than the UUPA, with a statement “extended at once.” This will eliminate people's rights to land.[67]

[64] Law No. 25 of 2007 on Investment, art. 18.

[65] *Judicial Review of Law No 25 of 2007 on Investment in the Indonesian Constitution of 1945* (2007) 21-22/PUU-V/2007 245.

[66] Law No. 25 of 2007 on Investment, art. 21-22.

[67] *Judicial Review of Law No 25 of 2007 on Investment in the Indonesian Constitution of 1945* (2007) 21-22/PUU-V/2007 252.

The Constitutional Court believes that the use of the phrase “extended at once” is of value contrary to the Constitution of 1945. This principle must be determined by the government in implementing investment, since giving facilities that exceed the fairness will result in the loss of state sovereignty.

## 4. Relevance of the Inclusive Legal Theory in the Constitutional Court's Decision Number 21-22/PUU-V/2007

The Constitutional Court's decision can be analysed based on the elements in the Inclusive Legal Theory. The explanation of the relevance of this decision with the elements can be explained as follows.

Based on the non-linear principle, the Constitutional Court has adjudicated the judicial review law of 25 of 2007 using open and comprehensive legal observations. This can be seen from the commitment in the decision which states that it will use the interpretation of the constitution not only in a textual manner but also in a contextual manner so that the constitution stay “alive.” The Constitutional Court not only conducts hearings by listening to the arguments of the Petitioners, expert statements submitted by the Petitioners, statements of legislators, expert statements submitted by the Government, but this Statement is then returned to the question of interpretation of the basic principles of the economic system adopted by The Constitution of 1945, as its basic provisions are regulated in Article 33 of the Constitution of 1945. Principles are in line with long tradition of freedom. This principle emphasizes justice in this decision. The Constitutional Court has fulfilled the obligation to listen to the arguments and statements of the parties carefully, even the trial trip is considered to be long enough so that the debates of the parties are facilitated by the Court properly. The principle of religious values. This principle reflects the values adopted by the Indonesian people. In this ruling, the Constitutional Court multiplies the living law that lives in society as one source of unwritten law.

National law principle is not independent but is subject to international law. This decision is closely related to the agreement made by the Indonesian people with the GATT agreement. The Constitutional Court still respects the agreement in its decision. The legal ideology principles to protect marginal society. The Constitutional Court does not direct protection on one party but protects all parties, especially the people of Indonesia. This protection is given in the form of actual decision making.

Related to the implementation of decision making or procedural law, the decision of the Constitutional Court is considered still relevant or in line with the Inclusive Legal Theory. However, in this study related to decision material, the principle of the Inclusive Legal Theory was used in decision making. It is seen that the constitutional court ignore the problem of the impact caused by capital liberalization. This aspect escapes the ruling of decisions in the constitutional court ruling. Even though this aspect is important to explore by the Constitutional Court, the Constitutional Court should not stop in matters of dialectics and logic alone but must explore the real values that occur in society, even though it is casuistic and has no broad impact. The principle of the Inclusive Legal Theory is to explore the truth and real justice so that legal problems can be found in long-term solutions.

## D. Conclusion

Based on the formulation of the problem, this study concludes that the conflict between liberalization and sovereignty in Investment Law is bridged by the Constitutional Court by giving a ruling that state sovereignty is still maintained. This decision provides for the preservation of state sovereignty with some supporting elements stipulated in this law.

The decision of the constitutional court in the views of the inclusive legal theory is still relevant to the elements of the inclusive legal theory. This can be seen from the legal procedures used by the judge in giving decisions. However, there are other elements that have not been applied by the judge in considering the impact of foreign investment. Judges are still passive, making this ruling have some problems in a good effort to create legal justice.

It is suggested that the Inclusive Legal Theory give practical improvements to be used by legal development actors in practical areas, such as judges, lawyers or other law enforcers. It also needs theoretical improvement through the study of legal philosophy by academics to make a better Indonesian legal condition.

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# RECONCEPTUALIZING CONSUMER CONTRACTS IN THE PHILOSOPHICAL PERSPECTIVE OF PANCASILA

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**Abstract**

*This study aims to develop the concept of consumer contracts from the philosophical perspective of Pancasila in Indonesia to achieve the legal objectives of legal certainty, justice, and legal benefits. The research is formulated to question how to conceptualize consumer contracts from the philosophical perspective of Pancasila. By using doctrinal research, this study concludes that consumer contracts in Indonesia do not meet the values of Pancasila. Therefore, the article attempts to conceptualize the consumer contract by offering communal principles to realize mutual benefits between the parties in a consumer contract without ignoring the special characteristics of the nation that existed before the independence of the Republic of Indonesia.*

**Keywords**: *Consumer Contracts, Pancasila Philosophy.*

## A. Introduction

Economic growth is compatible with community development. One important aspect of the economy is contract. Contract law constantly develops along with the rapid pace of science and technology. As a result, agreements are required to recognize technological advances and globalization, leading to a term better known as a business contract.[2] In currently developing business law theory, contractual relations have several terms classifying the types of contracts. Two of these types of contracts are frequently used in everyday life, namely commercial contracts and consumer contracts.[3]

A commercial contract is an agreement with commercial purpose between business entities. Commercial contracts emphasize the creation mutually-beneficial ventures based

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[2]In general, business contracts originate from an attempt to bridge differences in interests, Agus Yudha Hernoko, *Hukum Perjanjian (Asas Proporsionalitas dalam kontrak komersial)* (Kencana 2010) 1.
[3]Ibid 34.

on agreement and respect for the continuity of a business, following the rules of applicable contract law rather than imposing the will of others.[4]

On the other hand, consumer contracts are those made between a business entity and an individual, where the parties have unequal bargaining power. One party may have a stronger bargaining position, usually the business actor (either due to the mastery of capital/funds, technology or skills or the seller), while the individual party may have a weaker bargaining position. Thus, the party with the weaker bargaining position must simply accept all contract provisions, lacking any meaningful alternatives. Thus, there are only two alternatives for the parties who have a weaker bargaining position, to accept or reject an agreement (take it or leave it). The imbalanced position in consumer contracts can be seen in the standard clauses, which contain biased tendencies.[5] These standards of consumer contracts are often seen in Banking Agreements, Financing Company Agreements, and Insurance Agreements.[6]

Research into this problem is based on some underlying reasons of the normative basis, philosophical basis, and empirical basis, as follows.

The normative basis in this paper is that contract law in Indonesia is regulated in the Civil Code (KUHPer) /*Burgelijke Wetboek* (B.W.) of the third volume, which is about Engagement.[7] This third volume explains that an agreement must adhere to several principles, including: the principle of freedom to enter into an agreement (partij autonomy), the principle of mutual consent (conformity of the will), the principle of habit, the principle of binding force, the principle of equality of law, the principle of balance, the principle of public interest, the principle of good intention, the moral principle, the principle of obedience, the principle of protection for the weak, the principle of proportionality, and the principle of an open system.[8] Of the several principles for a standard agreement, one is of the most well-known principles, namely the principle of freedom of contract, as a universal principle used in almost all countries today.[9]

[4]Marsella Tridarani, 'Perbedaan Antara Kontrak Komersial dan Kontrak Konsumen' (Bacheor thesis, Universitas Airlangga 2018) 2.

[5]Jonneri Bukit *et.al*, 'Eksistensi Asas keseimbangan pada kontrak konsumen di Indonesia' (2018) 14(28) DIH Jurnal Ilmu Hukum 25.

[6]Marsella Tridarani (n.4) 3.

[7]Ridwan Khairandy, *Hukum Kontrak Indonesia Dalam Perspektif Perbandingan (Bagian Pertama)* (UII Press 2013) 12.

[8]Ibid 86.

[9]Agus Yudha Hernoko (n.2)105.

The legislation actually has established legal rules that aim to balance the rights and obligations of the parties in doing business. Some examples of these legal rules are Law Number 5 of 1999 concerning Antitrust and Unfair Competition, Law Number 8 of 1999 concerning Consumer Protection, and others.[10] It is hoped that this legislative product can become a legal instrument to prevent monopolistic practices and unfair business competition and protect consumers from the ill will of producers and traders alike. However, in Indonesia, these laws are considered to be less able to control and prevent the negative side of business activities. The inability of the law to prevent harmful business practices mostly leads to countless businesspeople and consumers who are victimized by fraudulent business behavior.

The second basis is the philosophical basis**,** which refers to Pancasila in this context. Pancasila is the founding principle of the state, which is arranged in some stages to represent the whole elements of the state. These elements are contained in the Preamble to the 1945 Constitution (UUD 45) paragraph IV. This framework shows that Pancasila is essentially the philosophical basis for the state and the order of Indonesian law.

This concept can be specified as follows: (a) Pancasila is the philosophical basis of the state (the spiritual principle of the state), philosophy of life; (b) The Indonesian state was founded on this basis with the principle of state politics (statehood) in the form of a republic with people's sovereignty; (c) both become the basis of the implementation of Indonesian national independence, namely the implementation and administration of the state as stated in Indonesia's positive laws as stipulated in the constitution of the Indonesian state; (d) the government structure and all other elements of positive legal regulations that apply for all the people of Indonesia in a family-based unity are based on the constitution; (e) the whole elements as mentioned above are for the achievement of a common goal, namely collective happiness, both physically and spiritually. Thus, all aspects of the administration of the state are encompassed and embodied by the spiritual principle of Pancasila. In this sense, Pancasila is positioned as the spiritual principle and

[10] Jonneri Bukit et.al. (n.5) 25.

the basic philosophy of the Indonesian state.[11] In addition, Pancasila is also set as a fundamental norm of the country, which is the highest legal norm.[12]

Apart from being a spiritual principle, the five precepts of Pancasila in their position as the legal ideals of the Indonesian people in social life, nation and state are the guiding light providing guidance and guideline in all walks of life. Affirmatively, they give content to each statutory regulation, and negatively, limiting the coverage of the contents of laws and regulations. The content of the laws and regulations of the precepts, both individually and together, both single and in pairs is a general legal principle.[13] With this description, it is clear that the Pancasila is the State's Fundamental Norm (Staatsfundamentalnorm) and at the same time a legal ideal, which is the basis and source and guidance for the Body of the 1945 Constitution (UUD 45) and the Basic Rules of the State (Varfasungsnorm) and regulations for other legislation.[14]

Secondly, the KUHPer / B.W. is the basis for judges in Indonesia to decide civil cases. It is also used by various groups as a basis for conducting legal transactions. B.W. in the Netherlands, based on the principle of concordance, is applied to European groups in the territory of Indonesia. Then B.W that is adopted as KUHPer applies to the Indonesian people based on Article II of the Transitional Provisions of the 1945 Constitution which stipulates that "All existing regulations up to the time of independence of Indonesia remained in effect as long as no new provisions were made according to this constitution."

[11]Sulistiowati, *Nurhasan Ismail, Penormaan Asas-Asas Hukum Pancasila (Dalam Kegiatan Usaha Koperasi dan Perseroan Terbatas)* (Gadjah Mada University Press 2018) 8. See also Dodik Setiawan Nur Heriyanto, 'Contracting Out Public Services to NGO Practices in Asian Countries' (2016) 1 (1) Public Goods and Governance 30, 36.

[12]In the system of legal norms of the Republic of Indonesia, legal norms apply to a multilevel and tiered system as well as in groups. In this way, a norm is always applicable, sourced, and based on even higher norms, thus so on until it reaches a basic norm of the state (staatsfundamentalnorm) of the Republic of Indonesia, namely Pancasila. Maria Farida Indrati Soeprapto, *Ilmu Perundang-undangan (dasar-dasar dan pembentukannya)* (11th Edin, Kanisius 2006) 39.

According to Sudjito Atmoredjo, Pancasila is a *Philosophisce Grondslag* and has a special position in the life of the state and law of the Indonesian nation as its core or spirit. The Preamble of the 1945 Constitution as a *Staat fundamental norm* has the essence and position that is permanent, strong and unchanging, attached to the survival of the state, and in the orderly hierarchy of Indonesian law. It is at the highest position and a source of law for articles in the Constitution as well as other laws and regulations. Sudjito Atmoredjo, *Ideologi Hukum Indonesia Kajian tentang Pancasila dalam perspektif ilmu hukum dan Dasar Negara* (Lingkar media 2016) 15.

[13]The supremacy of the Pancasila in the legal system was again found in Law No. 10 of 2004 on the Formation of Legislation. Article 2 of this Act states "Pancasila is the source of all sources of state law". The law was later replaced by Law No. 12 of 2011, which regulates similar things. Article 2 confirms the same thing as in Law No. 10 of 2004 that Pancasila is the source of all sources of state law. Thus, Pancasila is the supreme norm in the Indonesian state legal system making it as a view of life, awareness and legal ideals, and moral ideals legally legitimized. Fais Yonas Bo'a, 'Pancasila sebagai sumber hukum dalam sistem Hukum Nasional' (2018) 15 (1) Jurnal Konstitusi 36

[14]Maria Farida Indrati Soeprapto (n.11) 39.

Indonesia has yet to have a governing contract law, and thus until now Indonesian contract law is still guided by the KUHPer / B.W., which is more individualistic in nature and is in contrast to Indonesia's more communal characteristics. In the Netherlands, the B.W., was amended in 1992 to Nieuw Burgelijke wetboek (N.B.W.). Ideally, the formation of a law, including contract law, must be in accordance with the characteristics and view of Indonesia's national law and also not in conflict with the values contained in the state philosophy of Pancasila. As philosophical-ideological foundations for realizing the ideals of the state, law must follow both in the purpose of the constitutionalism principle as a formal legal state, as well as the four ideals of statehood contained in the Preamble of the 1945 Constitution, namely: protecting the whole nation and the whole elements of Indonesia; promoting public welfare; enriching the life of the nation; participating in maintaining the world order based on eternal peace and social justice.

The empirical basis. This study proposes that the implementation of contract law, especially consumer contracts in Indonesia, only meets the element of legal certainty, and do not meet the elements of justice and societal benefits. This is because the principle of freedom of contract dominates consumer contracts, which allows "any legal subject to do anything" as long as it fulfils the elements of ability, agreement, certainty of the object of the agreement, and legality (article 1320 of the Indonesian Criminal Code), does not contain elements of coercion, fraud, and negligence (article 1321 KUHPer), and contains good faith (Article 1338 Civil Code). Unfortunately, despite the facial legality, many contracts entered into by private companies and state-owned companies actually result in people being discriminated against by containing high interest, forfeited collateral, and other regulations.[15]

To achieve certainty, fairness and most importantly, to achieve legal benefits in consumer contracts, we cannot complete this by principles that answers the criticism on

[15] It is possible to observe the imbalance in contract from several contract models, especially the standard consumer contracts, which include clauses with biased contents. In the practice of lending in the banking environment, for example, there is a clause requiring customers to comply with all bank instructions and regulations, both existing and to be regulated later, or clauses that free banks from customer losses as a result of bank actions. Agus Yudha Hernoko, *Asas Proporsionalitas sebagai landasan pertukaran hak dan kewajiban para pihak dalam kontrak komersial* (LaksBang Mediatama, 2008) 3.

Also see examples of standard contract clauses that burden the buyer or lease purchase. For example, there is a clause containing the payment obligations in full and immediately if the buyer of the lease is in arrears of two consecutive payments, Sri Gambir Melati Hatta, *Beli sewa sebagai perjanjian tak bernama: Pandangan Masyarakat dan sikap Mahkamah Agung Indonesia* (Alumni Bandung, 2000) and Abdul Kadir Muhammad, *Perjanjian Baku dalam Praktik Perusahaan Perdagangan* (Citra Aditya Bakti, 1992) 12-17.

the principle of freedom of contract, namely the principle of Good faith,[16] the principle of proportionality,[17] and the principle of Balance.[18] This is because after all, the powerful large enterprises that dominate the state economy will have a superior position to an economically disadvantaged community, and the principles governing an agreement do not adequately accommodate consumer rights based on Pancasila. Therefore, it is necessary to conduct a study to conceptualize consumer contracts in Indonesia in an effort to fulfil consumer rights based on the Pancasila philosophy.

To analyse and solve the problems in the central issue mentioned above, this research formulates the problem in the question of "How to Reconcept Consumer Contracts in the Perspective of Pancasila Philosophy."

## B. Research Method

The paradigm[19] used in this study is the Pancasila[20] paradigm. This paradigm is selected to determine the extent to which research pays attention to the historical, socio-cultural, economic and political contexts in consumer contracts, intended to analyse consumer contracts from the perspective of the Pancasila Philosophy. The basic

[16]Although good faith is an important principle in contract law in various legal systems, the principle of good faith still raises a number of problems. These problems are related to the unclear meaning of good faith leading to various notions of good faith with different interpretations according to time, place, and person. Additionally, there is no single meaning of good faith. In practice, there are also issues arising from benchmarks and good faith functions that is based more on the attitudes or views of judges that determined a case on a case-by-case basis, Ridwan Khairandy, *Iktikad Baik Dalam Kontrak di Berbagai Sistem Hukum* (UII Press, 2017) 126.

[17] The Proportionality Principle opens the opportunity for imbalance but with the condition that the fair exchange of achievements takes place in a fair and proportional manner. The example of profit sharing in a franchise agreement (70:30) is mathematically unbalanced, but can be accepted as a proportional result. However, the proportionality principle is used in commercial contracts and it is ineffectively used in consumer contracts because the parties in a consumer contract position is not equal, Agus Yudha Hernoko, *Hukum Perjanjian* (n.2) 324.

[18] The principle of balance is a state of burden sharing on both sides to make it in a balanced state. If an agreement raises an unbalanced situation and condition, the imbalance must be assessed from the perspective of three aspects of the agreement, namely the act, the contents of the agreement, and its implementation. Herlien Budiono, *Asas Keseimbangan bagi Hukum Perjanjian Indonesia (Hukum Perjanjian Berlandaskan Asas-asas Wigati Indonesia*) (Citra Aditya Bakti, 2015) 551-552.

[19]The paradigm according to Heddy Srhi Ahimsa can be defined as a set of concepts that relate to one another logically forming a framework of thought that functions to understand, interpret and explain the reality and / or the problem at hand. Syamsudin. *Ilmu Hukum Profetik* (Pusat Studi Hukum (PSH) FH UII Press, 2013) 29.

[20] According to Sudjito Atmoredjo "Pancasila paradigm is a science category that is uniquely Indonesian, but objective-universal. The Pancasila paradigm of science has unique characteristics, character, nature, and foundations. Its specialty lies in the dimensions of its philosophical foundation, both ontology, epistemology and teleology or its axiology", in King Faisal Sulaiman, 'Political Law Testing Regional Regulations by the Supreme Court and the Government Post Amendment to the 1945 Constitution of the Republic of Indonesia' (DPhill Dissertation,Universitas Islam Indonesia 2016) 177.

assumption[21] of the studied reality (ontological aspects) [22] in this research is that consumer contracts should accord with religious values, human nature values, the value of Indonesian unity and diversity, democratic values and the value of justice in relation to the Indonesian people.

To gain the correct knowledge of the situation (epistemological aspects) [23] the researcher, as an academic and legal practitioner collected and accommodated written regulations and customary law and studied the legal principles regarding the currently applicable legal agreement and legal contract.

In the context of legal studies, this research belongs to the tradition of doctrinal[24] legal studies. The object of this research is the legal principles regulated in the Penal Code as well as the principles that arise in customary law governing agreements, and philosophical matters that underlie the concept of communal help as a complement to pre-existing principles.

This research uses two following approaches:

a. The philosophical approach, which examines in depth the values and habits of the Indonesian people to investigate and comprehensively explain the legal rationale underlying the formulation of Pancasila in an effort to meet people's welfare based on the values contained in Pancasila; and
b. The conceptual approach, which systematically and comprehensively describes the opinions of experts in the field of Agreement Law, which is expected to give birth to a new concept of agreement, especially in consumer contracts.

The primary data in doctrinal law research is secondary legal materials. Secondary legal materials in normative legal research consists of:

[21]Basic assumptions are views about a thing (can be objects, science, goals of a discipline, etc.) that have been accepted. This view is the starting point or basis for efforts to understand and answer a problem because it is considered true or believed to be true. These assumptions can arise from: (a) philosophical and reflective reflections; (b) sophisticated empirical studies; (c) careful observation. Heddy Shri Ahimsa, *Paradigma Profetik Islam Epistemologi, Etos, dan Moral* (UGM Press, 2017) 25.

[22] Legal science must have an ontological basis, since law cannot be separated from religious values, human nature values, the value of Indonesian unity and diversity, the value of democracy and the value of justice in relation to the community and the Indonesians. Syamsudin. (n.19) 2377.

[23] Epistemological aspects concern with the nature of the source of knowledge, the truth of knowledge, and the way to get knowledge. Syamsudin (n.19) 238.

[24] Pieter Marzuki said that normative or doctrinal research is a process of finding a rule of law, as well as legal doctrines to answer a problem. It is about what is done to produce new arguments, theories or concepts as a prescription in solving the problem at hand. Mukti Fajar, Yulianto Achmad, *Dualisme Penelitian Hukum Normative & Empiris.*(4th edn, Student Library 2017) 34.

a. Primary Legal Materials are legal materials that has binding power, including Pancasila; Basic norms and rules, the Preamble of the 1945 Constitution; Basic Regulations including the body of the 1945 Constitution; Legislation; Uncodified legal materials such as customary law, Jurisprudence, Treaties; Legal materials which are the legacy of the colonizers, such as the Penal Code.
b. Secondary Legal Materials provide an explanation of primary legal materials such as: academic texts; Bills; legal expert research results; and others.
c. Tertiary Legal Materials provide an explanation of primary legal materials and secondary legal materials such as: dictionaries; encyclopedia; and others. Dictionaries that are often referenced by legal researchers, including Kamus Besar Bahasa Indonesia; Kamus Bahasa Inggris; and Black's Law Dictionary.

The collection of legal materials was compiled by doing documentary studies or literature studies. Documentary study techniques were carried out by conducting an inventory of all legal rules relating to consumer contracts contained in various existing legal products, books, research reports, theses, dissertations, customary and other social laws, legal documents such as legal treatises, draft laws, academic texts, scientific journals of law, mass media and online media (internet), which are directly related to the problem to answer in this study.

This doctrinal legal research used qualitative analysis, which is an analysis that does not rely on numerical data, but rather a narrative description of the findings, and therefore it concerns the quality of the data and not the quantity.[25] Data analysis techniques in this study include:

a. The analysis technique using the means of deductive logical thinking, which is a process of analysis that starts from general statements to deduce specific statements with acceptable reasoning.
b. Analytical techniques based on descriptive qualities by classifying, comparing, and linking legal materials regarding the concept of consumer contracts to the philosophical values of Pancasila, which are in line with state goals. This research is essentially formulated to find solutions related to problems arising in consumer contracts, as explained in the research background, to build a new theory of consumer contracts based on the philosophical perspective of Pancasila.

[25] Mukti Fajar, Yulianto Achmad (n.24) 19.

## C. Reconceptualizing Consumer Contracts in the Philosophical Perspective of Pancasila

### 1. General Review of Consumer Contracts

Consumer contracts are any contracts that are characterized by the following elements:[26]

a. The parties are consumers and business entities (business actors);
b. In terms of bargaining position, the relationship between the two parties is a top-down relationship where the consumer has an inferior position to the business actor (subordinate).
c. The form is standard (standard contract)
d. In many standard consumer contract models, there is no negotiation between the parties;
e. It is an adhesion contract (made by one of the parties, generally a producer or business actor), and the consumer must “take it or leave it”;
f. Standard contract products are generally made in large quantities (massive);
g. There is an exoneration clause or an exemption clause; and
h. There is some regulatory intervention by certain authorities that aim to provide legal protection for consumers, by enforcing mandatory rules.

Consumer contracts are often opposed to commercial contracts that have the following elements:[27]

a. Both parties are generally oriented towards a "profit motive";
b. Contractual relations between the parties are considered equal or balanced in terms of bargaining position;
c. Acceptance of the terms and conditions in the contract can be negotiated by the parties, or by other forms agreed upon;
d. The business character (mutual benefit) is more prominent: the exchange of rights and obligations is not seen from the context of mathematical balance, but in the process and results; a fair and proportional exchange of rights and obligations;
e. It is not a consumer contract, meaning that one of the parties is not an "end user" or the last user of the product; and
f. If in a consumer contract there is an intervention of certain authorities aimed at providing legal protection for consumers, in a commercial contract in the case of an regulatory intervention it is more intended to provide a legal basis for the creation of fair “rules of the game” between or among the parties.

Therefore, to group the types of contracts into the categories of commercial contracts or consumer contracts, we should not only look at the title of the contract (heading) but examine the substance of rights and obligations exchanged by the parties.

[26]Agus Yudha Hernoko, *Hukum Perjanjian* (n.2) 34.
[27]Ibid 35.

The following are examples of consumer contracts which are differentiated from commercial contracts;[28]

a. The sale and purchase contract of fuel oil (BBM) between the Gas Station (SPBU) with consumers is an example of a consumer contract, but the contract of buying and selling fuel oil between PT Pertamina with a gas station or with PT PLN (Persero) is not a consumer contract but a commercial contract;
b. The contract of buying and selling electricity between P.T. PLN and customers in the Household category is an example of a consumer contract, but the power purchase contract between PT. PLN and customers in category I (Industry) is a commercial contract; and
c. Credit agreements in the banking environment, for KMK loans (Micro and Small Credit) that caters to small customers with a standard contract model is included as consumer contracts. Meanwhile, the investment loans involving customers with business backgrounds who have a balanced position is classified as a commercial contract.

**2. Principles in Consumer Contracts**

The third volume of the KUHPer explains that agreements must adhere to several principles, including: the principle of freedom of agreement (*partij otonomy*), the principle of mutuality of consent (conformity of the will), the principle of habit, the principle of binding force, the principle of equality of law, the principle of public interest, the principle of intentional commitment good, the moral principle, the principle of obedience, the principle of protection for the weak, the principle of proportionality and the principle of an open system. The principles that are widely used in the field of contract law are the principle of freedom of contract, the principle of balance, the principle of proportionality and the principle of good faith. The descriptions are as follows:

This principle of freedom of contract means that anyone can freely make contracts about anything, anywhere and anytime, even if the agreement is contrary to the provisions of the contract law. The KUHPer gives the parties the right to enter into and make any agreements with anyone, as long as they fulfill the legal requirements of the agreement stipulated in the third volume of the KUHPer. Every agreement made lawfully binds the parties to it. This formula can be found in article 1338 paragraph (1) of the Indonesian Criminal Code, which is reaffirmed by the provisions of article 1338 paragraph (2) of the Indonesian Criminal Code, which states that the agreed agreement cannot be withdrawn unilaterally by one of the parties in the agreement without the approval of other party in the agreement, or in cases where by law is stated sufficient reason for withdrawal. In

[28]Ibid 37.

general, legal scientists associate and treat the provisions of article 1320 of the Indonesian Criminal Code in conjunction with article 1338 paragraph (1) of the Indonesian Criminal Code as the principle of freedom of contract in the Agreement Law.

The Principle of Balance is a state of silence or harmony, none of which dominates the other or there is not one element that rules over another.[29] The principle of balance of the position of the parties are attributed to the operation of the three main principles of the agreement (freedom of contract, mutual consent and *Pacta Servanda*). The Balance Principle will be born when the three main Principles of agreement work and complement each other.[30] According to Herlien Budiono, the Principle of Balance is defined in two ways. First, the principle of balance is an ethical principle which means that a "load sharing situation on both sides is in a balanced state." The word “balance” here means that on one side it is limited by will (based on consideration of favourable circumstances) and on the other side of belief (of ability). Within the limits of both sides, balance can be realized. Secondly, the principle of balance is a juridical principle meaning that the principle of balance can be understood as a principle that is feasible and fair, and subsequently accepted as a basis for juridical attachment in Indonesian contract law. In the event that contractual balance is disturbed, the solution is to carry out the testing of the working power of the principle of balance, through action, content and implementation of the agreement. [31]

The Principle of Proportionality is another requirement in addition to the principle of balance, which is defined as the principle that underlies the exchange of rights and obligations of the parties according to their proportions or parts. The proportionality of the distribution of rights and obligations is manifested in the entire contractual relationship process, both in the pre-contractual phase, contract formation, and contract performance. The principle of proportionality does not dictate a balance (equality) of results, but rather emphasizes the proportion of the distribution of rights and obligations between the parties.[32]

The principle of good faith is one of the most important principles in contract law in various legal systems, but this principle still raises a number of issues. These issues are related to the abstract meaning of good faith that leads to various notions of good faith,

[29] Herlien Budiono (n.18) 507.
[30]Ibid 304.
[31]Ibid 510.
[32]Agus Yudha Hernoko, *Hukum Perjanjian* (n.2) 324.

differing in terms of time, place, and person. Additionally, there is no single meaning of good faith. Therefore, in practice, issues arise from benchmarks and good faith functions that are based more on the attitudes or views of judges who determined them on a case-by-case basis.[33]

Implementation of the principles of balance, freedom of contract, proportionality, and good faith according to researchers cannot solve problems related to consumer contracts, because the parties involved in consumer contracts are not in a balanced position, Rather an imbalance exists between those who have a stronger bargaining position and those who have weaker bargaining position. Therefore, in this sense, it is impossible to apply the principles of balance, proportionality, and good faith. These three principles are only suitable for use in commercial contracts where both parties have a balanced or equal bargaining position. Economic imbalances between the parties in consumer agreements, which is frequently found, will affect the formation of the agreement. Based on the Indonesian perspective or mindset, this imbalanced bargaining position can disturb the balanced position between the two parties.

In addition, it is emphasized that the use of the Indonesian Criminal Code, especially the Third Volume on Engagement, has proven to be inconsistent with the implementation of Pancasila values because these regulations are outdated and are not compatible with the development of Indonesian society. Thus, it is necessary to have a conceptual arrangement of the contents of the agreement in civil contracts, especially consumer contracts in Indonesia to allow all people to have equal justice and the potential to prosper.

### 3. Application of Pancasila Values Consumer Contracts

Pancasila is a reflection of the soul and ideals of Indonesian national law, which is the basis and source of all sources of law, both written and unwritten. The values of Pancasila must be followed in all fields and all walks of life as a nation and state including in the area of contract law, especially in consumer contracts that will be analyzed based on all precepts of Pancasila as follows.

a. The Precepts of Belief in the One and Only God

Belief in the one and only God contains the understanding and belief in God the Almighty and implies explicitly that humans must establish relationships with God, with other human beings, and with the universe as a whole. This is proof that no

[33]Ridwan Khairandy, *Iktikad Baik Dalam Kontrak* (n.16) 126.

religion teaches to prioritize individualism to its adherents. Thus, the consumer contract must have the hallmark of the social life that believe in the one and only God by putting aside the nature of individualism.

b. The Precept of Just and Civilized Humanity

Just and civilized humanity implies the concept of a whole human being, spiritually and physically. As a spiritual entity, the existence of a conscience is no less important than reason. Conscience carries the function of morality so that humans can distinguish between right or wrong, good or bad, fair or unfair. This mandates that the direction of human life is always on a straight path. On the other hand, reason carries the functions of creativity and progressiveness that continuously pushes human progress. In the dimension of legal science, creativity and progressiveness of the mind are controlled by the conscience. Hence, it requires people always be focused on the achievement of absolute truth and justice.[34]

The precept of just and civilized humanity in the field of consumer contracts can be realized by the following: recognizing equal rights and obligations among human beings (everyone is equal before the law); upholding the value of kinship; mutual respect and love for others; development of tolerance; upholding the value of humanity; defending truth, justice and expediency; and able to work together with all people.

c. The Precept of a Unified Indonesia

A unified Indonesia is the embodiment of the ideology of Indonesian nationalism imbued by the Belief in One and only God and Just and Civilized Humanity.[35]

The Precept of a Unified Indonesia in consumer contracts can be realized by the following principles: placing national unity, unity and safety above personal and discreet group interests; willing to sacrifice for the benefit of the nation and state; increasing national unity with Unity in Diversity; helping each other; and fostering the love of national customs.

d. The Precept of Democracy, Led by The Wisdom of the Representatives of the People

This precept implies the concept that the people or people's representatives in exercising their power must be led by wisdom, with a full sense of responsibility, both to God the Almighty and to all Indonesian people. Their actions shall never be based on

[34] Sudjito Atmoredjo (n.12) 34.
[35] Ibid 127.

power or formal legality. A philosophical wisdom will arise if humans love the truth. The closer a man is to absolute truth and God the Almighty, the wiser he is.[36]

To realize this fourth precept in consumer contracts, the following principles must be followed: prioritizing deliberation and consensus; realizing the balance of rights and obligations of the parties; prioritizing good faith and responsibility in the process of making and implementing agreements.

e. The Precept of Social Justice for All Indonesians

Social justice means justice that applies to society in all walks of life, both the material and spiritual aspects. The intended justice is not formal justice born from legislation, but rather justice that is associated with the social habitat of Indonesians in belief in one and only God.

To realize the principle of social justice for all Indonesians, attention must be paid to the following measures: strengthening the spirit of communal help in an effort to improve the welfare of the people; prioritizing the values of justice and expediency in various aspects; prioritizing the welfare of the community over foreigners; prioritizing the spirit of togetherness, and being willing to help others and avoid individualism.

## 4. The Concept of Consumer Contracts in the Philosophical Perspective of Pancasila

The term philosophy is derived from the Greek word *Philoshopia*, meaning love of wisdom. In the beginning, philosophy was defined as love for or the search for wisdom. Pythagoras was the first to call himself *philosophos*. He did not call himself a wise person, so he sought wisdom in life. For the Pythagoreans, philosophizing is not solely for scientific reasons (looking for truth), but rather the practice philosophy as a way of life, that is, as a way of life about the ways in which humans reach perfection, so as to escape the continual transfer of souls.[37]

A nation as a group of individuals has values that are upheld as a normative culture that gives direction to every decision and activity. These values are the nation's view of life, which is the manifestation of the national values, believed to be true empowering people to realize it. Without having the view of life, a nation will easily be shaken and lose

[36] Ridwan Khairandy, *Iktikad Baik Dalam Kontrak* (n.16) 126.

[37] Tjipta Lesmana et al. *Konsistensi Nilai-Nilai Pancasila dalam UUD 1945 dan Implementasinya* (PSP Press 2010) 57.

its grip on solving the problems it faces, whether in terms of political, economic, social, cultural, defense, or security aspects. [38]

The view of life of the Indonesian nation is Pancasila, because Pancasila has long been rooted in the socio-cultural culture of the Indonesian nation and is the nation's character. Pancasila is a distinctive feature of the Indonesian nation that is a different from other countries in the world. The characteristics that appear in Pancasila are a sense of kinship, affinity, communal help, consensus, tolerance, diverse cultural arts and so forth. This view of life is then used as the basis of the state, and in turn the source of all law.

Consumer contracts is types of agreements or contracts that have a distinct character. The uniqueness of a consumer contract is generally related to its standardized format. This standardized nature concerns the both the format of the agreement and the contents of the agreement. In this case, the form and content of the agreement are generally determined and made by a party that has a superior bargaining position, for example the creditor in a loan agreement. Consumers are basically only given the opportunity to accept or reject the contents and form of a contract, without being given the opportunity to engage in discussion of the contents of the contract. Considering its standard nature, it is not uncommon to ask where the mutuality of agreement element is required under 1320 KUHPer.

The many injustices caused by consumer contracts are due to the legal basis of consumer contracts, the Indonesian Penal Code / BW. This legal basis is the legacy of the Netherlands that does not represent the Indonesian communal character. Therefore, there are a number of questions regarding the concept of justice as applied to consumer contracts that has a distinctive Indonesian character. In this way, we should be able to describe the relationship between justice, legal certainty, and legal usefulness that depends on the values, culture and way of life of the Indonesian nation, Pancasila.

Therefore, the researcher argues that to bring the law of consumer contracts in line with the philosophical perspective of Pancasila, we need to apply the communal help principle.[39] The communal help principle is essentially employing cooperation to achieve

[38]Ibid 59.

[39]The principle of communal help means the activity of working together to achieve a common goal. Communal help or to help and to support each other is interpreted as a form of cooperation between one person to another in the framework of shared welfare goals). In communal help, the community provides unconditional help (without any interest) that does not rely on or expect any compensation, both for now and in the future. In this communal help the interests of individuals are absorbed into the totality of shared life on the principle that in a communal life, one must put the common interests before one's own interests to seek

common goals, which is a characteristic that is directly sourced from customary rules. In this principle, community members who provide assistance do not expect any rewards, either for the present or in the future. The assistance given to other members of the community is a form of pride for the helper. Individual interests are integrated into the common interests and are inseparable from it. The spirit of communal help is expressed in daily life in the form of cooperation among community members to achieve the goal of mutual prosperity.[40]

The implementation of the communal help principle as an effort to provide justice and benefit to the community is based on the following considerations. First, the communal help principle is a principle that existed before Indonesia's independence, and has become a characteristic of the Indonesian people in solving problems that arise in social relations and has become the way of life of the Indonesians. This is reflected in the will of the national founding fathers, who emphasized that the principle of communalism must underlie the social relations of Indonesians.[41] The basis of the Indonesian state, as stipulated in the Preamble to the 1945 Law, is Pancasila.

According to Sukarno, the essence of these five precepts is a communal help principle. Soekarno, one of the BPUPKI members in the BPUPKI Meeting in the June 1, 1945 session stated that if I have to squeeze these five precepts to three and three precepts to one, I can get an Indonesian term known as "gotong royong" (communal help). The country of Indonesia that we founded must be a country of communal help."[42]

Afterwards, on August 15, 1945, two days before Indonesia declared its independence, at the BPUPKI Great Meeting forum, Muhammad Hatta stated that

for and maintain order, peace and prosperity in society. This collaboration in communal help is a manifestation of the principle of harmony. In Paripurna P Sugarda, 'Posisi Hukum Adat Dalam Hukum Kontrak Nasional Indonesia' (2015) 4(3) Jurnal Yustisias 512.

[40]Herlien Budiono (n.18) 191.

[41]Customary law recognizes the principle of peace, the principle of properness or appropriateness, and the principle of harmony. The principle of harmony is closely related to one's views and attitudes regarding ways of communal living in society (interdependence among people), in everyday life. This principle is embodied in the concept of deliberation and consensus of communal help. The principle properness or appropriateness is related to morality and at the same time common sense directed at the evaluation of a particular factual action or situation. In other words, it should include both the moral element that is related to the evaluation of good or bad or the element of common sense, namely the assessment that is in accordance with the law of logic. The principle of harmony provides answers to a problem that is considered satisfactory both by those directly involved and by the community based on a measure of legal and moral needs and feelings. The basis of these principles can be found in Indonesian ideology, values, morality and norms adopted by the community, as well as in the essential worldview of Indonesian people: kinship ties, mutual cooperation, and help. Ibid 242-245.

[42]Muhammad Yamin, *Naskah Persiapan Undang-Undang Dasar 1945*, Djilid I (Jajasan Prapantja 1959) 91 in Paripurna P Sugarda (n.39) 511.

> "What I propose is no other than making the country we founded as a governing state to avoid this country from being a power state, an oppressive state. Thus, we put forward the basis of communal help and joint efforts. In short, it is the basis of collectivism."[43]

In addition to the principle of communal help, the ideal foundation of the Republic of Indonesia also adheres to the principle of mutual assistance and the principle of kinship. This understanding was expressed among others by Sukarno at the Great Meeting as mentioned above, where he said: "Therefore, if we really want to base our country on the ideology of kinship, the idea of helping, the mutual cooperation, and social justice, we shall get rid of the thought of individualism and liberalism from our mind."[44]

Soekanto and Taneko explained the mindset of Indonesians, which is characterized by the bond of togetherness at the core of the social life of Indonesians and is the basis for communal help and mutual assistance. The principle of communal help is based on cooperation to achieve a common goal. It is a characteristic that is derived from traditional law. In traditional law, community members who provide assistance do not rely on or expect compensation, either now or in the future. The assistance given to other community members is a kind of pride for the helper. Individual interests are integrated into the common interests and are inseparable from it. The spirit of communal help is expressed in daily life in the form of cooperation among everyone to achieve the goal of mutual prosperity.[45]

Second, Indonesian leaders drafted the 1945 Constitution and believed that the ideals of social justice in the economic field could achieve equitable prosperity. This aim is covered in Article 33 of the 1945 Constitution that reads as follows: (1). The economy is structured as a joint effort based on the principle of kinship. (2). The branches of production, which are important for the state and which control the lives of many people are controlled by the State. (3). The earth and water and the natural resources contained therein are controlled by the state and used as much as possible for the prosperity of the people (4). The National Economy is based on economic democracy with the principles of

[43] Ibid.

[44] Ideology that provides economic aspects to the old social cooperatives known as communal help. The ideals of Indonesian cooperatives are completely against individualism. The Indonesian cooperative ideology creates a collective Indonesian society, rooted in the original customs of Indonesian life, but grown at a higher level, in accordance with the demands of modern times, see Sudjito Atmoredjo, *Ideologi Hukum Indonesia (Kajian tentang Pancasila dalam Perspektif Ilmu Hukum dan Dasar Negara Pancasila,* (Lingkar Media, Yogyakarta, 2016) 57.

[45] Registrar and Secretary General of the 2017 RI Constitutional Court, *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, Undang-Undang Tentang Mahkamah Konstitusi* (Seventh Edition, January 2017) 114.

togetherness, fair efficiency, sustainability, being environmentally friendly, independence, and maintaining a balance between progress and national economic unity. Third, TAP MPRS Number II of 1960 stipulates that national law must have the following characteristics: mutual assistance, kinship, and anti-colonialism, anti-imperialism and anti-feudalism. National law must also prioritize uniformity, fairness and legal certainty that must not conflict with legal awareness.[46]

The application of the Communal Help Principle should make a positive contribution to the legal system in Indonesia. Hence, this principle can be the basis for formulating the yet uncodified contract law. In addition, it is also suggested that Indonesian Judges take into account the principle of communal help in deciding cases arising in the realm of agreement law to make decisions that benefit all Indonesians and does not conflict with the national philosophy of Pancasila.

## D. Conclusion

Based on the above description, it is conclusive that consumer contracts in Indonesia do not meet the values of Pancasila. This contrast can be seen from the fact in business contracts, in which companies and individuals who have a higher economic position often reap more profits by including unbalanced clauses in agreements, while consumers who are in a weaker position have to agree to what is stated in such agreements. Inevitably these provisions discriminate against consumers and are not, therefore, in accordance with the values of Pancasila.

The Penal Code tends to contain principles that are individualistic in nature and are contrary to the communal characteristics of the Indonesian nation. Therefore, to bring consumer contract law in line with the philosophical perspective of Pancasila, we need to incorporate the concept of communal help principle into consumer contract law. The principle of communal help is derived from the customary law principles, which is the basis of thought and way of life and ideology of Indonesians. By applying the principle of

[46] See also the Guidelines of the State Policy (GBHN) of 1960, which contain directions for the development or construction of a new legal system, among others (1). To make the principle of fostering National Law in accordance with the direction of the state (2) Development of National Law shall be based on customary law that is in accordance with the development of awareness of the Indonesians and does not hamper the creation of a just and prosperous society, Herlien Budiono (n.18) 27. See also Law No. 10 of 2004 on the formation of Statutory Regulations in Article 2 positioning Pancasila as the source of all sources of state law. The position of Pancasila as the source of all sources of state law is in accordance with the Preamble of the 1945 Constitution, which positions Pancasila as the basis and ideology of the state as well as the philosophical basis of the nation and state so that any material contained in the laws and regulations must not conflict with values contained in Pancasila, Ahmad Redi, *Hukum Pembentukan Peraturan Perundang-Undangan* (Sinar Grafika 2018) 88.

communal help in contract law, an unequal position between the two parties will not be a problem as long as both parties are able to provide benefits and justice.

Therefore, it is suggested to use the principle of communal help as a basis for conceptualizing consumer contracts that guarantee the realization of certainty, justice and legal benefits for both parties and serve as benchmarks of contracts based on the national characteristics of Pancasila. In addition, the government should immediately ratify the draft law on agreements, which reflect the culture and development of Indonesian society that is communal and does not conflict with the Pancasila as the philosophy of the Indonesian state.

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PROPHETIC LAW REVIEW
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# THE EFFECTIVENESS OF ADMINISTRATIVE REVIEW IN INDONESIA'S ADMINISTRATIVE COURT SYSTEM

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**Abstract**

*This research aims to describe the use of administrative review in Indonesia. There are two rules of administrative review: administrative review according to Act Number 5 Year 1986 on State Administrative Judicial Action, and administrative review according to Act Number 30 Year 2014 on Government Administration. Both of these rules contradict each other and are equally authorized at the same time, and thus, in practice, we must determine which regulation is the most appropriate to use as a legal basis. This study analyzes the use of administrative review and its effectiveness in providing legal protection. To discuss these issues, the researcher has used normative or dogmatic legal research method. The results of the study show that in general, administrative review procedure has applied the system as determined in Act Number 30 Year 2014 on Government Administration, except those specifically regulated by Act No 5, such as personnel disputes. The new version of Administrative review does not provide effective legal protection because the process of resolving state administrative disputes is lengthy and does not comply with the principles and theories of administrative review in general terms.*

**Keywords**: *Administrative law, administrative review, objection, State Administrative Court.*

## A. Introduction

Since the establishment of the State Administrative Court in 1986, the settlement of state administrative disputes has been directed throughs the State Administrative Court, a judicial institution/ The organization, substantive law, and rules of procedure of the State Administrative Court are arranged in a simple manner in one law. This structure requires legislative action to change either the substantive law and procedural law or procedural

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rules. The lack of complete substantive law and procedural rules at the level of positive law leads to a dominant role of general principles or doctrines of administrative law as the legal basis alternative to resolve state administrative disputes.

Currently, state administrative disputes tend to be directly resolved by the internal government itself (*premium remedium*), while the court is the last resort only when internal review fails (*ultimum remedium*). Internal settlement by government is often referred to as administrative review.

The use of administrative review to resolve state administrative disputes in Indonesia is a unique improvement. There are significant changes of paradigm between the administrative review system regulated in Statute No. 5 of 1986 on State Administrative Judicial Act with a system of administrative review regulated in Statute No. 30 Year 2014 on Government Administration. The changes are not only about procedural rules, but also affects widely known principles of administrative review.

Regulatory changes regarding the administrative review system are only based on pragmatic thinking and are not based on theories and principles of administrative review that are generally applicable, so that in practice there are many obstacles that can hamper the legal process. These normative constraints are, for example: first, *norm antinomy* between procedures for administrative review according to the Statute No. 5 Year 1986 on State Administrative Judicial Act with the Statute No. 30 Year 2014 on Government Administration. Those regulations are at the same level and equally applicable at the same time; second, the new paradigm requires that administrative review be conducted before a dispute can move to the court, in the absence of the procedural law, organization, facilities, or infrastructure to support it; and third, the process of administrative review according to the new paradigm does not guarantee effective legal protection.

Based on the dynamics of administrative review implementation, the author argues that it is important to research administrative review in Indonesia to provide an understanding of the principles of administrative review to ensure effective legal protection. Aside from the main purpose, there are several benefits from the administrative review mechanism, and it can provide a clear concept regarding administrative review procedure to apply to the settlement system of state administrative disputes in Indonesia.

To discuss the aforementioned legal issues, the author reviewed relevant data. The data were collected through normative research or dogmatic legal research. Preliminary observations indicate many contradicting regulations as the main obstacle that State

Administration Courts face in examining disputes after citizens petition for administrative review. To analyze and discuss these problems, the researcher used the principles of law and legislation, doctrines, and comparative legal analysis in this study.

To provide an overview of administrative review procedure in judicial system, the author will focus on two aspects: how administrative review is used to settle state administrative disputes in Indonesia; and whether administrative review can ensure effective legal protection.

## B. Research Method

The method in research here is defined as “how to obtain and collect data” which is functioned to identify the truth accordingly with the problems raised in this study. It is mainly aimed to test and to analyze the use of administrative review in the settlement state administrative disputes under the Indonesian legal system as well as the guarantee for effective legal protection. This normative legal research applies legal theories, legal principles, legislation, doctrine, and legal comparison.

## C. Discussion and Result

### 1. Definitions

Administrative review is a means of preventive legal protection carried out internally by the relevant government agency (*review intern*). There are several *review intern* terms. For example, in the Netherlands it is known as administrative review (*bestuurlijke toetsing*), which consists of "objection" (*bezwaar schrift*) and "administrative appeal" (*administratief beroep*). In France, it is known as *recour gracieux* and *recour hie'rarchique,* while in Australia, the UK and South Africa, it is known as an administrative appeal tribunal, a kind of independent special commission (*quasi-court*) that is classified as part of government and not an independent court.

In the Netherlands, there are two phases in resolving state administrative disputes, namely the administrative review (*bestuurlijke toetsing*) phase and the judicial review (*rechterlike toetsing*) phase. These two phases are called the civil service arbitration tribunal because they do not have State Administrative Court institutions that are hierarchically independent as in Indonesia and France. This administrative review phase is a prerequisite for petitioning the court for judicial review. The administrative review consists of an "objection procedure" which must be addressed to an administrative

authority who has issued a decision.[2] The second form is administrative appeal (*administratief beroep*), namely the process of appeals addressed to other bodies of those who have issued decisions (Higher officials who have issued a decision). Administrative appeals in particular can only be used if they have been specified in the legislation and have the same aim as the objection process even though it may contain an element of administrative control (*bestuurlijk toetzicht op de naleving*). To provide public legal protection, every decision must mention (commonly referred to as legal protection clause or *rechtsmiddelen clausule*) to whom an objection or appeal can be filed, or which court has authority to handle a complaint from the public regarding the decision by also including limitation period.

The Dutch objection and administrative appeal procedures are not levels such as in Indonesia, but more like choices or alternatives at the government level. The use of these two institutions is specifically regulated in the legislation, meaning that after an objection, it can be directly appealed to the court or through the administrative appeal procedure without going through the objection procedure first.

Countries that adopt the Civil Law system generall have various ways of using this administrative review. *First*, there is a connectivity between administrative review and judicial review (to the court) as applied by the Netherlands and Germany,[3] meaning that administrative review must be carried out before disputes submitted to the Court; or *Second*, there is no connectivity between administrative review with judicial review (to the court) as in France,[4] meaning that judicial review can be directly carried out without having to first submit a dispute for administrative review.

In Indonesia, the definition of administrative review is set forth in the explanation of Article 48 of Statute No. 5 of 1986 on State Administrative Judicial Act, as follows:

> Administrative review is a procedure that can be taken by a person or civil legal entity if he or she is not satisfied with a state administrative decision. The procedure is carried out in self-governing environment in two forms. In case the settlement must be carried out by a superior agency or other agency from which the decision is issued, the procedure is called "administrative appeal"….. in the event that the settlement of the state administrative decision must be carried out by the state administration body or official issuing the decision, the procedure adopted is called an objection....

[2] Marieke van Hooijdonk and Peter Eijsvoogel, *Litigation in the Netherlands: Civil Procedure, Arbitration and Administrative Ligitation* (2nd Ed., Wolters Kluwer 2012) 164

[3] F. Stroink and E. van der Linden, *Judicial Lawmaking and Administrative Law* (Intersentia Antwerpen 2005) 162 – 164

[4] Ibid 157, see also Dacian C. Dragos and Bogdana Neamtu, *Alternative Distpute Resolution in Europan Administrative Law* (Springer Heidelberg 2014) 63

> Section (2): if the procedure and opportunity in the elucidation of section (1) have been taken, and the party concerned is still not satisfied, the problem can be sued and brought to court.

Based on this explanation, the author argues that administrative review (*upaya administrasi*) in Indonesia should not be interpreted as *administratief beroep* because the administrative review itself consists of objections (*bezwaar schrift procedure/recour gracieux and administratief beroep/ recour hie'rarchique*), so that the equivalent of administrative review (*upaya administrasi*) in Indonesia is *administrative review* or *administrative appeal.*

**2. Benefits of Administrative Review**

Administrative review is a tool for the legal protection for citizens, both individuals and legal entities, who are affected by state administrative decisions (*beschikking*). Reviewing (*toetsing*) in administrative review is different from judicial review in State Administrative Court. Reviewing in State Administrative Court is merely examining disputes from a legal aspect, while administrative review process is not only reviewing it from a legal perspective. but also taking into account government policy, so dispute resolutions that come from administrative review tend to be more comprehensive.[5]

According to Karianne Albers, there are several advantages of administrative review. First, it can reduce cases in the state administrative court. Second; because the substance of the case has been examined in the objection process, it will be easier for state administrative courts to understand the core of the disputed issue. The objection procedure can also be used to clarify the facts and correct decisions if there are any errors in them. Third, the procedure can offer informal disposition of a dispute, including the possibility of mediation[6] There has been a recent tendency in Netherlands to use informal approaches to settle disputes, either before using the objection procedure or during the objection process itself.

Authorized officials must reconsider their decisions not only from legal perspective but must also consider fairness and political. They should be based on situations relating to both the facts and the law at the time when decisions are tested (*ex nunc*).[7] In this *administrative review* process, authorized officials are able to change or revoke the

[5] Hari Sugiharto and Bagus Oktafian Abrianto, 'Administrative Efforts as Legal Defenses for the People in State Administrative Disputes', (2018) 11 (1) *Arena Law Journal*, 34

[6] Zoltan Szente and Konrad Lachmayer, *The Principle of Effective Legal Protection in Administrative Law*, (Routledge Taylor & Francis Group 2017) 234

[7] Merieke Hooijdonk and Peter Eijsvoogel, Op. Cit., 168

disputed decision and if necessary, they are allowed to issue a new decision to replace existing one. The decision issued by authorized officials requested for objection is referred to as an objection decision, even though in the objection decision it will not change any part of an initial decision. However, if it has been reviewed by the objection institution, it will be called as an objection decision. To provide legal protection for decisions that have been examined, there must be a statement that the concerned parties appeal within a determined period and which court has competency to conduct the review.

The main difference between judicial review and administrative review is that judicial review is an external protection against maladministration, while administrative reviews including administrative appeal of the tribunal are an internal protection, as Hoexter notes:

> Effective administrative appeal tribunals breed confidence in the administration as they give the assurance to all aggrieved persons that the decision has been considered at least twice and reaffirmed. More importantly, they include a second decision-maker who is able to exercise a 'calmer, more objective and reflective judgment' in reconsidering the issue.[8]

Furthermore, Hoexter said that the administrative appeal has several advantages over judicial review. First, Administrative officials mostly become the best judges in making decisions for administrative institutions because they have specific expertise and seem to have a deeper understanding of the policy decision in question. Second, they are usually less costly and have faster processes than courts. Third, the doctrine of separation of powers states that the courts are not competent to carrying out political functions in the case of adjudicating administrative matters. As is often stated in some cases, procedure can be said to function as an extension of the government.[9]

Because of the importance of administrative review, in Netherlands and Germany, administrative review must be submitted first as a pre-requisite to petition the court for judicial review. There is an argument that administrators themselves are best prepared to handle disputes because judges may not always have a full understanding of the nuanced administrative functions and the way administrative authorities balance individual interests in the whole system, especially considering the increasing administrative activities in many fields.[10]

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[8] Cora Hoexter and Rosemary Lyster, *The New Constitutional and Administrative Law Volume II: Administrative Law* (1st Ed., Juta Law 2002) 37

[9] Ibid

[10] Dacian C. Dragos and Bogdana Neamtu, Op. Cit., 63

In addition to the above benefits, according to Rhita Bousta, there is a negative side in administrative review/administrative appeals, in that there is no guarantee of impartiality in its resolution, especially in the case of "*recours gracieux*" aimed at the same authorized officers who have made the original decision. Even in the case of the *recour hie'rarchique* addressed to higher authorities or agencies, there is no guarantee that these agencies would be neutral.[11]

In an effort to maintain neutrality, in the Netherlands, the authorized administrative officers can establish an Advisory Committee (*bezwaarscriftencommissie*) to carry out the objection process, advise the authorized authority, and to assess the validity of the objection. Then, they may ask the officers to change or even to pull (cancel) the decision that becomes an object of objection. The Objection Committee (*bezwaarscriftencommissie*) may consist of civil servants from the authorized administrative officials and people who come from outside the government, such as legal practitioners, legal academics, or judges. In principle, the authorized officials will remain to be responsible for examining the decision. Generally, the objection process is open for public and everyone can attend it.[12]

### 3. Administrative review According to Law No. 5 of 1986

The function of the court in the context of judicial review relates to the accuracy of decisions in terms of the law and it cannot assess the side of benefits. As Brightman revealed, "the judges do not concentrate their judgment on the content or purpose of the decision, but the focus of the assessment is the decision-making process." This is a big challenge from the aspect of justice that people want to achieve, where the boundaries between legality and benefits are blurred. HWR Wade observed that:

> The doctrine that power must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to make the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too tightly, merely according to its own opinion. It must strive to apply an objective standard, which leaves to the deciding authority the full range of choices, which the legislature is presumed to have intended[13].

[11] Ibid 63-64

[12] Marieke van Hooijdonk and Peter Eijsvoogel, Op. Cit., 167

[13] HWR Wade, *Administrative Law* (7th Ed., Oxford University Press 1994) 399, see also David Stott and Alexandra Felix, *Principles of Administration Law* (Cavendish Publishing limited 1997) 21

Cora Hoexter states that judicial control of administration is one of the most interesting and controversial issues in administrative law. This is because the principle of judicial review contains a contradiction between two opposing ideas: on the one hand is the dream of freedom of government in its actions, and on the other hand is the idea of control by the judiciary.[14] In a number of cases, in fact, this conflict emboldens views that the court would not be able to solve a substantial problem because they did not review the aspect of benefits. Thus, a dividing line had been drawn between the benefits of the decision and its legality.

The practice of legal protection for citizens against government actions always starts from the government itself through administrative review as a preventive protection, while judicial review is a means of protection from repression when citizens are not satisfied with administrative review made by government.

Procedural rules of the Civil Service Arbitration Tribunal do not concretely regulate administrative review, but rather only regulates them in general. Whether a dispute is available for administrative review or not is still dependent on sectoral regulations. Article 48 of Statute No. 5 Year 1986 on State Administrative Judicial Act:

(1) In case that a State Administration Agency or Officer is authorized by or based on legislation to administratively resolve certain State Administrative dispute, the state administrative dispute must be resolved through available administrative review.
(2) The court only has the authority to examine, decide, and settle the State Administration dispute as referred to in paragraph (1) if all administrative reviews concerned have been used.

The formulation of the articles above shows the connection between administrative review and judicial review. A development of understanding is that administrative review is considered equivalent to the first level of judiciary, so that after carrying out an administrative review, the court authorized to examine it is the State Administrative High Court as the court of original jurisdiction.

In its development, administrative review has rarely been used because sectoral regulations do not provide much administrative review in dispute resolution systems. Implementation of administrative review in Statute No. 5 Year 1986 turned out to separate the objection procedure and administrative appeals procedure, similar to that in the Netherlands, in which both were not levels but choices in accordance with sectoral regulations. If sectoral regulations only provide an objection procedure, after this

[14] Cora Hoexter and Rosemary Lyster, Op. Cit., 67

procedure the claim is submitted to the Administrative Court. Whereas, if the sectoral regulations only regulate administrative appeals, the authorized party is the State Administrative High Court.

Regarding the confusion of the term "objection" within administrative appeals in some basic rules of the agency or institution concerned, the Supreme Court gave an explanation through the Supreme Court Circular No. 2 Year 1991 on Implementation Guidelines for Several Provisions in Statute No. 5, Year 1986, on the State Administrative Judicial Act:[15]

1. What is meant by administrative review is:
   a. Submission of an objection letter (*bezwaarschrift*) addressed to the State Administration Agency or Official who has issued the decision (*decree* or *beschikking*) initially.
   b. Submitting an administrative appeal letter (*administratief beroep*) addressed to superior of an official or other agency of the State Administration Agency or Official who has issued decision authorized to re-examine decision of the State Administration concerned.

2.a. If the basic regulation only determines that there is administrative review in the form of submission of objection letter, the lawsuit against relevant State Administration Decree is submitted to the State Administrative Court.

2.b. If the basic regulation states that there is administrative review in the form of submission of objection letter and/or requires the submission of administrative appeal letter, the lawsuit against the State Administration Decision that has been decided at the administrative appeal level should be submitted directly to the first level of State Administrative High Court.

The authority of officials to conduct administrative review is different from judicial review in State Administrative Court. According to the explanation of Article 48 of Statute No. 5 Year 1986, the matter to be examined in administrative review is:

> …different from procedures in the state administrative court. Administrative appeals procedures and objections are carried out in a complete assessment, both in terms of legal application and in terms of policy by the deciding agency. From the rule of the legislation as the basis for the issuance of the state administration's decision, it can be seen whether against administration's decision is open or not open about the possibility of administrative review being carried out.

This means that the scope of administrative review is not only limited to normative testing or *rechtmatig but* can also cover assessing in terms of *doelmatig* and even assessing the policy.

[15] Supreme Court Circular No. 2 Year 1991 on Implementation Guidelines for Several Provisions in Statute No. 5, Year 1986, on the State Administrative Judicial Act

Although the law on Civil Service Arbitration Tribunals has affirmed the concept of objections and administrative appeals, the sectoral regulations might deviate from the concept and procedural law itself, such as administrative review regulated in Government Regulation No. 53 of 2010 on Discipline of Civil Servants. For example, the Government Regulation stipulates that the objection procedure is submitted to the authorized superior official to punish, not to the official authorized to punish. This concept is actually more akin to administrative appeals.

Interestingly, in the assessment of both the objection process and administrative appeals, the superior or reviewing official has authority not limited only to cancellation but also to commuting or aggravating the disciplinary punishment imposed by the authorized officer. Decisions of officials' superiors in the objection process are final and binding, meaning that they are no subject to administrative appeal, but appealable directly to the first level the State Administrative Court.

Administrative appeals according to Article 38 paragraph (1) Government Regulation No. 53, Year 2010, on Discipline of Civil Servants is submitted directly to the Personnel Advisory Board (*Badan Pertimbangan Kepegawaian*/BAPEK), without having to first exhaust the objection procedure, meaning that the objection and administrative appeals procedures are not a hierarchy but an alternative remedy decided in each sectoral regulation. The procedural law regarding administrative appeals is specifically regulated by the legislation governing the Personnel Advisory Board.

Administrative review in the Civil Service Arbitration Tribunal system in Indonesia under the Law No. 5 of 1986 is the most famous administrative appeals that is the Personnel Advisory Board, an advisory board that has decisions that could be submitted to the State Administrative High Court.

### 4. Administrative Review According to Law No. 30 Year 2014

Administrative review after the enactment of Statute No. 30 Year 2014 on Government Administration experienced a significant paradigm shift, especially concerning the time limitation for administrative review settlement, administrative review hierarchy, and authority to create a decision in administrative review.

Article 75 paragraph (3) of the Statute No. 30, Year 2014, on Government Administration stipulates that administrative review consists of 1) objection and 2) appeal. The administrative review procedure specified in the Government Administration Act is tiered, meaning that in the event that the community are not satisfied by the settlement of

objection by the Government Agency and/or Official (*recour gracieux* or *bezwaar schrift procedure*), the Community has the right to petition for review by a higher official (*recour hie'rarchique* or *administratief beroep*). Then, if the community is not satisfied by the appeal decision of higher official, the community "can" file a lawsuit in the court.

The drawback of the administrative review process in the Government Administration Act is that the decision in administrative review can only declare null or void decisions with or without claim for compensation and administrative demands. In addition, the examination at the administrative review phase is very short, and government officials are only given a short time for resolving either their objections or their appeals, a maximum of 10 (ten) working days. If they do not complete the process within that time limit, the objections and/or appeals are granted by default.

Supreme Court Circular (*Surat Edaran Mahkamah Agung/*SEMA) No. 4 Year 2016 on Implementation of the Resolution of Supreme Court 2016 Chamber Plenary Meeting as Guidelines of the Exercise of the Courts Duties, stipulates that: “State administrative decisions that have been examined and decided through administrative appeals will be an authority of the State Administrative Court”. The idea of this thought tends to be based on interpretation of Article 76 paragraph (3) *jo*. Article 1 number 13 the Government Administration Act. Article 73 paragraph (3) stipulates that “In the event that Community Members are not satisfied with the appeal resolution by a superior of Official, the Community Members can file a lawsuit to the Court.” Then, Article 1 Number 13 states that: “The Court is the State Administrative Court.” Indeed, after going through an administrative appeal, the dispute is then submitted to the first level of the State Administrative Court. This determination is quite different from a determination under Article 48 of Statute No. 5 Year 1986 on State Administrative Judicial Act, which requires that after an administrative appeal, a lawsuit is filed in the State Administrative High Court as the first level court.

Interestingly, in transition between administrative review of Administrative Court Act to Government Administration Act version, the decision of the Personnel Advisory Board which previously was determined on State Administrative High Court authority, after enactment of Government Administration Act is transferred to the State Administrative Court authority. Whereas normatively the administrative review referred to Government Administration Act is tiered. In other words, it starts from the objection process then appealed.  Only after exhausting both of these procedures, disputes will be

allowed to proceed to the State Administrative Court. On the other hand, the Personnel Advisory Board process is not preceded by the objection process. In practice, the Personnel Advisory Board decision is immediately cognizable in the Administrative Court, which according to the author, deviates from the necessity of objection process which is regulated limitatively the Government Administration Act.

**TABLE: The fundamental differences between administrative review concept of Indonesia and the Netherlands**

| The Netherlands AwB | Statute No. 5 Year 1986 | Statute No. 30 Year 2014 |
|---|---|---|
| 1. Administrative review is mandatory before a judicial review is submitted to the court. | There is a possibility (not for all) of administrative review procedure to be mandatory before the case is filed to the court. | Administrative review is mandatory before a judicial review is submitted to the court. (but the use of administrative review is interpreted as a "choice" in SEMA No. 1 of 2017) |
| 2. Administrative review consists of objection and administrative review. These two institutions are not hierarchies, meaning that objection and administrative review are choices, not levels; | Administrative review consists of objection and administrative review. These two institutions are not hierarchies, meaning that objection and administrative review are choices, not levels; | Administrative review consists of objection and appeal. Both institutions are hierarchical, not optional. Administrative appeal can only be used when objection review has been taken. |
| 3. Authority at administrative review level is very broad, not only about canceling decisions. | Authority at administrative review level is very broad, not only about canceling decisions. | Administrative review authority is limited to canceling decisions. |
| 4. There are 3 levels of justice/trial, namely:<br>(1) Objection or administrative appeal<br>(2) Appeal to District Court.<br>(3) Higher appeal to Administrative Tribunal | There is a distinction between objection and administrative appeal. After an objection, the judicial review goes to the Administrative Court, while after an administrative appeal, the judicial review goes to the State Administrative High Court. There are 3 levels of trial on administrative appeal, namely:<br>(1) Administrative appeal;<br>(2) State Administrative | There are probably 6 trial levels:<br>(1) Objection;<br>(2) Administrative appeal;<br>(3) Lawsuit to State Administrative Court.<br>(4) Appeal to the State Administrative High Court<br>(5) Cassation to Supreme Court (MA)<br>(6) Judicial Review to Supreme Court |

| The Netherlands AwB | Statute No. 5 Year 1986 | Statute No. 30 Year 2014 |
|---|---|---|
| | High Court<br>(3) Cassation<br>(4) Judicial Review | |
| 5. There is spacious time in administrative review settlement. | There is spacious time in administrative review settlement. | Administrative review settlement is relatively short. |

Supreme Court Circular No. 1 Year 2017 on Implementation of the Resolution of Supreme Court 2017 Chamber Plenary Meeting as Guidelines of the Exercise of the Courts of Duties in part E of formulation of Law of the State Administration Chamber point 3 letter d, stated that: "administrative review in the form of objection / appeal according the rule of Article 75 paragraph (1) of Government Administration Act are a legal choice, because Government Administration Act uses the term "CAN" (in Bahasa: *DAPAT*).

Regardless of whether the use of administrative review is mandatory or not, it is clear that construction of administrative review post- Government Administration Act according to the researcher is an ineffective and inefficient concept because:

a. The dispute resolution procedure becomes lengthy and burdensome;
b. There is not enough time at the phase of administrative review process; and
c. The purpose of administrative review is not achieved, because administrative review according to Government Administration Act only relates to declaring null and void decisions with or without claim for compensation and administrative demand. This function is the same as the court function, which is not in accordance with the principle of administrative review.

Throughout this time, the application of the concept of administrative review did not work in line with the spirit of legislators. Settlement of objections that are limited to 10 (ten) days is useless because in the practice of administrative review, it is rare for Government Officials to respond correctly and quickly to objections submitted by citizens. In the author's opinion, the slow response for the administrative review of citizens by the government is due to lack of time for them to examine and answer the problems posed to him or her. In addition, there were no procedures or rules to guide the implementation or response for administrative reviews.

**5. The Solution to Norm Conflict**

In judicial practice, because the validity of Supreme Court Regulation (*Peraturan Mahkamah Agung/*PERMA) No. 6, Year 2018, on Government Administration Dispute

Resolution Guidelines After Taking Administrative Efforts, there are two legal problems to solve: first, the period for filling a lawsuit to the State Administrative Court; and second, the competency of the State Administrative Court and State Administrative High Court after administrative review.

The State Administrative Judicial Act imposes a statute of limitations 90 (ninety) days after a decision is approved or announced, while Statute No. 30 Year 2004 juncto Supreme Court Rules No. 6 Year 2018 has contradictory stipulation. The period arranged by the government has been limited to no later than 21 (twenty-one) working days from the issuance of an administrative decision. If the government does not make any improvements, the citizen can accept the decision. Impact of Statute No. 30 Year 2004 *juncto* Supreme Court Regulation No. 6 Year 2018 against the deadline for filing suit more than 21 (twenty-one) days since a decision is issued, the citizen cannot file a lawsuit.

Second, in accordance with Article 48 juncto Article 51 Paragraph (3) of the State Administrative Judicial Act, if there is a basic rule governing administrative regulations, the judicial review goes directly to the State Administrative High Court as the court of original jurisdiction. Otherwise, if there is no basic rule governing an administrative regulation, the judicial review goes to State Administrative Court related to Statute No. 30 Year 2004 *juncto* Supreme Court Rules No. 6 Year 2018.

In accordance with Article 48 juncto Article 51 Paragraph (3) of the State Administrative Judicial Act, if there is a basic rule governing administrative regulations, the judicial review goes directly to the State Administrative High Court as the court of original jurisdiction. Otherwise, if there are no basic rules governing administrative regulations, the judicial review goes to State Administrative Court related to Statute No. 30 Year 2004 juncto Supreme Court Rules No. 6 Year 2018.

The solution above is actually not constructive because it still contradicts the State Administrative Judicial Act and Statute No. 30 Year 2004, even though Statute No. 30 Year 2004 is a legal bases for the State Administration Court system, and State Administrative Judicial Act is a law. It is expected that there will be conformity between legal material and law, so that the State Administrative Court system can be administered properly.[16]

[16] Ayu Putriyanti, 'Study of Government Administration Laws in Relation to State Administrative Courts' (2015) 10 (2) *Pandecta Journal*, 185

The contents of Statute No. 30 Year 2004 also contain new rules, which were not previously contained in the State Administrative Judicial Act.[17] Although Statute No. 30 Year 2004 only regulates material, it does not explicitly declare revocation and invalidity of several Articles in State Administrative Judicial Act and its amendments. However, according to the legal principle of *lex posteriory derogate legi priory*, the current law defeats past or earlier laws. In other words, some provisions in State Administrative Judicial Act that are no longer in accordance with Statute No. 30 Year 2004 should not be applied.[18]

To respond the above contradictions, the author believes that the most appropriate period to file a lawsuit with the Administrative Court is a period of 90 (ninety) days. The limitation of only 21 days can prevent a party to submit an objection attempt. Thus, as long as the community is still in the deadline for suing as specified in the State Administrative Judicial Act, he or she must be given the opportunity to make administrative review before submitting a claim to the State Administrative Court. It is also advised that the authority of the court, after having an administrative review, refers to the new paradigm set forth in the Statute No. 30 Year 2004., Regardless whether there are basic regulations or no basic rules after the lawsuit is submitted to the Administrative Court, it should not go to State Administrative High Court.

In the practice of implementing state administrative dispute resolution and the characteristics of the government system in Indonesia, the author opines that administrative review cannot be implemented perfectly, except when in the future every public law (sectoral law) clearly regulates the provisions concerning administrative procedures. Regulations on administrative procedures must also pay attention to the level of difficulty of dispute resolution by providing sufficient opportunities for government officials to correct the decisions that have been issued, and then it should be connected to the State Administrative Court procedural law as a unit for resolving state administrative disputes.

## D. Conclusion

There has been a paradigm shift in Indonesian administrative review from the concepts determined in the Administrative Court Act to the concepts determined in the

[17] Tri Cahya Indra Permana, 'Administrative Court after Government Administration Acts in Terms of Access of Justice' (2015) 4 (3) *Journal of Law and Justice,* 424

[18] Ibid 425

Government Administration Act. The shift changes various things such as: the obligation of using administrative review, the duration of dispute resolution, the authority in administrative review, the hierarchy between objections and administrative appeals, and the authorized court that has authority to resolve dispute after administrative review is carried out. Administrative review in Indonesian administrative court system is a prerequisite for citizens before they can file a lawsuit for judicial review in administrative court (as a *premium remedium*). Administrative review consists of objection to the officer who issues a decision and objection to the higher-level officer. This action needs to be taken unless its basic rules determine otherwise. In the case of the regulation of administrative review between Statute No. 30 Year 2004 and the State Administrative Judicial Act, and in the case of the authority to adjudicate between State Administrative Court and State Administrative High Court, the State Administrative High Court is only authorized to solve administrative review if the basic regulation authorizes it. Otherwise, when the basic regulations do not determine this, it should be against the time of period of filling a lawsuit to the court based on Article 55 of the State Administrative Judicial Act with the provisions of must have previously submitted administrative review.

Administrative review according to Government Administration Act does not guarantee effective legal protection, because 1) it does not provide flexibility in process of administrative review regarding time duration of dispute settlement and authority to decide disputes; 2) the process of state administrative dispute becomes longer and winding; 3) the benefit from administrative review that should provide extensive legal protection, not only reviewing *rechtmatigheid* aspect, but also reviewing *doelmatigheid* aspect, becomes unachievable.

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# EXPANDING ACCESS TO JUSTICE THROUGH E-COURT IN INDONESIA

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**Abstract**

*Indonesia's Supreme Court (MA) has started a new initiative by applying modern technology to the justice system through e-court. This new measure is a sign that the court responds the development in information technology while improving the quality of legal administration which has long been considered complicated by those seeking justice. This article raises a problem related to the implementation of the e-court system. This article uses a normative approach by obtaining data from various reports and books to be analyzed further and presented descriptively. It tries to explore whether the implementation of e-court has an impact on the efficiency of the administration of legal proceedings as well as an increase in transparency in the process of seeking justice and encouraging professional, transparent, accountable,*
*effective and efficient justice administration.*

**Keywords**: *Access to justice, e-court, modern court*

## A. Introduction

The rapid progress of Information Technology that has eased human workloads (including judicial duties) is not without side effects that adversely affect humans/society/the country at large. Uncontrolled information will lead to confusing information pollution that inundates us with useless data.[2]

The fast pace of information technology development ultimately requires judicial bodies in various countries including Indonesia to increase adoption of information technology. Previously, case administration in the courts was carried out manually, making a long, winding process and resulting high costs. Harnessing information technology aims to speed up, simplify, and reduce the cost of case administration. Thus,

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[2] Nina Winangsih Syam, *Komunikasi Peradaban* (PT Remaja Rosdakarya 2014) 56

judicial trends in various parts of the world have also started to develop an integrated judiciary (i-Judiciary).

Anne Wallace in her article entitled "E-Justice: An Australian Perspective" identifies several breakthroughs made by Australian courts, such as the use of Case Management, Judgment Publication and Distribution, Litigation Support, Evidence Presentation, Electronic Courtrooms, Knowledge Management, Video-Conferencing, Transcripts, Electronic Filing, Electronic Search, and E-court systems. What is worth emulating from the Australian court is the launching of a website, http://www.austlii.org., which has become the most popular free provider of legal material and information in Australia for primary public legal information such as laws and court decisions, as well as secondary sources such as journals and legal studies. The High Court of Australia has published on the website official decisions of the court from 1903 until the latest court decisions. Also provided are Special Leave Dispositions (since 2008), trial transcripts (since 1994), and High Court Bulletins (since 1996).[3]

The trend of utilizing information technology to ease judicial tasks is currently growing rapidly through electronic justice (e-court). This use of technology is mandated by Law Number 11 Year 2008 as amended by Law Number 19 Year 2016 concerning Amendment to Law Number 11 Year 2008 concerning Information and Electronic Transactions, which mandate that the government support the development of information technology in its legal infrastructure and its arrangements to enable the utilization of secure information technology to prevent its misuse by paying attention to the religious and socio-cultural values of the Indonesians.

Transparency of information in the justice system is one of the matters to highlight since it relates to the right to a fair trial.[4] Convoluted bureaucratic procedures have the potential to make people reluctant to fight for their rights through formal institutions of law. Research reveals many extortion practices carried out by court officials in Indonesia in providing judicial services to the public.

The Ombudsman Report of the Republic of Indonesia revealed that in the three years from 2014-2016, the District Court was the judicial institution with the highest number of

[3] Marco Fabri, 'The Italian Style of E-Justice in Comparative Perspective' in Agusti Cerrillo i Martinez and Pere Fabra i Abat (eds), *E-Justice: Using Information Communication Technologies in the Court System* (Hershey 2009) 104

[4] Wim Voermans, '*Judicial Transparency Furthering Public Accountability for New Judiciaries'* (2007) 3 (1) *Utrecht Law Review* < https://www.utrechtlawreview.org/articles/abstract/10.18352/ulr.42/ > accessed 4 April 2019

complaints. There were 394 complaints related to maladministration, especially the postponement of protracted cases with 215 complaints, 117 complaints for lack of competence in carrying out judicial tasks, and as many as 115 complaints about procedural irregularities.[5]

The blueprint for judicial reform for 2010-2035 has determined that one of the ideal indicators of justice is a modern judiciary based on integrated information technology. The term "integrated" arises from the problem that during the preparation of the blueprint, namely prior to 2010, the Supreme Court had realized that there was no comprehensive or integrated information technology infrastructure.[6]

As a comparison, Australia has already implemented online dispute resolution,[7] where litigants can resolve their disputes online. Likewise, in 1999, the United States launched Public Access to Electronic Records (PACER), a Case Management and Electronic Case Files (CM/ECF) system, and various uses of information technology to support judicial tasks. Through the use of e-court, the Supreme Court of the Republic of Indonesia is now more closely aligned with the United States Supreme Court, the Supreme Court of the United Kingdom, and the Supreme Court of Singapore, E-Sharia in Malaysia, PACER in the United States, E-Filing in Singapore and India, the Electronic legal service in Canada and e-Case administration in Australia.

The Indonesian Supreme Court through Supreme Court Regulation No. 3 of 2018 concerning Case Administration in the Electronic Court, has begun to use information technology to help improve judicial performance. This is in line with the Supreme Court's vision to become a Modern Judiciary based on an Integrated Information Technology. The use of e-court is a major leap forward in the overall efforts of the Supreme Court in making administrative changes in the court. This is an attempt to overcome the three obstacles that the judicial institutions often face, namely the slow handling of cases, the difficulty of accessing court information, and the integrity of court officials.

[5] Supreme Court of the Republic of Indonesia, 'Aparatur Peradilan Harus Melayani Dengan Sepenuh Hati' (28 August 2017) <https://mahkamahagung.go.id/id/berita/2688/kma-aparatur-peradilan-harus-melayani-dengan-sepenuh-hati> accessed 5 April 2019

[6] Supreme Court of the Republic of Indonesia, 'Cetak Biru Pembaharuan Peradilan 2010-2035' (October 2010) < https://www.mahkamahagung.go.id/media/198 > accessed 8 April 2019

[7] .Supreme Court of the Republic of Indonesia, 'Di Family Court Australia, Ini yang Dipelajari Inovator Pengadilan' (6 December 2016) < https://badilag.mahkamahagung.go.id/seputar-ditjen-badilag/seputar-ditjen-badilag/di-family-court-of-australia-ini-yang-dipelajari-para-inovator-pengadilan > accessed 4 April 2019

This article examines the impact of using e-court for court proceedings and access to justice for those seeking justice before Indonesian courts.

## B. Research Method

Research for this article followed a normative approach in analyzing the application of e-court in the Supreme Court judiciary and its impact on court proceedings and access to justice. The data were obtained from literature studies and searches of various official reports of the Supreme Court, journals, and other supporting literature for further analysis and descriptive presentation.

## C. Discussion and Result

The issue of justice has long been a subject of study among religious philosophers, politicians, thinkers, and jurists. Justice is the basic ideal of independence for every nation. In essence, justice has long been a problem in human life because it is one of the primary necessities of human life. since the beginning of Greek philosophy, the theme of justice has been a central theme. Discussions about justice have broad dimensions, ranging from ethical, philosophical, legal, to social justice.

The maintenance of justice principles is one of the characteristics of the rule of law. Justice is a basic human right that is in line with the principle of equality before the law. Everyone has the right to redress for any violations of their rights, while the state has an obligation to ensure the fulfillment of these rights. The accumulation of these rights confirms that justice rests on respect and assurance of human rights fulfilment. There is a need to place the concept of access to justice as an affirmative action based on a human rights perspective with the aim of avoiding discrimination, but as a form of temporary 'assistance' for the poor and marginalized until they are able to gain access to justice.

Prior to the 1970s, most definitions of access to justice referred to the model of access to state courts obtained through legal assistance.[8] Initially, access to justice only emphasized efforts to provide legal assistance to the poor, then it developed into the unification of the interests of those who play a role in providing access to justice for the poor. The parties consisted of various related state institutions such as the attorney

[8] As an example, Mauro Cappelletti and Garth stated that the basic purpose of the legal system is the legal system that can be accessed by the public to defend their rights and/or resolve disputes under general supervision of the state. First, the legal system must be accessible to everyone. Second, the legal system must lead to fair outcomes, both for individuals and for society.

general's office, court, ombudsman, relevant public service ministries and community institutions that all play a role in community empowerment.

However, over time, this began to change gradually along with the increasing variety of recovery mechanisms in modern countries. The concept of access to justice has been progressively expanded to include other forms of 'justice.' This is understandable because an injustice is often closely related to other injustices. Besides being important to unravel the existing relationships among various forms of injustice experienced by those who seek justice, it is also important to see which injustices can be resolved through recovery procedures.

The concept of access to justice focuses on two basic objectives of a legal system, namely: 1) the legal system should be accessible to all people from various populations; and 2) the legal system should be able to produce laws and decisions interpreting and applying laws that are fair to all parties, both individually and as groups. The priority from this conceptualization are measured to achieve social justice for citizens from all walks of life.[9]

Access to justice is a scientific area of study, developed from the discourse and research of a number of agencies and experts on legal issues in Indonesia. As for how the subject of access to justice fits within the larger framework of the rule of law, it is well known that the concept itself is still in a debatable position over its definition as a rule of law or *rechtstaat*. This paper will address this debated issue, but it is very important to understand that the theoretical framework of access to justice is nothing but the umbrella of the rule of law discourse.[10]

## 1. Transforming the Indonesian Justice System Through e-court to Realize the Principles of Simple, Efficient, and Affordable Justice

After the issuance of Supreme Court Regulation Number 3 of 2018, concerning Case Administration in Electronic Courts, the Director General of the Military Courts and State Administrator of the Supreme Court of the Republic of Indonesia have followed up by issuing a Decree of the Director General of Military Courts and the Administrator of the Supreme Court of the Republic of Indonesia Number 307/Djmt/Kep/5/2018 concerning

[9] Ministry of National Development Planning of the Republic of Indonesia, S*trategi Nasional Akses pada Keadilan 2016-2019* (BAPPENAS RI 2009) ix

[10] The Jacqueline Veil report states quite clearly the discourse supported by the World Bank and UNDP projects. *See*, Jacqueline Vel, 'Policy Research on Access to Justice in Indonesia: A Review of World Bank and UNDP Reports' (2009) http://media.leidenuniv.nl/legacy/review-of-reports-jacqueline-vel.pdf, accessed 14 September 2013

Guidelines for Implementing Supreme Court Regulation Number 3 of 2018 concerning Case Administration in the Electronic Court.

The Indonesian Supreme Court has targeted all courts in Indonesia to immediately implement an electronic court system, or e-court. As a pilot project, the Indonesian Supreme Court appointed 32 Courts of general, religious and State Administrative courts (TUN) to carry out trials of e-court implementation. The pilot courts include Central Jakarta District Court, North Jakarta District Court, South Jakarta District Court, East Jakarta District Court, West Jakarta District Court, Tangerang District Court, Bekasi District Court, Bandung District Court, Karawang District Court, Surabaya District Court, Sidoarjo District Court, Medan District Court, Makassar District Court, Semarang District Court, Surakarta State Court, Palembang State Court, Metro State Court. Meanwhile, the religious court includes Religious Court of Central Jakarta, Religious Court of North Jakarta, Religious Court of South Jakarta, Religious Court of East Jakarta, Religious Court of West Jakarta, Religious Court of Depok, Religious Court of Surabaya, Religious Court of Denpasar, Religious Court of Medan. The pilot of State Administrative Court includes State Administrative Court of Jakarta, State Administrative Court of Bandung, State Administrative Court of Serang, State Administrative Court of Denpasar, State Administrative Court of Makassar, and State Administrative Court of Tanjung Pinang.

The Supreme Court E-court system aims to streamline court functions, including case administrators, case administration registration, summonses of parties, provision of copies of court decisions, administrative governance, and payment of court fees All of these functions which are all done electronically/online when filing applications/lawsuits in civil cases, religious cases, and state administrative fora as apply to each court, without the need to come to the courthouse.

The process for case-related payments has also is envisioned to become more convenient because the e-payment system allows payments to be made from any bank with any electronic payment channel, such as internet banking, sms banking, and ATM transfers through partners of the relevant court. This e-payment system is directly targeting illegal “levies,” from court personnel that have been pervasive. The practice of illegal levies on court cases has certainly burdened the public while litigating in court, especially low-income parties.

Electronic e-summonses also simplify the process and reduces costs, by allowing service or process directly to electronic domiciles, also eliminating the need for delegation

procedures in the event that the parties reside in different jurisdictions. Again, this allows the costs to be kept to a minimum. The 2018 MA Annual Report mentions that in 2018 as many as 907 cases had been submitted to the e-court with details of 445 registered cases using e-court in courts of general justice, 422 cases in religious court, and 20 cases in the State Administrative Court (TUN).[11]

The use of information technology also accelerates the legal process. During 2018, 17,638 cases were successfully resolved by the Supreme Court. The Supreme Court Annual Report states that during 2018 the number of cases submitted to the Supreme Court was 18,544, consisting of 17,156 cases in 2018 and the remaining cases totaling 1,388 cases in 2017.[12] Regarding the period of case resolution, during the course of 2018, 96.33 percent of cases were successfully resolved on time. Throughout 2018, the Supreme Court processed cases on average within 1-3 months of 16,911 from 17,638 cases (96.33%). Only 3.67% of cases were resolved after three months had passed since filing. This achievement exceeded the Supreme Court's own target of 75% on time case processing.[13]

Looking back to 2017, before the use of e-court, it is clear that the number of registered cases increased by 10.65%, the cost of case administration increased by 3.82%, the number of cases decided increased by 7.07%, while the number of remaining cases decreased by 34.73 %. In contrast, it is apparent that the number of the remaining cases of the 2018 is also the smallest number in the history of the Supreme Court. Referring to the remaining cases in 2012 which amounted to 10,112 cases, until 2018 the Supreme Court was able to reduce the remaining cases to 9,206 cases or 91.04%. The comparison shows the ratio of Supreme Court productivity in deciding a case in 2018 that rose to 95.11%, or equal to an increase of 2.89% as compared to the ratio of case resolution productivity in 2017 at 92.23%. When compared with the target set at 70%, the achievement exceeded the target by 25.11%.[14]

By the end of 2018, the Supreme Court had announced that the number of registered e-court users up until December was 11,224, while the number of cases registered using the e-court application up to December was recorded as many as 389 cases in general

[11] Supreme Court of the Republic of Indonesia, *Laporan Tahunan* (Mahkamah Agung RI 2018) 213
[12] Ibid
[13] Ibid
[14] Ibid

justice, 289 cases in religious courts, and 17 cases in state administrative courts, making the total number of registered e-court cases to 695 cases.[15]

Despite the success correlated with the launch of the e-court, this e-court system still has some drawbacks both in terms of technical and substantive obstacles. The most serious problem is inadequate internet network access in many areas of Indonesia. According to data from the National Development Agency, throughout Indonesia there are around 25,000 villages that have no internet access, most of which are located in Kalimantan, Sulawesi, Nusa Tenggara, and Papua. These villages are mostly underdeveloped, close to borders, and located at the outer edges of the Indonesian archipelago (3T). This is a government challenge to build an internet network to reach these areas. On the other hand, problems also arise from the inequality of technological knowledge of court employees and the mindset of the internal or external parties of the court to take the initiative and be willing to make routine changes from the *status quo* to more modern ways of doing things.

Although the e-court application was trialed gradually in 32 first-tier courts throughout Indonesia, the Director General of the General Judiciary Body through Circular Letter No. 4 of 2019 concerning Obligations to Register Civil Cases through e-court now requires 56 courts under the Supreme Court to implement e-court. This SEMA policy applies to all District Courts of Special Class 1A, Class 1A and all District Courts (PN) in the Banten High Court (PT) Territory, PT Jakarta, PT Bandung, PT Semarang, PT Yogyakarta and PT Surabaya. These 56 PN's in all PTs are required to use e-court since the issuance of this SEMA on June 10, 2019. Meanwhile, the policy implementation in the religious court (PA) includes, the Religious Courts of Central Jakarta, North Jakarta, South Jakarta, East Jakarta, West Jakarta, Depok, Surabaya, Denpasar, and Medan. The application of SEMA in State Administrative Courts (TUN) includes PTUN Jakarta, PTUN Bandung, PTUN Serang, PTUN Denpasar, PTUN Makassar, and PTUN Tanjung Pinang.

The Supreme Court (MA) has continued to develop e-court applications by creating an electronic trial menu (e-litigation). Then, on August 19, 2019, the Supreme Court issued Regulation Number 1 of 2019 concerning the Administration of cases and trials in the Electronic Courts and e-litigation Applications. Through Regulation Number 1 of 2019 and the application of e-court and e-litigation, all claims, payment of all costs,

[15] Supreme Court of the Republic of Indonesia, 'Era Baru Menuju Badan Peradilan yang Modern' (27 December 2018) < https://www.mahkamahagung.go.id/id/berita/3365/era-baru-menuju-badan-peradilan-yang-modern > accessed 3 April 2019

notifications and summons until the delivery of the decision are made electronically. Likewise, the examination of witnesses and experts in the trial can be done through teleconference. Technical directives from Regulation Number 1 of 2019 concerning the Administration of cases and trials in Electronic Courts and e-litigation Applications has also been issued through Decree of the Chief Justice of the Supreme Court Number 129 / KMA / VIII / 2019 Concerning Technical Guidelines for Case Administration and in Electronic Trials.

E-litigation is part of e-court development and has been applied to civil, religious civil, military administrative and state administrative cases since last year. The difference between e-court and e-litigation lies in the transition from a partial to comprehensive system. Unlike the e-court, which only transforms justice to digital network in case administration, the e-litigation encompasses the entire trial process. Thus, in this e-litigation, digitalization is not only done in terms of case payments or summon fees, but also in the exchange of documents, answers, verification, and even the submission of decisions on the of e-litigation application, which would be conducted periodically. As for trial, the Supreme Court has appointed 6 District Courts, 4 Religious Courts, and 3 State Administrative Courts to beta test this newly developed system.

## 2. Court Modernization and its Impact on Law Administration and Access to Justice

The use of technology for justice as stated by Dory Reiling is believed to prevent corrupt practices in the judicial environment. According to Reiling, openness to science and technology for the legal community is an inevitable part of the need for legal reform programs. The use of information technology will support and ensure proper administrative governance and judicial process. Dory Reiling divides the level of information technology utilization by the court into three levels, namely stand-alone functions of information technology, network of information technologies, and enterprise information technology and external communications.[16]

However, Dorry Reiling also reiterates that innovating also means the experimentation process of continuous testing, which would involve finding out what works well and what does not. The presence of the e-court is part of the court's efforts to foster a much better legal culture while providing easy access to justice and make the court more transparent, effective and efficient.

[16] Dory Reiling, *Teknologi Untuk Keadilan* (PT Alumni 2018) 130

This is one answer to address problems faced by the general population related to the convoluted judicial process, including delays, lack of access, and corruption. Thus, the application of technology is not only beneficial to society but also to government for a better performance that is cleaner, more accurate, and accountable. Through an efficient justice system, it is expected that the government can increase productivity and reduce the costs of disseminating important information. An effective justice system will simplify the winding procedures or bureaucracy to reduce costs and increase public access to information to reduce waste of time and money of the court administration. It will also increase transparency of the judicial process to be easily evaluated publicly, increase public trust in the justice system, and most importantly strengthen the legitimacy of judicial power.

Along with the development of digital technology, the transformation of the court to modern court that utilizes digital information technology to its full potential is a necessity. Dory Reiling's research found that there are three main problems faced by judicial institutions around the world, namely the slow handling of cases, the difficulty of public access, and judicial integrity.[17] Thus, the use of technology for justice is basically in line with the principle of informed dispute resolution. Just like in court, alternative dispute resolution is subject to the principle of fast and timely, low cost, and simpler ways.

A properly functioning justice system must give everyone the opportunity to raise objections for any violations of their rights. Legal information systems are created to inform the public of their rights, help them settle disputes, inform them about how to file case to court, or the way to settle the case amicably outside the Court. Therefore, the ability to disseminate legal information at an efficient cost through information technology, especially the internet, is seen as an important way to improve access to justice.

Article 2 paragraph (4) of Law Number 48 Year 2009 concerning Judicial Power states that the Judiciary shall conduct its business with a simple, fast, and low cost. Hence, the principle of justice enforcement that is simple, fast and at low cost should guide the Indonesian Judiciary System in carrying out its main duties and functions.

The application of the case administration in court electronically in accordance with Regulation Number 3 of 2018 is also in line with the General Principles of Good Justice.

[17] Dory Reiling, *Technology for Juctice: How Informaton Technology Can Support Judicial Reform* (Leiden University Press 2009) 17

The Principle of Justice is Openness to the Public. Hence, applying the case administration electronically allows not only the parties in charge to access and control the documents, but also the public at large.

Public demand for justice services is increasing along with the increasingly massive use of information technology and various regulations that open space for the public to access information and get excellent service from public institutions. In such conditions, the judicial apparatus must increasingly open themselves to change and adapt to current developments.

The Supreme Court in the 2010-2035 court reform blueprint has endeavored to improve the realization of the Supreme Indonesian Judiciary's constitutional mandate, which is oriented to excellent public service by providing equitable legal services to justice seekers. The judiciary must always improve public services and guarantee fair trial processes. Meanwhile, related to the principle of opportunity to defend oneself (*audi et alteram partem*) the application of e-court gives broad access to the Parties to submit their defense to provide more protection for the parties. Similar to the Accountability Principle, the application of electronic case administration will leave a digital footprint that is stored forever. This digital footprint will enable easier public control over the case documents and prevent lost or damaged files.

A transparent system applied by the court is also expected to gradually reduce the practice of extortion in the court, which was commonplace before. As is well known, the practice of extortion significantly affects the access to justice for the community. These corrupt practices arise because there are more costs that have to be incurred by justice seekers in court services due to the long and winding administrative process that involves many parties. Such practices previously gave birth to practices of brokering and other procedural deviations. The Ombudsman Report of the Republic of Indonesia, for example, said that in the 2014-2016 period, the District Court was the judicial institution with the highest number of complaints, with 394 complaints. These complaints were specifically related to maladministration, such as the protracted case delay of 215 complaints, incompetence performance in the justice system as many as 117 complaints, and procedural irregularities in as many as 115 complaints.[18] This result is almost in line with

[18] Supreme Court of the Republic of Indonesia, 'Aparatur Pengadilan Harus Malayani Sepenuh Hati' (28 August 2017) < https://mahkamahagung.go.id/id/berita/2688/kma-aparatur-peradilan-harus-melayani-dengan-sepenuh-hati > accessed 4 April 2019

that of the MaPPI FHUI research in 2017, revealing that corrupt practices in the judiciary also occur in the form of extortion.

One of the prerequisites for the establishment of a superior court is the transparency of the court to the public, especially those seeking justice. Transparency is the benchmark to determine whether a court institution has truly opened itself up to public scrutiny in all matters, including the judicial processes and mechanisms. Through the move to a more transparent court administration system, it is hoped that the judiciary institution as the main and foremost spearhead in law enforcement can avoid corrupt practices. A transparent law enforcement process can also encourage the level of community satisfaction over the performance of law enforcement officials, which in turn increases public trust in the judiciary.

The direct impact of the implementation of the e-court can be seen from the results of a public satisfaction survey conducted by the Institute for Economic and Social Research, Education and Information (LP3ES) with the Supreme Court Supervisory Agency for the judiciary institutions in 60 work units of the judiciary (State Administrative Court, General Court, and Religious Courts) across 20 Provinces in Indonesia. The results of a survey conducted from January 21 to February 15, 2019 showed that overall the public satisfaction index for court institutions by 76% was in the "good" category. The results of the current public satisfaction study increased by 6.7% points in the period of five years (2014 - 2018).[19]

The implementation of an e-court system is also projected to foster a new legal culture among law enforcement officials and the public. Legal culture according to Friedman is "… the system-their beliefs, values, ideas, and expectations."[20] He further opined that "*without legal culture, the legal system is meet-as dead fish lying in a basket, not a living fish swimming in its sea*." Legal culture itself includes the habits, ways of thinking, and ways of acting both from law enforcement officials and from the community. Without legal culture, the legal system would lose its power while the quality of legal culture determines the quality of law enforcement. In renewing the legal culture

[19] Aida Mardatillah, 'Seberapa Puas Publik Terhadap Lembaga Peradilan? Ini Dia Hasilnya' (28 May 2019) < https://www.hukumonline.com/berita/baca/lt5cece6502ec2e/seberapa-puas-publik-terhadap-lembaga-peradilan-ini-dia-hasilnya > accessed 31 May 2019. This research was conducted in 20 provinces in Indonesia, among which are Aceh, South Sumatra, Yogyakarta, North Sulawesi, and Papua. Sampling was taken from 60 work units of court institutions, which include PTUN, PN, and PA using a mixed method of surveys, observations, and in-depth interviews. The survey was conducted by involving 720 respondents through face-to-face interviews and questionnaires.

[20] Lawrence M. Friedman, *Sistem Hukum Perspektif Ilmu Sosial*, (Nusamedia 2013) 7

through proper, ethical law enforcement, officials will propagate effective and efficient law enforcement. According to Friedman, one of the most important types of legal culture is the legal culture of legal professionals, the values, ideologies and principles of lawyers, judges and others who work in the legal system. The behavior and attitudes of these professionals are very influential on the pattern of disputes that are submitted to the system. Based on this aspect, the legal system is not merely seen as a vehicle, but also as the behavior of professionals that determines the development of the legal system.[21]

Nurturing a legal culture requires the involvement of all stakeholders, including law enforcement, the community, professional associations, legal education institutions, and community members. The improvement of the legal culture among law enforcement officials is expected to have an impact on increasing the credibility of the court and expanding public access to justice. This is consistent with what was stated by Stephan Golub, that a very important element in access to justice is the existence of formal legal institutions that should be trusted by the community as efficient, neutral, and professional institutions.[22] On the other hand, the openness of the institution will encourage community to participate in preventing irregularities or maladministration. Consequently, this will make the delivery of public services more accountable, transparent and enable the implementation of the rule of law. Through the application of e-court, it is hoped that public trust and access to court institutions and law enforcement officials, especially in the courts, will continue to increase.

## D. Conclusion

The application of information technology is a measure to realize the principle of simple, fast, and low-cost justice as well as an attempt to encourage the development of management and administrative improvements towards modern justice. This is a big leap from the overall efforts of the Supreme Court to overcome the three obstacles that judicial institutions often face, namely the slow handling of cases, difficulty accessing court information, and the low integrity of the judicial apparatus, especially judges. The application of e-court is also a strategy to create a superior and transparent court in the judicial process and mechanism.

[21] Ibid 254-255. See also Setiawan Nur Heriyanto Dodik, 'Strengthening Indonesian Judges Understanding of the Refusal and Annulment Grounds of Foreign Arbitral Awards' (2015) *Acta Juridica Hungarica* 167, 176.

[22] Stephan Golub, *Beyond Rule of Law Orthodocy: The Legal Empowerment Alternative, "Rule of Law series, Democracy and Rule of Law Project,* Number 41, 2003

The implementation of e-court directly impacts the efficiency of the administration of justice as well as a form of transparency in the process of seeking justice and encouraging professional, transparent, accountable, effective and efficient law enforcement behavior. Judicial modernization will affect the resolution of the slow handling of cases as well as improving the integrity and professionalism of law enforcement officials. The application of e-court directly impacts the justice seekers since it enables them to easily access and control the ongoing process while making litigation cost savings.

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# LEGAL REVIEW OF INDEFINITE REVOCATION OF THE POLITICAL RIGHT TO HOLD PUBLIC OFFICE AGAINST CORRUPTION CONVICTS

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**Abstract**

*To break the vicious cycle of corruption in the society and maintain social order, revocation of political rights for public officials' candidacies is considered an appropriate punishment for corruption convicts. This is a form of corruption eradication that prioritizes the achievement of legal goals. Between 2013-2017, 26.9% of corruption convicts had their political rights revoked. This study aims to determine the accuracy of the verdicts for their legal objectives. The study used a normative method with the approach of statutory norms and examples of cases of corruption, described and analyzed critically. The study shows that such verdicts are in accordance with the objectives of the law, because acts of corruption harmed the mandate and public trust.*

**Keywords**: *Corruption convicts, legal objectives, revocation of political rights.*

## A. Introduction

This study is motivated by a polemic shared by the community and anti-corruption activists ahead of the 2019 General Election, which questions the appropriateness of those convicted of corruption from running for legislative offices in the general election. Public uproar was addressed by the General Election Commission of the Republic of Indonesia (KPU RI), which issued Regulation of the General Election Commission of the Republic of Indonesia Number 20 of 2018 concerning the Nominations of Members of the House of Representatives, Provincial Regional House of Representatives and the Regency/City Regional People's Representative Council, prohibiting those convicted of corruption from becoming a legislative candidate. This was also reinforced by the Republic of Indonesia Election Commission Regulation Number 14 of 2018 concerning the Nomination of

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Individual Participants in the General Election of Members of the Regional Representative Council in article 60 paragraph (1) letter "j," which regulates those convicted of corruption. However, this provision was challenged by some former corruption convicts who were candidates for the DPR RI and DPRD legislative candidates. Sarjan Tahir, a DPR RI legislative candidate from South Sumatra; Darmawati Dareho, a legislative candidate for DPRD of the North Sulawesi Manado; Patrice Rio Capella, a prospective DPR RI candidate from Bangka Belitung Province; and Al Amin Nur Nasution, a prospective candidate from Jambi Province[2] petitioned the Indonesian Supreme Court for a judicial review of the KPU regulations. On September 13, 2018, the Supreme Court through its rulings Number 46 P / HUM / 2018 and Number 30 P / HUM / 2018 decided to grant the request for judicial review so that candidates for legislative members and/or government institutions that had been convicted of corruption within the five years prior to the registration could still nominate themselves or be elected as members of the legislative and/or government institutions.

The state administration is carried out by executive, legislative and judiciary institutions, where officials or state administrators are elected democratically for the positions of head of state, regional head, and members of the Legislature as public officials.[3] Some state administrator positions in the executive institutions are the Head of State and Regional Heads such as Governors, Mayors, Regents, while some positions in the legislative institutions are members of the DPR, DPD and DPRD.[4] These positions are open to all Indonesian citizens, because the political right has been guaranteed in the 1945 Constitution of the Republic of Indonesia Article 28 D paragraph (3) stating that, "Every citizen has the right to have the equal opportunity in government."

However, this political right has been the source of an endless debate among the public, anti-corruption activists, academics, politicians, and law enforcement officials who are concerned with equality before the law. They have constantly questioned whether all

[2] Ayu Cipta, '4 eks Napi Korupsi gugat peraturan KPU ke Mahkamah Agung'*Tempo* (Jakarta, 9 July 2018) <https://nasional.tempo.co/read/1105127/4-eks-napi-korupsi-gugat-peraturan-kpu-ke-mahkamah-agung> accessed 13 December 2018.

[3] Public officials is defined as everyone who holds an executive, legislative or administrative or judicial position. They are appointed or elected, permanently or temporarily, paid or unpaid, regardless of one's seniority. It refers to anyone who carries out a public function, including a public agency, or public company, or that provides a public service, as stipulated in the national law of a State, and which is applied in law, and any person designated as a public official in a State.

[4] Dhani Irawan, 'Sejak KPK berdiri, ada 220 wakil rakyat Korup di jerat' *Detik News* (Jakart, 18 September 2018) <https://news.detik.com/berita/d-4216860/sejak-kpk-berdiri-ada-220-wakilrakyat-korup-dijerat> accessed 11 December 2018.

citizens without exception retain their political rights, including those who have been convicted of corruption and have their criminal sentences?

The Corruption Eradication Commission of the Republic of Indonesia (KPK) released information about the arrests of countless public officials, mostly from the DPR and DPRD. There was a total of 220 people, consisting of 74 officials from the DPR and 146 officials from the DPRD. The total number of DPRD members who have been investigated by KPK was 146 people. The following details describe the number of officials arrested by KPK from its initial establishment until the period of September 2018:

- Bengkulu : 4 people
- DKI Jakarta : 1 person
- Jambi : 1 person
- West Java : 5 people
- Central Java : 5 people
- East Java : 47 people
- South Kalimantan : 2 people
- North Sumatera : 50 People
- South Sumatera : 13 People
- Riau : 13 People
- North Maluku : 1 Person
- Lampung : 3 People
- East Kalimantan : 1 Person

As for the DPR members, a total of 74 people was arrested since the initial establishment of KPK until the period of September 2018 as follows:

- 2007 : 2 people
- 2008 : 6 people
- 2009 : 8 people
- 2010 : 27 people
- 2011 : 3 people
- 2012 : 5 people
- 2013 : 3 People
- 2014 : 2 People
- 2015 : 4 People
- 2016 : 5 People
- 2017 : 6 People
- 2018 (until Sept) : 3 People

Corruption is one of the crimes that has become a worldwide concern, including in Indonesia. It is also considered a public enemy and an extraordinary crime requiring extraordinary measures to eradicate. Law enforcement has taken many actions against corrupt individuals, including an additional verdict in the form of revocation of political rights. According to a study by Indonesia Corruption Watch (ICW), of the 576 corruption cases leading to conviction in 2016, there were only seven sentences that imposed additional verdicts revoking political rights. Such sentences were given to former Constitutional Court Chief Akil Mochtar, former Indonesian Police Traffic Corps Chief Djoko Susilo, former President of the Prosperous Justice Party (PKS) Lutfi Hasan Ishaaq, and former member of the House of Representatives Dewi Yasin Limpo.

Of concern, according to ICW research, the average corruptor was only sentenced to 26 months in prison in 2016. In 2013, the average sentence was 35 months; in 2014, 32 months; and in 2015, 26 months. With the low verdict, an additional sentence in the form of permanent revocation of political rights provides new hope as a progressive step in eradicating corruption.[5]

According to the Corruption Eradication Commission through its spokesman Febri Diansyah, during 2013-2017, the corruption court (tipikor) had revoked the political rights of 26 individuals who were proven to be involved in corruption cases. "There are 26 people who serve as chairmen and administrators of political parties, members of the DPR and DPRD, regional heads and other positions that will pose threats to public if they are elected as political leaders," said Febri in his written statement, Tuesday (09/18/2018). He explained that the revocation of political rights is necessary to reduce the potential for future corruption. "After the discussion and analysis by the KPK at the moment, we take note that there is a high-risk concern for the public if the convicted in certain cases serves as political leader," he said. It was also explained that the KPK had the authority to submit demands in the form of revocation of political rights against politicians who were entangled in corruption cases.[6] Throughout the period of 2016-2018, based on the ICW monitoring, the KPK prosecuted at least 88 politicians as defendants. However, the KPK only demanded that 42 of those defendants be stripped of their political rights.[7]

Additional punishment in the form of political rights revocation to serve in public office is facultative in nature,[8] deterring the original perpetrators and other political officials and the general public from committing similar crimes. This is also a means to achieve criminal law objectives both specifically and generally, so that the consequences of imposed penalties have an impact on justice, expediency and legal certainty for the entire community.

Revocation of the right to serve in public office for former corruption convicts is the correct solution to break the vicious cycle of corruption cases commonly committed by the political elite. The regional heads or people's representatives are political positions. Thus, it is

[5] Mimin Dwi Hartono, 'Pencabutan Hak Politik Koruptor' *(Indonesia Corruption Watch, 17March 2017)* <https://antikorupsi.org/id/news/pencabutan-hak-politik-koruptor> accessed 11 December 2018.

[6] Dylan Aprialdo Rachman, 'KPK: Hak Politik 26 Koruptor dicabut' *Kompas* (Jakarta, 18 September 2018) <https://nasional.kompas.com/read/2018/09/18/13252541/kpk-hak-politik-26-koruptor-dicabut-sepanjang-2013-2017> accessed 11 December 2018.

[7] Indonesia Corruption Watch, 'Tren Vonis Kasus Korupsi 2018' (*Indonesia Corruption Watch*, 28 April 2019) < https://antikorupsi.org/id/tren/tren-vonis-kasus-korupsi-2018> accessed 15 May 2019.

[8] Judges have the discretion whether to impose these penalties.

necessary to take measures to prevent those convicted of corruption from running for public office for fear that they will repeat their crimes. In doing so, it is hoped that the community will have leaders and representatives of high integrity who prioritize the public interest.

However, some judges may have different views on the revocation of political rights for corruption convicts. Some judges have imposed time limits on the political right revocation, varying from 2 (two) to 5 (five) years, while others imposed indefinite revocation. In the following decisions, the various courts did not set a limitation on the revocation of the defendants' political rights:

1) Decision of the Supreme Court of the Republic of Indonesia Number 537 K / Pid.Sus / 2014 dated June 4, 2014 regarding the Defendant, Inspector General of Police Drs. Djoko Susilo, SH., M.Sc; which imposed an additional punishment of political rights revocation, prohibiting either voting or holding public office;
2) Decision of the Supreme Court of the Republic of Indonesia Number: 1195 K / Pid.Sus / 2014 dated 15 September 2014 regarding the Defendant Lutfi Hasan Ishaaq, which decided to Revoke the Defendant's political right to be elected to public office;
3) Decision of the Supreme Court of the Republic of Indonesia Number: 1648 K / Pid.Sus / 2014 dated 17 November 2014 regarding the Defendant H.M. Rusli Zainal, which decided to Revoke the defendant's political right to be elected to public office;
4) Decision of the Supreme Court of the Republic of Indonesia Number: 285 K / Pid.Sus / 2015 dated February 23, 2015 regarding the Defendant Hj. Ratu Atut Chosiyah, SE, which decided to revoke the defendant's political right to be elected to public office;
5) Decision of the Supreme Court of the Republic of Indonesia Number: 1261 K / Pid.Sus / 2015 dated June 8, 2015 regarding the Defendant Anas Urbaningrum, which decided to Revoke the defendant's political right to be elected to public office; and
6) Decision of the Supreme Court of the Republic of Indonesia Number: 2864 K / Pid.sus / 2015 dated January 13, 2016 regarding Defendants Ade Swara and Nurlatifah, which decided to Revoke the political rights of the defendants to be elected to public office.

The lack of judges' decision to revoke political rights permanently can be due to limited understanding about the impact of corruption on social conditions, or it can also be attributed to fear of violating the law regarding revocation of political rights in corruption cases under the provisions of Article 17 juncto Article 18 paragraph (1) letter d of Law number 31 of 1999 concerning Eradication of Corruption Crimes juncto Article 35 paragraph (1) juncto Article 38 paragraph (1) of the Criminal Code (KUHPidana), which

provides a sentencing range on the revocation of political rights for a minimum of 2 (two) years and a maximum of 5 (five) years. Whereas the verdict in the 6 (six) cases above does not state the time limit for revocation. Some experts consider this as derogable right, which is a right that can be violated in the context of law enforcement.

In general, those corruption convicts who are stripped of their political right to occupy a public position can no longer be elected for a public position. Some considerations for sentencing them with additional punishment include: *First*, judges consider that corruptors have abused their rights and authority as public officials, thus causing widespread hardship to society. *Second*, the corrupt officials' actions have undermined people's trust in their representatives. *Third*, corrupt officials have tarnished the good reputation of the pillars of democracy through political institutions. *Fourth*, corrupt officials as state administrators should be role models for the people in realizing governance that is free from corruption, collusion, and nepotism.

Given the introduction, it is possible to formulate the research problems in the following questions: Is a judge's decision to permanently revoke the political right of those who have been convicted of corruption to be elected in a public office for based on legal legitimacy and in accordance with legal objectives?

## B. Research Method

In this study, the researchers used normative legal research methods or literature studies. They also used the legal approach, analysis of legal concepts and case approaches. The collected data were secondary sources consisting of primary legal materials, secondary legal materials, and tertiary legal materials, which were analyzed using qualitative analysis.

## C. Discussion and Result

### 1. Legal Objectives

According to Gustav Radbruch,[9] the law is purported to achieve justice and legal certainty, and to provide benefits to the community. Therefore, the law must be dynamic and adjust to current developments to achieve the intended legal purpose of benefitting the society and maintaining social order.

[9]Ahmad Zaenal Fanani, *Teori Keadilan dalam Perspektif Filsafat Hukum dan Islam* (Liberty 2006) 51.

Gustav Radbruch[10] describes the principle of priority, which is made into three basic values of legal objectives, namely: justice; expediency; and legal certainty. These three basic values are orientated to create harmonization of law enforcement.

The realization of Gustav Radbruch's concept of three basics legal values of justice, expediency, and certainty may in practice contradict each other. There are times when justice contradicts expediency, or other times when justice contradicts legal certainty. It is also possible that there is tension between expediency and justice. To anticipate these conditions Gustav Radbruch provides a "way out" through the standard priority concept, by providing a benchmark in deciding a case, where the first priority is justice, the second is expediency, and the third is legal certainty. The standard priority concept is relatively wiser and more sensible than extreme concepts such as the Ethical Law School that only focuses on justice, the Utilitarian school that only focuses on the use of law, and the Legalistic Dogmatic School (legal positivism) that only focuses on legal certainty.[11]

Gustav Radbruch views *sein* and *sollen*, "matter" and "form" as the two sides of the same coin. "Material" fills "form," and "form" protects "material." According to Radbruch, the value of justice is "material," which must be the content of the rule of law, while the rule of law is the "form" that must protect the value of justice.[12]

To realize the objectives of the law, the principle of priority is used based on the order of priority with legal justice as the first order, legal expediency as the second order, and legal certainty as the third order. The principle of priority harmonizes laws to avoid internal conflicts.

## 2. Legal Review of Judicial Decisions on Permanent Revocation of Political Rights to Hold Public Office.

Gustav Radbruch denounced that "rechct ist wille zur gerechtigkeit" (law is the will for justice).[13] Law is a tool to enforce justice as its ultimate goal. The law is not an arbitrary tool of authorities or the majority against the minority. Good law is when the law contains the values of justice, legal certainty, and expediency.

[10] A legal philosopher as well as a German bureaucrat and politician from the school of Relativism (1878-1949) at the same time the originator of three basic values of law.

[11] M. Muslih, 'Negara Hukum Indonesia Dalam Perspektif Teori Hukum Gustaf Radbruch (Tiga Nilai Dasar Hukum)' (2013) 1-4 Legalitas: Jurnal Hukum Program Magister Ilmu Hukum Universitas Batanghari Jambi 149.

[12] Bernard L Tanya *et.all, Teori Hukum, Strategi Tertib Manusia Lintas Ruang dan Generasi* (Genta Publishing 2013) 116-117.

[13] Sakhiyatu Sova, 'Tiga nilai dasar Hukum menurut Gustav Radbruch' (Bachelor thesis, Diponegoro University 2013).

At first, Gustav Radbruch subordinated justice to legal certainty in his concept of legal objective priority. However, when confronted with the fact that Germany under Nazi rule legalized inhumane practices by making laws, Gustav finally revised his theory by putting justice above other legal objectives. To Gustav, justice is the paramount objective of law, because it is in accordance with the nature of the ontology of the law itself, where the law is made to create order through fair rules. This is done to enable everyone to have rights. If the existence of law gives birth to injustice, it is not in essence law. Thus, law and justice are embedded in each other (united as one unit).

Justice is an abstract concept. However, the concept of justice implies the protection of rights, equality and position before the law, and the principle of proportionality between individual interests and social interests. The nature of justice is abstract because justice cannot always be born from rationality, but it is also determined by the social atmosphere that is influenced by other values and norms in society. Therefore, justice also has a dynamic nature which sometimes cannot be contained in positive law.[14]

The word justice can be an analogy that gives birth to other related terms such as procedural justice, legalist justice, commutative justice, distributive justice, vindictive justice, creative justice, substantive justice, and so on. Justice can only be understood if it is positioned as a state that is intended to be realized by law. The effort to bring about justice in the law is a dynamic process that develops over time. This effort is often also dominated by contradicting forces within the general framework to actualize political order.[15]

Gustav Radbruch does not provide a clear definition of the terminology of justice. Likewise, legal experts do not have the same definition of the meaning of justice. Gustav said that the law is a tool to enforce justice. Thus, according to the author's analysis, it is implied that the law is just if it can protect social interests, individual interests, and pay attention to the conditions required by the community.

The KPU-RI regulations that prohibit the corruption convicts from running for public office is a way to accommodate the people's anxiety over untrustworthy leaders. Likewise, a judge's decision to impose the additional punishment of permanent revocation of political rights is a protection and deterrent against repetition of acts, both for the same perpetrators and others who have the potential to commit corruption. The substance of the

[14] Moh. Mahfud MD, 'Penegakan Hukum DanTata Kelola Pemerintahan Yang Baik' (National Seminar Saatnya Hati Nurani Bicara, Jakarta, 8 January 2009).

[15] Carl Joachim Friedrich, *Filsafat Hukum Perspektif Historis* (Nusamedia 2004) 239.

rules and judges' decisions concerning the public interest in justice are inseparable from the process of making a decision, which must be done carefully and pay attention to the values that have the potential to cause legal phenomena in the community, formulated in a result aimed to satisfy the public interest.

Legal results can take the form of judges' decisions, because the judge can also establish a law that formulates general rules that are generally accepted by everyone. In examining and deciding corruption cases, judges should also consider that the defendants had inherent political rights, but they forfeited their rights by committing evil acts of corruption. On the other hand, the community has the right to elect leaders or regional heads or legislative members who have moral integrity.

The judges' decisions on revocation of permanent political rights to nominate for public office for convicted corruptors Police Inspector General Drs. Djoko Susilo, SH., M.Sc; Lutfi Hasan Ishaaq; H.M. Rusli Zainal; Hj. Ratu Atut Chosiyah, SE; Anas Urbaningrum; Ade Swara and Nurlatifah were actually a way to fulfil the community will as accommodated by the KPU in a regulation prohibiting ex-convicts of corruption from running in general elections, although finally the regulation was declared invalid by the decision of the Supreme Court of the Republic of Indonesia. A good decision is one that can reflect a change, in the dynamics of community life towards a better direction or at least can prevent community actors from violating the law, enabling a ruling to be an effective media in creating law and order in the community.

On a smaller scale, the decision is the media to settle the prosecuted case, but in a broader sense, the consideration of the decision will be polarized into a rule that is generally accepted in society because it contains good values for people's lives. A criminal verdict will have a deterrent effect if the conviction outweighs the benefit of the crime. This will affect the mental atmosphere of the community at large to refrain from committing the same crime.[16]

Normally, a law is promulgated by legislators. However, judges can contribute to law making if their legal findings are permanently enshrined as jurisprudence, referred to by other judges as a guideline for the community. This is known as the decisions containing legal principles formulated in discrete events but gaining general force of law.

[16] Syaiful Bakhri, *Sistem Peradilan Pidana Indonesia (Dalam Perspektif Pembaruan, Teori dan Praktik Peradilan)* (Pustaka Pelajar 2014) 224.

Thus, one decision can at the same time contain two elements namely the decision as the settlement or resolution of a discreet event and a legal regulation for the future events.[17]

The legal holding by a judge is the law because it has binding effect as a law contained in the form of a decision. In addition, the legal holdings by judges are a source of law as well. Accordingly, the Judges' decisions on permanent revocation of political rights to nominate for public office against the convicted corruptors Police Inspector General Drs. Djoko Susilo, SH., M.Sc; Lutfi Hasan Ishaaq; H.M. Rusli Zainal; Hj. Ratu Atut Chosiyah, SE; Anas Urbaningrum; Ade Swara and Nurlatifah form the framework of fulfilling community justice based on the facts revealed in court, because judges are required to explore, follow, and understand the legal values and sense of justice that lives in society as stipulated in Article 5 paragraph (1) of Law number 48 years 2009.

In carrying out their duties, judges must refer to the applicable law, and the law must be interpreted broadly, not only as a law, but also as the law and values that live in society. Consequently, a judge has responsibility for the law, because all law enforcement processes culminate in the court and the judge will determine the law. The law must be a benchmark, as long as the law can provide justice. Otherwise, a judge can make new law by expanding the interpretation on the meaning and statement of the legislation.[18]

Law as the bearer of the value of justice, according to Radbruch, is a measure for both the fairness and unfairness of the rule of law. In addition, the value of justice also forms the basis of law as law. Thus, justice has both a normative and constitutive nature for law. It is normative, because it functions as a transcendental precondition that underlies every dignified positive law. It becomes the moral basis of law and at the same time a benchmark for a positive legal system. The positive law originates from justice. Meanwhile, it is constitutive in nature because justice must be an absolute element of law as law. Without justice, a rule does not deserve to be law.[19]

Thus, it is interesting to consider about the decisions of judges in cases of convicted Inspector General of Police Drs. Djoko Susilo, SH., M.Sc; Lutfi Hasan Ishaaq; H.M. Rusli Zainal; Hj. Ratu Atut Chosiyah, SE; Anas Urbaningrum; Ade Swara and Nurlatifah, revoking their political rights to hold public office without indicating a time limit as stipulated in Article 38 paragraph (1) of the Criminal Code which provides a maximum

[17] Sudikno Mertokusumo, *Penemuan Hukum* (Cahaya Atma Pustaka 2014) 48.

[18] Darmoko Yudi Witanto and Arya Putra Negara Kutawaringin, *Diskresi Hakim Sebuah Instrumen Menegakkan Keadilan Substantif Dalam Perkara-perkara Pidana* (Alpabeta 2013) 39.

[19] Bernard L Tanya et.al. (n. 12) 117.

limit of 5 years. Such decisions are efforts to protect broad public interests and promote justice for the community by preventing the convicts from occupying public positions that had been available to them previously. They violated the public trust by committing corruption while serving as the public officials. In the researcher's opinion, the Judges' decisions here were in accordance with Article 24 paragraph (1) of the 1945 Constitution and Article 5 paragraph (1) of Law Number 48 of 2009. Therefore, in making decisions, Judges must explore and follow the legal values based on a sense of justice that lives in the community that required the corrupt officials to be severely punished without any chance of repeating their actions. In essence, state institutions must function based on ethics, integrity, and morals, which prioritize the values of common interests.

## 3. Review of the Legal Expediency of Judges' Decisions on the Indefinite Revocations of Political Rights

Gustav Radbruch stated that ideally a decision must contain "idee des recht," which includes three elements, namely justice (Gerechtigkeit), legal certainty (Rechtsicherheit) and expediency (Zwechtmassigkeit). These three elements should be considered by any Judge and proportionally accommodated to make quality decisions that meet the expectations of justice seekers.[20]

Gustav Radbruch places expediency as one of the goals of justice. Expediency is defined as a tendency to hold to the value of utility. As a utility value, it will provide value if the law is able to encourage and regulate social behavior in a better direction. Expediency will shift the value of legal certainty and the value of justice in certain circumstances, because what is important for the expediency value is the fact that the law is useful and beneficial for the community.

A judge's decision to revoke the political right to public office for someone convicted of corruption is certainly based on morals and the spirit of thought in the law, which favors the community by demonstrating the real impact of corruption on the society. Such verdict is aimed at maintaining public morality by protecting the public interests to prevent corruption convicts from serving in public office.[21]

The verdict in the political right revocation against Inspector General of Police Drs. Djoko Susilo, SH., M.Sc; Lutfi Hasan Ishaaq; H.M. Rusli Zainal; Hj. Ratu Atut Chosiyah, SE; Anas Urbaningrum; Ade Swara and Nurlatifah in the decision of the cassation in the

[20] Bernard L Tanya et.al. (n. 12) 74.
[21] Ibid.

Supreme Court is a responsive decision that dared to defy Article 38 paragraph (1) of the Criminal Code. This is in accordance with the independence structure of judicial power, which is in line with the legal objectives of providing benefits by considering the community hardship caused by corruption.

Article 5, paragraph (1) of Law Number 48 of 2009, states that judges and constitutional court justices are obliged to explore, follow, and understand the legal values and sense of justice that exists in society. Thus, judges are granted the discretion to revoke the political rights of corruption convicts for an indefinite period. This rule shows that Indonesia, in addition to adopting a civil law system, is also influenced by the common law system. Essentially, the decision shows that Article 5 Paragraph (1) of Law Number 48 Year 2009 states that judges and constitutional justices are obliged to explore, follow, and understand the legal values and sense of justice that exists in the community. This decision aims to protect the community and prevent those who have betrayed public trust and have used the public office to commit corruption from regaining their position.

In the spirit of protecting the interests of the people, guarding the spirit of the rule of law, protecting the honor of the rule of law, maintaining public morality through the operation of the law through decisions, the verdicts are actually influencing the behavior of the whole community. In addition, the judge has contributed in maximizing his duties and authority to find, interpret and make laws to regulate public behavior and to provide guidance for other law enforcement officials in the context of the examination and settlement of corruption criminal cases. As explained above, legal findings by judges are also a source of law.

### 4. Legal Certainty and a Review of Judge's Decision on Political Rights Revocation of Corruption Convicts to Nominate for Public Position without Time Limits

Indonesia is a state of law, not a state based on power. Thus, based on the provisions of Article 1 paragraph (3) of Law D 1945, official actions of government other institutions, including citizens must be subject to and based on law.[22]

Gustav Radbruch stated 4 (four) underlying things related to the meaning of legal certainty. First, the law is positive, meaning that positive law is legislation. Second, the law is based on facts, meaning that it should be based on reality. Third, facts must be formulated in a clear manner to avoid errors in meaning, as well as to make it easier to implement. Fourth, the positive law cannot be easily changed. Gustav Radbruch's opinion

[22] Prayitno Iman Santosa, *Pertanggungjawaban Tindak Pidana Korupsi* (Alumni 2015) 54.

is based on his view that legal certainty is certainty about the law itself. Legal certainty is a product of law or more specifically from legislation. According to Gustav Radbruch, positive law governing human interests in society must always be obeyed even though positive law is sometimes unfair.

Legal certainty is the certainty in a law or regulation. It is various ways, methods and the like that are based on a law or regulation. Legal certainty relies on positive, written law. Written law is promulgated by the competent institution, has strict sanctions, valid by itself, and marked by official announcement at the State Institution. Legal certainty is a question that can only be answered normatively, not sociologically. Normative legal certainty is a rule made and promulgated with certainty because it regulates behavior clearly and logically.[23]

Legal certainty as well as justice and legal benefit is actually a doctrine. The doctrine of legal certainty guides every law enforcer to (for the sake of controlling the obedience of citizens to participate in maintaining order in life) to apply the law uniformly. This doctrine stipulates that every legal expert, especially those who serve judges, do not use normative references other than those that are considered legal norms to prosecute a case. For the sake of compliance, only the legal norms that have been promulgated are purely and consequently allowed to result in punishment. It is not permissible for this legal norm to interfere with considerations that refer to other normative sources; such as moral norms, a sense of justice, political ideology, or personal beliefs. It is believed that by obeying doctrines like legal certainty. The law (as an institution) will be a powerful force to make effective rules to organize life and maintain social order.[24]

Legal certainty is needed to guarantee peace and order in society, because legal certainty (general rules / regulations) has the following characteristics:

a. Coercion from outside (sanctions) from the authorities in charge of maintaining and fostering public order using the instruments;
b. The nature of the law is one that applies to everyone. However, it is necessary to realize that prioritizing the element of legal certainty can violate community justice because legal certainty will never consider whether a judge's decision fulfills a sense of justice or not. The most important point is to make it in accordance with the underlying provisions.[25]

[23] Sakhiyatu Sova (n.13).

[24] Soetandyo Wingjosoebroto, 'Terwujudnya Peradilan Yang Independen Dengan Hakim Profesional Yang Tidak Memihak' (National Seminar of Problem Pengawasan Penegakan Hukum di Indonesia, Jakarta 8 September 2006).

[25] Ibid.

On this basis, e legal certainty must be clear and able to be implemented. To understand the meaning of legal provisions, the law must be resolute and transparent. The legal certainty in a decision cannot be separated from the facts of the trial, which is legally relevant with consideration of conscience. The application of the law must be in accordance with the case, so that in rendering a decision, the judge can construct the case as a whole, justly, wisely, and objectively.

Judges' decisions that have permanent legal force are no longer the opinions of the judges themselves who decide the case, but they are rather the opinions of the judiciary and become a reference for the community in daily interactions. These decisions contain elements of legal certainty, which will contribute to the development of science in the field of law. Therefore, Judges are always required to interpret the meaning of the laws and other regulations as the basis for the law's application.

Revocation of the political right to be elected in a public position has been regulated in the provisions of Article 17 juncto Article 18 paragraph (1) letter d of Law Number 31 of 1999 concerning Eradication of Corruption, and the provisions of Article 10 juncto of Article 35 in conjunction with Article 38 of the Criminal Code and also in the Constitutional Court Decision Number 4 / PUUVII / 2009 dated March 24, 2009, which provides a maximum time limit of 5 (five) years. In the context of legalism, Judge will be faced with reconciling both justice and legal certainty. Combining justice and legal certainty is not easy. Therefore, they must always consider these two perspectives in making decisions.

Judicial decisions on indefinite revocation of the political rights of corruption convicts without the time limitation is part of a criminal case. Thus, it is necessary that the law enforcers prioritize the principle of legal certainty, especially the judges. Only in very exceptional cases, the interpretation of an existing legal role can be stretched. This is in accordance with the function of judges who are not merely mouthpieces of the law, but judges are obliged to seek the value of justice in the application of progressive and responsive laws. A good ruling is one that can reflect a change, in the dynamics of community life towards a better or at least the ruling can prevent community actors from breaking the law to be an effective media in creating law order in the community.

## D. Conclusion

Based on the explanation and analysis, it is conclusive that the political rights revocation to nominate for public office without a time limit of the convicted Police

Inspector General Drs. Djoko Susilo, SH., M.Sc; Lutfi Hasan Ishaaq; H.M. Rusli Zainal; Hj. Ratu Atut Chosiyah, SE; Anas Urbaningrum; Ade Swara and Nurlatifah is in accordance with the elements of legal objectives of justice for the Indonesians to protect the public interest. The decision becomes the domain of judges who explore the values of justice applicable in society as stipulated by the will of Article 5 paragraph (1) Law No. 48 of 2009. Political Rights Revocation of corruption convicts to prevent them from running for public office is still effective in achieving the legal objective of justice and legal expediency, protecting wider social rights of the community. It is timely to revise the time limitation for the political rights revocation to run for a public office for a maximum of 5 years, by considering the criminal law goals and philosophical objectives of establishing a law on corruption eradication. This is based on the fact that corruption in Indonesia occurs systemically and extensively, not only harming the country's finances, but also the social and economic rights of the community at large. The eradication of corruption justifies extraordinary measures. Thus, it takes courage of the law enforcers to punish the perpetrators. Public Prosecutors and judges should enforce the law in progressive and responsive ways by revoking the political rights of corruption convicts to nominate in public office positions permanently or without any time limit through a judge's decision. In addition to being realized in the form of laws and regulations, it is necessary to realize it in the form of judges' decisions, which will limit the political rights of corruption convicts that have harmed state finances. This will make it possible to realize social justice as demanded by the community.

The judge's decisions on political right revocation to be elected in public office without a time limit for the convicted Police Inspector General Drs. Djoko Susilo, SH., M.Sc; Lutfi Hasan Ishaaq; H.M. Rusli Zainal; Hj. Ratu Atut Chosiyah, SE; Anas Urbaningrum; Ade Swara and Nurlatifah are the best practice of judicial institutions that fulfill the awakening social demand for justice in the community. Such decisions should be followed by law enforcement officials as a source of jurisprudential law. This criminal punishment should be used as an alternative punishment for corrupt officials, providing a deterrent effect in the hope that it will reduce the occurrence of corruption.

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