



Legal Implications Regulation of Citizens's Rights and Government Obligations in Managing Natural Resources and the Environment in the 1945 Constitution of the Republic of Indonesia

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Abstract

Formulating basic environmental rights into national constitutions holds some hope for addressing environmental challenges that most affect either individuals, groups or the environment itself. They must be matured into enforceable norms to achieve ecological justice and become a means of responding to national environmental challenges around the world. If it is not regulated clearly and firmly the regulation of the rights of citizens to the environment and the responsibility of the State in guaranteeing its fulfillment, then the goal of realizing ecological justice will not be achieved. For this reason, this research needs to conduct a basic study related to the legal implications of subjective rights (subjective rights) and state obligations (duty of state) in natural resource management not formulated in the 1945 Constitution of the Republic of Indonesia.

Keywords: *Legal Implications; Subjective Rights; State Obligations; Natural Resources Governance.*

Introduction

Every country must have certain goals to be realized. The purpose of this state is to guide how the country is structured and how the lives of its people are regulated. On the other hand, the function of the state emphasizes the dynamics of the state with all its activities, the role played in achieving the goals of the state. Machiavelli's theory of the purpose of the state was put forward in his book "II Principles" (Head of State). According to Machiavelli, the aim of the state is to cultivate power in order to achieve the prosperity of the people. The purpose of the state is determined by the perspective of a nation (society) regarding the nature of the state, while this perspective depends on the philosophical basis adopted. The state has an important task, namely controlling and regulating the symptoms of power that arise in society that conflict with each other, besides that the state also has the task of organizing and integrating the activities of individuals/individuals and groups in order to achieve the goals of the whole society such as what they aspire to (Gani, 1984).

Many legal theories teach that the law must be stable, but it cannot best ill or rigid. At first glance, these statements contradict each other, but they are not actually contradictory. Because, that is one of the essential facets of law where on the one hand the law must contain elements of certainty and

predictability, so that it must be stable. But on the other hand the law must be dynamic, so that it can always follow the dynamics of the development of human life (Lathif, 2017). The purpose of the Indonesian state is determined by the perspective of the Indonesian people regarding the nature of the nature of the Indonesian state. This perspective is determined by the philosophical foundation of the Indonesian nation, namely Pancasila. In accordance with the philosophical foundation of Pancasila, in the view of the Indonesian people, the state is a means or tool to achieve the goals of the Indonesian nation, namely a just and prosperous society or social justice for all Indonesian people. The Indonesian state is a means or a tool to organize welfare for the entire Indonesian nation. Based on the view of the nature of the nature of the Indonesian state as stated above, the fourth Aliena of the Preamble to the 1945 Constitution of the Republic of Indonesia states that the goal of the Republic of Indonesia is to provide general welfare for all Indonesian people. The meaning of public welfare in the Preamble to the 1945 Constitution is of the same quality as the meaning of social justice for all Indonesian people in the fifth precept of Pancasila.

Indonesia as a democratic country must be able to fulfill human rights as a manifestation of achieving the country's goals in the fourth paragraph of the opening of the 1945 Constitution of the Republic of Indonesia. Human rights and democracy are conceptions of humanity and social relations that are born from the history of human civilization in all corners of the world. Human rights and democracy can also be interpreted as the result of human struggle to maintain and achieve their human dignity, because until now only the conception of human rights and democracy has been proven to best recognize and guarantee human dignity. The state here is democratically obligated to issue all laws and other legal instruments so that the implementation of human rights can be democratically enforced in accordance with applicable rules (Rosana, 2016).

Asshiddiqie (2006) argues that the principles of democracy and nomocracy should be developed in order to realize the ideals of Indonesia's development in the future. Democracy is an idea that relies on power from, by, for and with the people. The pinnacle of the development of the most idealized idea of democracy in modern times today is the idea of democracy based on law (constitutional democracy). In the idea of modern democracy, the law occupies a very central position. Circulated democracy must be placed in the corridor of law. Without law democracy is developed in the wrong direction, because the law can be interpreted unilaterally by the authorities in the name of democracy. Because of this, the concept of democracy based on law (constitutional democracy) has developed which is commonly used in discussions about the modern concept of a constitutional state which is considered ideal at this time (Asshiddiqie, 2009).

In the context of Indonesia, which is known as a maritime country that has wide seas, an agricultural country, a country that has small islands that have the potential to experience the impact of global climate change, and a country with a high potential for disasters, as well as our oceans at the level of ecosystem damage that has already occurred. Worse, there is no choice but to treat it as a strengthening not only a democracy and a nomocracy, but also an ecocracy. Ecocracy is a government that bases its governance on the principles of ecologically sustainable development (ESD). ESD is not an environmental bias as feared by narrow-minded businesses and government managers, but rather an orientation or economic growth, social development (especially for vulnerable and marginalized people) and protection of ecosystem carrying capacity. ESD requires a touch of good governance so that it is often termed good (ecologically) sustainable development governance. As described above affect the effectiveness of the implementation of sustainable development. Ineffectiveness in eradicating corruption, building a legal system and law enforcement that is just, has a negative impact on the actualization of environmentally sustainable development. To make Indonesia a solid country that adheres to democracy, nomocracy and ecocracy, it is necessary to strengthen constitutional rights in the field of environmental management (Asshiddiqie, 2009).

In Indonesia, constitutional rights to the environment have been regulated in Article 28 H Paragraph 1 of the 1945 Constitution of the Republic of Indonesia which states, "Everyone has the right to live in physical and spiritual prosperity, to have a place to live, and to have a good and healthy environment and have the right to obtain health services. ". The right to a good and healthy environment is combined with other fundamental rights, such as the right to life and the right to good health, the existence of this right as a subjective right that is indispensable to maintain and demand the performance of the state in making it happen. In addition, it is also regulated in Article 33 paragraph (4) of the 1945 Constitution of the Republic of Indonesia which reads, "The national economy is carried out based on economic democracy with the principles of togetherness, efficiency, justice, sustainability, environmental insight, independence, and by maintaining a balance of progress and national economic unity. ". This means that the implementation of the Indonesian economy prioritizes the principles of togetherness, efficiency, justice, sustainability and environmental insight and creates an independent nation and advances the national economy.

This indicates that the constitution has provided and guaranteed the protection of its citizens to obtain the right to the environment. And states are obliged to guarantee the fulfillment of which is a constitutional mandate that has been mutually agreed upon. However, the provisions in the Indonesian constitution regarding environmental governance, especially regarding subjective rights obligations state in natural resource management, have not been specifically, explicitly and in detail. The weakness of mixing various fundamental rights in one article causes the recognition of constitutional rights to be missed and does not become the attention of the public and policy makers.

Providing special arrangements regarding environmental rights into the state constitution by explaining the mandate of the duties and authorities of the state in fulfilling the rights of citizens to the environment is very important as a manifestation of environmental justice. The regulation of subjective rights must also be balanced with the duty of the states carried out by France with the Environmental Charter and Ecuador with the Charter for Nature. The same is true for Argentina, Spain and Switzerland. The Indonesian constitution does not pay attention to the recognition of the country's fundamental rights and obligations. The state's obligation to protect the entire Indonesian nation and the entire homeland of Indonesia as stated in the Preamble to the 1945 Constitution (preamble) is still too general so that it cannot be understood as the state's obligation to protect subjective rights and the carrying capacity of the ecosystem for the welfare of the people as wide as possible.

Incorporating basic environmental rights into national constitutions holds some hope for addressing environmental challenges that most affect either individuals, groups or the environment itself. They must be matured into enforceable norms to achieve ecological justice and become a means of responding to national environmental challenges around the world. If it is not regulated clearly and firmly the regulation of the rights of citizens to the environment and the responsibility of the State in guaranteeing its fulfillment, then the goal of realizing ecological justice will not be achieved. For this reason, this research needs to conduct a basic study related to the legal implications of subjective rights (subjective rights) and state obligations (duty of state) in natural resource management not formulated in the 1945 Constitution of the Republic of Indonesia.

Research Methods

This research uses normative legal research to examine the basic problems in this research. Among other things, the legal implications of the non-execution of the state's subjective rights and obligations in the management of the environment and natural resources as well as the formulation of the state's subjective rights and obligations in the management of the environment and natural resources. The approach used in this research is a philosophical approach, a conceptual approach, a legal history approach, and a comparative law approach.

Discussion

The development of global environmental problems and their placement in the constitution, developments in international environmental law with regard to state responsibilities for environmental protection and management:

“States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”

In comparison, one of the countries that have a commitment to environmental protection and management are South Africa, Argentina, Spain, Switzerland, France, Ecuador and Portugal.

The following is a table regarding the contents of the obligations and subjective rights of citizens in fulfilling environmental rights regulated in the constitutions of seven countries, namely South Africa, Argentina, Spain, Switzerland, France, Ecuador and Portugal:

Table 1. State Obligations and Rights to the Environment in the Constitutions of the Seven States

Constitutional	Year	Articles	Duties & Obligations	Mention of Environmental Rights Guarantee
South Africa	1996	Article 24	No	Yes
Argentina	1853	Article 41	Yes	Yes
Spain	1978	Article 45 paragraphs (1), (2), and (3)	Yes	Yes
Switzerland	1999	Articles 42-43 and Articles 74-80	Yes	Yes
France	1958	Articles 1-5	No	Yes
Ecuador	2008	Article 86	No	Yes
Portugal	1976	Article 52 paragraph (3)	No	Yes

Source: Primary Data, processed by the author, 2021

In the management of natural resources, the seven countries in the table above only regulate a few articles in their constitution, some even regulate it in one article. This indicates that the regulation regarding the management of natural resources and the environment has been accommodated in every state constitution that is the object of this research study, but when viewed quantitatively, the articles governing this matter are still relatively minimal. The regulation in the article regarding the management of natural resources related to the environment where there are 3 out of 7 countries that mention their state's obligations in terms of the environment, some do not mention the state's obligations. The mention of state obligations in the constitution uses the nomenclature *"the state must ..."*, which indicates that the state is given responsibility by the constitution to carry out its obligations. However, the mention of state obligations in the constitutions of the three countries, namely: Argentina, Spain, and Switzerland, is still not regulated in a complex manner, only in a few articles or verses in their constitutions. In addition to state obligations, there is also a mention of guaranteeing the right to the environment and all countries in

the table have regulated in their constitution regarding guaranteeing the right to the environment. This indicates that all countries that are the object of the study have recognized and protected the right to environmental safety. However, in terms of state obligations which in this case regulate environmental rights guarantees in the content of each country's constitution, it can still be said to be minimal.

Included in the Spanish Constitution already gives the right to enjoy a suitable environment for the development of the person and even provides a very broad meaning guaranteed by the constitution. It's the same in Portugal and Argentina, in their constitutions found a basic environmental right which says that "everyone should" have the right to a healthy and ecologically balanced human environment and the obligation to maintain it. In Argentina, there was a case where the Court upheld the rights of citizens to enforce constitutional environmental rights without administrative procedural proof that blames the State for managing the environment Argentine courts have also interpreted the provisions broadly to include the right to enjoy sea views (United Nations Framework Convention on Climate Change, nd).

Ecuador 's Constitution passed by the *Constitutional Assembly* on 10 April 2008 and began applies after obtaining people's approval through a referendum, it can be said to be the first constitution to affirm the existence of natural rights as legal subjects in human life in a constitutional state. In title II concerning *Fundamental Rights*" *Article of Right Entitlement* is emphasized n that "*Persons and people have the fundamental rights quaranted in this constitution and in the international human rights instrument. Nature is subject to those rights given by constitution and law*". Thus everyone in Ecuador has basic rights guaranteed by the constitution and by international instruments and makes nature a subject who is also entitled to all rights guaranteed in its constitution (Asshiddiqie, 2009).

Portugal (1976) and Spain (1978) were the first countries to include the right to a healthy environment in their constitutions. Article 66 of the Portuguese Constitution states "Everyone has the right to a healthy and ecologically balanced environment and the obligation to maintain it" (Wolfrum & Grote, 2012). Since the mid-seventies, ninety-five countries have granted this right constitutional status, (see Map 2). Constitutional law experts observe that the recognition of environmental rights has grown more rapidly over the last fifty years than any other human right (Law & Versteeg, 2012).

In the constitutions of most countries it has been stated that it is the duty of everyone to obey the Constitution. Almost all constitutions also contain guarantees of rights related to the environment, the obligations of the state and citizens who care about these rights have also been determined. Most constitutions have used the following terms:

1. Everyone has the right to a healthy, balanced environment, and the obligation to maintain and preserve it. Several constitutions have stipulated the duty of the state to guarantee rights related to the environment. For example, the constitutions of the Republic of Portugal and the Republic of Ecuador have even drawn up roadmaps of duty.
2. The environment must be preserved for the benefit of present and future generations (South Africa)
3. It is everyone's obligation to preserve the environment (Spain)

Some constitutions also have an outline of the duties of the state and citizens, some of these provisions are:

1) Article 41 - All residents have the right to a healthy and balanced environment suitable for human development so that productive activities must meet the needs of the present without endangering future generations; and have an obligation to preserve it. As a first priority, environmental damage creates an obligation to repair it according to law. The authorities should provide for the protection of this right,

rational use of natural resources, preservation of natural and cultural heritage and biological diversity, and shall also provide environmental information and education.

2) Article 66 - a healthy and ecologically balanced human environment and the obligation to maintain it. To ensure the right to the environment in the context of sustainable development is the duty of the State, acting through appropriate bodies and with citizen involvement and participation:

- i. Prevent and control pollution, and its effects, as well as harmful forms of erosion;
- ii. To organize and promote national planning with the aim of establishing appropriate locations for activities and a balance between economic and social development, while enhancing the landscape;
- iii. Establish and develop nature reserves and parks and recreation areas, as well as classify and protect rural areas in order to ensure the preservation of nature and the preservation of cultural assets of historic or artistic importance;
- iv. To promote the rational use of natural resources, while maintaining their capacity for renewal and ecological stability, respecting the principle of solidarity between generations;
- v. To promote, together with local authorities, the environmental quality of populated areas and urban life in particular with regard to architecture and protection of historical zones;
- vi. To promote the inclusion of environmental objectives in various policy sectors;
- vii. To promote environmental education and respect for environmental values; and
- viii. Ensuring that tax policies achieve a match between development and protection of the environment and quality of life.

Environmental provisions made in the 2008 Constitution of the Republic of Ecuador look different from other countries. The constitution gives rights to nature, which exceed human rights to the environment in general. Those rights must be exercised on their own and it will be the duty and right of all Ecuadorian governments, communities and individuals to uphold these rights.

The Swiss Constitution 1999 with amendments until 2014. In its constitution it regulates the basic rights of the environment from articles 74-80 and mentions the State's obligations in managing and fulfilling environmental guarantees to its citizens in articles 42-43a, namely on "*duties of the confederation and the cantons*".

On March 1, 2005, the French National Assembly adopted the Charter for the Environment (*the Charter for the Environment*) of 2004 and integrated this Charter into the Constitution of France (*the Constitution of the French Fifth Republic*). The adoption of this Environmental Charter is clearly seen in the Preamble to the French Constitution, as quoted in Asshiddiqie, which states: "the French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946, and to rights and duties as defined in the Charter for the Environment of 2004" (Wibisana, 2011). The Environmental Charter also imposes an obligation on everyone to participate in efforts to maintain and improve the environment (Article 2), and an obligation to avoid disturbance to the environment or, if avoidance is not possible, to limit the consequences of such disturbance (Article 3). The state's obligation to regulate basic environmental rights is not clearly regulated in the French constitution, they place an obligation on everyone to participate in efforts to maintain and improve the environment.

Incorporating basic environmental rights into national constitutions holds some hope for addressing environmental challenges that most affect either individuals, groups or the environment itself. They must be matured into enforceable norms to achieve ecological justice and become a means of responding to national environmental challenges around the world. If it is not regulated clearly and firmly

the regulation of the rights of citizens to the environment and the responsibility of the State in guaranteeing its fulfillment, it will have the potential to result in:

1. It will be difficult to hold the state accountable due to exploration and exploitation

In our country, the law that has the highest position is the 1945 Constitution of the Republic of Indonesia (Asshiddiqie, 2009). Because the law has the highest position, then the law must be enforced, because if the law is not enforced then the law will not be of any use. The enforcement of the law will be the regulator and controller of all human activities or activities. Law enforcement in Indonesia is related to the principle of people's sovereignty, where in this case the people are sovereign, have the power to determine how the people are governed in order to achieve the goals of the state (Sodikin, 2014). The aim of the state is as stipulated in the Preamble to the 1945 Constitution, namely that the people become prosperous.

The existence of popular sovereignty stimulates the emergence of the idea of environmental sovereignty in the power system in the Indonesian state. Environmental sovereignty which means that power over a country is in the environment, or nature as the universe gets a higher position and position in the sense that in every state management that the environment gets a high position (Sodikin, 2019). In this case, the state does not only have the power in managing natural resources as the principle of the Right to Control the State, but the state should also be held accountable for everything that is caused by the management of natural resources. However, the legal basis regarding state responsibility for the environment has not been clearly formulated so that in this case the state will be difficult to hold accountable.

The issue of state responsibility for environmental protection and management has only just begun to be realized and carried out by countries in the world, both developed and developing countries, after the world's development which led to a decline in the quality of the environment globally. One of the global environmental problems that has received attention and must be faced by the world community today is global warming which causes climate change. Global warming is a modern and complex problem. Poverty, economy, development and population growth are the causes. It is not an easy thing to deal with and if you don't care about it, it will make the situation worse (United Nations Framework Convention on Climate Change, nd).

2. The absence of subjective rights and obligations of the State will result in counter-productive formation of laws and regulations on Natural Resources

Although the 1945 Constitution of the Republic of Indonesia has included norms regarding environmental protection in its body, it has not been able to overcome the problems and environmental damage that occurred. Environmental damage that occurs can be caused by weak law enforcement for parties who do environmental damage, lack of public awareness to be able to protect the environment, sanctions imposed have not been able to cause a deterrent effect, or there are weaknesses in the legislation. To be able to solve all problems. Therefore, it must start by strengthening the environmental norms contained in the 1945 Constitution of the Republic of Indonesia because the 1945 Constitution of the Republic of Indonesia is the basic law of all existing laws and regulations. By strengthening the environmental norms contained in the 1945 Constitution of the Republic of Indonesia, the laws and regulations under it will follow. Strengthening of environmental norms in the law can be done by stating in detail, firmly, and clearly what environmental norms are needed to provide full protection of the environment and to reduce environmental damage (Fajarwati, 2016). This will result in the State, especially the legislative body, experiencing counter-productive formation of laws and regulations because there is no clear attribution of rules to the Constitution. This can also be seen in the natural resource management arrangements of the seven countries as follows:

Table 2. Public Trustee and Environmental Rights in

Negara	Undang-Undang	Article	Public Trustee	Tugas & Kewajiban Lingkungan Hidup	Thd
Afrika Selatan	UU No 36 thn 1998 tentang Air Nasional (No. 36 of 1998: National water act) No. 10 of 2004: National Environmental Management: Biodiversity Act, 2004 No. 57 of 2003: National Environmental Management: Protected Areas Act, 2003.	Chapter 1 Nomor 3 Chapter I Chapter 1	Yes		Yes
Argentina	Codigo De Mineria Ley Nacional N° 13.273 Ley De La Defensa De La Riqueza Forestal Argentina	Pasal 1-6 Chapter 3 (4), 15, and 17 Chapter 10,18, and 37	No		Yes
Spanyol	Law 43/2003 Montes / UU	Chapter 7, 44	No		Yes
Swiss	Federal Act on the Protection of Nature and Cultural Heritage (NCHA)1 of 1 July 1966 (Status as of 1 April 2020) Federal Act on the Protection of the Environment (Environmental Protection Act, EPA) Federal Act on the Protection of Waters (Waters Protection Act, WPA)	Chapter 3 and 16 Chapter 10 Chapter 19-21	No		Yes
Prancis	Code Forestier	Chapter L112-1 Chapter L121-1 Chapter 1246, 1247, and 1248	No		Yes
Ekuador	Ley De Mineria Ley Forestal Y De Conservacion De Areas Naturales Y Vida Silvestre Ley De Prevencion Y Control De La Contaminacion Ambiental	Chapter 4, 6, and 16 Chapter 1, 2, 5, 10, 12, and 19 Chapter 3 and 4	No		Yes
Portugal	Assembleia Da República Lei n.o 33/96)	Chapter 8 and 10	Yes		Yes

Source: Primary Data, processed writer, 2021

From the results of the editorial analysis of State Obligations in the Legislation of South Africa, Argentina, Spain, Switzerland, France, Ecuador and Portugal, it was found both directly and indirectly (implicitly). The editorial pattern of the State's obligations is found in the preamble, the body in the "public trusty" point, articles on principles, and is also found in the explanation section. So it can be concluded that subjective rights and State obligations are very rarely explicitly stated in articles in the existing natural resources environmental regulations in South Africa, Argentina, Spain, Switzerland, Frech, Ecuador and Portugal. It is clearly stated in the preamble, but only refers to the mention of the article that has been included in the country's constitution. There is a tendency for variations in the regulation of the content of natural resources to be directly proportional to the inclusion of environmental rights and responsibilities given to its citizens by the state.

3. The formation of laws and regulations as the executor of the constitutional mandate will result in unclear/unfirm formulations in regulating subjective rights and obligations of the state in managing natural resources.

For most countries, including Indonesia, the constitution is classified as a high-level constitution as a constitution that has the highest position in the country. In every country there are always various levels of legislation, both in terms of content and in terms of its form, one of which is a constitution which is included in the highest category, when viewed in terms of its form, it is above other laws and regulations (Soemantri, 2006). Furthermore, for the constitution of a unitary state, basically all state power is in the hands of the central government. However, this does not mean that all power is in the hands of the central government, because there is a possibility of deconcentrating power to the regions.

In the Indonesian constitution there is already an idea of environmental sovereignty which is then implemented in several laws. The formulation of the statutory policy is in the context of implementing the 1945 Constitution to provide a green nuance such as in the fulfillment and protection of human rights, economic development through sustainable development and insight into the archipelago which is the limit of environmental management in the territory of the Unitary State of the Republic of Indonesia. However, if the fundamentals have not been regulated explicitly and clearly, implementing regulations or laws and regulations under them will form regulations that have not been able to answer and overcome natural resource problems, especially those relating to the fulfillment of the right to the environment. This will greatly result in differences in the interpretation of legislators in interpreting the contents of the constitution. The ambiguity of norms in the constitution makes legislators lose their way in seeing the philosophical, sociological and juridical foundations and objectives.

4. There is no explicit guarantee in the constitution to its citizens for environmental safety.

Humans are the most perfect components of the environment among other environmental components, according to Kusnadi Hardjasoemantri, with their advantages over other populations, humans have the task and obligation to regulate the harmony and balance between the whole ecosystem, both natural and artificial ecosystems. Hardjasoemantri, 2002). The existence of natural resources and their balance is a prerequisite for human existence which cannot be separated from the environment (Wibisana, 2011). This is because the Indonesian people are in fact more familiar with their natural environment than with the technological environment. The state of nature is still more decisive for most Indonesians than technological endeavors.

The right to a good and healthy environment is the most basic and essential right that cannot be reduced and humans can enjoy a good and healthy environment. This is because the environment is an ecological unit which is also a cycle of life (recycling) or an ecosystem where humans are in it. Ecosystem which is a reciprocal relationship between various environmental components to support environmental sustainability or ecology itself. In this reciprocal relationship, it is necessary to have ecological balance and harmony, namely a condition that living things exist in a harmonious relationship with their environment, so that there is a balance and harmony of interactions between living things and their environment. Of all living things, humans are the most capable of adapting to their environment. If humans are not able to maintain and protect the environment, there will be pollution, destruction and environmental damage. Pollution and destruction is a problem for life and human life.

This is what is intended and desired in the philosophy of Pancasila as the basis of the state which is then implemented in the written basic law, namely the 1945 Constitution. So it is necessary to guarantee the right to the environment clearly in the constitution. The urgency of regulating subjective rights and obligations of the state in natural resource management in the current era is the exploration and exploitation of natural resources with increasingly sophisticated technology. This will certainly have a direct environmental impact and will disrupt the safety of the environment itself and also the community.

If these two things are not explicitly regulated in the constitution, the guarantee of environmental safety for its citizens cannot be fulfilled. In ensuring the right to the environment, the state as a policy maker must plan carefully to avoid damage to the environment due to the exploration and exploitation of natural resources (Raffensperger & Tickner, 1999). In this case, if there is a threat of serious and irreversible damage, public officials have an obligation to ensure, based on the application of the precautionary principle and their authority, that risk assessment procedures will be followed and that provisional and proportionate measures will be followed. taken to prevent such damage.

- 5. The very real legal implication is that there is no juridical basis that provides legal certainty for the Constitutional Court to decide cases (judicial review) against laws that are considered unconstitutional based on the concept of the Pancasila economy populist economy, in accordance with Article 33 paragraphs (1), (2) and (3) the 1945 Constitution. This is because the addition of Article 33 paragraphs (4) and (5) reduces the concept of the people's economy in Article 33 significantly. The existence of paragraphs (1), (2), and (3) further confirms the building of a cooperative (cooperative) and pro-people economic system, so the amendments to paragraph (4) are more encouraging and tend to strengthen a competitive economic system that prioritizes market mechanisms.**

Sri Soemantri stated that the constitution was built on the framework of the state as an organization of power and therefore the existence of the constitution other than as a basis or basis for power, is also a limitation of power (Soemantri, 2006). The 1945 Constitution of the Republic of Indonesia as the constitution of the state of Indonesia must provide a clear formulation of issues related to the state and must also determine requirements that guarantee the welfare and rights of the people, as well as provide protection for freedoms that guarantee the welfare and rights of the people, as well as provide protection of freedom that guarantees better living conditions than in the past (colonial era), as well as a happier life in the country (Deputy Chief Justice of the Constitutional Court's Book Drafting Team, 2008). Likewise with the environmental regulation in the 1945 Constitution, this is part of the state's efforts to guarantee and provide protection for the rights of the people and create a better life for its citizens (Ansari, 2014).

- 6. The constitutional court will find it difficult to interpret norms that result in uncertain decisions.**

Environmental rights are contained in the Constitution of the Republic of South Africa, Law 108 of 1996 (hereinafter referred to as the "Constitution"). Section 24 now enshrines environmental rights in South Africa. This right is construed as having a two-fold purpose. The first part ensures a healthy environment for everyone. The second part mandates the State to ensure compliance with the first part mentioned above. The state is prohibited from violating the right to environmental protection and is further required to provide protection against harmful behavior towards the environment.

Section 24 states the following:

Everyone has the right:

- (a) To an environment that is not harmful to their health or well-being; and
- (b) That the environment is protected, for the benefit of present and future generations, through reasonable legislative and other measures that:
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) securing ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

This section also incorporates International Environmental Law which covers the duty of care and that the "polluter" will pay to pollute the environment, creating liability for the environmental damage caused.

The concept of health and well-being - Section 24(a)

That "health" relates to human health which includes mental and physical integrity. However, "well-being" is more difficult to define and is often questioned. Usually "well-being" is considered in a broader sense that includes spiritual or psychological characteristics and the individual's need to be able to connect with nature. Environmental issues, such as conservation and maintenance of biodiversity, are brought within the scope of the above rights.

The concept of health was first addressed in the case of the Interim Constitution in the case of the Minister of Health and Welfare v Woodcarb (Pty) Ltd (hereinafter referred to as the Woodcarb case). In the Woodcarb case, the Minister of Health and Welfare applied for a ban under the Atmospheric Pollution Prevention Act (hereinafter referred to as "APPA") based on complaints received about smoke emissions from Woodcarb's sawmills. Woodcarb is operated without the required registration certificate as required by APPA. The prohibition is granted in terms of Section 29 of the Interim Constitution. The court, however, arrived at this decision without any interpretation of the concept of health or well-being.

Another practical example of how Section 24(a) applies, is the case of Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products and Others (hereinafter referred to as the Hichange case). The Cape Produce Company produces a number of chemical waste products some of which are controlled under the APPA. In the Hichange case, the Petitioners (Hichange Investments) allege that the hazardous gases produced, caused a foul offensive odor and the rapid and uncontrolled corrosion of metal structures and that these gases were detrimental to the health and well-being of workers and city dwellers. The court here linked well-being with the notion of physical discomfort. Courts have been hesitant to interpret well-being in a broader sense that transcends the physical and includes an aesthetic or spiritual dimension (Warnich, 2018).

Sustainable development – Section 24(b)

Before a State fulfills its mandate in terms of Section 24(b), it must ensure that there is a balance, not only in environmental considerations, but also in social and economic considerations – namely sustainable development. To achieve sustainability in most cases, economic inequalities need to be reduced and social welfare issues need to be addressed.

In the infamous case of the Minister of Public Works and the Kyalami Ridge and Others Environmental Association (hereinafter referred to as the Kyalami Ridge case), heavy rains caused widespread flooding and the subsequent destruction of about 300 people's homes. The government decided to set up a site for temporary accommodation. Residents then brought a prohibition against holding Respondents from proceeding with the establishment of informal settlements for temporary accommodation. The residents' argument is based on that the Government's actions contravene the relevant urban planning scheme as well as applicable environmental laws. Their argument was further based on the damage that would be done to the environment if temporary camps were established. The Court granted a temporary ban and ordered the Government to comply with the required environmental laws. The government then successfully appealed the case to the Constitutional Court. The call raised important constitutional considerations, including the Government's constitutional obligation to provide assistance to flood victims. The Court concluded that, if it left to the Government's constitutional obligations to landowners, and to its executive powers to implement policy decisions, its decision to establish temporary transit camps for flood victims was valid. However, critics argue that the court at

Kyalami Ridge missed the opportunity to assess sustainable development against the backdrop of challenging interest characteristics in the principles of sustainability itself (Warnich, 2018).

Sustainable development received the most detailed attention in the case of the Fuel Retailers Association of SA (Pty) Ltd v Director-General Environmental Management Mpumalanga and Others (hereinafter referred to as Fuel Retailers). This case relates to the nature and scope of obligations of environmental authorities when they make decisions that may have a substantial adverse impact on the environment. In particular, the interaction between social and economic development and environmental protection. At Fuel Retailers, the family trust wants to build a filling station. However, the Environmental Conservation Act prohibits anyone from carrying out activities that may have a substantial adverse impact on the environment without the written authorization of the appropriate Governing Body directed by the Minister. In the above case authorization was obtained from MEC Agriculture, Conservation and Environment, Mpumalanga (Warnich, 2018).

Environmental Law in South Africa has been strengthened by the inclusion of environmental rights in Section 24 of the constitution. This section mandates States to ensure environmental protection and ecologically sustainable development. The foregoing is achieved by means of laws and regulations. Private individuals, corporate entities and public authorities need to comply with such laws and regulations by means of putting appropriate measures in place and, where compliance is lacking, enforcement mechanisms. Courts and judiciary further play a key role in ensuring the enforcement of environmental rights. South Africa also has many goals to achieve sustainability in various fields, namely; ensure the availability and sustainable management of water and sanitation for all; ensure access to affordable, reliable, sustainable and modern energy for all; take urgent action to combat climate change and its impacts (this will be done in line with the United Nations Framework Convention on Climate Change); conserve and sustainably use the oceans, seas and marine resources for sustainable development as well as protect, restore and promote the sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt the loss of biodiversity.

The nomenclature in Article 28 H paragraph (1) states that everyone has the right to a good and healthy living environment, this means that the constitution has regulated the subjective rights of citizens to the environment, but the norms in the article have not stated the state's obligations to the environment. This is different from Article 31 of the 1945 Constitution of the Republic of Indonesia which states that:

- (1) Every citizen has the right to education****)
- (2) Every citizen is obliged to attend basic education and the government is obliged to pay for it.

In article 31 it can be seen in paragraph (1) that citizens have the right to education, then in paragraph (2) it is also stated that the state's obligations are that the government has an obligation to finance it. So in one article it is fully regulated regarding the rights of citizens and also the obligations of the state in fulfilling these rights. Article 28H paragraph (1) should also have the same structure as Article 31 of the 1945 Constitution of the Republic of Indonesia, not only the subjective rights of citizens are included, but the obligations of the state should also be fully regulated in one unified article.

Conclusions and Suggestions

Conclusion

The inclusion of subjective rights and duties and responsibilities of the State towards the environment is something new considering that in the constitution prior to the amendment, human rights,

especially regarding the environment, were not regulated and discussed explicitly and clearly. There are implications that will arise, namely it will be difficult to hold the state accountable due to exploration and exploitation, the absence of subjective rights and obligations of the state will result in counter-productive formation of laws and regulations on natural resources, the formation of laws and regulations as implementers of the constitutional mandate will produce unclear/unfirm formulations in regulating subjective rights and obligations of the state in natural resource management, there is no explicit guarantee in the constitution to its citizens for environmental safety, the very real legal implication is the absence of a juridical basis that provides legal certainty for the Constitutional Court to decide cases (judicial review) against laws that are considered unconstitutional based on the concept of the Pancasila economic populist economy, in accordance with Article 33 paragraphs (1), (2) and (3) of the 1945 Constitution. The reason for the addition of Article 33 paragraph (4) and (5) reduce the concept of people's economy in Article 33 significantly. The existence of paragraphs (1), (2), and (3) further confirms the building of a cooperative (cooperative) and pro-people economic system, so the amendments to paragraph (4) are more encouraging and tend to strengthen a competitive economic system that prioritizes market mechanisms, and The Constitutional Court will find it difficult to interpret norms which result in decisions without legal certainty.

References

- Ansari, M. I., 2014. Implikasi Pengaturan Lingkungan Hidup terhadap Peraturan Perundang-Undangan dalam Kegiatan Bisnis (Perspektif Konstitusi). *Jurnal Konstitusi*, 11(2), pp. 277-278.
- Asshiddiqie, J., 2009. *Green Constitution "Nuansa Hijau Undang-Undang Dasar Negara Republik Indonesia Tahun 1945"*. Jakarta: Rajawali Press.
- Asshiddiqie, J., 2009. *Green Constitution "Nuansa Hijau Undang-Undang Dasar Negara Republik Indonesia Tahun 1945"*. Jakarta: Rajawali Press.
- Asshiddiqie, J., 2009. *Green Constitution: Nuansa Hijau Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*. Jakarta: Raja Grafindo.
- Asshiddiqie, J., 2009. *Green Constitution: Nuansa Hijau Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*. Jakarta: Rajawali Press.
- Asshiddiqie, J., 2009. *Green Constitution: Nuansa Hijau UUD 1945*. Jakarta: Rajawali Pers.
- Asshiddiqie, J., n.d. *Gagasan Kedaulatan Lingkungan: Demokrasi Versus Ekokrasi*. [Online] Available at: [http://jimly.com/makalah/namafile/160/Demokrasi dan Ekokrasi.pdf](http://jimly.com/makalah/namafile/160/Demokrasi%20dan%20Ekokrasi.pdf) [Accessed 20 August 2021].
- Binawan, A. A. L., 2014. Jalan Terjal Ekokrasi. *Jurnal Hukum Lingkungan*, 1(1), p. 9.
- Borrows, J., 2010. *The Indigenous Constitution*. Toronto: University of Toronto Press.
- Boyd, D., 2012. *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment*. Vancouver: University of British Columbia Press.
- Doherty, B. & Geus, M. d., 1996. *Democracy and Green Political Thought: Sustainability, Rights and Citizenship*. Milton Park: Routledge.
- F., M. & J.B., F., 2018. *Lingkungan Hidup dan Kapitalisme: Sebuah Pengantar*. Tangerang Selatan: CV. Marjin Kiri.
- Fajarwati, M., 2016. Green Constitution Sebagai Upaya Untuk Memperkuat Norma Lingkungan Hidup. *Jurnal Recht Vinding*.

- F, K. C., I, H. & Hermawan, 2012. *Good Environmental Governance*. Malang: UB Press.
- Gani, S. I., 1984. *Pengantar Ilmu Politik*. Jakarta: Ghalia.
- Hardjasoemantri, K., 2002. *Hukum Tata Lingkungan*. Yogyakarta: Gadjah Mada University Press.
- Husin, S. S., 2009. *Penegakan Hukum Lingkungan Indonesia*. Jakarta: Sinar Grafika.
- I, M., 2017. Ayat-ayat Neoliberalisme (Implikasi Yuridis dan Praktis Amandemen Pasal 33 UUD 1945 terhadap Ketimpangan Penguasaan Sumber Daya Alam (SDA) di Indonesia. *Jurnal Transisi*, Issue 11.
- Kasim, H. & Anindyajat, T., 2016. Perspektif Konstitusional Kedudukan Negara dan Swasta dalam Pengelolaan Sumber Daya Air Menurut UUD 1945. *Jurnal Konstitusi*, 13(2).
- Lathif, N., 2017. Teori Hukum sebagai Sarana/Alat untuk Memperbaharui atau Merekayasa Masyarakat. *Pakuan Law Review*, 3(1), pp. 73-94.
- Law, D. & Versteeg, M., 2012. The Declining Influence of the United States Constitution. *New York University Law Review* 87.
- Mahkamah Konstitusi, 2008. *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945. Latar Belakang Proses, dan Hasil Pembahasan 1999-2002, Buku VII (Keuangan Perekonomian Nasional, dan Kesejahteraan Sosial)*, Jakarta: Sekretariat Jenderal MK RI.
- Nurjaya, I. N., 2021. *Ideologi Tata Kelola Sumber Daya Alam Dalam Pembangunan Nasional Berkelanjutan*. Malang, s.n.
- Putra, D. A., 2019. Tinjauan Yuridis Terhadap Eksistensi Pengaturan Mengenai Lingkungan Hidup di Dalam Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 Dan Konstitusi Republik Kelima Perancis. *Jurnal Pemerintahan dan Politik Islam*, 4(1).
- Quina, M., 2017. CLS sebagai Salah Satu Instrument untuk Mendorong Laju Pemulihan Sungai: Pembelajaran dari Sungai Gangga dan Riachuelo. *Jurnal Hukum Lingkungan*, 3(2).
- Raffensperger, C. & Tickner, J., 1999. *Protecting Public Health and the Environment: Implementing the Precautionary Principle*. Washington DC: Island Press.
- Rinaldi, Y., 2015. *Konsep Keadilan Dalam Pengelolaan Sumber Daya Alam*, Banda Aceh: Universitas Syiah Kuala.
- Rosana, E., 2016. Negara Demokrasi dan Hak Asasi Manusia. *Jurna Tapis*, 12(1), pp. 38-53.
- Saefulloh, E., 2006. *Betapa Lemahnya Pemerintah*, Jakarta: Kompas.
- Santosa, M. A., 1999. *Reformasi Hukum dan Kebijakan di Bidang Pengelolaan Sumber Daya Alam, Prosiding Lokakarya Reformasi Hukum di Bidang Pengelolaan Sumber Daya Alam*, Jakarta: Indonesia Center for Environmental Law.
- Santosa, M. A., 2016. *Alampun Butuh Hukum dan Keadilan*,. Jakarta: Prima Pustaka.
- Sembiring, R., 2014. *Anotasi Undang-Undang Nomor 32 Tahun 2009 Tentang Perlindungan dan Pengelolaan Lingkungan Hidup*, Jakarta: Indonesian Center for Environmental Law (ICEL).
- Sodikin, 2014. *Hukum Pemilu: Pemilu Sebagai Praktek Ketatanegaraan*. Bekasi: Gramata Publishing.
- Sodikin, 2019. Gagasan Kedaulatan Lingkungan Dalam Konstitusi Dan Implementasinya Dalam Pelestarian Lingkungan Hidup. *Jurnal Masalah-Masalah Hukum*, 48(3), p. 296.

- Soekarno & Soepomo, 1945. *Risalah Sidang Badan Penyelidik Usaha-usaha Persiapan Kemerdekaan Indonesia (BPUPKI), Panitia Persiapan Kemerdekaan Indonesia (PPKI) 29 Mei 1945-19 Agustus 1945*, Jakarta: Sekretariat Negara.
- Soemantri, S., 2006. *Prosedur dan Sistem Perubahan Konstitusi*. Bandung: Alumni.
- Tarigan, 2015. *Dampak Pertambangan Terhadap Sosial, Ekonomi dan Lingkungan Bagi Masyarakat Sekitar Tambang*. Bogor, Workshop Jurnalis EITI.
- Tim Penyusun Buku Wakil Ketua MK, 2008. *Konstitusi Sebagai Rumah Bangsa: Pemikiran Dr. Harjono, S.H., MCL Wakil Ketua Mahkamah Konstitusi*. Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi.
- United Nations Framework Convention on Climate Change, n.d. *Felt the Heat*. [Online] Available at: http://unfccc.int/essential_background/feeling_the_heat/items/2917.php
- Warnich, B., 2018. *Polity*. [Online] Available at: <https://www.polity.org.za/article/environmental-right-in-terms-of-the-constitution-2018-02-14>
- Wibisana, A. G., 2011. Konstitusi Hijau Perancis: Komentar atas asas Kehati-hatian dalam Piagam Lingkungan Perancis. *Jurnal Konstitusi*, 8(3).
- Wibisana, A. G., 2011. Konstitusi Hijau Perancis: Komentar atas asas Kehati-hatian dalam Piagam Lingkungan Perancis 2004. *Jurnal Konstitusi*, 8(3), pp. 208-209.
- Wibisana, A. G., 2011. Konstitusi Hijau Perancis: Komentar atas Asas Kehati-hatian dalam Piagam Lingkungan Perancis 2004. *Jurnal Konstitusi*, 8(3), p. 215.
- Wibisana, A. G., 2020. *Catatan Kritis Atas Ketentuan Mengenai Lingkungan Hidup Dalam Pasal 23 Rancangan Undang-Undang Cipta Kerja 2020*, Jakarta: Traction Energy Asia.
- Wolfrum, R. & Grote, R., 2012. *Constitutions of the Countries of the World*. New York: Oceana Law.
- Yusa, I. G. & Hermanto, B., 2018. Implementasi Green Constitution di Indonesia: Jaminan Hak Konstitusional Pembangunan Lingkungan Hidup Berkelanjutan. *Jurnal Konstitusi*, 15(2), p. 313.
- Undang-Undang Dasar Negara Republik Indonesia Tahun 1945
- Undang-Undang Nomor 39 Tahun 1999 tentang Hak Asasi Manusia
- Constitution of the Republic of South Africa, 1997
- Constitution of the Kingdom of Spain, 1978
- Constitution of Argentina, 1853
- Constitution of the Portuguese Republic, 1976
- Deklarasi Rio 1992

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