

Constitution Food: Study of Constitutionality Principles of Food Sovereignty in the Constitution in Indonesia

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Abstract

This article analyzes the principles of food sovereignty is to meet the criteria of legal principles that became the idea of the constitution or the constitution of the underlying normative or formulated in positive constitution. This is based on the principles of food sovereignty is present values of justice, democracy, sovereignty, collectivity, environmental protection, and siding with those who are poor, which is the virtue value. Those values become positive constitutionalism to the constitution. The normative constitution can be formulated in the Indonesian legal system in the form of: 1) Recognition of the right to food explicitly in the constitution; 2) Recognition of the right to food contained in the principles or direction in the state policy (Directive Principles of State Policy); and 3) Recognition implicitly through the formulation of a broad interpretation of human rights norms of other (non-food).

Keywords: Constitution, Food Sovereignty, State Policy

1. Introduction

*"I ask you, while Indonesian people will be harmed, calamity, havoc in the near future if the problem of food is not solved soon, while the food supplies of masses is a matter of life and death, why you are not interested in farming and forestry?... Understand, please understand, if we are not interested in masses food radically and revolutionary, we will be doomed...."*¹

Excerpts of the speech of President Sukarno reminded the entire nation of Indonesia to take seriously the issue of food. How serious the issue of food, because it is not just a business meeting the needs of a hungry stomach, but also about the life or death of a nation. Food is not just a question of individual human beings, but the problem of the whole nation and even the universal humanitarian issues.

¹ This quote is partly the sentence pronounced by President Sukarno, in 1952 in Bogor, when laying the first stone of the Faculty of Agriculture, University of Indonesia, which is the forerunner of the Bogor Agricultural Institute (IPB). At the time of President Sukarno has reminded us all of the things that is very important, that agriculture is a problem of the state and nation. Disclosed is also that the problem of food security is a matter of life and death that if ignored then we will be doomed. See, Khudori, Import of Food and Farmers' Right to Life, National Journal, February 1, 2008

The issue of food for Indonesian people is the agenda that has been fought since the struggle for independence. Sukarno, in his speech on August 15, 1945 in front BPUPKI, is very clearly mentions the obligation countries (Indonesia, which will be formed), to end poverty and hunger of the people. Sukarno also stated that action to end poverty and hunger can only be implemented if the state is based on the familiar kinship and mutual cooperation, as Sukarno's speech in front of BPUPKI following:

*"...What for we make grondwet, what good is it if it can not fill the stomach of people who want to die of starvation. Grondwet containing "Droits de l'homme et du citoyen", it can not eliminate the hunger of the poor people are going to starve to death. So therefore, if we really want to base our country to understand brotherhood, understanding mutual help, understanding mutual cooperation and social justice, Away with each individualism and liberalism from him."*¹

As an independent and sovereign country, Indonesia must have Constitution. But the Constitution which acts as a positive constitution means nothing if it does not contain guarantees food needs of the poor which are starving, and not built on the principle of social justice as a normative constitutional. It means that the problems of poverty and hunger is not only a question of fulfilling the needs of the belly of hunger, but also the issue of the process or how the food needs of the people of Indonesia are provided. The process of food needs that must be based on principles of kinship, mutual assistance, and social justice. Guarantee protection of the right to food and the principles of social justice is an ideal value that serves as the soul of the Constitution which protects the right to food of citizens from the threat and understand the individualistic liberalism.

But in the fact that a Constitution as a positive man-made constitution essentially have a limitation, imperfect and full of shortcomings. These limitations are shown in the gap or lack of clarity, lack and insufficiencies in drafting the norms into the formulation. Drafting the norm in the formulation of the article or clause in the text of the positive constitution (enurable constitution) which will always be faced with the limitations of the meaning of a series of words or sentences contained, with the idea of law or the underlying value. That is, it is not every idea of law or the ideals contained in any notion of normative constitution can be contained in one or more sentences that are formulated in the articles of the Constitution positive.

Legal Gap of food constitution occurs when clearly guaranteed protection of the right to food in 1945, making food policy in Indonesia has lost orientation. Gap in 1945 as a positive constitution of capacity to an unjust state policies, as stated in various forms of legislation. Unfortunately even countries often became perpetrators of injustice against the practice. Using powers contained in various laws and regulations, the state actually facilitate or legitimize the oppression of farmers.

The government's policy is very side with the big companies (and foreign) who defeated national agricultural community. As example, Law No. 4/2004 on Water Resources, regulation 36 and 65/2006, Law No. 18/2003 About Plantation, and the latest Law 25/2007 on Investment. With the ease of this regulation, privatization efforts toward monopoly or cartel in the food sector more open. It is getting worse with no seriously pursued the development of cooperatives and SMEs in the production, distribution and consumption in the food sector.

Poverty, conversion and reduction of agricultural land, the lack of incentives from the state, foreign domination in the marketing of food upstream to downstream, environmental degradation, lack of access to farmers' participation in public policy, and a mastery of low technology are the result of the failure of the state ensure the protection of the right to food. The impact of those is food crisis which are appearing every year as a form of government failure to ensure the right food for the people. An irony for an agricultural country whose land is fertile and "*gemah ripah jinawi*", but most of the people are not able to meet food needs.

Globalization and institutionalization of WTO become a conspiracy and vehicle for developed countries, international finance institution (IFI's), and trans-national corporation (TNC) to meet the desires of their liberalism and capitalism. Constitutionality through various packages deregulation policies related to the trade system is a form of policies that exploit farmers. Constitutionality and legislation agenda of the WTO is a strategy libelisme / capitalism to dominate the market (food) by a foreign national. It has made poverty for farmers. Normative constitution becomes alienated from the values of social justice held and believed by the people, it has become the state ideology: Pancasila.

The gap between the idea of law (*rechtsidee*) or the value contained in the formulation of normative constitution positive as stated in the constitution, it must be resolved by putting the values of this ideal as normative control instruments. Guarantee the protection of the right to food a state based on the principles of justice as conceived in the concept of food sovereignty should be a positive value that animates the Indonesian constitution. Because it requires a strategy constitutionality to the principles of food sovereignty to bring back the values of social justice in the food sector as the idea of constitutionalism, which on the one hand to organize

¹ Sukarno's speech on August 15, 1945 in BPUPKI, based on the script compiled by RM. A.B. Kusuma, enactment of Act of 1945, the Agency Publisher Faculty of Law, University of Indonesia, Jakarta, in 2004 terms. 352

the state power and the other side of the food guarantee protection of rights of citizens. So, it can serve as a normative constitution for the fulfillment of national food sovereignty.

The above conditions have resulted that Indonesia is not sovereign food. Because it requires a strategy to reinforce national food sovereignty using constitutional instruments. Constitutionality food values as contained in the principles of food sovereignty is the judicial approach to address the legal gap in food policy in Indonesia. This paper intends to explore ideas related to legal principles in Constitutionality principles of food sovereignty. Furthermore, exploring the model of constitutionality of food sovereign principles into the legal system in Indonesia.

2. Literature Review

2.1 Constitution and Constitutionalism

In Latin, the term of constitution is a combination of two words, namely *cume* and *statuere*. *Contitutio* singular meaning set something together with the plural form *constituciones* which means everything is predetermined. Lexical definition, the constitution according to the dictionary laws Oxford Dictionary of Law, stated that the "constitution" is defined as the rules and practices that Determine the composition and functions of the organs of the central and local government in a state and Regulate the relationship between individual and the state.¹ From the definition above, it can be stated that the constitution is the written rule and concerns the practices or activities in the state governance (*ongeschreven constitutie* or Unwritten constitution).

Brian Thompson stated that the Constitution is "... a constitution is a document the which contains the rules for the operation of an arganization". The word "constitution" is derived from the French language, which is "constituir" which means "form".² It means to form a country. So that the constitution implies as the beginning of everything is the principal regulations concerning the joints of the first to establish a large building called the state.³ Adnan Buyung Nasution said that the constitution is the highest in the state rules that must be obeyed both by the holders of power in the state and by any citizen. Regarding the role of the constitution in the country, C. F. Strong likens the human body and the constitution as well as the state as a political body organs of the body. Organ will work in harmony if the body in a healthy state and vice versa. State or political bodies will work in accordance with the functions set out in the constitution.⁴ Based on the understanding and role of the constitution in the said country, the meaning of the concept of constitutionalism is the concept of the supremacy of the constitution.

The essence of the constitution is the law which is considered as the highest level. Therefore, the aim of the constitution as the supreme law is to achieve and realize the goal of the highest law. The highest purpose the are: justice, order, and the embodiment of ideals like freedom or liberty and the prosperity and well-being (prosperity and welfare) along, as defined as the purpose of the state by the founders of the state (the founding leaders) or the framers of the Constitution (the framers of the constitution).⁵

Louis Henkin said that constitutionalism has the following elements: (1) *government according to the constitution*; (2) *separation of po-wer*; (3) *sovereignty of the people and democratic government*; (4) *constitutional review*; (5) *independent judiciary*; (6) *limited government subject to a bill of individual rights*; (7) *controlling the police*; (8) *civilian control of the military*; and (9) *no state power, or very limited and strictly circumscribed state power, to suspend the operation of some parts of, or the entire, constitution*.⁶

Nine elements of the constitution can be grouped into two related to the functioning of the constitution as follows: 1).restricting the power of government or authorities in the country. Limitation of power that includes two things: the content and timing of implementation of power control. Content restrictions of power implies that the Constitution specified duties and authority of state institutions. Content restrictions of power implies that the Constitution specified duties and authority of state institutions. 2).Dividing a power in the country between branches of state power (especially the legislative, executive and judicial) to realize a system of checks and balances in the administration of the state.

¹ Oxford Dictionary of Law, Fifth Edition, Oxford Univesity Press, 2003, hal. 108.

² Wiryono Prodjodikoro, 1989, *Azas-azas Hukum Tata Negara Indonesia*, Jakarta, Dian Rakyat, hal. 10.

³ C. A. J. M. Kortman, dalam Taufiqurrohman Syahuri, 2004, *Hukum Konstitusi. Proses dan Prosedur Perubahan UUD di Indonesia 1945 – 2002*, Jakarta, Ghalia Indonesia, hal. 29.

⁴ Ibid, hal. 12

⁵ Jimly Asshiddiqie, 2010, *Konstitusi Ekonomi*, PT Kompas Media Nusantara, Jakarta, hal. 8.

⁶ Henkin, Louis., 2000, "Elements of Constitutionalism." Unpublished Manuscript.

2.2. Human Rights, Citizen Rights and Right to Food

Normative definition of Human Rights (HAM) is a set of rights inherent in the nature and existence of every human being as a creature of God Almighty and it is His grace that must be respected, upheld and protected by the State, Law, Government, and everyone for the respect and protection of human dignity.¹ It means that as a human right is a right inherent in every human person. Human Rights are universal rights possessed by human beings solely because of his position as a human being.

This view implies that characteristics such as race, sex, religion, social status and citizenship are irrelevant to question whether a person has or has not human rights. This implies that these rights can be implemented around the world. One special characteristic of the human rights that apply right now is that it is an international right. Compliance with the similar rights that have been seen as objects of attention and international legal action.²

The right to food is a human right for all people to get food in sufficient quantity and quality to run the essence and dignity as human beings. There should be no one else can suffer from hunger and/or malnutrition or even die because they can not eat. There should be no one else can be or can put people into hunger and / or malnutrition. Food is the most basic needs (primary) in human life, because the right to food is a minimum prerequisite for the fulfillment of the right to life which is the basis for the fulfillment of human rights of others.³ The human rights others arise after the fulfillment of the right to life and the right to food is a minimum prerequisite for the fulfillment of the right to life.

Once the importance of the right to food, the state/government should provide guarantees fulfillment as a form of state responsibility and the constitutional obligation. The fulfillment of the right to food are urgent, immediate, and can not be put off (non-derogable). Therefore, the government should actively provide guarantees for everyone to be free from hunger.

The right to food is a human right that is universal. It reserved both for individuals and groups of people without no discrimination in any form. The recognition of the universality of the right to food has been recognized at the international, regional, and national levels. International recognition normatively has poured in *Universal Declaration of Human Rights (UDHR)*, article 25 yang menyatakan : “everyone has the right to a standard of living adequate for the health and well being of himself and his family, including food...” *Universal Declaration of Human Rights is the highest international legal document which became a symbol of international commitment to the protection of human rights in the world. Further to the provisions stated in article 11 International Covenant on Economic, Social and Cultural Rights (ICESCR)*, on verse (1) concerning right for getting food; and verse (2) concerning right to be free from hunger.⁴ On verse (1) :

“The State Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The State Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.”

Then on verse (2):

“The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international cooperation, the measures, including specific programmes, which are needed: a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian system in such a way as to achieve the most efficient development and utilization of natural resources; b) Taking into account the problems of both food importing and food exporting countries, to ensure an equitable distribution of world food supplies in relation to need.”

2.3. Food Sovereignty

So far, there is little academic studies or systematic papers on the concept of food sovereignty. Instead, it

¹ Lihat Pasal 1 angka 1 UU No. 39 Tahun 1999 tentang Hak Asasi Manusia, dan UU No. 26 Tahun 2000 tentang Pengadilan Hak Asasi Manusia.

² James W. Nickel, *Making Sense of Human Rights Philosophical Reflection on the Universal Declaration of Human Rights*, Alih bahasa: Titi S. Dan Eddy Arini, Jakarta: Gramedia, 1996, hlm. 10.

³ Hak hidup dalam *Universal Declaration of Human Rights* di formulasikan pada Pasal 1, yang dengan demikian dapat ditafsirkan secara sistematis bahwa keberadaan hak hidup adalah yang utama (dipenuhi lebih dahulu) karena dengan pemenuhan hak hidup akan mendasari bagi pemenuhan hak-hak asasi manusia lainnya yang diatur pada pasal-pasal berikutnya.

⁴ Lihat, Philip Alston & Katarina Tomasevski eds, 1984, *International Law and Human Right to Food*, in *The Right To Food*, hal.9 dan 29.

is a concept still in the process of being conceptualized and literally debated among civil society organizations after it was first proposed by the global social movement and family farmers, Via Campesina. For Via Campesina: "Food sovereignty is the right of peoples to define their own food and agriculture, to protect and regulate domestic agricultural production and trade in order to achieve sustainable development goals, to determine the extent to which they want to be independent; [and] to restrict the dumping products in their markets"¹

The idea or framework of food sovereignty is the first introduced by organizations of small farmers and international civil society, The La Via Campesina, the World Food Summit, Rome 1996.² Food sovereignty is the precondition for the fulfillment of the actual food security, in order to realize the fulfillment of the right to food. Rationale is right for everyone (the state) to determine their own food policies in accordance with the conditions and needs of their cultural and environmental sustainability.

The framework of *food sovereignty* is as follows:

Food sovereignty is the right of peoples to define their own food and agriculture; to protect and regulate domestic agricultural production and trade in order to achieve sustainable development objectives; to determine the extent to which they want to be self-reliant; to restrict the dumping of products in their markets; and to provide local fisheries-based communities the priority in managing the use of and the rights to aquatic resources. Food sovereignty does not negate trade, but rather, it promotes the formulation of trade policies and practices that serve the rights of peoples to safe, healthy and ecologically sustainable production.

Normative definition of food sovereignty adopted in Article 1 verse (2) of Indonesian Food Law No. 18 year 2012, namely: "Food sovereignty is the right of the state and nation independently determining the policy of Food which guarantees the right to Food for the people and that gives the right for the public to determine the system food accordance with the potential of local resources.

The principles of food sovereignty as presented by The La Via Campesina, on World Food Summit in Roma in 1996, as follows³ :

- a. Food is a human rights
- b. Agrarian reform
- c. Protection of natural resource
- d. Food trading system
- e. Terminating and eliminating global hunger
- f. Social peace
- g. Control of the democracy

3. Discussion

3.1. Constitutionality of the principles of food sovereignty

The concept of the constitution can be distinguished between the concept of positive constitution (as it is) and the concept of normative constitution (as it ought to be). The Constitution is a constitution that created a positive and / or enforced by a legitimate authority, whether the base form of acceptance or recognition of the people and the basis is the attributive authority. UUD 1945 is positive constitution of the Republic of Indonesia. While the normative constitution is the constitution aspired, constitutional values and the supposed ideal. Normative constitution is the constitution as the law that directs and guides the conduct and interpretation of / for the positive constitution.

Constitutional definition contains a lot of sense. As presented by Mollers, "*Constitution can describe a norm but also a political condition, an object, the document itself or even a function.*"⁴ From the Moller's statement, we could understand that constitution concept can be described in a variety of meanings, because it can be approached from various perspectives. To analyze the exact meaning of the concept of constitution, Moller offering to analyse the meaning of constitution in the third matters: "*a theoretical level that reflects the term with regard to history and legitimacy; a normative level that applies the term as an element of the legal*

¹ Via Campesina, "Priority to people's food sovereignty", 1 November 2001 (see www.peoplesfoodsovereignty.org/statements).

² Steve Suppan, 2008, Challenges for Food Sovereignty, The Fletcher Forum of World Affairs Vo. 32 : 1 Winter 2008, hal. 111.

³ Lihat, Sadie Beauregard, 2009, *Food Policy for People: Incorporating Food Sovereignty Principles Into State Governance (Case Studies of Venezuela, Mali, Ecuador, and Bolivia)*. Urban and Environment Policy, hal.10 – 11.

⁴ Christoph Mollers, Pouvoir constituant – Constitution – Constitutionalisation, dalam Armin von Bogdandy & Jurgen Bast, eds., *Principles of European Constitutional Law*, Hart Publishing, Oxford-Oregon, 2006, p. 183.

system; and descriptive level that uses constitution as a term to analyse institution.”¹ Referring to the opinion, the focus of discussion in this paper is a concept of constitution emphasizes the *normative level*—constitution in applies the term as an element of the legal system.

According to Thomas Paine, expressed in two's argument, namely (1) “A Constitution is not the act of a government, but of a people constituting a government, and a government without a constitution is power without right.” (2) “A constitution is a thing antecedent to a government; and a government is only the creature of a constitution.”² The author uses Paine's quote opinion as an entry point to discuss the issue of the position or the position of the Constitution against the government that is then associated with the analysis of the concept of normative level of the constitution in the legal system.

Based on the Paine's opinion, the existence of the constitution in essence with respect to the legitimacy of government power as a representation or personification of the state to run the government. Furthermore, Paine says the following: “a government without a constitution is power without right.”, In this statement Paine emphasizes that the functional aspects of the position or the position of the constitution of the existence of the government. there first constitution of the government, and the government there because it was created by the Constitution. Based on that idea can be concluded that all of the country must have a constitution. The Paine statement merely descriptive, namely talking about the constitution is, not what should be. It means that by going back to the essence of the constitution above—a body of rules constitutes a government of a country, no country can exist without a constitution since the existence of the constitution meaningless juridical, as well as the existential basis of government. The basic rights of such significance are not questioned as to whether the government would be born by the constitution: Is democracy or autocracy? Is it good or bad? This is consistent with the statement Mueller, that: “A constitution can be thought of as the set of rules that define a community's political institutions. By this definition all communities, even dictatorships, have a constitution.”³

In a more operational definition, the constitution can be interpreted as:

“The constitution establishes the structure of government. It creates the agency of government, describes their functions, and determines their relationships.”⁴ Referring to the definition, constitution has a constitutive function in connection with the government of a state, described by Young: “... determine methods for selection, supervision, and discharge of their officers.”⁵ Based on the notions above, it appears that the government is creating a major issue explicitly in the constitution. That is the main conception of the constitution is to form a working government. Not too important link with the form of the constitution whether written or unwritten.

From the description above, it can be concluded that each country must have a constitution. But even if all countries have constitutions, not all have the Constitution. Related to that Kelsen argued:

*The hierarchical structure of the legal order of a State is roughly as follows : Presupposing the basic norm, the constitution is the highest level within national law. The constitution is here understood, not in a formal but in a material sense. The constitution in the formal sense is a certain solemn document, a set of legal norms that may be changed only under the observation of special prescriptions, the purpos of which it is to render the change of these norms more difficult. The constitution in the material sense consists of those rules which regulate the creation of the general legal norms, in particlar the creation of statutes.*⁶

Based on the said opinion, the position of the constitution is as voted the highest level in the hierarchy of a legal system (a system of laws and regulations). Whether formal or material, the constitution as a legal resident in the highest level in the hierarchy of the legal system of a country, because the constitution is a set rule governing the establishment of the rules of common law in the form of legislation.

In line with these opinions, Larry Alexander argue that:

A more promising way of thinking about constitutions is in terms of their being ‘higher law’. Put differently, constitution are what validate ordinary law – the law produced by legislative and administrative bodies and by common-law courts. Ordinary law is valid law, when it is so, just because it is authorized by the higher law of

¹ Ibid, p. 184.

² Thomas Paine dalam Charles Howard McIlwain, *Constitutionalism : Ancient and Modern*, Cornel University Prss, New York-Ithaca, 1947, p. 2.

³ Dennis C. Mueller, *Constitutional Democracy*, Oxford University Press, Oxford, 1996, p. 43.

⁴ Owen M. Fiss, “The supreme Court 1978 Term – Foreword : The Forms of Justice,” 93 *Harvard Law review* 1979, .

⁵ Ernest A. Young, 2008, *The Constitutive and Entrenchment Functions of Constitution : A Research Agenda*, 10 *University Pennsylvania Journal of Constitutional Law*, p. 400.

⁶ Hans Kelsen, 1961, *General Theory of Law and State*, Russel @ Russel, New York, p : 124.

*the constitution.*¹

The opinion states that the constitutive function of a constitution on a country's legal system in the position and his position as the supreme law (the higher law) in the system. The Constitution serves to validate all positive laws of a country, either legislation or judicial decision.

The important in understanding the meaning of the constitution is a constitutional relationship with the value. Although the debate on the statement that the constitution is value free, as it appears in classic debate in the study of jurisprudence.² The author follows the opinion that it is unlikely the constitution (in this case the law) it is *value free*. As presented by Fuller: *The respect we owe to human laws must surely be something different from the respect we accord to the law of gravitation.*³ Then he said: *to be effective a written constitution must be accepted, at least provisionally, not just a law, but as a good law.*⁴ Approaching to the legal positivism that the law is a value-free or morally neutral, the separation between law (material cargo) with moral values. It is especially dangerous place power as the ultimate answer to the question of validity and the binding force of law to the legal subjects. Eg opinion: the command theory of law which is defended by Bentham and Austin with his thesis: law as the command of the sovereign backed by a sanction⁵. Everything unscrupulous can bind as law throughout formally met the criteria of validity, for example, formed by a body or officer of the state. Therefore the concept of normative constitution is a necessity. It is parallel to the opinion of Luis Recasens Siches, stating: *Every idea of ought to be, of normativity, is based on judgement, that is, on an appreciation of value.*⁶ Normativism of constitution will born a normative constitution concept.

Inclusive legal positivism approach is different than classic positivism approach-dividing expressly between law and morale. *Inclusive legal positivism approach* accept the possible role of morality as the evaluation and criticism of positive law, including determining the material payload ideal. A similar approach is called with the approach of idealism, according to Coyle: *the legal order consist of princiles of justice, which define the extent of individual rights and which, taken together, embody a society's share conceptions of the good.*⁷

Therefore normativisme constitutional approach is expected to reveal the essence of the object being discussed, the constitution is not just a constitutional reality. According to Radbruch, the essence is *value as the principles of its being.*⁸ To find the essence of the constitution will require efforts by conducting philosophical study of the constitution to distinguish between reality with the value of the

In this discussion, justice is the ultimate value of the law. Everything is called laws, including the Constitution. It must originate and can be returned to justice (coherence). As stated by Rawls that: *Justice is the first virtue of social institutions, as truth is of systems of thought. A heory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institution no matter how efficient and well-arranged must be reformed or abolished if they are unjust.*⁹ Keadilan adalah *the first virtue* dari hukum, sebagaimana keadilan adalah *the first virtue of social institutions*. Keadilan adalah landasan normatif hukum yang bersifat *self evident*.

Aspects of the value of justice should be a legal basis, as well as interpret the constitution and at the same time impose a normative demands of the constitution. This approach rejects the view that separate legal/moral

¹ Larry Alexander, 2008, *Constitutions, Judicial Review, Moral Rights, and Democracy : Disentangling the Issue*, dalam Grand Huscroft, ed. *Expounding the Constittion : Essay in Constitutional Theory*, Cambridge University Press, Cambridge, p. 119-120.

² Lihat, perdebatan H.L.A. Hart, *Positivism and th separation of Law and Moral*, 71 Harvard Law Review 1958 dan Lon Fuller, *Positivism and Fidelity to Law-A replay to Professor Hart*, 71 Harvard Law Review 1958.

³ Lon L. Fuller, id., p. 632

⁴ Ibid, p. 642.

⁵ Lihat : Hilaire McCoubrey & Nigel D. White, 1996, *Texbook an Jurisprudence*, Blackstone Press Ltd. Lpndon, p. 13 - 24

⁶ Edgar Bodenheimer, 1970, *Jurisprudence : The philosophy and Method of the Law*, Harvard University Press, Cambridge-Mass, p. 39.

⁷ Sean Coyle, 2007, *From Positivism to Idealism : A Study of the Moral Dimensions of Legality*, ashgate, Aldershot, p. 14.

⁸ Kurt Wilk, 1950, *The Legal Philosophy of Lask, Radbruch and Dabin*, Cambridge-Mass : Harvard University Press, p. 51.

⁹ John Rawls, *A Theory of Justice*, The Belknap Press-Harvard University Press, Cambridge-Mass, 199, p. 3.

constitution. Establishment of a purely descriptive and neutral in addressing law, reducing the law as legislation and reducing the constitution became merely Constitution dominating product, while the science of law is only stating what the legislation such as the law (even if the substance of its immoral).

Constitution which does not based on constitutionalism, or the Constitution which fundamentally contradicts the constitutionalism is not in the real constitution. The new constitution can be said as a constitution if it has been validated by the constitutionalism. So it will produce a constitutional government (not only government which has a constitution as the constitution). Therefore, it is important for the Constitution to adopt prescription constitutionalism into the constitutional provisions. However, it does not mean that the Constitution is not adopted a prescription constitutionalism was unconstitutional. Prescription constitutionalism can perform the function of the spirit of the application and interpretation of the state constitution in everyday life, as well as a gap filler Constitution.

Every person has a legitimate interest in the same demanding that the constitution fight for values or ideals given the same for everyone who ruled with respect to a government, requiring the presence of a government by constitutional design can be a benefit to everyone, or at least limit lest a government effect non-baikkan for the governed.

All countries have a constitution, but not all constitutional. Having the constitution does not automatically give the title as the country / constitutional government.¹ All countries have a constitution is a neutral descriptive terms in the position that any government can exist because it undoubtedly must be established by the constitution. One state is recognized to exist, so it is certain that the country has a constitution. The statement was not made a judgment on the results of the constitutionalism process, namely the qualification of successful governance is established. According to McIlwain, so that the state / government are entitled to the title as the country / constitutional government, then “*All constitutional government is by definition limited government.*”²

Constitution which did not reflect the idea of constitutionalism is not a constitution. Against the existing constitution, but not in accordance with the constitution should be, then imposed a constitution is the constitution that is supposed to be (normative constitution). Relations constitution and constitutionalism is that constitutionalism is normative constitution of a constitution (as the law for the constitution, the constitution of the constitution or the constitution meta).

McIlwain explained, concept of constitutionalism is antithesis despotic governments / arbitrary:

*“in all its successive phases, constitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; it is opposite is despotic government, the government of will instead of law.”*³

Then he said:

*“The two fundamental correlative elements of constitutionalism for which all lovers of liberty must yet fight are the legal limits to arbitrary power and a complete political responsibility of government to the govern.”*⁴

Constitutionalism is the most legitimate normative claims of the constitution, that constitution ideal or idealized is a constitution based on the principle / principles of constitutionalism. The essence of the principle of constitutionalism is the embodiment of justice in the constitution, a government based on the constitution of the fair is limited government (limited government). Constitution as law, to be valid or binding, should have both legitimacy acceptable, not solely because of the power.

As believed by Rawls, that justice is the first virtue of social institutions. Constitutionalism is the first virtue of the constitution in order for the constitution to a government function. Constitutionalism is the basis / principles in order to design a good government or ideal. The concept is good or ideal which must be a sense a priori, and which can be generalized because it is a concept that is acceptable for most people, and therefore the concept is feasible and it is not replaceable.

The concept of constitutionalism as meta constitution related to the concept of justice is what is said by Bodenheimer who identify with the concept of human rights protection demands justice in society reciprocal “

*The concept of justice prevailing in the symbiotic society would be one which ensures the enjoyment of individual rights, such as freedom, a reasonable degree of equality, and security against violence and serious want, to the greatest extent consistent with the public good.”*¹

¹ Bandingkan dengan K.C. Wheare, 1975, *Modern Constitutions*, Oxford University Press, Oxford, p. 135.

² Charles Howard Mc Ilwain, 197, *Constitutionalism : Ancient and Modern*, Cornell University Press, New York-Ithaca, p. 21.

³ Ibid, p. 21-22

⁴ Ibid, p. 146

In line with Dworkin's opinion that: "*if we accept justice as political virtue we want our legislators and other officials to distribute material resources and protect civil liberties so as to secure a morally defensible outcome*".²

Further Bodenheimer formulate normative character of the concept of justice for the law (including the Constitution) as follows:

*"From the point of view of justice, we are deeply interested in the fairness and reasonableness of these rules, principles, and standards, their effects upon human beings, and their worth as measured in term of their contribution to human happiness and productive human effort."*³

The statement can be drawn from the sense that there are three concepts of justice, namely:

- (1) law (rules, principles, and standards) that fairness and reasonableness. Fairness related to the procedure or the procedure, while the reasonableness of concerns about the substance or the substance;
- (2) the impact of law to humans. It involves with integrity or the integrity of the human being which must not violate openly integrity or the integrity of the human being).
- (3) His contribution to human happiness and productive work. Contributions are meant in a positive sense is that the law should be able to give happiness to the people and promote human productive efforts.

The purpose of justice as stated by Bodenheimer is a universal aspiration enforceability nature, a good thing or a positive aspiration of every human being. Penjabarannya through human rights for the purpose of justice is one of the tactics to be realized. The concept of constitutionalism, legal and political, contain a strong justice dimension, at least parallel and can be justified from the point of berdirnya justice as the Philosophical underpinning its because it is a requirement for the achievement of justice as an ideal of common law that concentrated the aspiration of every human being.

Therefore the protection of human rights (in the relationship between the state and the people is the term citizen rights) through the constitution (legal constitutionalism; rights based constitution) as the normative demands of constitutionalism to the constitution of a positive is a reflection of the idea of justice is the most powerful, as is intended in the statement Ramcharan:

"the quest for law and justice is an integral part of humanity's pursuit of better world. The concepts of law and justice are indeed part of the shared heritage of humanity".⁴

State / Government (in the context of human rights) are obliged to treat individuals based on considerations of fairness and reasonableness, which gives a positive influence on their existence as human beings with integrity, happiness, as well as encouraging productive efforts.

In UN report on the right to food prepared by the UN Human Rights Commission in February 2004, food sovereignty is defined as the right of peoples, communities, and countries to determine the system of food production itself, both in the fields of agriculture, fisheries, food and land, as well as other policies which are ecologically, socially, economically and culturally appropriate to the particular circumstances of each⁵. Food sovereignty is an alternative political economic concept proposed and championed by various farmers' organizations and international civil society, and small-scale food producers from various countries, to respond to the globalization of trade policies of neo-liberalism. Regime of free trade and industrialization of agriculture (including food) that has marginalized small farmers and traditional, indigenous / local, traditional fishermen, farm workers and farm worker, and damage to the environment due to the exploration and exploitation.

The idea or framework of food sovereignty is first introduced by organizations of small farmers and international civil society, namely: The La Via Campesina, the World Food Summit, Rome 1996.⁶ It is stated that food sovereignty is a prerequisite for the fulfillment of the actual food safety⁷, as well as the need to realize the

¹ Edgar Bodenheimer, *Anthopological Foundations of Law*, dalam Eugenio Bulygin, et. Al., eds., 1985, *Man, Law and Modern Forms of Life: Proceedings of the 11th World Congress on Philosophy of Law and Sosial Philosophy*, D. Reidle Publishing Co. Dordrecht, p. 11.

² Ronald Dworkin, 1986, *Law's Empire*, The Belknap Press of Harvard University Press, Ca,bridge-Massachusetts, P. 166.

³ Edgar bodenheimer, op cit., p. 177.

⁴ Bertrand G. Ramcharan, *Contemporary Human Rights Ideas*, Routledge, London-New York, 2008, p. 13.

⁵Jennifer del Rosario, Antonio Tujan Jr. (ed), 2007, *Modul Tentang Kedaulatan Pangan, Pesticide Action Network Asia and the Pasific (PAN AP)*, Penang, hal. 6

⁶Steve Suppan, 2008, *Challenges for Food Sovereignty*, The Fletcher Forum of World Affairs Vo. 32 : 1 Winter 2008, hal. 111.

⁷ La Via Campesina. 1996. *Food Sovereignty: A Future Without Hunger*. (www.viacampesina.org).

fulfillment of the right to food for everyone. The rationale is that Food Sovereignty is the right for everyone (the state) to decide about food policies of their own in accordance with the conditions and needs of the cultural (values of local wisdom) them, and environmental sustainability, which focuses on meeting the needs of food to the people rather than food as a tradable commodity.

The principles of food sovereignty as expressed by La Via Campesina is:

Food sovereignty is the right of peoples to define their own food and agriculture; to protect and regulate domestic agricultural production and trade in order to achieve sustainable development objectives; to determine the extent to which they want to be self-reliant; to restrict the dumping of products in their markets; and to provide local fisheries-based communities the priority in managing the use of and the rights to aquatic resources. Food sovereignty does not negate trade, but rather, it promotes the formulation of trade policies and practices that serve the rights of peoples to safe, healthy and ecologically sustainable production.

Food Sovereignty: A Right For All, Political Statement of the NGO/CSO Forum for Food Sovereignty. Rome, June 2002

La Via Campesina Food Sovereignty manifesto introduces the World Food Summit in Rome in 1996. In the manifesto formulated the principles that form the basis for the framework of food sovereignty, which is then referred to as Principles of Food Sovereignty. The principles of food sovereignty is:¹

a. Food and Human Rights

Food is a basic human right. Therefore, everyone should have access to food that is safe, nutritious and in accordance with the customs or cultural traditions, the number (quantity) and quality (quality) are adequate to maintain a healthy life and meet the dignity of his humanity. Every country should be stated that access to food is a constitutional right and the state (government) guarantee the development of primary sector that ensure the concrete realization of this fundamental right.

b. Agrarian reform

The agrarian reform is needed as policies that provide/distribute land to small farmers (landless) and those in need (especially women), ownership and control over land on which they work. The agrarian reform is also intended to restore the indigenous territories to indigenous peoples concerned to re-run productively. Titling of land to be cultivated or worked should be free from discrimination based on gender, religion, race, social class or ideology. Family farmers, especially women, should also have access to productive land, credit, technology, markets and expansion of similar services. Governments should establish and support decentralized rural credit systems that prioritize food production for domestic consumption and ensure food sovereignty are met. The production capacity of the land should be used as collateral for a loan guarantee. To encourage young people to remain in rural communities and together as productive citizens, then the activities of food production and processing of agricultural land should be valued economically and socially. The government should make long-term investments of public resources in the development of social and infra-structure rural ecologically appropriate.

c. Protecting national resource

Food sovereignty requires ongoing basis protection and use of natural resources, especially land, water, plant seeds and livestock breeds. Society who has the right to work the land (farmers) must have the ability and trained to perform the management of natural resources and preserve biodiversity in a sustainable manner. This can only be done with safe security of tenure, healthy soil and reduce the use of chemicals that threaten biological life. Long-term and sustainable means demanding liberation from dependence on chemical inputs, on cash-crop monocultures and intensive, and the model of industrial production. What is needed is a balanced natural farming systems and diverse. Genetic resources (GMO) is the result of thousands of years of evolution and belong to all mankind. They represent the work and knowledge of many generations of rural and indigenous communities. Patents and commercialization of genetic resources by private companies should be banned. The WTO agreement on intellectual property rights related to genetic resources therefore can not be accepted. Farming communities have the right to freely using and protecting diverse genetic resources, including seeds and breeding stock which has been developed by them throughout history.

d. Reorganizing food trade

Food is the primary requirement and a major source of nutrition for human life, but only secondarily treated as an item in the trade (commodity). National agricultural policies must prioritize production for domestic consumption and food self-sufficiency of citizens. Food imports must not displace local production or depress domestic prices. Small farmers have the right to produce food is important for their country and to control the marketing of their own products. The price of food in domestic and international markets must be regulated and reflect the actual costs incurred from the food production process itself. This will ensure that

¹La Vía Campesina, November 11-17, 1996, Rome, Italy; www.viacampesina.org

farmers and farming families have adequate income. It is unacceptable that the trade of food commodities continues to be based on the economic exploitation of the most vulnerable to the lowest earning producers and the further degradation of the environment. The same is the inadmissibility of trade policy and food production is increasingly dictated by the need to earn currency (foreign currencies) are merely to meet the country's debt burden is high. This debt has placed a disproportionate burden on the farmers in rural society and should therefore be abolished.

e. Ending the Globalization of Hunger

Food sovereignty countries ravaged by multi-lateral agencies (Trans National Corporation / TNC and International Finance Institution), and the speculative capital that blindly seeking profits as possible without regard to the interests of other parties (farmers). Growth control of the TNC's agricultural policy has been facilitated by the economic policies of multilateral organizations such as the WTO, World Bank and IMF. Because it takes regulation and taxation on the practice of speculative capital and a strict code of conduct for transnational corporations.

f. Social Peace

Everyone has the right to be free from violence. Food should not be used as a weapon or an instrument of force to suppress other countries and impose their will. Food is an instrument of peace, not the control or power tools. Increased levels of poverty and marginalization in rural communities, along with the suppression of ethnic minorities and indigenous peoples, further aggravated the situation of injustice and despair, especially in some poor countries and conflict. Displacement, forced urbanization, repression and increasing incidence of racism against small farmers is in progress at this time can not be tolerated.

g. Democracy Guided

Small farmers must have direct input or channel for formulating agricultural policies at all levels of the food. The UN and related organizations must undergo a process of democratization to enable this to be true. Everyone has the right to honest, accurate information and open and democratic decision-making. These rights are the basic principles of good governance, accountability and equal participation in economic life, political and social, free from any form of discrimination. Rural women, in particular, should be given directly and actively in decision-making on issues of food and countryside.

The idea of the principles of food sovereignty is basically a response (reaction) to the global trading system that is neo-liberal. The agricultural policy is unequal (benefit countries whose economy is strong). Farmers and farmers' organizations from the northern hemisphere and southern joined in solidarity to oppose trade liberalization and actively promote the concept of food sovereignty as an alternative frameworks of international food policy.

3.2. Food Constitutionality Model

Because it takes a supreme norm that it is higher than the legislation. The norm is expected to become an instrument at the same normative control testing stone towards legislation deviating or contrary to the values of food. Supreme norms that are to be the norm that contains the values of justice, as there are in the wild notion of food sovereignty. Constitution is an attempt to formulate ideas about the food into the supreme norm that is positive in the constitution or the constitution. There are several models of juridical strategy food constitutionalization that can be done in Indonesia, namely:

a. Recognition of the right to food explicitly in the constitution.

Recognition of the right to food can be done explicitly (directly) into the Constitution (1945) as part of the human rights of every individual / person / citizens or certain categories of the population / society, such as children, women, or laborers. Such models can be found in the Constitution of South Africa, which is stipulated in article 27:

Everyone has the right to have access to

a. (...)

b. *Sufficient food and water; and*

c. *Social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.*

The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.

Referring to the above model, explicitly and clearly, protection guarantee of the right to adequate food is formulated in the body of the constitution, as it has been done in countries such as South Africa above. This means that required new construction totally different to the structure used in constitution all this time. With the apparent construction, the substance of the constitution does not need ambiguity, so the concern is loaded with political interpretation of the provisions of norms in the constitution does not need to happen.

During the formulation of the food rights protection in the Constitution does not explicitly loaded. Formulations of food rights explicitly can also be done by amending Article 28A, by adding a clause including

the right to adequate food as details alongside other fundamental rights. In this model the constitutional provisions referring to the right to food is to make the clause outlining. For comparison is the formulation of the food on the constitutional protection of some Belarusian state as follows:

1. The right to food as a human right is as one component of a decent standard of living or quality of life measure. Such models can be seen in the Belarusian state constitution, namely article 21.2:

Every individual shall exercise the right to a dignified standard of living, including appropriate food, clothing, housing and like-wise a continuous improvement of necessary living conditions.

2. In addition there are the country's constitution which explicitly includes the right to food as a human right for certain groups or categories of people, such as children or workers. Colombia for example, the state constitution, article 44 which states: *Children have fundamental rights to: life, integrity, health and social security, and adequate food.*

While Brazil's state constitution guarantees the fulfillment of the right to food explicitly to workers or labor. Article 7 states:

The following are rights of urban and rural workers, among others that aim to improve their social conditions:

....

IV – nationality unified minimum wage, established by law, capable of satisfying their basic living needs and those of their families with housing, food, education, health, leisure, clothing, hygiene, transportation and social security, with periodical adjustments to maintain its purchasing power.

As described in the first part of this paper, the legal consequences of excellence in the context of the constitution is hierarchical national legal norms that all norms of legislation or law or sub legislation must not contradict (coherent and / or consistent) with the constitution. Therefore, in case of conflict between the provisions of the normative constitution with provisions in the legislation, the provisions in constitution must be won. Recognition of the right to food directly on the substance of the constitution will provide a broad effect on all state agencies (the executive-legislative-judicial). Administrative practices of public services and safeguards for members of society's most vulnerable can be used as a standard of the highest possible for people who are relatively powerless to fight the government's actions and asked for an explanation and accountability from government, violating their rights to obtain food by / the exact mechanism through the courts.

The court (Constitutional Court) can discuss the question of whether the measures taken by the government can be considered in compliance with the state's obligation to provide or realize the right to food is guaranteed by the state constitution. If public officials and the courts have a deep knowledge of the provisions or norms that exist in the constitution, and apply them in their day-to-day, the immediate recognition (explicit) right to food as part of the substance of the constitution will ensure (at least in theory) that the right to food will be brought into all fields of activities, in a state based on human rights.

b. *Directive Principles of State Policy*

Directive principles of State Policy is a statement / direction / guidance / instructions that are fundamental or principal, it basically represent the ideals aspired or desired by the community, even in the process of developing them maybe not reflect the social reality clear / concrete or abstract formula. As an illustration of the Republic of Indonesia ever has Outlines of State Policy (Guidelines) that in the "Orde Baru" period became directive principles of the policy. The formulation of GBHN's norm is set in the Decree MPR R.I. since the format of the position of the Assembly is the highest state body. So the position of MPR R.I. at that time also supreme than law and other laws made by state agencies. In the said position, then the responsibility of the state to guarantee the right to food to the people can be loaded in the Guidelines that have a higher authority than laws. Thus Guidelines (should) be able to perform the functions of normative control of the government policies related to food.

Model directive principle of the states of the policy was originally known in the Irish Constitution in 1937 in terms of the Directive Principles of State Policy, which contains the principles to be used as a reference for every operator in formulating various policies of state and government of an operational nature.¹ *The text of Directive Principles of State Policy* includes the main principles regarding social and economic policy which should be used as a handle or guidelines for the legislative branch of state government in formulating policies through legislation.

Directive Principles of State Policy functioned as a constitutional guideline which is not intended to be used or enforced in the courts for the benefit of individuals. But for the sake of keeping the policies of state and government are running under the constitutional reference. High Court (Supreme Court) granted the authority to assess or control normative constitutional or constitutional review of legislation that contains policies that are considered contrary to the constitution. In the context of food policy, the values set forth in the provisions of Directive principles of state policy that will guide the actions of the government (the executive-legislative-

¹Jimly Assiddiqie, 2010, *Konstitusi Ekonomi*, Jakarta, PT Kompas Media Nusantara, hal. 193.

judicial), particularly related to the food industry (and agriculture) in order not to deviate or contrary to the principles of sovereignty food.

c. Implicit recognition through the formulation of a broad interpretation of human rights norms of other (non-food).

There are many countries in the formulation of the substance of the constitution does not contain clear and unequivocal right to food. Norm of the right to food is not formulated as the right to food, but only implicitly contains provisions on guaranteeing the right to food or nutrition. But that does not mean that the demands of the right to food and then not be guaranteed by the state. This means that required further interpretation to a clause to ensure that the country can not be separated from its responsibility to provide jamian the right to food to its citizens. There is no reason for the government once not guarantee the right to food to the public for reasons no reference to the provisions of konstitu-sionalnya (no norm in the Constitution).

Guarantee the right to food (either partially or completely) can be associated with human rights guarantees the fulfillment of other species, which implicitly implies or related to the right to food. For example if the right to food linked to the right to a standard of living adequate or right to welfare, the right to the means necessary to ensure and lead a dignified life, the right to be provided with a standard of living not below the subsistence level, and the right to a minimum wage to ensure the existence of human dignity. Likewise, the Constitution of the Republic of Indonesia was also not clearly and expressly contains provisions on the right to food, and systematically interpreted as part of Article 28A. Several other countries are usually interpret the right to life and the right to freedom from torture and degrading treatment.

Although there is no direct and unequivocal recognition of the right to food in the constitution of the country, it does not mean that the right to food will not be covered at all in the country. It will largely depend on the country's legal traditions, to categorize other human rights can be interpreted as the right to food. The combination of a constitutional provision (human rights) that other countries with policy commitments (political will) and Directive pricipal recognized by the state, it can be used to advance the implementation of the right to food.

The experience of some countries have shown that the government is accountable for ensuring the implementation of the right to food effectively under conditions (mean or linked) with other categories of human rights contained in the constitution. However, the extent of the human rights provisions of the other (civil rights and political and economic rights and other social) can provide effective protection of the right to food at the national level, ultimately depends on the legal interpretation of the jurists of the constitution country and whether human rights are granted (for example the right to life) to be interpreted broadly so that also included therein is the right to food.

In Indonesia, the realization of the right to food is also a constitutional obligation of the state. The key task of the country has been enshrined in the Constitution (UUD 1945), which is to promote the general welfare, educating the nation and participate in the establishment of world order based on freedom, lasting peace and social justice. The constitution mandates to the government as a responsible state officials to meet civil rights and political and ESC citizens. Connection with efforts to fulfill the right to food, the constitution set it in some article, among others:

- Article 27 paragraph (2), "Every citizen has the right to work and a decent living for humanity".
- Article 28A, "Everyone has the right to live and to defend their life".
- Article 28C paragraph (1), "Everyone has the right to develop themselves through the fulfillment of basic needs, is entitled to education and to benefit from science and technology, arts and culture, in order to improve the quality of life and for the welfare of mankind".
- Article 28H paragraph (1), "Everone has the right to live physical and spiritual prosperity, reside, and get a good environment and healthy and receive medical care".
- Article 28H paragraph (2), "Everyone is entitled to the ease and special treatment to obtain the same opportunities and benefits in order to achieve equality and justice".
- Section 28H (3), "Everyone is entitled to social security that allows development of his or her self as a dignified human being".

And to strengthen the promotion and fulfillment of the constitutional rights of the citizens, the 1945 Constitution Article 28 paragraph (4) mandates that, "The protection, promotion, enforcement and fulfillment of human rights is the responsibility of the state, especially the government."

4. Conclusion

From the above discussion it can be concluded that the principles of food sovereignty is to meet the criteria of legal principles that became the idea of the constitution or the constitution of the underlying normative or formulated in positive constitution. This is based on the principles of food sovereignty is present values of

justice, democracy, sovereignty, collectivity, environmental protection, and siding with those who are poor, which is the virtue value. Those values become positive constitutionalism to the constitution.

The normative constitution can be formulated in the Indonesian legal system in the form of: 1) Recognition of the right to food explicitly in the constitution; 2) Recognition of the right to food contained in the principles or direction in the state policy (Directive Principles of State Policy); and 3) Recognition implicitly through the formulation of a broad interpretation of human rights norms of other (non-food).

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