

# Embodying Green Constitution by Applying Good Governance

## Principle for Maintaining Sustainable Environment

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### Abstract.

This research project is aimed at elaborating and exploring an effective solution for recovering and improving the quality of environment. The solution will be focused on embodying the green constitution which emphasizes the importance of the protection and management of environmental function. This approach is required to simplify and to coherence the chaotic regulation in exploiting strategic natural resources which has impacted on the massive destruction of environment. It covers not only the first extinction, but also the secondary extinction of environment. In Indonesia, those chaotic regulations have been sparked by the national policy of regional autonomy that allow the regional government exploit their strategic natural resources, such as forest, fishing, coral reef, and other natural resources. The above condition has simulated many regions in producing and enacting regional regulations to exploit their natural resources. The lack coordination in issuing regional policy and regulation has caused many diametrical regulations that have exacerbated the quality of environmental protection and management. In anticipating the deterioration of the quality of environment, this paper offers administrative approach in embodying the green constitution. This approach refers to the application of the good governance principles in controlling, protecting and managing the function of environment.

### Introduction

The damage and destruction of the environment due to industrial activity, mass consumption, modern lifestyles, and human greed, has encouraged the emergence of concern and ecological awareness. Global community is now charged with the role and greater responsibility and to address the serious problems faced by the environment and prevent environmental damage and more severe. It is now increasingly believed the importance of sustainable development that notice and consider the environmental aspects of sustainability our planet, human life, animals, plants and other species. There is a terminology and concepts of green which until are now not widely understood, namely green constitution. The terminology and concepts of green constitution is a new phenomenon among practitioners and academics, who deal about environmental issue. In principle, green constitution raises degree of environmental protection into the constitution. Thus, the importance of the principles of environmentally sustainable development and environmental protection must be evident through a strong principle in the legislation. On that basis, green constitution and then introduce the terminology and concepts called ecocracy which emphasizes the importance of environmental sovereignty. Constitutional issues occupy center stage in federal and state efforts to protect land, air, water, species, and habitat,<sup>1</sup> perhaps fuelled by the U.S. Supreme Court's ambivalence about environmental protection.<sup>2</sup> Indeed, from 2005-2010, more than 50 percent of the nearly 400 federal cases yielded reported decisions involving environmental, natural resources or energy law and policy turned on a constitutional question, including most often standing, sovereign immunity, takings and due process, and with increasing

<sup>1</sup> See generally Robert V.Percival, "Greening" the Constitution-Harmonizing Environmental and Constitutional Values," 32 *Envtl. L.* 809, 840 (2002).

<sup>2</sup> See Richard J.Lazarus, Restoring What's Environmental About Environmental Law in the Supreme Court, 47 *UCLA L. ev.* 703, 749-52 (2000)

frequency, political question, pre-emption and federalism.<sup>3</sup> Current developments indicate growing recognition regarding congressional and state constitutional authority to address environmental matters, including climate change, and judicial authority, takings and standing.<sup>4</sup>

## Problems

### *2.1 Symptomatic problems: destructed forest, first extinction, secondary extinction*

Symptomatic problem is undesired effect which is a consequence of the conflict between regulations at the central level and regional level either in the form of vertical or horizontal patterns.<sup>5</sup> For example: 1. Ministry of Forestry Decree NO. 317/KPTS-II/1999 About Right to Collect Forest Indigenous People in Production Forest Areas with Minister of Agrarian / Head of BPN Regulation No. 5 of 1999 on Guidelines for Land Rights Settlement have the same settings on Indigenous Peoples but contradict each other. In Ministry of Forestry Decree said that existence of Adat law communities in a particular area is declared and defined the decree while the same thing by saying that the existence of Agrarian Permenag indigenous determined by local regulation. 2. Local Regulation (Perda) Central Java Province No.6 of 2002 about Water in Under Soil contradict with Law No. 7 of 2004 About Water Resources. 2. Local Regulation (Perda) Selayar Regency No. 17 of 2003 About Utilization of Marine National Park Conservation Taka Bonerate contradict with Law No. 5 of 1990 About Conservation of Natural Resources and Ecosystem and Law No. 41 of 1999 About Forestry. The above conflict clearly create uncertainty in managing and exploiting natural resources such as forest, mining, water and so forth. Further consequence uncertainty can be seen from the huge of deforestation of forest. According to the World Resources in 2004, deforestation of forest has reached the level of serious threats. In 20 years world Resources know there are 48 million hectare of forest were destructed. Indonesia's deforestation rate at this time period by 1.51 million ha / year. Based on its location, the greatest deforestation in Borneo in the amount of 0.55 million hectares per year and the rate of deforestation of Sumatra at 0.37 million hectares per year. Based on the rate of deforestation in the period 2000-2009 by ignoring the grouping by function, is estimated by the year 2020 will be depleted forests in Java, Bali and Nusa Tenggara remaining 0.08 million hectares, 2.37 hectares Maluku, Sulawesi 7.20 hectare, Sumatra 7, 72 hectares, 21.29 million hectares Kalimantan and Papua 33.45 million hectares (Forest Watch Indonesia, [www.fwi.or.id](http://www.fwi.or.id), 2012). Some countries such as Brazil, Democratic Republic of Congo and Indonesia which have huge potential for the growing and maintaining of biological diversities have suffered from the deforestation. Indonesia for example, in the beginning of 20 century has densely forest country which has 84% of the total land area. The above conflict has been exacerbated by national policy on regional autonomy. This policy has shift central authority (central government authority) to regional level. Consequently, the policy has stimulate many regional governments to exploit their natural resources based on their own interest in partial and local framework. This exploitation also has sparked the clash among of regional governments (For example: Operations performed and Forestry Police Headquarter against those involved in illegal logging in West Kalimantan Ketapang that resulted in the removal of some officials from West Kalimantan Forest Service Chief, Police Chief and the Police Chief of West Kalimantan Ketapang and ranks. Logging is done by unscrupulous local officials are almost lost Ketapang woods around 7,000 hectares of forest a year. Including the area of Mount Palong and protected forests Bukit Lawang. From forest to loggers hauling logs Meranti and Bangkirai, in the international market prices of both wood reaches 18 million rupiah per cubic meter. However, the barons of the forest Ketapang spend 3 million rupiah. Based on the report Tempo is very difficult to eradicate illegal logging fight because the alleged involvement of security forces in the field (TEMPO, *Pembalakan di Ketapang*, Edition April 14-20 2008 p. 104). This is because every regional government own has their own interest. In addition the above conflict has accumulated with the interest of corporation (For example: A lot of deforestation in Riau masterminded by big paper company Asia Pulp and Paper (APP) and Asia Pacific Resources rival International Holding Limited (APRIL), which holds 80% of the accumulated total pulp capacity in Indonesia

<sup>3</sup> Research conducted with "Lexis Focus Search," searching "Environment and Natural Resource and Energy," date restricted to "previous 5 years." Within these cases, an additional search was conducted using the search terms "Environment and Natural Resource and Energy" along with the particular constitutional issue "and (constitutional issue)." For instance, to search 11<sup>th</sup> amendment issues "Environment and Natural Resource and Energy and eleventh amendment" was used. Of the results, cases were examined individually to confirm the constitutional issue. Last searched 1 August, 2010.

<sup>4</sup> See James R. May, *New and Emerging Constitutional Theories and The Future of Environmental Protection*, Environmental Law Institute 40 ELR 10989 (2010).

<sup>5</sup> Personal communication with Hayyan UI Haq April 28 2012, see Hayyan UI Haq in *Creating Coordinate Structure in The Contract of the Transfer of Technology*, International Journal of Technology Transfer and Commercialization.

and control of two pulp mills largest in the world.<sup>6</sup> That tends to emphasize the profit interest, not philanthropic interest even tend to ignore the obligation to maintain conservation to sustainability to the environment. Add the level grassroots the forestation has been caused by the way of people to exploit the natural resources without considering the national interest. This can be seen from many illegal logging cases (Adelin Lis Case an example of a case that drew the attention of the public is the release of Adelin Lis by the judge who tried the case, which was previously prosecuted by the public prosecutor in the District Court of Medan on October 22, 2007 with demands 10 years imprisonment, a fine of 1 billion subsidy 6 months confinement, and must pay compensation of Rp 119 billion and U.S. \$ 2 million. Acquittal was read by the Medan District Court Judge on November 5, 2007 raises the pros and cons and recriminations between police were investigating the case with the Attorney General Adelin Lis Field. Meanwhile, the release of Adelin Lis apparently leaving question marks, because it turns out the letter had come out before the release of District Court Judges reading the verdict, the decision of exemption has been issued by the Chief of the Detention Tanjung Gusta dated 3 November 2007.<sup>7</sup> All of deforestation has caused first extinction biological diversities and damage all of the potential natural resources for defending the survival of collective life. As a sequence of the first extinction it has create new treats and disaster for the environment. That is a secondary extinction for example is visualize through the rising of sea level.

### *2.2 Core problems: Incoherence regulation accumulated with diametrical interests from various parties*

Core problems, in this contexts are causes that create the symptomatic problems or undesired effect. In this respect the core problem could be seen at the incoherence regulation and diametrical interest of various parties. Related to the incoherence regulation, in September 2006 more than 5550 regional regulations (PERDA) have been submitted to the Departement of Domestic Affairs.<sup>8</sup>

Most of the cancelled regulation are related to green policy and regulation. (For example: PERDA Sintang Regency No. 7 of 2000 About Forest Product Permit Retribution, PERDA Serang Regency No. 12 of 2002 About Publishing List Transportation Replacement of Forest, PERDA Kapuas regency No. 9 of 2003 About Timber Utilization Permit Granting Soil Reserved). For that reason it is necessary to underlined the green policy and regulation by introducing strong explicit fundamental legal reason. In this respect the fundamental legal reason could be formal under the 1945 Constitution Article 28 (1) (h) which emphasize the status and position of good environment, healthy living and good health care as a part of the core elements of human rights. This article has explicitly express the characteristic of 1945 Constitution as the Green Constitution as the Green Constitution. Under legal theory, all of regulation rules, policy should be coherence with the constitution. This concept obliged all policies, regulations and other rules either at the national level, regional level should respect and advocate environment. Unfortunately, the above ideal legal theories, has been ignore at the practical level, where many regional government tend to visualize and emphasize their own local interest. That has been influence by corporation (Kompas search results illustrate togetherness forces, thugs, and timber barons in Borneo during the year 2001-2005 are always visible in the big city: Kuching, Samarinda, Banjarmasin, Tawau to the Mahakam river upstream far inland. From the logging camp, nightclubs, office related institutions to home apparatus, familiarity is very intertwined. Giving gifts electronic equipment and even lent a luxury car is a natural symbiosis between the barons, gangsters and government officials in illegal timber logging business.<sup>9</sup>

Thus, all the policies and actions of government and development should be subject to the provisions concerning the human right to good environment and healthy. There should no longer be a policy set forth in the form of laws or regulations under laws that are contrary to the pro-environmental constitutional provisions. Moreover, Indonesia is an archipelago which is very fragile and prone to natural disasters. If the environment is not protected, natural damage that occurs will harm the nation of Indonesia itself. Starting from the real of the constitution, (UUD 1945), Act No. 32 of 2009 on Environmental Protection and Management set a clear philosophy of how important the green values are absolutely necessary in the preparation of the Act include regional regulation.

### *2.3 A Structural Theory of Imperialism: Exploring the Causes*

<sup>6</sup> IFCA (2007) Strategies to Reduce Carbon Emissions from the Pulp and Paper and Plantation Sectors in Indonesia, Initial Draft, October 9, 2007, expert paper to IFCA, unpublished.

<sup>7</sup> Koran Tempo, Bolong Sebelum Sidang, 26 November-2 Desember 2007.

<sup>8</sup> I Gusti Ayu, K.R.H., Formulation Model of Regional Regulation Legal Drafting Based on Green Legislation, *Research Report*, Sebelas Maret University, 2010.

<sup>9</sup> Kompas 7 Maret 2006

The structural theory of imperialism has an approach to exploitation which came out of one particular question: when the terms of trade are right, but what then defines them as right? The theory suggested that this would never be enough; that in addition to exchange aspects of interaction, one also had to look at the “in change” aspect, the intra-action that takes place within both parties as a consequence of the interaction. Clearly, exploitation or inequality differs from inequality in being some type of structure-induced inequality. But that is not merely a question of what meets the naked eye and can be measured as the net value flow between periphery and center; it is also what goes on inside the periphery and inside the center as a result. This “something” can be referred to as spin offs or externalities, in other words, as costs and benefits not accounted for (not compensated for, not paid for).<sup>10</sup> Theory structure of imperialism from sociologist Johan Galtung based on his concept about Center and Periphery countries and center and periphery groupings.

There is of course the disharmony in center/periphery relations inside the country, be that a Center or a periphery country. This certainly does not mean that they cannot both grow together as they can also both go down together. The disharmony is expressed in very differential rates, even when they are both positive and they are both negative (thus it is not at all presupposed that it is positive for the center and zero or negative for the periphery). Moreover, it is assumed that the disharmony in the periphery is bigger than the disharmony in the center; this is the second major axis around which the theory of the four groupings is woven.<sup>11</sup> For example Bupati of Buol Case accepting bribes from Haryati Murdaya.

#### **The significance of the function of environment**

Reasonably the function of environment not only related to abiotic and culture but also human rights aspect. Traditionally the function of environment is more related to the capacity to environment to support system abiotic, biotic, culture. However, in juridical perspective the issue of environment has been regulated under the 1945 Constitution Article 28 (1) (h) (See sub section 2.2). The Green Constitution has been constructed through second amandement of the Constitution in August 18<sup>th</sup> 2000.

In this context this construction has clearly show the awerness of Indonesia Government in protecting, maintaining and concerning on natural resources, its environment and functions. Undoubtedly the significance of environment function has surveys not abiotic, biotic, culture and human rights issue.

The concept of environmental functions is defined as possible uses of our natural, biophysical surroundings that are useful for humans. Uses can be either passive or direct and practical. The services of environmental functions are defined as their possibilities or potential to be used by humans for whatever end. Some functions can be conceived as consumption goods while others as capital goods. Producing is defined in conformity with standard economics, as adding value (by transforming one good into another to satisfy wants). As soon as the use of a function is at the expense of another (or the same) function, or threatens to be so in the future, there is competition of function. Competing function are economic goods, because they fully meet the definition of scarcity. Function has been changed from free goods with an economic value zero into scarce goods with an ever higher positive value. The significance of the function of environment is water and food resources, catchment areas, biodiversity, local Uses and flood mitigation.

#### **Defending the function of environment in maintaining the sustainability of collective life**

##### *4.1 Green constitution: basic concept, rationales and advantages.*

Turkey recently started a campaign calling for an ecological constitution (Initiative for an Ecological Constitution/IEC). Since Turkey has been talking about making a new constitution, which is supposed to value the individual, then we should be talking about an ecological approach to it. The Turkey role models are Bolivia and Ecuador, which understand the value and rights of Mother Earth. The IEC believes in this approach of the Latin American states because neither the European states nor the United States have been able to fully address the issue even though there are some examples like France, which has a Green Charter, and some states in the US, which have been adopting ecologically sensitive laws.

Ecuador is the first constitution in the world to recognize legally enforceable Rights of Nature. Although a small country, Ecuador is home to the Galapagos Islands, Andean Mountains, and Amazon rainforest as it is a geologically and ethnically diverse country. Ecuador took a bold step in 2008 to add Rights for Nature to their new constitution providing a system of environmental protection based on rights.

<sup>10</sup> Johan Galtung, A Structural Theory of Imperialism, page 5 (1970)

<sup>11</sup> Johan Galtung, A Structural Theory of Imperialism, page 15 (1970)

Turkish laws treat ecosystems as articles of property that give land owners the right to destroy even fragile ecosystems, but that a lot of governments have started to enact environmental regulations to limit harm to ecosystems and impose fines for damage. Conventional environmental policies are not sufficient to address looming environmental crisis; therefore an ecological constitution is a must. If this issue had been underlined in the constitution, then laws, bylaws and practices would be more meaningful. Humans are not owners of the ecological balance but they are part of it. In the context of Indonesia, green constitution is reflected in the notion of power and human rights and the concept of economic democracy as defined by the 1945 Constitution. Article 28 H Paragraph (1) and Article 33 Paragraph (4) of the Constitution which provides the constitutional basis for green constitution. Thus, the norms of environmental protection in Indonesia is actually now have a stronger based. However, there are not many public policy makers and society in the country who know and understand about this important case. That is why the program is necessary to disseminate knowledge and understanding of green constitution.

#### *4.2 Administrative approaches: embodying good governance principles*

From 1999 when Indonesia's decentralization policy was adopted, many people were pessimistic. This arose from rampant negative practices that characterized the conduct of local government officials. To others, decentralization (local autonomy) was seen as a potential cure to some the country's ills. Nevertheless excesses like corruption have emerged.<sup>12</sup> In some cases, local government regulations do not take into account the interests of citizens<sup>13</sup>. Moreover, the investment climate is not attractive to businesses.<sup>14</sup> Embodying good governance principle must apply by administrative approaches include in central and local government like Indonesia.

##### *4.2.1. Properness principle*

Does the public have that right to public information? If the answer is yes, the how is this right acknowledged, protected and given? This question has turned into long debate. James Madison, a founding father of the American Constitution said: popular government without popular information or the means to provide it is only a long journey to a buffoonery or tragedy or both. Knowledge will always organize the ignorant and people who want themselves organized, or organize themselves on their own, must arm themselves with the power derived from knowledge'. The principal policy document of ADB said that "access to accurate information at the right time about the economy and government policies can be vital for private sector policy making." Transparency is needed so that the citizens get that access to information on what was, what is and what will be done by government. So far, in the case of Indonesia, information control is still highly dominated by the government, especially the executive. The legislature which should have authority to control is not capable enough and their access to information is very limited. Under conditions like this, roles that should be played by the legislative institutions are inadequate. In addition to that, at the citizens' levels, access to information is equally insufficient. When the legislative institutions cannot work maximally and the citizens do not make inputs to their representatives, government works unrestrained.

In the end, transparency is an issue of considerable importance due to the following: First, a knowledgeable public well equipped with information participates more in the democratic processes; secondly, parliament, press, and public must be capable and swiftly follow and investigate governmental actions which is a prime obstacle to accountability; thirdly, public services makes important decisions that affects many people, to be accountable then administrators must provide a feedback mechanism of information concerning what it is doing now; fourthly, good channels of information are bound to result in a government which more effective and helps to create more flexible policies; and fifthly cooperation between the public and government shall improve through the abundant information available.

All men and women have opportunities to improve or maintain their well-being. Legal frameworks should be fair and enforced impartially, particularly the laws on human right.

##### *4.2.2 Participation principle*

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<sup>12</sup> Pramusinto, A. Building Good Governance in Indonesia Cases of Local Government Efforts to Enhance in Indonesia, p. 4-5, 2006

<sup>13</sup> World Bank, *Governance and Development*, World Bank, Washington DC, 1992

<sup>14</sup> SMERU, *Regional Autonomy and the Business Climate: North Sulawesi and Gorontalo*,

SMERU, Jakarta, 2001.



Participation must be understood as a right and not a privilege granted to the people by government. It must as well be seen as a voluntary process from the citizens and not a mobilization process conducted by government apparatuses that end up in *enforced participation*. Government throughout the New Order period embraced the practice of engineered participation. Whenever there were people's involvement, emphasis was put more on implementation of development programs already made by government. Other forms of participation were oppressed to bring about social shock which would disturb the investment climate. Participation is necessary for the legitimization of government policies. Citizen's participation in every public policy is a process of expressing views more specifically channelling complaints against government services which is perceived to be unsatisfactory. Mediums of participation are meant to allow the citizens to be heard, understood, respected, get an explanation and listen to apologies from government besides getting information about remedial actions to correct mistakes made by government.

#### *4.3.3 Transparency principle*

There is a very strong relationship between transparency and political participation. The push to undertake participation was instigated by the changes in the political structures termed democracy, whereby citizens insist on the formation of a political arrangement which allows room for different groups in the civil society to join in the public policy processes. In political sciences, political participation consists of activities connected to voting, electoral campaigning, and non-partisan lobbying<sup>7</sup>. From a public policy perspective however, political participation is defined more at the levels of involvement of society in the process of public decision making.

#### *4.3.4 Accountability principle*

The Parliament and local government must be made responsible and accountable for all manner of conduct and policies made to the public. Currently in Indonesia there is a phenomenon that the local government head became a suspect in a criminal case of illegal logging, corruption and other criminal cases. It is shown that governments are less accountable for what the authorities well although there has been both internal and external control.

#### *4.3.5 Human rights principle*

Human rights, especially citizens of the State of Indonesia are provided for in Article 28 (H) of the 1945 Constitution and include the right to good environment and healthy living. In lagging regions, many people are having water shortages, so people take water for eating and drinking, bathing and washing from polluted rivers.

#### **Coherence principle in simplifying and solving chaotic regulations and diametrical interests**

The Forestry Ministry Number SK. 317/KPTS-II/1999 on the Rights of Indigenous and collection of indigenous forest in the area of production forests and the Agrarian Ministry Decree / Head of BPN Number 5 of 1999 on Guidelines for Communal Land Dispute Resolution rights regulate the Indigenous Peoples, but contradict each other. In SK, the Ministry of Forestry said that the existence of community law on a particular area declared and determined by the SK Regent while the Agrarian law said that indigenous peoples are determined by local regulations. Here there is a discrepancy regarding the form of formal arrangement concerning the existence of indigenous peoples in the region. The SK Menhutbun requires setting the container in the form of SK Regent commonly used for material arrangements that are concrete and tied to a particular space and time. While PERDA tends to be a provision that is more general and abstract that need to be translated through the provision further. SK Regent is a one-sided legal unilateral administrative officer (Regents) that revocation is the unilateral authority of the Regents.

From 2001-2009, there were 3091 problematic legislation in Indonesia. By 2010 there were 3000 regulations that had been cancelled because it conflicted with Central Regulation.

#### **Conclusion and Recommendation**

Embodying the green constitution which emphasizes the importance of the protection and management of environmental function is needed. This approach is required to simplify and to give coherence to the chaotic regulation dealing with the exploitation of strategic natural resources, which has impacted on the massive destruction of environment. It covers not only the first extinction, but also the secondary extinction of environment. In Indonesia, those chaotic regulations have been sparked by the national policy of regional autonomy that allow the regional government exploit their strategic natural resources, such as forest, fishing, coral reef, and other natural resources. The above condition has simulated many regions in producing and enacting regional regulations to exploit their natural resources. The lack coordination in issuing regional policy and regulation has caused many diametrical regulations that have exacerbated the quality of environmental protection and management. In anticipating the deterioration of the quality of environment, this paper suggests an administrative approach in embodying the green

constitution. This approach refers to the application of the good governance principles *in controlling, protecting and managing the function of environment*.

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