

# Green Constitution as an Effort to Strengthen Environmental Legal Norms in Indonesia

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Provisions regarding the Environment formulated in the 1945 Constitution are contained in Article 28H paragraph (1) and Article 33 paragraph (4) of the 1945 Constitution, which confirms that "every person has the right to a prosperous physical and spiritual life, to live and obtain a good and healthy environment, and also the right to obtain health services". This article shows that the 1945 Constitution highly respects the right to a good and healthy environment and health services. The green policies reflected in several articles of the 1945 Constitution have not yet become a fundamental tool for environmental law enforcers and the community to preserve the environment, because there are still many cases of ever-worsening environmental damage, such as forest fires, which have a major impact on state losses. The legal problem is: "What role does the concept of a Green Constitution, as detailed in the 1945 Constitution of the Republic of Indonesia, have in securing human rights to a sustainable environment?" The purpose of this study is to analyse the concept of a Green Constitution in the Indonesian Constitution. The method used in this paper is normative juridical study of constitutional norms and laws and regulations related to the environment. It is hoped that through this paper, the concept of a Green Constitution in Indonesia can be applied through the making of a constitution of environmental legal norms, as regulated and in the provisions of Article 28H paragraph (1) and Article 33 paragraph (4) of the 1945 Constitution of the Republic of Indonesia. It is also hoped that this paper can highlight the considerations a, b, and f of Article 1 number (2), Article 44, Elucidation of Part I General number (1) and (5) of Law Number 32 of Year 2009 concerning the guarantee of the human rights of citizens to a good and healthy environment.

**Key words:** *Green - Constitution- Indonesia.*



## Introduction

The Republic of Indonesia is a country whose citizens are closely united and who overcome all individual or group understandings to guarantee that every citizen is equal in law and government, without exception. This includes guarantees to a good and healthy environment, which is a right that must be accepted by all Indonesian citizens, without exception (Huda, 2010). The environmental problem is a very risky problem that requires joint attention, especially from the state, one of Indonesia's largest organisations.

In recent decades, environmental problems have become increasingly widespread, which afflicts life at the national and international levels. Legal awareness of the importance of a good and healthy environment is increasingly experiencing a drastic decline. Everyday human activities that directly impact nature but do not preserve it result in deteriorating environmental conditions. The Government, as the State Operator, has a large role in environmental preservation and is strict in regulating its preservation. For this reason, it is not enough that the preservation of the environment is regulated by laws; it must be included in the Constitution itself, because the constitution is the highest law in the Republic of Indonesia. If Environmental Conservation and protection is regulated in the Constitution, safeguards will be even stronger.

The integration of Environmental Policy (Green Policy) into legislation products can also be translated into English with green legislation (Asshidiqie, 2010). Therefore, if these legal norms are adopted by the text of the Basic Law, then this is called a Green Constitution. Basically, Green Constitution is the inclusion of environmental legal norms into the constitution by raising the degree of environmental protection norms to constitutional level. This is done in order to realise the human rights of citizens to a good and healthy environment. In Indonesia, the application of a Green Constitution is reflected in the 1945 Constitution of the Republic of Indonesia. The concept of human rights to a good and healthy environment is reflected in Article 28H Paragraph (1) and Article 33 Paragraph (4) of the Basic Law of the Year 1945 (1945 Constitution), and also reflected in the concept of democracy by the principle of sustainable development (sustainable development) and environmental insight. These things provide a constitutional basis for a Green Constitution.

Indonesia should have strong guidelines to protect the values of environmental sustainability, because they have been guaranteed such in the constitution; however, environmental problems are experiencing significant increase. The repeated occurrence of forest and land fires illustrates that the policy makers do not fully understand the concept of the Green Constitution contained in the 1945 Constitution. Therefore, a program is needed to disseminate knowledge about the understanding of the Green Constitution and ecocracy. The

Green Constitution program is designed to fulfill the needs of a good and healthy environment for the community.

## **Method**

The type of research used in this study was normative legal research or what could be referred to as doctrinal law research. In normative research, laws are conceptualized based on what is written in the legislation or based on the rules, norms, or benchmarks of human behaviour that was considered appropriate. The normative legal research for this study was library law research (Soekanto, 2007). Data collection was done by using library research techniques (library research), which included examining textual sources that related to the topics in this study, such as laws, regulations, and literature that has a relationship with the study's main problem.

In this study, the analysis used by the writer was a qualitative analysis, not by using statistics, but by obtaining descriptive data. It focused on the general principles and units that are symptomatic of human life (Ashsofa, 2010). Furthermore, the writer drew both general and specific deductions and conclusions from the data. The process of drawing these conclusions was started by looking at the real factors and ended by determining how the factors were connected by theories (Rasyad, 2005).

## **Result and Discussion**

### ***a. Constitutional Theory***

The term constitution is a term that is very old, because the constitution was known in ancient Greece; however, the constitution at that time was still interpreted materially, meaning that the constitution had not been put in a written text (Indra, 2011).

The term constitution, according to Wirjono Prodjodikoro, comes from the verb *constituer* in French, which means "to form", so the constitution means formation. In this context, what is "formed" is a country. The constitution contains the fundamentals of all sorts of regulations, which comprise the first joints that support the basic building that is a country (Firdaus, 2010).

According to Miriam Budiardjo, there are similarities in the characteristics of the provisions in the Constitution: The first is state organizations, for example the division of power between the legislative, executive, and judiciary bodies, and the relationship between the three. The Constitution also contains the form of the state along with the distribution of power, it contains procedures to resolve the issue of violation of jurisdiction by one of the state or government bodies, and so on. The second is the human rights. The third is the

procedure to amend the Constitution (amendments). The fourth is a limited set of conditions that prohibit the change of certain characteristics of the Constitution. The fifth is that the Constitution is the highest legal rule binding all citizens and state institutions (Budiardjo, 2008).

The main point of the theory of Kelsen is that, whether it is formal or material, the constitution occupies the highest level in the national hierarchy or legal system of a country, because the constitution is a set of rules that govern the formation of general legal norms, laws, and regulations. (Kurnia, 2014).

### ***b. Law State***

The rule of law is a term that, although seemingly simple, contains a relatively long history of thought. Rule of law is an Indonesian term formed from two syllables: state and law. This word equivalent shows the form and nature of the complementary contents between the state, on the one hand, and the law, on the other. The purpose of the state is to maintain law and order (*rechtsorde*). Therefore, the state needs the law and vice versa. The law is implemented and enforced through state authority (El-Muhtaj, 2012).

Ellydar Chaidir put forward the view of the important elements of a rule of law, which are an absolute requirement: (Chaidir, 2007)

- a. The principle of recognition and protection of human rights
- b. Principle of legality
- c. The principle of division of state power
- d. The principle of free and impartial justice
- e. The principle of popular sovereignty
- f. The principle of democracy
- g. Constitutional principle

The State of Indonesia, as a State of law, has independent characteristics, because the goal of the State of Indonesia is the realisation of a just and prosperous society, both spiritual and material, based on Pancasila. According to Azhari, the Pancasila rule of law has the following characteristics: (1) there is a close relationship between religion and the State; (2) relies on the Godhead of the One; (3) religious freedom in a positive sense; 4) atheism is not justified and communism is forbidden; and (5) the principle of family and harmony (Azahary, 2003).

**c. *Environmental Law in Indonesia***

Nationally, various efforts have been made by the government, including by creating legal regulations, especially those related to the Environment. One of the latest legal products that has been passed by the government is Law Number 32 of Year 2009 concerning Environmental Protection and Management. The law, which took effect in October 2009 and is listed in the Republic of Indonesia State Gazette of 2009 Number 140, replaces the role of Law Number 23 of 1997 concerning Environmental Management. Law Number 32 of 2009 is believed to have a level of completeness and discussion which is more comprehensive than Law No. 23 of 1997.

In Article 1 number 1 Chapter I General Provisions of Law number 32 of 2009 Concerning Environmental Protection and Management, it is stated that understanding the environment is understanding the unity of space with all things; understanding objects, powers, conditions, and living things, including humans and their behaviour, that affect nature itself; understanding the continuity of life; and understanding the well-being of humans and living things (*Undang-Undang Nomor 32 Tahun 2009 Tentang Perlindungan dan Pengelolaan Lingkungan Hidup, 2009*).

Internationally, concerns and awareness of the environment and the future of the earth are manifested in the form of a series of international laws, various multilateral forum meetings, and various activities specifically related to the issues concerning it. The State ratifies international law on the environment, engages in multilateral and bilateral agreements on the environment, enforces domestic policies on the environment, and carries out programs related to the environment. Lately, national and international corporations have begun to pay attention to environmental issues through various corporate social responsibility activities in the form of, for example, planting trees, environmental education, and environmental socialisation. In addition, civil society is involved in various activities that relate to the importance of instilling and spreading environmental awareness.

In addition to creating various legal regulations related to environmental law, preventive measures that control environmental impacts also need to be carried out by making maximum use of the instruments of supervision and licensing. In the event that pollution and environmental damage have occurred, repressive efforts, in the form of effective and consistent law enforcement, must be actioned against environmental pollution and damage that has already occurred.

***d. The Concept of Green Constitution in Indonesia as an Enforcement of Environmental Law***

A good and healthy environment is a human right and constitutional right for every Indonesian citizen, as stipulated in the 1945 Constitution of the Republic of Indonesia. Therefore, the state, the government, and all stakeholders are obliged to carry out environmental protection and management in the implementation of sustainable development so that Indonesia's environment can remain a source of and support for life for the people of Indonesia and other living things.

The real proof that Indonesia has adopted a Green Constitution is the adoption of environmental values into the constitution. This is reflected in Article 28 H paragraph (1) and Article 33 paragraph (4) of the 1945 Constitution, which leads to a Green Constitution by guaranteeing citizens' rights to a good and healthy environment. Article 28 H paragraph (1) reads, "Every people have the right to live in physical and spiritual prosperity, to live and to have a good and healthy living environment, and the right to obtain health services." (Undang-Undang Dasar Negara Republik Indonesia Tahun 1945)

From this paragraph, it is shown that the State protects the environment in order to protect the human rights of its citizens. Furthermore, Article 33 paragraph 4 of the 1945 Constitution states, "The national economy is based on economic democracy with the principles of togetherness, fair efficiency, sustainable, environmentally friendly, independent, and by maintaining a balance of progress and national economic unity." Based on this article, Indonesia has basically applied the concept of ecocracy, namely environmental sovereignty, through a government that has obeyed the principles of ecologically sustainable development.

One idea to protect the environment is to place environmental rights arrangements in the state constitution as a commitment to environmental protection and management. A Green Constitution (Green Constitution) addresses various kinds of community concerns regarding the decline in environmental functions, as stated by (Priyanata, 2010):

"This country is seeing an unstoppable process of ecological crunch, a threatening ecological disaster where millions of people continue to bet on their own safety and their families due to the weak role of the state in protecting the safety of its citizens, as mandated in the country's Constitution".

The green principle is basically a commitment to the environment as part of an ideology that places human relations with the natural world in a position of utmost importance. This has the consequence of increasing efficiency in the development of activities without sacrificing environmental sustainability.

The constitutionality of the protection of human rights for the environment is increasingly reinforced by the enactment of Law 32 of 2009, as explained earlier. Law 32 of 2009 is a new phase in the recognition and guarantee of the protection of human rights for the environment.

Other important affirmations are stated in Article 3 letter g of Law 32 of 2009:

"Environmental protection and management aims to ensure the fulfillment and protection of the right to the environment as part of human rights."

And Article 65 paragraph (1) of Act 32 of 2009, which states:

"Everyone has the right to a good and healthy environment as part of human rights."

The affirmation of the right to the environment found its momentum when the Stockholm Declaration was born on 5 June 1972. The first principle of the declaration states: "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being."

This declaration further strengthens the steps to respect and protect the integrity of the global environment and the development system. This is further emphasized by this excerpt: "Human beings are the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."

Appointment of the environment in a central position has the right, besides reminding us of the importance of the environmental position. The growth of human awareness of the environment is expected to increase. The culture of respecting the environment is becoming human culture and humans' love of the environment is getting stronger. In addition, the conception of environmental law, according to Mashhur Effendi and Taufani Sukmana Evandri, is expected to strengthen the confidence of the authorities to take care of the environment and avoid making wrong decisions. Thus, we can leave a good and healthy living environment to our children and grandchildren and not be sued by it (Effendi, 2007).

In juridical terms, the instrument of environmental regulation in Indonesia at this time is sufficient to illustrate that environmental law has a very important position in the state; however, at the level of implementation, practices that damage the environment always occurs, and percentage frequency of such practices has increased every year. The environmental destroyers do not fully understand the role of Green Constitution as a guarantee of citizens' rights by the State.

The process of licensing and supervision carried out by the government, regional government, and law enforcement agencies in the enforcement of environmental law is actually not optimal because it is still considered weak, and the principles regarding the application of sustainable environmental insights are still far from complete.

Physical development that is not supported by environmental sustainability will accelerate the damage to the surrounding environment. Most natural damage is caused by human activities and behaviours that are not environmentally friendly. For this reason, it is necessary to strive for a form of sustainable and environmentally sound development.

However, this arrangement is still too abstract in its implementation. The State must encourage every person and legal entity to protect nature and must promote respect for all elements in the interests of ecosystem unity, which is not expressly regulated in the opening of the 1945 Constitution, which states that the state protects all Indonesian blood, and is instead regulated in various laws in the field of Environmental Management.

The environment should be managed properly in order to provide life and welfare for humans. The objectives of environmental management are as follows: (Sunu, 2001)

- a) The achievement of harmony in the relationship between humans and the environment, with the goal to develop a whole person.
- b) The controlled, wise use of resources.
- c) Manifestation of an environment builder.
- d) Implementation of environmentally sound development for present and future generations.
- e) The protection of the state against the impacts of activities outside the national territory that cause damage and environmental pollution.

The current constitution in Indonesia is the highest legal foundation and is used as a basis for the administration of the state. This can be a positive thing if the constitution incorporates matters and rights regarding environmental management. Affirmation of the right to the environment will prevent the overlapping of laws and regulations and make the legislation harmonious, because it comes directly from the constitution.

Every country that claims to be a constitutional democracy must guarantee these fundamental human rights as constitutional rights. Therefore, Indonesia, as a constitutional democracy, should provide a constitutional guarantee of a good environment. This guarantee could have a positive impact on environmental protection in several respects. First, constitutional guarantees provide the basis for the relations between the people's, state, and the environment. Constitutional provisions have the highest rank in the hierarchy of norms, so

they provide a level of certainty and strength that is greater than that of laws, administrative regulations, or court decisions (Rudy, 2015).

Second, constitutional provisions can be a tool of coordination in environmental protection. In this context, constitutional guarantees could be a beacon of coordination on environmental protection for all legal instruments, thereby making it easier to submit constitutional reviews of regulations that are detrimental to the environment (Rudy, 2015).

Third, constitutional guarantees can foster and empower greater community participation in environmental protection (Rudy, 2015).

Based on the explanation of the juridical points above, Indonesia has actually applied the concept of ecocracy, a sovereignty of the environment or ecosystem in which a government bases its governance on obedience to the principles of ecologically sustainable development. Ecocracy is an effort to prioritize environmentally sustainable development in the political flow of national development based on the constitution (Rahmadi, 2018); however, although Indonesia has constitutionally recognized the subjective right or duty of the state, the patterns and directions for sustainable development has not been placed in specific articles, but has rather been superimposed or mixed with other fundamental rights. This is partly due to a lack of effort by the government and the private sector to guarantee the fundamental rights of citizens to a good and healthy environment.

An example of ecocracy that not being fully guaranteed in the laws and regulations of Indonesia can be found in Law Number 32 of 2009, contained in Article 69 paragraph (1) item h, which reads, "Everyone is prohibited from: opening land by burning."

Similarly, article 69 paragraph (2) provides a loophole for certain elements to destroy the environment:

"The provisions referred to in paragraph (1) letter h take seriously the local wisdom in each area."

In the explanation of article 69 paragraph (2), it is said that:

"Local wisdom referred to in this provision is to burn land with a maximum land area of 2 hectares per head for families planted with local varieties of plants and surrounded by firebreaks to prevent the spread of fire to the surrounding area."

This means that article 69 paragraph (2) deviates from the concept of ecocracy, that is promoting sustainable development with an environmental perspective. Therefore, according

to the hierarchy of laws and regulations stated in Law Number 12 of 2011 concerning the Formation of Laws and Regulations, the Government of Indonesia is obliged to adjust all laws and regulations in Indonesia to become sustainable and environmentally sound.

The integration of environmental legal norms into the articles of the Constitution should make human rights guarantees stronger. By including these legal norms in the Basic Law, every legislative product made by a parliamentary body can be controlled, because they must comply with constitutional norms. The parliamentary forum, which usually has to compromise conflicting interests to reflect the lives of those represented by the people's representatives, must submit to the constitution as the highest law. This wave of awareness to incorporate environmental legal norms into the text of Basic Law is what Jimly Asshiddiqie calls the constitutionalisation of environmental policy, which is the Second Wave in the development of environmental policy.

The Green Constitution addresses various kinds of community concerns regarding the decline in environmental functions. Every country that claims to be a constitutional democracy must guarantee these fundamental human rights as constitutional rights. Indonesia, as a constitutional democracy, is supposed to provide a constitutional guarantee of a good environment for every state warge. This guarantee could have a positive impact on environmental protection in several respects. First, constitutional guarantees provide the basis for the relations between the people's, state, and the environment. Constitutional provisions have the highest rank in the hierarchy of norms, so they provide a level of certainty and strength that is greater than that of laws, administrative regulations, or court decisions.

Reforms or changes that occur in policies about the environment are expected to make fundamental changes. There are a number of things that have led to the achievement of environmental management objectives, namely: (Sriyanto, 2007)

- 1) Strengthening community social control through development, transparency, and community participation, especially in the decision making process.
- 2) Justice for the people in their use of the environment. Every decision taken must involve and be for the welfare of the people at large. The community is given access to the widest possible environmental management.
- 3) Simplification of procedures, such as creating a simple, quick, easy procedure in controlling environmental impacts, that enable communities to complain and argue about environmental impacts that concern their interests.
- 4) Balance between exploration and conservation. Natural resources and available artificial resources need to be optimised for the welfare of the community.
- 5) However, at the same time, the conservation of natural and artificial resources must be taken into account (adequate conservation).



- 6) Decentralization. This policy is based on the fact that in the management of the environment, there is delegation of authority to the relevant regional government.
- 7) Integrated approach. Considering that the environment cannot be separated (such as a watershed), it is necessary to develop policies that accommodate integration in environmental management.

### **Conclusion**

Green Constitution is the strongest foundation upon which Indonesia's national development of environmental perspective can be realised. Green Constitution also reinforces the model of environmental law enforcement, which has so far been deemed ineffective due to the declining function of a good and healthy environment. In the future, the concept of a Green Constitution, which at this time has been incorporated into several articles in the 1945 Constitution, can realize the ecocracy of every aspect of national life. Thus, all policy makers must always prioritize the green principle in the establishment of laws and regulations in Indonesia.

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