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Legality versus Morality: Moral Reading and the Case of Pemilukada in Tulang Bawang Regency of Lampung Province

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Abstract

General Election for the Head of Local Government (Pemilukada) has become one of problematic features in our democratic ways of managing the nation. This problematic feature is happening in many regions; in Lampung, the problem of Pemilukada has been encompassing the problem concerning legality versus morality. Specifically, Tulang Bawang Local General Election Commission which has been hailed as winner by Administrative Court, decided guilty ethically and morally by Election Organizer Ethics Council (DKPP). Five members of the Tulang Bawang KPUD acted unprofessionally by annulling the couple from the election.

Academically, a core difficulty in the search for justice is the coexistence of different legal and moral system since there are three legal and moral efforts which has been given to Pemilukada participant: Legal effort through Administrative Court (PTUN), Moral effort through Ethic Hearing and the last is through Constitutional Court (MK) which operates within the area of legal and moral. The systems are coexistence, thus creating the confusion of legality versus morality.

This article takes one aspect of the question of the search for justice, that is related to the ubiquitous phenomenon of legality and morality. The article thereby attempts to place the problems of Pemilukada within the discussion of legal versus moral using Dworkin moral reading doctrine and moral function that Raz believes lawmaking must aim to fulfill. These doctrines, thus, shall be framed in MK decision as the court of legal and moral. This paper turns attention on how MK is responding to resolve the duality of legality versus morality. While the MK itself was designed to operate encompassing political, moral, legal, and social aspect of nation just like the typical civil law centralized constitutional

court, the approach taken by MK in the case of Pemilukada in Tulang Bawang is purely legal.

Keyword: Legality, Morality, General Election, Constitutional Court.

A. Introduction

Decentralization has become the trend around the world[1]. Nearly all countries worldwide are now experimenting with decentralization. Their motivations are different. Many countries are decentralizing because they believe this can help stimulate economic growth or reduce rural poverty. Some countries see it as a way to off load expensive responsibilities onto lower level governments. At the same time, donors such as the World Bank sometimes require the promotion of decentralization as conditionality of assistance.[2] Even it is not proven yet, decentralization is seen as an effective method to many different kinds of problems.

In the case of Indonesia, decentralization recognition can be found in the Constitution of Indonesia, Article 18 of constitution states that Indonesia is divided into large and small regions and recognizes for their autonomy and their legal origins. Decentralization recognizes that the central government must delegate certain amount of government responsibilities to sub national levels. It is a broadly held view that a decentralized system matches Indonesia, which is known for its long inter-island distances, rich cultural heterogeneity, and widely divergent social economic conditions.

During the New Order, the Indonesian government pursued a policy of decentralization within framework a unitary state. To this end, a two tiers system of regional government was established based on Law 5 of 1974 concerning Local Government. However, centralizing tendencies have strongly, and successfully, obstructed official decentralization policies for the sake of government control and national integration.

The fall of President Soeharto in May 1998 marked the beginning of a new relationship between the central and local governments. The protest in favor of reform and democratization expanded to the regions before and after Soeharto's downfall. Calls for an end to corruption and nepotism at the national level were replicated at provincial, district, and even village levels. Many regions demanded fiscal independence from Jakarta and more political

[1] Dillinger, 1995, "Decentralization, Politics and Public Sector." In A. Estache ed., *Decentralizing Infrastructure: Advantages and Limitations*. Washington DC: World Bank Discussion Papers 290.

[2] JICA. 2001. *Government Decentralization Reform in Developing Countries*. Japan: Institute for International Cooperation, JICA

importance[3].

In response to structural and political drivers, East Asian governments have taken different approaches to decentralization, combining standard elements of delegation, deconcentration, and devolution found in many intergovernmental reforms around the world. The fast starter such as Indonesia has rapidly introduced major structural, institutional, and fiscal reforms in response to a sudden and far-reaching political stimulus. Sweeping decentralization reforms were introduced through "Big Bang" decentralization in the aftermath of Soeharto's fall and the 1997 financial crisis in Indonesia. These fast starters introduced the basic elements of a decentralization framework, sub national democratic elections, and substantial resource sharing[4].

The House of Representatives (the DPR), formed through democratic general elections in June 1999, passed new Law No. 22 Year 1999 on Local Government that took effect on 1 January 2001. With the devolution of authority to the lower levels of government, certain questions inevitably arose. In extending the authority of the regions, would decentralization weaken and perhaps even disrupt local governance? Many people saw decentralization as signaling the official recognition of regionalism, which had re-emerged not only in the political sphere but also in the active promotion of local cultures, languages, traditions and customs. Others feared that certain regions could become virtually separate states and that the expression of social cultural and ethnic differences, if encouraged, would adversely impact the concept of a specifically Indonesian character and culture.

The new Law No. 22 Year 1999 on Local Government featured the effective abolition of hierarchical structures between regions and the clarification of fiscal relations between central and local governments[5]. USAID[6] describes the legislation:

> *The first of these laws, Law 22/1999, assigns to central government only key national functions such as defense, judiciary, foreign relations and the monetary and fiscal system, while devolving most authorities directly to local governments (city and district). The roles of provinces were minimized, restricted largely to inter-district functions and governance and management of deconcentrated central government functions. The law gives local government great autonomy over most of the functions that affect people most directly, including urban*

[3] Michael Malley, 1999. "Regions: Centralization and Resistance." In Donald Emmerson ed., *Indonesia Beyond Suharto: Polity, Economy, Society, and Transition*. New York: ME Sharpe.

[4] World Bank, 2005, *East Asia Decentralize: Making Local Government Work*. Washington. DC: World Bank.

[5] IDE-JETRO. 2000. Indonesia Entering New Era: Abdurrahman Wahid Government and Its Challenge. IDE Spot Survey, Institute of Developing Economies.

[6] USAID. 2000. "Transition to Prospering and Democratic Indonesia, Country Strategic Paper, November. Available at: http://www.usaid.gov/id/docs-csp2kes.html.

services, primary and secondary education, public and basic health services, environmental management, planning and local economic development.

This law adopted the local democracy model as described by Halligan ınd Aulich[7] that:

The local democracy model values local differences and system diversity because local authority has both the capacity and the legitimacy for the local voice. This means that local authority can and will make choices that differ from those made by others.

Even with its weaknesses, it is generally accepted by politicians and ;cholars that the passage of Local Government Law No. 22 of 1999 after the ›ig bang decentralization was one of the most important political events in the egislation in term of local autonomy guarantee. However, some features of Law Vo. 22 Year 1999 model did not satisfy Provincial Local Governments, which vas in some ways, did not have important role in decentralization process. According to Law No. 22 Year 1999 each autonomous region is independent ınd there was no longer any hierarchical relationship between the provinces ınd regencies/municipalities government.

After more than three and half year implementation, both national and nternational communities praised the decentralization process as a success. The success could be demonstrated by how the Indonesians quickly adjusted o massive and drastic changes from a very strong centralized government, ;iven only one year of preparation. The relatively smooth ‹ransfer of 2 million :ivil servants (Koran Tempo, 14th July 2001) might be the symbol of smooth levolution process that did not create significant social or political unrest. The :entral government, especially some line ministries, is still trying to be involved nore in the local activities, and it is understandable given their almost absolute ›ower in the past. The local governments might be still in the learning process ›n how to rely on their own but they are learning quickly.

Almost at the end of Megawati Soekarnoputri presidency, there was a ;ingle event that is very influential in determining the future of Indonesian lecentralization: the House of Representatives approval of the revision of ;aw 22 Year 1999 concerning Local Government and Law No. 25 Year 1999 :oncerning Intergovernmental Fiscal Relationships. In the end of 2004, Law Vo. 32 Year 2004 was enacted to replace Law No. 22 Year 1999 and effectively mplemented in 2005. The Presidential Election overshadowed the event itself, ›ut its importance was obvious.

Law No. 32 Year 2004 was brought mainly because of the failure of :oordination functions of provincial local governments under Law No. 22 Year

[7] John Halligan and Chris Aulich. 1998. Reforming Australian Government: Impact ınd Implication for Local Public Administration in Reforming Government: New Concept and Practices in Local Public Administration. Tokyo: EROPA Local Government Center.

1999 framework. With the amended law, the provincial local governments have the authority to do monitoring and evaluation process over the regencies and municipalities in their area. Some argue that with the amendment, the provincial local governments and the governor will become powerful again in the near future and that may explain why the governor election is still intense and interesting. By giving more power to the provincial local governments, the central government is trying to break the intense relationship between provincial and local governments that sometimes leads to the ignorance of local governments on the existence of provincial government.

The new law brought many revisions prior to Law 22 Year 1999. The important changes include hierarchical system among the central government, provinces, and municipalities/regencies and direct election for governors and mayors/regents by popular votes. Broad local autonomy is applied, which means that local governments have the right to regulate and maintain all government affairs with the exception of central government authority stipulated in the law (Elucidation of Law No. 32 Year 2004).

In Law 32 Year 2004, political accountability at the local level now includes the accountability of the local government head (governor/regent/mayor) to both of the constituents, via direct elections, and to the local assembly. Vertical accountability in the form of reports from the municipalities/regencies government heads to the governor and to the Ministry of Home Affairs, covering technical and administrative aspects of governance, has also been reworked through this law.

Based on Law No. 32 Year 2004, the process of democratization and decentralization moved another step forward in June and July of the year 2005 when direct elections were conducted for a large number of regency heads, city mayors and provincial governors. Local direct elections are held by popular votes to elect governors or mayors/regents. This provision was not provided in the Law No. 22 Year 1999. Direct election by popular vote is the important provision in the new law; it gives the means to communities to elect their own leaders democratically. Thus, it gives local government heads legitimacy over the regions, brings him/her closer to community and finally may be more accountable. Yet although this sounds promising, many Indonesian observers feel pessimistic about some of the trends that are emerging and ask whether these direct elections have really promoted democracy at the local level.

This current arrangement, built into Law 32 Year 2004, is a response to the demand for greater democracy at the local level, and represents a significant change from the approach seen in Law 22 Year 1999, where the DPRD was dominant in representing the people and selecting the local head. The change was seen as necessary in view of the wide-spread allegation that DPRD members, and political parties, abused their powers by "selling" the local head

offices to the highest bidder[8].

A political party or an amalgam of parties that has reached a certain threshold can put a combined local head and vice-local head ticket forward to the Regional Election Commission (KPUD) (Article 56 and Article 59 Law No. 32 Year 2004). The new rules also encourage parties to open the candidacy to persons either within the party ranks or from the larger community, and for the party to conduct the selection in a democratic way. Post MK decision on independent candidate, currently independent candidate can compete with the contestant representing political party. Local government heads are then elected using the majority run-off system directly by constituent.

The many factors affecting decentralization include local capacities, political and social histories and unresolved conflicts, local forms of social organization, including the role of development agencies, state and government resistance to decentralization, the cost of change, and the extent of commitment to democratic participation. A major problem is that of governments transferring inadequate powers to actors who are not themselves accountable to local populations[9]. Direct election, to some extent has become a law institution providing a safeguard for democratic accountability so that sound policies could be delivered in the decentralization process.

Indonesia's surge towards democratization was one of the most dramatic events of the late twentieth century. Change and transition are unsettling in themselves. Undoubtedly there has been much pain associated with the birth of this new democracy. Nevertheless, a remarkable opening-up of political space, democratic safeguard on political institution, the regeneration of civil society, a freeing of the media and a positive spirit demanding greater accountability from government have all emerged. Today broader ranges of citizens feel they are partners and active stakeholders in the governance of Indonesia.

In addition, decentralization has changed several fundamental ways in governing Indonesia. It has been colored not only by sweet story of decentralization impact but also by many problems arising within its implementation. Ultimately, regional autonomy is not just a matter of regulating the relationships between the various levels of governments; rather it is also about regulating the relationship between the state and the people. Regional autonomy is essentially the responsibility of the local population, because it is ultimately the people's right to administer their own system of government in a manner that will accommodate their own laws, ethics and local traditions[10]. This is to be ultimately achieved through their representatives in the local

[8] USAID, Supra note 6.

[9] Jesse C Ribot, 2002, *Democratic Decentralization of Natural Resources: Institutionalizing Popular Participation*. Washington, DC: World Resources Institute.

[10] H. Sumitro Maskun, 1999. "Otonomi dan Masa Depan Integrasi Bangsa." (Regional Autonomy and the Future of Indonesian Unity). Orasi Ilmiah pada Acara Peluncuran Jurnal OTONOMI. Jakarta.

parliament and head of local government by way of the free elections.

After 7 years of implementation, General Election for the Head of Local Government (Pemilukada) has become one of problematic feature in our democratic ways of managing the pluralist nation. This problematic feature is happening in many regions; in Lampung, the problem of Pemilukada has been encompassing the problem legality versus morality. Specifically, Tulang Bawang Local General Election Commission which has been hailed as winner by Administrative Court, decided guilty ethically and morally by Election Organizer Ethics Council (DKPP). Five members of the Tulang Bawang KPUD acted unprofessionally by annulling the pair from the election.

Academically, a core difficulty in the search for justice is the coexistence of different legal and moral system since there are three legal and moral efforts has been given to Pemilukada participant: Legal effort through Administrative Court (PTUN), Moral effort through Ethic Hearing and the last is through Constitutional Court (MK) which operates within the area of legal and moral. The systems are coexistence, thus creating the confusion of legality versus morality. This paper turns attention on how MK is responding to resolve the duality of legality versus morality in its decision. The analysis is involving the moral theory of Raz, moral reading of Ronald Dworkin and the institutional design of civil law type constitutional court.

B. Case of Pemilukada in Tulang Bawang Regency Lampung Province

Tulang Bawang Regency which called "SAI BUMI NENGAH NYAPPUR" formed pursuant to base on Law No. 2 Year 1997 with Menggala as its capital. Based on administration views, Tulang Bawang regency divided into 28 district of definitive and 239 kampongs (sub-district) with amount of its resident 839.889 in person with have earn to agricultural sector and fishery sector, plantation commodity which is dominated palm with rubber, sugar cane and cassava.

Tulang Bawang Regency in 27 September 2012 had held general election for regents. The problem of Pemilukada in Tulang Bawang Regency started since Tulang Bawang General Elections Commission (KPUD) decided that Frans Agung MP did not pass the threshold to join the election. Previously, the Tulang Bawang KPUD endorsed Frans Mulia, together with three other pairs, as Regents candidates. However, it revised its decision, saying that parties supporting Frans Agung MP did not fulfill the minimum threshold to join the election basing on double support from parties.

Table 1.
Tulang Bawang Pemilukada Candidate

lo. Urut	Nama Pasangan Calon	Keterangan
1	Hi. ISMET RONI, S.H.	Calon Bupati
	SOLIHAH, A.Ma.	Calon Wakil Bupati
2	Ir. HANAN A. ROZAK, M.S.	Calon Bupati
	HERI WARDOYO, S.H.	Calon Wakil Bupati
3	MARZUKI, S.Sos	Calon Bupati
	NASROLLAH	Calon Wakil Bupati

Frans Agung MP then took the case to the Administrative Court against : KPUD Decision. Bandar Lampung Administrative Court rejects Frans ung MP Petition. While waiting the decision of Medan Administrative urt, Frans Agung MP put petition to The Election Organizer Ethics Council KPP) basing his petition that Tulang Bawang General Elections Commission PUD) violating the code of ethics by one-sidedly annulling the candidacy of ns Agung MP.

The Election Organizer Ethics Council (DKPP) through Decision No. DKPP-PKE-I/2012 dismissed the chairman of the Tulang Bawang General ctions Commission (KPUD) and four members for misconduct, following a al dispute surrounding the Pemilukada in Tulang Bawang. During a hearing the KPU headquarters in Jakarta, the DKPP said that five KPUD members re found guilty of violating the code of ethics by one-sidedly annulling the ndidacy of Frans Agung MP. Five members of the Tulang Bawang KPUD ed unprofessionally [by annulling the pair from the election]. DKPP saying t Tulang Bawang KPUD decision created public uncertainty and reduced : public's trust in the commission.

In the same time, the dispute of local election of Tulang Bawang Regency d reached MK. However, MK did not consider the DKPP Decision for the pute. By decision No. 72/PHPU.D-X/2012 MK dismiss Frans Agung case.

Positivist Tradition of Adjudication in Indonesia

Indonesia legal theory has always been markedly positivist in conceiving v as a set of norms established by legislators and other properly authorized blic officers. Such prevailing view, influenced by Dutch formalism, which planted Civil Law[11] when Indonesia was one of its colonies, was definitely

[11] The civil code or civil law system is also called by other names such as *Roman , Continental law* or *Napoleonic law*. All are systems where laws are legislated by liament or some other form of representative government and codified (i.e. brought ether). They are distinguished from common law mainly because they come from

consolidated in the early 1970's. Since then, an excessive attachment to the law text has been observed in both judges and courts. Legal interpretation constituted a syllogism: the major premise was the applicable statute, the minor premise was the facts, and the conclusion was the decision itself. Indonesia positivism has thus developed beneath the myth of the objectivity of law.

Indonesia did not have a long tradition of constitutional interpretation; its approach of interpretation has been influenced by the classical method of statutory interpretation of civil tradition. In addition to legal teaching in Indonesia, which largely concerns the conventional canon of methods, it also follows Roman legal tradition by installing a pandectist system of civil law. This involves a concept of canon different from that in common law. Employing grammatical, systematic, historical, and teleological interpretation, the MK tries to interpret the constitution like normal statutory law.

Referring to the canon of Indonesia jurisprudence[12], the core of legal interpretation can be summarized as follow:

1. Grammatical Interpretation
2. Systematic Interpretation
3. Historical Interpretation
4. Teleological Interpretation

Using Grammatical Theory, a provision under a law must be interpreted literally and grammatically. In systematic interpretation, one attempt to clarify the meaning of legal provision by reading it in conjunction with other, related provisions of the same section, or title, of the legal text, or even other texts within or outside the given legal system; thus, this method relies upon the unity, or at least the consistency, of the legal world.

In historical analysis, the interpreter attempts to identify what the founders of a legal document wanted to regulate when they used certain words and sentences. Using a Teleological interpretation, a law's provisions must be interpreted by considering the main purpose and scope of the law.

It is quite obvious that the constitution is different from other laws, at least in those countries where it has *lex superior* status, and amending it requires a qualified procedure. A characteristic of the constitution is that its norms contain more principles and value statements than the norms in laws that are hierarchically below the constitution. This can be seen at least in the case of basic rights. Still, there is a great similarity at the level of interpretation

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parliaments, not from court cases. Indeed, in civil code systems the courts do not usually have as much freedom to interpret laws. In the original Napoleonic courts judges were specifically banned from interpreting statute laws, See Michael Stolleis, Judicial Interpretation In Transition From The Ancien Régime To Constitutionalism In Morigiwa Yasutomo Etal Ed, Interpretation of Law in The Age of Enlightenment From The Rule of The King to The Rule Of Law. Springer. 2011

[12]See Sudikno Mertokusumo, Mengenal Hukum (Introduction to the Jurisprudence). Liberty; Yogyakarta, 1990.

tween the norms of the constitution and other statutes. The basic problem in th cases is that the norm content is unclear.

Since its establishment, MK has recorded so many cases encompassing litically related cases to constitutional rights related cases. Until the beginning 2010, the MK had handled 238 constitutional review cases from 114 different ws[13]. Many of the petitions for constitutional review were granted, which eans that part of the law was unconstitutional. These constitutional reviews volving many kinds of constitutional review of law, most of them are very ated with the breach of rights provision provided in constitution.

MK judges are using every possible approach in interpreting the nstitution. Usually the first interpretation method of grammatical is used by e judges; after that follows the systematic interpretation, since sometimes the ammatical provision of one law is not synchronized with other law[14]. MK dge Maria Farida put importance on grammatical text with the systematic proach of whole unity of constitution. The historical fact will be the important urce to understand the grammatical text of provision. In each case, the erpretation can be used differently to achieve the conclusion[15].

Sociological approach is also used because provision of the law may be nstitutional at present but can be unconstitutional in the future. MK Chief stice in an interview stated that he prefer the historical approach because he nts to know what is the meaning of one definition in the time it was drafted t still it depends on the nature of the case[16]. However each judge usually s his or her preference of method, thus sometimes creating the dissenting inion[17].

In interpreting the constitution, the difference of open policy case ample is governor is elected democratically) and closed policy cases ample is candidate for governor shall be nominated from political party) all be differentiated. In open policy case, MK can be flexible interpreting e democratic principle. However in closed policy cases, MK is bound by the thority of legislature, only when it breaches the fundamental principle of mocracy, MK can interpret the provision of closed policy using sociological proach to protect the citizen[18]. Thus the important thing is how the judgment MK can achieve the justice and legal utility[19].

In interpreting the constitution, it is important to put the Indonesian ntext into the definition in question. The example is the definition of

[13] See the detail in MK official Website, accessed on April 28, 2010, http://www.hkamahkonstitusi.go.id/index.php?page=website_eng.RekapitulasiPUU

[14] Interview with MK Chief of Justice Mahfud MD in Lampung August 6th 2010.

[15] Interview with MK Judge Maria Farida in Jakarta August 12, 2010.

[16] Supra note 14.

[17] Ibid.

[18] Ibid.

[19] Ibid.

democracy should be adjusted into Indonesia context. Democracy in Indonesia context then should be seen from the 1945 Constitution system. Therefore, the constitutional provision, constitutional question, and constitutional definition shall be understood as the integral part of the constitution system. However it does not mean that we can leave the historical fact of law making because in interpreting the constitution, MK can summon DPR and government to explain the law making process. MK can't also leave the doctrinal and comparative law approaches since MK can ask expert opinion[20].

Indonesian 1945 Constitution is the cornerstone of the constitutional review but MK judges also considering the international law and international judgment as the reference, but not binding. Having said that, MK judges shall not be limited by the framer intent and bound by textual provision of constitution if it is considered not fulfilling the justice sense of community. In judging the case, the method may be different in each case depending on how the judgment can give the certainty, justice, and utility[21]. MK judgments shall have the spirit of the progressive law as advocated by Prof. Satjipto Rahardjo[22] so the substantive justice is more important than the procedural justice[23]. The living constitution with the method of contemporary interpretation following the dynamic of the law is an important tool for interpretation[24].

D. Legality versus Morality

Joseph Raz, as one champion of living constitution, concludes that judges should not confine themselves to "conserving" interpretations, which attempt to clarify its current meaning. They should also engage in "innovative" interpretations, which change it's meaning in morally desirable ways[25]. While Originalists claim that the original meaning of a constitution is determined partly by evidence of its founders' intentions, Raz on the other hand, denies that judicial interpreters are bound by those intentions, on the grounds that the founders have no moral authority over them[26].

[20] Interview with Constitutional Judges in Jakarta August 12, 2010.

[21] MK Chief Justice Mahfud MD supports this opinion that certainty, justice, and utility shall come as priority in interpreting the constitution. Supra note 204.

[22] Satjipto Rahardjo is the initiator and advocate of progressive law during his academic life; see Satjipto Rahardjo, Penegakan Hukum Progresif (Enforcement of Progressive Law), Penerbit Buku Kompas, 2010.

[23] Supra note 20

[24] Ibid.

[25] Joseph Raz, 1999, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, in L. Alexander eds., Constitutionalism; Philosophical Foundations Cambridge: Cambridge UP; See also Joseph Raz on Constitutional Interpretation, Law and Philosophy, Vol. 22, No. 2 (Mar., 2003), pp. 167-193.

[26] Ibid.

Another alternative among the above school of interpretation is Ronald Dworkin's theory, which emphasizes values in the law[27]. Dworkin views judicial rulings as akin to a chain novel, a cooperative enterprise to which a series of authors contribute, over generations. In a chain novel, one person starts a tale; another fills in chapter two, another chapter three, and so on. Each develops the tale further, continuing with what has gone before. Similarly, Dworkin contends, a judge must make his decisions as part of an ongoing story. His role is both to interpret what has been said so far and to move the narrative forward. This novel shall be based on the principles, abstracted from the moral reading of constitution fundamental values.

Along with this chain theory, Dworkin developed the theory, which he champions most, of law as integrity[28]. This conception aims to show law in its best light by viewing past institutional decisions as embodying a morally coherent scheme of principles, so far as possible, and by following those principles in resolving current and future disputes. Thus, legal practice manifests integrity in applying the same principles in all cases. This places two important demands on a judge: his contribution must be something that other authors might have written, and his contribution must aim to make the law the best it can be. Judges should strive to create a unified story and a good story, advancing the law by resolving new disputes in desirable ways, remaining faithful to law and rulings of the past[29].

The relation among Raz, Dworkin, and Indonesia Constitutional Court interpretation best explained by showing the trend of Indonesia Constitutional Court Interpretation upon single object of constitutional provision. Truly, the interpretation for socio-economic rights developed by the Indonesian Constitutional Court in the series of relevant cases, has special importance to Indonesian society after decades of authoritarian regime. The provision of Article 33 of 1945 Constitution that defines the State has control upon land and natural resources was used as a weapon by the authoritarian government to silence the protests of indigenous peoples who had been pushed out of their lands and whose traditional rights were violated.

The new interpretation given by the Constitutional Court of Indonesia has clarified that there are certain constitutional constraints on state control based on the objective hierarchy of constitutional values. It was an epoch-making

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[27] Ronald Dworkin claims that the law should be viewed as a body of principles, not as a collection of rules, See Ronald Dworkin, *Law as Interpretation*, Critical Inquiry, Vol. 9, No. 1, The Politics of Interpretation (Sep., 1982), pp. 179-200, The University of Chicago Press; see also Ronald Dworkin, *Laws Empire*, Cambridge, MA. Belknap Press of Harvard University Press, 1986; Ronald Dworkin, *Taking Rights Seriously*, Cambridge, MA: Harvard University Press, 1977

[28] Ibid. See also Ken Kress, *The Interpretive Turn: Law's Empire Review*, Ethics, Vol. 97, No. 4 (Jul., 1987).

[29] Ibid.

judgment of the Indonesia Constitutional Court which declared that, in light of the people's sovereignty over all natural resources and public ownership of those natural resources, the people, through the Constitution, had "provided a mandate to the state to make policy, organize, regulate, manage and supervise to achieve maximum welfare for the people" (case reference no. No. 001-021-022/PUU-I/2003 page 106). In the MK decision No. 001-021-022/PUU-I/2003 on electricity law case, Indonesia Constitutional Court has put principle of "controlled by state" and allows the participation of investor to the important sector as long as the state still retained control over the sector. The Underlying principle is the protection of welfare rights of Indonesia's people over the peril of absolute ownership by the private sector. The following series of judgments involving MK Decision Number 002/PUU-I/2003 on Oil and Gas Law, MK Decision No. 008/PUU-III/2005 on Water Law, and MK Decision No. 21-22/PUU-V/2007 on Investment Law have made the principle of state control in MK decision No. 001-021-022/PUU-I/2003 on Electricity Law as the basis of interpretation.

It is found that in this series of interpretation on the social economic rights, Indonesian Constitutional Court has developed a series of hierarchical objective values of constitutional rights in the area of economic activity, such as follows: first ranked is the right to life, second ranked is the state and nation objectives goal, and the third is the right to public welfare.

By a series of social economic related cases, the Indonesian Constitutional Court has been consistent on the interpretation of article 33 of Indonesia's 1945 Constitution, and is expected to apply the same ground to succeeding similar cases according to the already established hierarchy of objectives values in the 1945 Constitution. The integrity of hierarchical value developed in these series of judgments seems to imply a typical influence of civil law style of adjudication, but at the same time seems to confirm the philosophical theory of Ronald Dworkin on the "moral reading" and "law as integrity" which is often understood to explain the case law development in the common law tradition. As Ronald Dworkin describes in his concept of "principles" and "the law as integrity"[30], Indonesian Constitutional Court in socio-economic cases shows an obvious tendency by viewing past institutional decisions as embodying a morally coherent scheme of principles, and attempting to follow those principles in resolving current and future disputes.

Is it true that the MK shall consider the conception of legal and moral as described above? Or does this conception only applicable in the case of reviewing the law and not the other authority such as dispute on general election. Before answering those questions, the characteristic of MK shall be discussed and analyzed. Each constitutional review system was developed in accordance with a different constitutional tradition and understanding. These

[30] Ibid.

differences reflect the wide variations in constitutional legacies and structures, historical inheritances, and formative experiences, as well as non-trivial differences in the value systems of Asia, America, Europe and other foreign urisdictions.

These differences are manifested in the model of constitutional court design; there are two basic models, the American and the European. Traditionally, scholars have said that these two constitutional review paradigms work differently and sometimes in a contradictory way. These classical differences are found in the nature of the constitutional review (concrete or abstract), in their character (incidental or principal), in the type of court (diffuse or concentrated), and in their effects (special or general). The American system was developed in order to give supremacy to the Judicial Power and it was formulated by the end of the 18th Century, whereas the constitutional court model was developed in the 20th Century to support the rule of law and the supremacy of the Parliament.

Decentralized system of judicial review characterizes the United States; almost all courts-state courts, federal courts, and, of course, the Supreme Court-have the power of judicial review of constitutionality, which, in this system, can be exercised over all acts of Congress, state constitutions and statutes, as well as acts of the executive and the judiciary itself. Even the constitutional validity of treaties and legislation based on treaties may be the subject of judicial inquiry. In short, according to the decentralized system, judicial review is an inherent competence of all courts in any type of case or controversy.

The centralized judicial review system (often referred to as constitutional review), in contrast, is characterized by having only a single state organ (a separate judicial body in the court system or an extrajudicial body) acting as a constitutional tribunal. This model of judicial review has been adopted by many European countries that follow one of the various branches of the civil law tradition, such as Germany, Austria, Italy, and Spain, as well as by almost all of the new democracies in post-Communist Europe and Asia.

Judicial review in a centralized system reflects a different conception of the separation of power and is based upon a doctrine radically different from that upon which decentralization type is founded. Countries preferring this system of judicial review tend to adhere more rigidly to the doctrine of separation of power and the legislative supremacy. Because most people feel that any judicial interpretation or invalidation statue is essentially a political one, it is sometimes viewed as the breach of exclusive power of legislature to make law. The centralized system thus refuses to grant this power to the judiciary generally.

The principal reason for creating a separate constitutional court was the recognition that constitutional review differs from the day-to-day work of ordinary criminal and civil courts. It often requires judges to decide value-laden,

quasi-political matters, such as whether a particular law or executive action treats all citizens "equally" or is in accord with the "rule of law." Much greater discretion is exercised when deciding these cases than in the usual criminal or commercial ones, and it was believed that the career judges of the continental system, recruited to resolve these latter kinds of disputes, were unlikely to have the policy and political skills needed for constitutional review[31].

Three principal reasons account for adoption of centralized system of review in a growing number of civil law countries. First is the conception in civil law countries of a rigid separation of power between branches of government, partially explaining the centralized system of review, second is the absence of principle comparable to stare decisis doctrine in civil jurisprudence which makes it unable to produce a consistent decision, and the third one is that the unsuitability of the civil law judiciary undoubtedly establishes the need for a specialized court to handle important constitutional questions[32].

Therefore, Indonesia Constitutional Court (MK) as typical civil law centralized system of review has also same characteristic of operation in the quasi-legal-political and moral in accordance with the constitution as Kelsen designed. Not only in the case of reviewing the law against the constitution, all the decision encompassing the conflict between state actor to the dispute upon general election shall consider all the aspect of legality and morality.

However, MK in the case of Tulang Bawang Regency did not consider the decision from DKPP. This decision shed light upon the positivist conception of MK when deciding the dispute of general election. It seems that MK use different conception of reviewing the case since there is quite different approach between reviewing the law against constitution and settling dispute of general election.

E. Conclusion

Legality versus Morality is always problematic, especially in the typical of country such as Indonesia where the positivism take roots for quite a long time. While the MK itself was designed to operate encompassing political, moral, legal, and social aspect of nation just like the typical civil law centralized constitutional court, the approach taken by MK in the case of Pemilukada in Tulang Bawang is purely legal. Yet this conclusion is still early and referring to the Law as Integrity Dworkin, it will be fruitful wait and see the continuation of this kind of legality versus morality battle.

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[31] Mauro Cappelletti, *Judicial Review in Comparative Perspective*. California Law Review, Vol. 58, No. 5 (Oct., 1970), p. 1017-1053.

32 Ibid.