

QUESTIONNAIRE

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I. The different concepts of the rule of law

1. What are the relevant sources of law (e.g. the Constitution, case-law, etc.) which establish the principle of the rule of law in the legal system of your country?

The principle of the rule of law in Indonesia is stipulated in Article 1 sub (3) of the Indonesian Constitution as refer 'The state is based on the rule of law'. The rule of law in the Indonesian term is 'negara hukum'. This term, as explain in the elucidation of the previous Indonesian Constitution, means that the state is arrange based on laws (using Dutch terms 'rechtstaat') not on power alone ('machtstaat').

The term 'negara hukum' is often interpreted by the Constitutional Court in its constitutional adjudications. The Court rulings are also the source of law in Indonesian legal system.

2. How is the principle of the rule of law interpreted in your country? Are there different concepts of the rule of law: formal, substantive or other?

The principle of rule of law as stipulated in the Constitution is within the Constitutional Court authority to interpret the Constitution. The Court uses different approaches to the principle in regards to the cases that are being examined by the Court. The court uses formal approach to examine case in regards to legislative procedure on drafting bills of the law in reviewed. Yet, the Court also uses substantive approach to deal with the constitutionality test of the reviewed laws.

3. Are there specific fields of law in which your Court ensures respect for the rule of law (e.g. criminal law, electoral law, etc.)?

To guarantee the respect for the rule of law is the task of the judiciary. Indonesia adopted european model of constitutional review. Therefore, Indonesia established the Constitutional Court as the highest judiciary organ next to the Supreme Court.

Based on Article 24 paragraph (2) of the Indonesian Constitution, criminal law, private law, military law and religious law are the field of the Supreme Court. This article stipulates that judicial power shall be implemented by a Supreme Court and it sub-organ which consists of public courts, religious affairs courts, military courts and state administrative courts.

In addition, the article also stipulates that the Constitutional Court implements the judicial power. The Constitutional Court is a special court to decide several disputes, including disputes concerning the results of general election. Based on Article 74 of the Constitutional Court Law, the Court has an authority to decide disputes on the results of general elections consisting of presidential election and legislative elections.

Therefore, the rule of law covers in all law fields which include constitutional law, criminal law, electoral law, etc. The principle is ensured by the courts in accordance to each given tasks.

4. Is there case-law on the content of the principle of the rule of law? What are the core elements of this principle according to the case-law? Please provide relevant examples from case-law.

There are many decisions that refer to the core elements of the principle of the rule of law. For instance, based on Constitutional Court Decision Number 102/PUU-VII/2009 on 6 July 2008 regarding judicial review of the Presidential Election Law, the core element of the rule of law is to guarantee individual rights in using their constitutional rights to elect the President and Vice-President.

Please find other relevant decisions made by the Indonesian Constitutional Court in Codices Database of Venice Commission:
<http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>.

5. Has the concept of the rule of law changed over time in case-law in your country? If so, please describe these changes referring to examples.

In Indonesia, the concept of the rule of law is based on the amendment of the Indonesian Constitution. The Indonesian Constitution had been changed four times from 1999 to 2002. Before the amendment, the state institutions consist of: (1) the People's of Consultative Assembly (MPR); (2) the President; (3) the Supreme Advisory Council (DPA); (4) the House of Representative (DPR); (5) the Financial Audit Board (BPK) and (6) the Supreme Court (MA). The Constitutional Court did not exist in Indonesia before the Constitutional amendment.

After the constitutional amendment, the position of the state institutions had changed. The Supreme Advisory Council does not exist anymore. In addition, the amendment created the Constitutional Court. After the constitutional amendment, the state institutions consist of: (1) the People's of Consultative Assembly (MPR); (2) the President; (3) the House of Representative (DPR); (4) the Regional Representative Council (DPD); (5) the Financial Audit Board (BPK); (6) the Supreme Court (MA) and (7) the Constitutional Court (MK). The Supreme Advisory Council (DPA) was abolished for decreasing the absolute power of President in the past. Additionally, the function of the Supreme Advisory Council was not effective.

Concerning the rule of law, the establishment of the Constitutional Court aims to increase check and balances mechanism between state institutions in legislative, executive and judiciary. The Constitutional Court guarantees whether laws that have been enacted are in accordance to the Constitution or not.

6. Does international law have an impact on the interpretation of the principle of the rule of law in your country?

International law has an impact on the interpretation of the principle of the rule of law in Constitutional law cases. For example, the Constitutional Court Decision Number 33/PUU-IX/2011 regarding judicial review of Law Number 38 of 2008 concerning the ratification of the Charter of the Association of South-East Asian Nations (ASEAN

Charter). In its ruling, the Court stated that a state has the obligation to comply because it has accepted the treaty which means it is party to the treaty which become legal subject to the international treaty. This issue is accordance to the principle of *pacta sunt servanda*. In deciding this case, the Constitutional Court considers international law as follow:

- a) Based on Article 38 paragraph (1) of the Statute of the International Court of Justice, the international treaties are the second source of law after the international customs;
- b) Based on Article 2 paragraph (1) letter b of the Vienna Convention, *'ratification', 'acceptance', 'approval' and 'accession' mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty'*.

This case shows that the Constitutional Court uses the international law in examining judicial review cases and consider them in accordance to the Indonesian Constitution.

II. New challenges to the rule of law

7. Are there major threats to the rule of law at the national level or have there been such threats in your country (e.g. economic crises)?

There are no major threats that have the impact on the enforcement of the rule of law in Indonesia. In 1998, there was an economic crisis in Indonesia that led to political crises. Consequently, President Soeharto detached his position after 32 years had a power. Based on the experience of President Soeharto, Indonesia had an experience that the limitation of the President authority is important. Furthermore, Indonesia has a consciousness that guaranteeing the individual rights is the core element of the rule of law. Economic and political crises raised ideas to amend the Indonesian Constitution. The constitutional amendment resulted to the establishment of Constitutional Court that aims to assure individual rights and to strengthen the check and balances mechanism. In short, the economic and political crises could increase the quality of the rule of law in Indonesia in a long term.

8. Have international events and developments had a repercussion on the interpretation of the rule of law in your country (e.g. migration, terrorism)?

It depends on the international events whether these events affect the situation and the condition in Indonesia or not. In the context of terrorism, the President and the House of Representatives enacted Law Number 15 of 2003 concerning Anti-Terrorism. In Constitutional Decision Number 013/PUU-I/2003 regarding judicial review of the Anti-Terrorism Law, the Court was of the opinion that all types of terrorism must be eradicated, including the roots of the problems and the initial causes thereof.

Therefore, there should be a law that assures the deterrence, suppression and eradication of terrorism. According to the Court, the law must provide heavier sanctions, smooth arrangements for the process of probing, repression and apprehension. The application of retroactive principle in criminal code is permissible and may be applied to a case of gross violation of human rights. However, in the review of Anti-Terrorism Law, the majority opinion of the Court argued that it can not be applied retroactively.

9. Has your Court dealt with the collisions between national and international legal norms? Have there been cases of different interpretation of a certain right or freedom by your Court compared to regional / international courts (e.g. the African, Inter-American or European Courts) or international bodies (notably, the UN Human Rights Committee)? Are there related difficulties in implementing decisions of such courts / bodies? What is the essence of these difficulties? Please provide examples.

The Constitutional Court does not have cases where its decisions are contrary with the interpretation made by regional or international courts. As discussed earlier, the Constitutional Court often uses international law in its legal consideration for making decision. Indeed, there is no regional court both in Southeast Asia or Asia.

III. The law and the state

10. What is the impact of the case-law of your Court on guaranteeing that state powers act within the constitutional limits of their authority?

The Constitutional Court decisions has strengthened the presidential system in Indonesia by placing the authority of each state institution to act in accordance with the constitutional limits. For instance, in the Constitutional Court Decision Number 138/PUU-VII/2009 on 18 February 2010, the Court imposed limits and criteria to be used by the President before declaring the Interim Emergency Law (*Perppu*) to prevent abuse of authority and violations of citizen's constitutional rights.

11. Do the decisions of your Court have binding force on other courts? Do other / ordinary courts follow / respect the case-law of your Court in all cases? Are there conflicts between your Court and other (supreme) courts?

The Constitutional Court decisions are binding to all state institutions, including other ordinary courts. Indeed, the decisions shall be followed by other courts in examining and deciding cases. According Article 55 of the Constitutional Court Law, Supreme Court's review of regulations under the law must be ceased until a decision by the Constitutional Court is made when the act used as the basis of review is being examined by the Constitutional Court. Thus, there is no conflict between the Supreme Court and the Constitutional Court.

12. Has your Court developed / contributed to standards for law-making and for the application of law? (e.g. by developing concepts like to independence, impartiality, acting in accordance with the law, *non bis in idem*, *nulla poena sine lege*, etc.).

As explained above, in Constitutional Court Decision Number 013/PUU-I/2003 on 23 July 2004, the Court revoked a law which contains provisions related to criminal acts of terrorism that could be applied retroactively (*ex post facto law*) against the Bali's bomber on 12 October 2002. According to the Court, the provision is contrary to the spirit of Article 1 paragraph (3) and Article 28 paragraph (1) of the Indonesian Constitution stating that the right not to be prosecuted under a retroactive law are one of human rights that cannot be reduced under any circumstance whatsoever.

13. Do you have case-law relating to respect for the rule of law by private actors exercising public functions?

Based on Constitutional Court Decision Number 53/PUU-VI/2008 on 13 April 2009, the Court affirmed and required the company to implement a provision stipulated in the Company Law concerning Corporate Social and Environmental Responsibility (CSER). This provision is different from the Corporate Social Responsibility (CSR) concept in many countries which is voluntary, while CSER in Indonesia has become a legal obligation for companies to implement it.

14. Are public officials accountable for their actions, both in law and in practice? Are there problems with the scope of immunity for some officials, e.g. by preventing an effective fight against corruption? Do you have case-law related to the accountability of public officials for their actions?

The Indonesian Constitutional Court always supports the efforts of law enforcement and corruption eradication in Indonesia based on the principle of equality before the law. For instance, in Constitutional Court Decision Number 76/PUU-XII/2014 on 22 September 2015, the Court ruled that permission to ask information from the parliament members who are suspected of committing a crime is shall not be given by the Parliament Honorary Body, which is an internal organ within the Parliamentary, but it should be given by the President.

According to the Constitutional Court, the Body is part of the Parliament. It has no direct connection with the criminal justice system. The Court also found that the permission given by the Honorary Council would have a conflict of interest because the Honorary Council members are selected from and by the Parliament members itself. This decision also aims to strengthen the mechanism of checks and balances between the legislative and executive power.

IV. The law and the individual

15. Is there individual access to your Court (direct / indirect) against general acts / individual acts? Please briefly explain the modalities / procedures.

Constitutional adjudication system in Indonesia provides a very broad access to every citizen, individually, to directly apply for judicial review of law made by the Parliament before the Constitutional Court. In other words, a citizen can review the constitutionality of law without the need to lodge an initial petition through Parliament or other state institutions.

16. Has your Court developed case-law concerning access to ordinary / lower courts (e.g. preconditions, including, costs, representation by a lawyer, time limits)?

Based on the Constitutional Court Decision Number 006/PUU-II/2004 on 13 December 2004, the Court annulled a provision in the Advocate Law which stipulates that any person who knowingly perform advocate profession and act as an advocate can be sentenced to a maximum of five years. This decision is based on the high demand of legal representation for less fortunate people. Therefore, legal assistances within and beyond the court hearing can also be done by lecturers at the university who are not an

advocate. Generally, they work at legal aid institution in the university as a form of community service.

17. Has your Court developed case-law on other individual rights related to the rule of law?

Based on Constitutional Court Decision Number 5/PUU-VIII/2010 on 24 February 2012, the Court affirmed the importance of privacy rights protection as the rights of citizens. The Court also found that interception is a violation of privacy rights. According to the Court, the limitation of privacy right can only be done if the mechanism of interception is regulated directly in national law. Therefore, the Court overturned a provision in the Information and Electronic Transaction Law stating that interception should be regulated in a government regulation.

18. Is the rule of law used as a general concept in the absence of specific fundamental rights or guarantees in the text of the Constitution in your country?

The Indonesian Constitutional Court has developed implied rights as constitutional rights that are not explicitly stated in the Constitution. This development is based on the concept of 'rule of law' or 'law state' (*negara hukum*) stated in Article 1 paragraph (3) of the Indonesian Constitution which says, 'The state of Indonesia is a law state'. For instance, based on Constitutional Court Decision Number 005/PUU-I/2003 on 28 July 2004, the Court introduced the presumption of innocent principle as one of citizens' constitutional rights that must be protected. This constitutional right is not listed in the Indonesian Constitution.