

STRENGTHENING NEW ORDER OF CONSTITUTIONALISM IN ASEAN AFTER COVID-19

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ABSTRACT

To compare about the constitution and the impact caused by pandemic covid-19, could not be covered by scope of one state only, but also compare it with others. In order to strengthen of cooperation between asean community, we should understand about constitutional concept which follows by the rule of law in health concept. we have to discuss more significant idea about the state, law, the rights and health welfare in wide perception on South East Asia. This research promoted to explain about the extent of health recognition as well as the constitutionalism in the asean countries by using juridical normative methodology, with emphasizes result by compare among countries. Finally, this research describes how important if we ask health concept in the body of the constitutions (in each manuscript) to end the pandemic effect, and also to reach “the living constitution”. This research aims to show the other side of welfare concept in ASEAN countries with various theory of laws. The approach method related with doctrinal legal research.

Keywords: Constitution, health, ASEAN

INTRODUCTION

As a basic document, the constitution used power to covering the state in the form of law. In this day, the constitution and its constitutionalism in the south east asian will be different because hitting by new problem with never prediction before. The critical situation caused by Covid-19.

To argues in new aspect, the study of the constitutions related and relevant to the living constitution concept as well as constitutionalism. The big challenges in constitutional studies become crucial caused by pandemic attacks to advance their people and their rights. Moreover, within a wider range, the Constitutionalism in a particular_after covid – 19_ has its own uniqueness. For example, the different Constitutionalism concept by each nation in the viewpoint of facing critical case with huge impact in healthy, although the main objective in achieving social and health welfare.

Besides health concept, the universal values related also with the concept of “welfare” for the clusters of Southeast Asian (*eastern*) nations differs from that which originally appeared in the western region. In case of health, The words of welfare would be advance for the people of southeast asia refers to the priorities of political, economic and social impact. Areas with diverse constitutionalism give different views on what they will do after pandemic attack. The importation of values and / or recognition for health recognition for people as constitutional rights are equal in the body of the constitution.

In the form of the rule of Law, The constitutionalism and it comparisons especially on the realization of the welfare state was actually preceded by the views of Jeremy Bentham. According to Bessant,

Watts, Dalton and Smith (2006)¹, the welfare state idea founded since the 18th century when Jeremy Bentham (1748-1832) promoted that governments have a responsibility to guarantee the greatest happiness (or welfare) as the greatest number of their citizens. In the meantime, Bentham using the term 'utility' to describe the concept of happiness or well-being. Based on the principle of utilitarianism, Bentham argues that something can lead to happiness is something good. Conversely, something that causes pain is bad. According to him, government actions should always be directed to increase the happiness of many people and make sure it was possible to reach by political power. Bentham's notions of legal reform, the role of the constitution and social research for the development of social policy and make him known as the "father of the welfare state".²

South east asia nation has it own concept in welfare state. Good point to gain the happiness is not only morality due with political process. the happiness in the asean view is about how good the life is. If they feel better in their entire lives, feeling healthy, it will help them to get more spirit and more peaceful. Healthy society gave them reasons to reach meaningful life, peacefull and happiness as well as how welfare state concepts pursued better things in economy on the western society.

RESEARCH METHODS

This research using doctrinal legal research. The authors use this approach to look at the concept of the theory of the state especially constitutional law in ASEAN

countries, whether it has been in conformity with the context of diversity on health rights. This is a normative legal research includes reviewing the values, norms that exist in the constitutions. This research are technical prescriptive, with deepening results that will provide a comprehensive descriptions.

FINDING AND DISCUSSION

Constitutional Theory

The Constitution derived from the French language (*constituer*) which means to form or to build. The use of the term constitution is the establishment of a State or formulate and declare a State.³ Jimliy Asshiddiqie said that The Constitution is the basic law may be written (in the form of the Constitution) and unwritten. According to Brian Thompson, he proposed that the form: "a constitution is a document roomates contains the rules for the operation of an organization",⁴ constitution is an aggregate of fundamental principles or to established precedents thatconstitutethe legal basis of a polity, organisation or other type of entity and commonly determine how that entity is to be governed.⁵

The concept of happiness according to Jeremy bentham can be added or correlated in what majority people on Southeast Asian societies looking for. It is look like blueprints through comparison of constitutional text of the state in the region of Southeast Asia (ASEAN). This study does not address to extent which state constitutionalism could give better, but only sees it as one of the recognized and required values to strengthen after pandemic. Thus,

¹. this opinion changed by Edi Suharto. *Negara Kesejahteraan dan Reinventing Depsos*, presented on discuss session in topic "Mengkaji Ulang Relevansi Welfare State dan Terobosan melalui Desentralisasi-Otonomi di Indonesia" held by Wisma MMUGM, Yogyakarta, July 25, 2006. Inside and look: Oman Sukmana, *Konsep dan desain Negara Kesejahteraan*, sunday, september 20, 2015.

². *ibid*

³. Sri Soemantri, 1992, "*Bunga Rampai Hukum Tata Negara Indonesia*", Alumni, Bandung, page. 29-30

⁴. Jimliy Asshiddiqie, 2006, *Konstitusi dan Konstitusionalisme.*, Jakarta, SEKJEND MKRI. page. 152

⁵ The *New Oxford American Dictionary*, Second Edn., [Erin McKean](#) (editor), 2051 pp., 2005, Oxford University Press, [ISBN 0-19-517077-6](#).

through the constitution we all see the spirit of health concept and the strengthening of potential cooperation within the scope of ASEAN region. We have to analyze the needs of the nation in the future, and prevent any form of disappearance, the reduction of constitutional rights.

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Recognition of health rights on constitutions

NO	NAME OF STATE	HEALTH RECOGNITIONS
1	INDONESIA	<p>Article 28H, UUD NRI 1945</p> <ol style="list-style-type: none"> 1. Every person shall have the right to live in physical and spiritual prosperity, to have a home and to enjoy a good and healthy environment, and shall have the right to obtain medical care. 2. Every person shall have the right to receive facilitation and special treatment to have the same opportunity and benefit in order to achieve equality and fairness. 3. Every person shall have the right to social security in order to develop oneself fully as a

		dignified human being.
2	MALAYSIA	<p>Article number 9. Constitution of Malaysia Prohibition of banishment and freedom of movement</p> <p>No citizen shall be banished or excluded from the Federation.</p> <p>Subject to and to any law relating to the security of the Federation or any part thereof, public order, public health, or the punishment of offenders, every citizen has the right to move freely throughout the Federation and to reside in any part thereof.</p>
3	SINGAPORE	<p>No appointment in the body of the constitutions (The health concept are covered by government under the constitutions}). But they have strict rules in security. (Subject to any law relating to the security of Singapore or any part thereof, public order, public health or the punishment of offenders, every citizen of Singapore has the</p>

		right to move freely throughout Singapore and to reside in any part thereof.)
4	BRUNEI DARUSSALAM	Brunei have a limitation in health responsibility in their constitutions
5	THAILAND	<p>Thailand constitution of 2017</p> <p>Section 47 A person shall have the right to receive public health services provided by the State.</p> <p>An indigent person shall have the right to receive public health services provided by the State free of charge as provided by law.</p> <p>A person shall have the right to the protection and eradication of harmful contagious diseases by the State free of charge as provided by law.</p>
6	PHILIPPINES	<p>ARTICLE III Bill Of Rights</p> <p>SECTION 15. The State shall protect and promote the right to health of the people and instill health consciousness among them.</p>

		SECTION 16. The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.
7	MYANMAR	<p>CHAPTER I: BASIC PRINCIPLE OF THE UNION</p> <p>Part 2: Basic Principle Number 26.</p> <p>The Union shall: earnestly strive to improve education and health of the people; enact the necessary law to enable National people to participate in matters of their education and health;</p>
8	LAO	<p>Constitution of Lao people's democratic republic</p> <p>Article 25. The State focuses on improving and expanding public health services to take care and promote the people's health.</p> <p>The State and society focus on building, improving disease prevention systems, providing health care to all people with quality, creating conditions to ensure that all people have access to health care, especially women</p>

		<p>and children, poor people and people in remote areas, to ensure the people's good health.</p> <p>The State promotes private sector investment in public health services to advanced and modernize them.</p> <p>All health services are prohibited from violating the laws and regulations.</p> <p>Article 27 The State and society attend to encouraging, supporting and investing in public sports activities, including traditional and international sports, [in order to] upgrade abilities in sport and to strengthen people's health</p>
9	CAMBODIA	<p>Article 72 The health of the people shall be guaranteed. The State shall pay attention to disease prevention and medical treatment. Poor people shall receive free medical consultations in public hospitals, infirmaries and maternity clinics.</p>

		<p>The State shall establish infirmaries and maternity clinics in rural areas</p>
10	VIETNAM	<p>Article 20 1. Every one shall enjoy inviolability of the person and the legal protection of his or her life, health, honor and dignity; and is protected against torture, harassment and coercion, and any forma of violation of his or her life and health, and offence of honor and dignity.</p>

Source: constitution project, data center-2020

Most of all recognition in the constitution of the Asean countries depend on their respective legal systems⁶ includes health rights. In Indonesia, the recognition of health concept in the constitution lay on the principles of democratic law, while in malaysia and singapore, the constitutionalism is strongly influenced by the organic law under the constitutions. Thailand, laos, vietnam and Cambodian constitutions more accommodate the types of health concept. Their constitution are well prepared for all problem to face pandemic covid – 19 with te respective legal sytem and good policy. In the Philippines and brunei, they need more efforts on it. By laws, on every modern written constitution confers specific powers on an it organization, institutional entity or important rights in crucial case. Consist of mechanisms of power control for the protection of the

⁶. Henning Glaser, statement, on winter academy of human rights, CPG, Bangkok, 2017

interests, rights and liberties of the citizenry, including those that may be in the minority.⁷ The constitutional governments should be stable, adaptable, accountable, open and should represent the people⁸ with particular or total enforcement by the rule of law on various characters of nation-society, the next big thing for south east Asian rules.

To understand about the challenge of ASEAN constitution within the pandemic covid -19, we will using prismatic theory. it means, law should be a large combination of principles derived from modern and traditional social values or in selective local wisdom. Law having such character which labeled as "Prismatic Law".⁹ Fred W. Riggs in his book "State Administration- State Developing; Public Theory of Prismatics " notes in understanding of developing countries can be improved through the use of prismatic models because some of them are still transitional. The prismatic model helps us understand the fundamental reasons or even the rationality of the elements in the western public structure .¹⁰ It was able to using that concept for eastern society in south east Asian. If the prismatic model gives us valid indications of public structure which is formally differentiated, behaves much less independently when compared to the - a more developed or "advanced" system¹¹ on Health-welfare and it protection in south east asia. due to manage the constitutionalism after pandemic so we can get a wider picture about traditional society in asean with traditional values on behalf

their respective legal system. We would see the table above.

To elaborate about the theory of prismatics, from Talcot Parsons' dichotomy which includes five alternatives which are called "pattern-variables", consist of;¹²

1. *Affectivity - Affective neutrality.*
2. *Self-orientation - Collectivity - Orientation.*
3. *Universalism - Particularism.*
4. *Ascription - Achievement.*
5. *Specificity - Diffuseness.*

Riggs used Parsons' fifth dichotomy as a starting point for developing his theory of prismatics. Each of these sub-systems has a certain degree of autonomy, but also interdependent. Within this framework, Riggs introduces the concept of a prismatic society. According to Riggs and Gordon, there are many prismatic societies in Southeast Asia because;¹³

"..They exhibit many practices of traditional society, while aspiring to the norms and methods of refracted societies on modern states. Both levels may exist side by side in a single nation, and this can lead to a multitude of internal tensions ".

The rationale for developing prismatic law refers to the concept of responsive law proposed by Philippe Nonet and Philip Selznick, as well as the concepts of substantive law and reflective law proposed by Gunther Teubner. Using values of wisdom and tolerance which conceptualized by responsive law or substantive law and

⁷.Gordon, Scott, 1999. *Controlling the State: Constitutionalism from Ancient Athens to Today*. Harvard University Press. page. 4. ISBN 978-0-674-16987-6.

⁸.Herbert John Spirro, [constitution \(politics and law\)](https://www.britannica.com/topic/constitution-politics-and-law). *Encyclopædia Britannica*. <https://www.britannica.com/topic/constitution-politics-and-law>, Retrieved and accessed on February 24, 2020, on 3.00 PM (Jakarta GMT zone).

⁹. Fred W Riggs, on Nurhasan Ismail, *Prismatics: Community Needs Compound An Initial Thought*, Professorship Inauguration Speech, delivered at the Open Meeting of the Gadjah Mada University Council of

Professors on December 12, 2011 in Yogyakarta, page. 11.

¹⁰.Fred W Riggs, 1985, *State Administration-country Developing; Theory Public Prismatic*, (translated by the Yasogama Translation Team from the original title, Administration in Developing Countries; The Theory of Prismatic Society), CV Rajawali, Jakarta, page. 59.

¹¹. *Ibid.*, page. 60.

¹².Soerjono Soekanto, 1991, *Legal Function and Social Change*, Citra Aditya Bakti, Bandung, page. 13.

¹³. *Ibid.*, Page. 15.

reflective law.¹⁴ This concept has similar condition on south east asia, in responsible about rule of law, traditional values, local society with a large groups in indigeneous or in religious groups for the new concept of health as constitutionalism in the future.

In the context of the constitution, the reference to prismatic law similar to be delivered in asean constitution. Most of the asean state have powerful in their traditional concepts which was illuminated their society in the body of law and the rule of the state. The prismatic conception according to Fred W. Riggs above combines elements of good values from various elements of conflicting values. So the authors conclude that Riggs' prismatic conception will being adopted in the future for ASEAN constitutionalism in cooperation with one eyes of perception facing the common enemy, pandemic for example. ASEAN people felt great happiness because they have good perceptions with indigeneous tradition in the same way with modernity. ASEAN society are obey the rule of law concept as modern society in the name of democracy and the rule of law based on their constitutionality, but they also pursued the happiness inside by challenging their beliefs. In the future, the authors advice community constitution for South East Asian. Even they have their own constitutions, the community-union constitution will make easier with unpredictable situation. We all fight not only for pandemic covid -19, but also "common enemy" in the next new order.

CONCLUSION

Constitutionalism was a powerfull entity on South East Asia. After hitting by COVID-19, the people of the state using their respective values as the big stone to start building the new hopes of the state. The big challenges is how to Strengthen the health rights perspective and its

requirements covered by the state law as "the living constitution" in south east asia by using the new community constitutions for Asean people.

CONFLICTS OF INTEREST

This research interpretation based on normative reported research on postdoctoral series of research for South East Asian Constitution. The design of the study; the collection, analyses, interpretation of data; in the writing of the manuscript, are originally made by the authors".

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