



Constitutional Review

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- The Tenure Arrangement of Primary Constitutional Organ Leaders in Indonesian Constitutional System
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Faiq Tobroni, Izzatin Kamala

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Jl. Medan Merdeka Barat No. 6 Jakarta 10110

Phone. (+6221) 23529000 Fax. (+6221) 352177

E-mail: jurnal@mahkamahkonstitusi.go.id

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THE TENURE ARRANGEMENT OF PRIMARY CONSTITUTIONAL ORGAN LEADERS IN INDONESIAN CONSTITUTIONAL SYSTEM

Bayu Dwi Anggono

Faculty of Law, University of Jember
Jalan Kalimantan 37 Jember
bayu_fhunej@yahoo.co.id

Abstract

The tenure arrangement of primary constitutional organ leaders is required as the implementation of power limitation principle and the manifestation of political equality principle as the characteristic of democratic state. The tenure arrangements of primary constitutional organ leaders in Indonesia have four models: tenure arrangement through the 1945 Constitution, tenure arrangement through Law, tenure arrangement which is not regulated by law but regulated in the constitutional organs' internal regulation, and tenure arrangement which is not regulated by law as well as internal regulation. The problem in this paper is: First, how is the arrangement of leadership tenure in the constitutional organs according to the Indonesian legislation system. Second, how to adjust the arrangement of constitutional organ leader in order to provide legal certainty and prevent conflict that can disrupt organs' performance. The arrangement through the Constitution is the most powerful model in term of legal certainty regarding that the Constitution is in the highest national legal order and materials related to the structure and organization of primary constitutional organs constitute the Constitution's substance. The model not regulated in law but regulated in internal regulation prone to cause conflict because every member of the constitutional organs which meets the requirements may change the internal regulation at any time. To avoid this conflict, this paper concludes that it requires the change of regulation regulating the tenure of constitutional organ leaders so that it is no longer regulated in the constitutional organs' internal regulations, but it is set in the 1945 Constitution or at least in the Law in order to have a better legal certainty.

Keywords: Arrangement, Tenure, Primary Constitutional Organ

I. INTRODUCTION

1.1 Background

One of the constitutional organs in Indonesia, i.e. Regional Representatives Council (DPD), is engaged in internal conflict among its members since March 2016. It is caused by different opinion on the ratification of DPD's code of conduct especially the limitation of DPD leadership tenure from five years to two and a half years.¹ The supporting party argues that the tenure of DPD leader is not explicitly mentioned in the Law No. 17/2014 on People's Consultative Assembly (MPR), House of Representatives (DPR), Regional Representatives Council (DPD), and Provincial Legislative Council (DPRD). Therefore, it becomes the authority of DPD members to determine DPD's code of conduct. Moreover, the limitation of leadership tenure from 5 years to 2.5 years is also required to evaluate leader's performance and make him focus on managing the institution. If it is too long, a leader can become complacent about the position.²

On the contrary, the party which does not agree with the tenure limitation from 5 years to 2.5 years argues this change is not taken in accordance with the constitutional practice stipulated in the Law No. 17/2014. Then, the change of leadership tenure is false and unfounded regarding the election cycle and DPD membership period are applied *mutatis mutandis* towards the tenure of DPD leader, i.e. five years. It is also applied to the tenure of MPR leader, DPR leader, and DPRD leader.³

The conflict happens to DPD as a constitutional organ will have a certain implication to the effective implementation of its authorities and duties. Moreover, the internal conflict on the limitation of leadership tenure can

¹ The DPD was established based on the 3rd amendment of the 1945 Constitution in November 2001. It aims to fulfill the need of justice for society in regions, to expand and to increase the motivation and the capacity of regions in the national life as well as to strengthen the Unitary State of the Republic of Indonesia. See DPD RI, "Profil", <http://dpd.go.id/halaman-profil>, accessed 10 April 2016.

² Kompas.com, "Anggota DPD: Polemik Pemangkas Masa Jabatan Pimpinan Untuk Evaluasi Kinerja", http://nasional.kompas.com/read/2016/04/19/13072211/Anggota.DPD.Polemik.Pemangkas.Masa.Jabatan.Pimpinan.untuk.Evaluasi.Kinerja?utm_campaign=related&utm_medium=bp-kompas&utm_source=news&, accessed 19 April 2016.

³ Kompas.com, "Irman Gusman Anggap Pemangkas Masa Jabatannya Bertentangan dengan UU", http://nasional.kompas.com/read/2016/03/17/22361671/Irman.Gusman.Anggap.Pemangkas.Masa.Jabatannya.Bertentangan.dengan.UU?utm_source=RD&utm_medium=inart&utm_campaign=khprdr, accessed 10 April 2016.

also affect the dignity and public confidence in DPD. The public confidence is not quite high before the conflict. It is based on the survey findings conducted by the Indonesian Survey Circle (LSI) on 11-15 December 2015 showing only 53.4%.⁴

Internal conflict by the members of constitutional organs, including the leadership tenure, will greatly affect the performance and the goal achievement of constitutional organs. Jimly Asshiddiqie states that:

Institutional structure consists of people who hold their own position and role with different attitude and behavior. If the togetherness at work environment creates a traditional work culture, then the work climate and work relationship among the members will be mixed between personal and official matters. The stronger is the paternalistic and feudalistic culture in institutional structure, the stronger is the conflict of interest in every position level. The conflict of interest between those two matters will disturb objectivity, rationality, and professional work culture. Then, it slows the growth of institutional performance to achieve a common goal.⁵

DPD's conflict on leadership tenure happens because there is no single basic regulation to unite the regulation of constitutional organ leadership tenure in Indonesian constitutional system, especially primary constitutional organs (President and Vice President, MPR, DPR, DPD, MA, MK, and BPK). The absence of single basic regulation here means that there some regulations ruling the tenure of constitutional organ leaders qualified as primary constitutional organs. Those regulations range from the 1945 Constitution (UUD 1945), Law (UU), constitutional organs' internal regulation, or even not regulated at all.

The diversity of regulations will have some consequences as experienced by DPD. It results from the incomplete process to regulate its leadership tenure. Logemann as cited by Sri Soemantri states that the mechanism of constitutional organ leader appointment, including the leadership tenure is an issue which needs certainty. Logemann suggests several issues in constitutional

⁴ Kompas.com, "Survei LSI: Kepercayaan Publik terhadap DPR Ada di Titik Terendah", <http://nasional.kompas.com/read/2015/12/17/14485741/Survei.LSI.Kepercayaan.Publik.Terhadap.DPR.Paling.Rendah>, accessed 11 April 2016.

⁵ Jimly Asshiddiqie, "Liberalisasi Sistem Pengisian Jabatan Publik", a paper presented at 2nd *Konferensi Hukum Tata Negara*, Universitas Andalas, September 2015, p. 4.

organs, as follows: (1) The creation of constitutional organs. It means who creates and arranges the organs. (2) Because every constitutional organ is led by a leader, the problem is how is the mechanism. It can be conducted by election, appointment, or other mechanisms. (3) What are their duties and authorities. To achieve the country's goal, every constitutional organ should be given duties and authorities. (4) How is the relationship between the constitutional organs.⁶

The leadership tenure and constitutional organ require certain arrangements to prevent absolutism. Christopher Pierson states that:

Absolutism signaled the emergence of a form of state based upon: the absorption of smaller and weaker political units into larger and stronger political structures; a strengthened ability to rule over a unified territorial area; a tightened system of law and order enforced throughout a territory; the application of a 'more unitary, continuous, calculable and effective' rule by a single, sovereign head; and the development of a relatively small number of states engaged in an open-ended, competitive, and risk-laden power struggle.⁷

1.2 Questions

This paper will raise the issue related to the tenure of constitutional organ leader in the Indonesian constitutional system. First, how is the arrangement of leadership tenure in the constitutional organs according to the Indonesian legislation system. Then, how to adjust the arrangement of constitutional organ leader in order to provide legal certainty and prevent conflict that can disrupt organs' performance.

II. DISCUSSION

2.1 The arrangement of leadership tenure in primary constitutional organ according to the Indonesian legislation system.

The arrangement of constitutional organ leadership tenure is based on at least two considerations. The first consideration is the implementation of power

⁶ Konsorsium Reformasi Hukum Nasional (KRHN) and Mahkamah Konstitusi RI, *Lembaga Negara dan Sengketa Kewenangan Antar Lembaga Negara*, Jakarta: KRHN, 2005, p. 15.

⁷ Christopher Pierson, *Modern State*, Second Edition, New York: Routledge, 2004, p. 35.

limitation principle; and secondly, the manifestation of political equality principle among citizens as the characteristic of democratic state.

First, as the implementation of power limitation principle. The implementation of law-state principle adopted by Indonesia as stipulated in Article 1 (3) of the 1945 Constitution is power limitation.⁸ According to the history of the birth of Article 1 (3) of the 1945 Constitution, it can be seen that Indonesia is a law-state which maintains the supremacy of law to uphold truth and justice, and there is no unaccountable power.⁹

According to legal experts' opinion, there are some characteristics of Indonesia as the law-state. Jimly Asshiddiqie suggests thirteen basic principles of law-state (Rechtsstaat), one of them is power limitation.¹⁰ The power limitation is necessary because according to "the iron law" every power has a tendency to be arbitrary. It is in line with Lord Acton's opinion: "Power tends to corrupt, and absolute power corrupts absolutely."¹¹ Therefore, power must be limited by separating them into some branches which function as 'checks and balances'. Those branches balance and control each other as well as have an equal position.¹² The power limitation is also conducted by distributing the power into some organs arranged vertically. Therefore, the power is not centralized and concentrated in one single organ allowing the arbitrariness.¹³

The limitation of tenure can be seen as part of the power limitation from some point of views. Moreover, the limitation of state organs' authority as the main function of constitution is basically related to two different aspects of power, i.e. (a) scope of power; and (b) period of power. The limitation of the scope of power can be carried out by (a) separation of power; and (b) division of power. The limitation of the period of power can be done by establishing the tenure of state officials.¹⁴

⁸ Article 1(3) of the 1945 Constitution, "The state of Indonesia is a state based on law".

⁹ Sekretariat Jenderal MPR RI, *Panduan Pemasyarakatan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 dan Ketetapan Majelis Permusyawaratan Rakyat Republik Indonesia*, Jakarta: Sekjend MPR, 2012, p. 68.

¹⁰ Jimly Asshiddiqie, "Gagasan Negara Hukum Indonesia", a paper presented at *Forum Dialog Perencanaan Pembangunan Nasional*, Badan Pembinaan Hukum Nasional (BPHN), Ministry of Law and Human Rights of Indonesia, 22-24 November 2011, p. 6.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ Hotma P Sibuea, "Pemberhentian Presiden/Wakil Presiden Pada Masa Jabatan Oleh Majelis Permusyawaratan Rakyat Dalam Sistem Ketatanegaraan Indonesia", *Jurnal Hukum Staatrechts*, Volume 1, Issue 1, October 2014, p. 88.

Tenure limitation is also adopted by the 22nd amendment of United States Constitution stating:

No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this article shall not apply to any person holding the office of President when this article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this article becomes operative from holding the office of President or acting as President during the remainder of such term.

The limitation of USA Presidential tenure for only two periods according to Stephen W Statis is “*to strengthen and safeguard democracy from what they believed to be its greatest danger: the aggran-dizement, consolidation, and even usurpation of political power by the executive branch of government*”¹⁵

Power needs to be limited because it will reduce the power devoted to certain interests which is inappropriate to the objective of the power itself. Alexander Tabbarok explains that:

Since political exchange is rarely simultaneous or subject to enforce-able contracts there is potential for opportunism. Will the representative exert high effort for the interest? Will the interest fulfill its promises of support? Answering these questions in the affirmative requires that there be mutual trust between interest and representative, which can only be created in a long-term relationship.¹⁶

Second, as a manifestation of political equality principle among citizens as the characteristic of democratic state. According to Article 1(2) of the 1945 Constitution, Indonesia has declared itself as a democratic state. Then, Article 1(2) of the 1945 Constitution states, “*Sovereignty is vested in the people and implemented pursuant to the Constitution*”. Miriam Budiardjo explains the compulsory elements must be possessed by the democratic state as follows: (1) constitutional protection, (2) independent and impartial judiciary, (3) free

¹⁵ Stephen W Statis, *The Twenty-Second Amendment: A Practical Remedy or Partisan Maneuver?*, Constitutional Commentary, vol 7:61, p. 69.

¹⁶ Alexander Tabbarok, “A survey,Critique, And New Defense Of Term Limits”, *Ceto Journal*, Vol. 14, Issue 2, Fall 1994, p. 337.

election, (4) freedom of expression, (5) freedom of association, organization, or opposition, and (6) civic education.¹⁷

Furthermore, the elements of democratic state can be achieved if these conditions are available: (1) a responsible government, (2) house of representatives elected from the election conduct a free supervision, (3) the presence of several political parties, (4) the presence of independent press or media, and (5) a free judicial system which guarantees human rights.¹⁸ Democratic state can also be achieved if every person has the same opportunity. James S. Fishkin states three democratic values, i.e. deliberation, political equality, and participation.¹⁹

Rainer Forst defines that deliberative value is not an individual and communal will as the source of legitimacy, but the source of legitimacy is the process of deliberative formation, argumentative discussion, a political decision which is reviewed together and it is temporary and open for revision²⁰. According to James S. Fishkin, there are five conditions to obtain a quality deliberative value, as follows:

- a. *Information*: The extent to which participants are given access to reasonably accurate information that they believe to be relevant to the issue.
- b. *Substantive balance*: The extent to which arguments offered by one side or from one perspective are answered by considerations offered by those who hold other perspectives.
- c. *Diversity*: The extent to which the major positions in the public are represented by participants in the discussion.
- d. *Conscientiousness*: The extent to which participants sincerely weigh the merits of the arguments.
- e. *Equal consideration*: The extent to which arguments offered by all participants are considered on the merits regardless of which participants offer them.²¹

¹⁷ Miriam Budiarmo in Moh. Mahfud MD, *Demokrasi dan Konstitusi di Indonesia: Studi tentang Interaksi Politik dan Kehidupan Ketatanegaraan*, Jakarta: Rineka Cipta, 2000, p. 2.

¹⁸ Franz Magnis-Suseno, *Mencari Sosok Demokrasi: Sebuah telaah filosofis*, Jakarta: Gramedia Pustaka Utama, 1995, p. 56.

¹⁹ James S. Fishkin, *When the People Speak Deliberative Democracy and Public Consultation*, Oxford: Oxford University Press, p. 33.

²⁰ Rainer Forst as quoted by F Budi Hardiman, *Demokrasi Deliberatif, Menimbang 'Negara Hukum' dan 'Ruang Publik' dalam teori Diskursus Jürgen Habermas*, Jakarta: Kanisius, 2009, p. 130.

²¹ James S. Fishkin, *op.cit*, p. 34.

Moreover, the goal of democratic deliberation can be achieved by combining it with political equality, an idea in which everyone has an equal opportunity in every political choice. According to James S. Fishkin, the basic idea of political equality is every citizen has an equal possibility to support any alternative (candidate, party, or policy). Therefore, democratic system should give every citizen an equal probability to be voters determining the ones who will serve in important position.²²

The recognition of political equality principle in democratic living has been acknowledged in Indonesian constitution, i.e. Article 28D(3) of the 1945 Constitution. It states, “*Every citizen has the right to equal opportunity in government*”. The provision of Article 28D(3) of the 1945 Constitution regulates the important materials in modern constitutional life with the following characteristics: First, good governance. Second, the rule of law. Third, Democracy. Fourth, checks-and-balances principle. Fifth, upholding human rights.²³ Furthermore, the presence of citizens’ political rights provision in the 1945 Constitution will enhance the constitutional guarantee towards Indonesia’s human rights and make Indonesia as a more civilized country in the international arena.²⁴

The presence of Article 28D (3) of the 1945 Constitution has become the foundation for the Constitutional Court of Indonesia to provide constitutional protection for citizens, as reflected in the Constitutional Court Decision No. 5/PUU-V/2007 reviewing Law No. 32/2004 on Regional Government (Regional Government Law) against the 1945 Constitution. In this case, the plaintiff argues that the nomination of regional head and deputy head which is monopolized by the political parties and does not give the opportunity for independent candidates to run for regional head and deputy head violates the 1945 Constitution. Then, the plaintiff also states that Article 28D (3) of the 1945 Constitution guarantees every citizen has the right to get an equal opportunity in government.²⁵

²² *Ibid.*, p. 43

²³ Mahkamah Konstitusi RI, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 Latar Belakang, Proses, dan Hasil Pembahasan 1999-2002*, Book VIII concerning Warga Negara dan Penduduk, Hak Asasi Manusia, dan Agama, Jakarta: Sekretariat Jenderal MKRI, 2010, p. 219.

²⁴ *Ibid.*

²⁵ Constitutional Court Decision No. 5/PUU-V/2007 reviewing Law No. 32 of 2004 concerning Regional Government, p. 52.

The Constitutional Court responds to this appeal that to provide the equality of rights for all citizens as guaranteed by Article 28D(1) and (3) of the 1945 Constitution cannot be done by stating that the nomination of independent candidates as stipulated by Article 67(2) of the Law No. 11/2006 on Aceh Government violates the 1945 Constitution and therefore should be declared null and void, since the fact that the nomination of independent candidates does not violate the 1945 Constitution.²⁶ However, the equality of rights can be conducted by requiring the Regional Government Law adapts to new developments made by the law maker to give the right for every individual to run for regional head and deputy head as independent candidate as stipulated in Article 67 (2) of the Aceh Government Law.²⁷

After knowing the importance of the arrangement of constitutional organ leadership tenure, this article will discuss the form of leadership tenure arrangement especially for constitutional organs categorized as primary constitutional organs. According to Asshiddiqie, there are more than 34 constitutional organs stated either directly or indirectly in the 1945 Constitution. Those 34 organs can be distinguished from two aspects, i.e. functionality and hierarchy.²⁸ In term of the hierarchy, all 34 organs can be differentiated into three layers. The first layer is primary constitutional organs. The second layer is constitutional organs, while the third layer is regional organs.²⁹

Asshiddiqie explains after the amendment of the 1945 Constitution there is no terminology of primary constitutional organs. However, to facilitate the understanding, constitutional organs in the first layer are referred to primary constitutional organs, namely: (i) President and Vice President; (ii) DPR (House of Representatives); (iii) DPD (Regional Representatives Council); (iv) MPR (People's Consultative Assembly); (v) MK (Constitutional Court); (vi) MA (Supreme Court); and (vii) BPK (Supreme Audit Agency).³⁰

²⁶ *Ibid.*, p. 55.

²⁷ *Ibid.*

²⁸ Jimly Asshiddiqie, *Perkembangan dan Konsolidasi Lembaga Negara Pasca Reformasi*, Jakarta: Sekretariat Jenderal dan Kepaniteraan MKRI, 2006, p. 105.

²⁹ *Ibid.*

³⁰ *Ibid.*

Besides the hierarchy, they can be seen from their importance of position and function. The constitutional organs categorized as primary or principal are: (i) President; (ii) DPR (House of Representatives); (iii) DPD (Regional Representatives Council); (iv) MPR (People's Consultative Assembly); (v) MK (Constitutional Court); (vi) MA (Supreme Court); and (vii) BPK (Supreme Audit Agency).³¹ Those organs are primary constitutional organs. Meanwhile, the other constitutional organs are supporting or auxiliary organs. Thus, the organs categorized as primary constitutional organs reflect countries' major power branches, i.e. legislature, executive, and judiciary.³²

In connection to the arrangement of constitutional organ leadership tenure categorized as primary constitutional organ, there are four legislation models which govern it. **The first model** is the arrangement of tenure through the 1945 Constitution. The arrangement of the President and Vice President's tenure belongs to this category as stipulated in Article 7 of the 1945 Constitution, "*The President and Vice President hold office for a term of five years and can afterwards be elected to the same office, for one other term only*".

Prior to the amendment of Article 7 of the 1945 Constitution, the original text is, "*The President and Vice President hold office for a term of five years and can afterwards be elected again*". The amendment of Article 7 is motivated by the Indonesian constitutional practice in which there is no presidential turnover for decades.³³ It is caused by the formulation of Article 7 of the 1945 Constitution before the amendment which can bring several interpretations. It can be interpreted the president can be served many times or the president can only be served twice.³⁴

Learning from the constitutional experience above, the amendment of Article 7 is carried out by defining and limiting the tenure period of President and Vice President. They can be re-elected only for one more term. Therefore, President or Vice President may serve only a maximum of two terms.³⁵

³¹ *Ibid*, p. 115.

³² *Ibid*, p. 116.

³³ Sekretariat Jenderal MPR RI, *Panduan Pemasarakatan*, *op.cit*, p. 86.

³⁴ *Ibid*.

³⁵ *Ibid*, p. 87.

Syamsuddin explains that the limitation of President's tenure through the amendment of Article 7 of the 1945 Constitution is needed because many developed, developing, or underdeveloped countries also limit their head of state or head of government's term of office for only two periods. The other consideration is the most appropriate leadership tenure for the head of state or head of government is two periods.³⁶

Regardless of democracy, constitution, and other noble values, people basically have natural limitations especially if they hold powerful position. These natural limitations can be a prison lulling the sovereign, so the vested interest appears and leads to the abuse of power.³⁷

The second model is the arrangement of tenure through legislation. The constitutional organs belong to the second category are the Supreme Court and the Constitutional Court. The Supreme Court as one of the judicial authorities shall have the competence to make judgment at the cassation level, to review regulations made under a law against that law, as well as other competences as provided by law.³⁸ The Supreme Court consists of chief justices, judges, registrars, and secretaries. The chief justices of the Supreme Court consist of one chief justice, two deputy chief justices, and some junior-chief justices. MA deputy chief justices consist of the deputy chief justice of judicial affairs and the deputy chief justice of non-judicial affairs.

MA Chief Justice and Deputy Chief Justice are elected from and by the supreme court justices and appointed by the President pursuant to Article 5(6) of the Law No. 5/2004 on the Amendment of the Law No 14/1985 on the Supreme Court holds office for a term of 5 (five) years. Although the tenure period of Chief Justice and Deputy Chief Justice has been determined, there is a note to this arrangement. The Law No. 14/1985 as amended by the Law No. 5/2004 and the Law No. 3/2009 did not regulate the limitation of how many times supreme court justice can serve as MA Chief Justice and Deputy Chief Justice.

³⁶ Syamsuddin Haris, "Soal Pembatasan Kekuasaan Presiden", *Kolom Tempo*, 3 September 1997, <http://tempo.co.id/ang/min/02/27/kolom4.htm>, accessed 30 April 2016.

³⁷ *Ibid.*

³⁸ Article 24A(1) of the 1945 Constitution.

The implication of the absence of limitation on how many times the ones can be MA Chief Justice and Deputy Chief Justice results in various interpretations whether supreme court justice can only serve as MA Chief Justice once or can serve as MA Chief Justice for many times. In other words, Article 5(6) of the Law No. 5/2004 has caused uncertainty. It undoubtedly violates Article 28D (1) of the 1945 Constitution which states, “*Each person has the right to recognition, security, protection and certainty under the law that shall be just and treat everybody as equal before the law*”.

The provisions of Article 5(6) of the Law No. 5/2004 does not meet four things related to legal certainty as stated by Achmad Ali, namely: First, law is positive which means it is legislation (*Gesetzliches Recht*). Second, law is based on facts such as “goodwill”, “decency”. Third, the fact should be formulated in a clear way so as to avoid mistakes in the meaning and easier to be implemented. Fourth, the positive law can be changed many times.³⁹

The provisions of Article 5(6) of the Law No. 5/2004 is not formulated clearly so it brings confusion in the meaning and it is also difficult to be implemented. The unclear arrangement stated in Article 5(6) of the Law No. 5/2004 has enormous potential to cause problems in its application because legal certainty demands a clear law.

In addition to the Supreme Court, Article 24(2) of the 1945 Constitution determines the other judicial authority, i.e. the Constitutional Court. The Constitutional Court shall have the authority to make final decisions in cases of first and last instance handling the review of laws against the Constitution, to decide on authority arguments among constitutional organs whose competence is enshrined in the Constitution, to decide on the dissolution of political parties, and to decide on disputes regarding general election results.⁴⁰ Moreover, the Constitutional Court also has the duty to rule on an opinion of the DPR regarding alleged violations by the President or the Vice President according to the Constitution.⁴¹

³⁹ Ahmad Ali, *Menguak Teori Hukum (Legal Theory) dan Teori Peradilan (Judicial Prudence)*, Jakarta: Kencana Prenada Media Group, 2009, pp. 292-293.

⁴⁰ Article 24C(1) of the 1945 Constitution.

⁴¹ Article 24C(2) of the 1945 Constitution.

The Constitutional Court shall consist of Chief Justice and member, Deputy Chief Justice and member, as well as seven members of the constitutional justices. In connection to the election procedure and the tenure period of MK Chief Justice and Deputy Chief Justice, it is stipulated in Article 4(3) of the Law No. 8/2011 on the Amendment of the Law No. 24/2003 on the Constitutional Court. It states that MK Chief Justice and Deputy Chief Justice elected from and by constitutional justice members for a term of two years and six months from the date of appointment as MK Chief Justice and Deputy Chief Justice. Furthermore, Article 3A of the Law No. 8/2011 also regulates the elected MK Chief Justice and Deputy Chief Justice can afterwards be elected to the same office, for one other term only.

The tenure period of MK Chief Justice and Deputy Chief Justice in the Law 8/2011 is different from the Law 24/2003 which previously states MK Chief Justice and Deputy Chief Justice elected from and by constitutional justices for three years. According to the framers of the amendment of Law No 24/2003, the change of the tenure of MK Chief Justice and Deputy Chief Justice which is six-months lower than the previous tenure is to adapt to the tenure of constitutional justices which is five years, i.e. the tenure of MK Chief Justice and Deputy Chief Justice is only 2.5 years, but they can be re-elected. This is a correction to the discrepancy between the tenure of constitutional justices for a term of five years and the tenure of MK Chief Justice and Deputy Chief Justice for a term of three years. If the Chief Justice and Deputy Chief Justice are re-elected for the second times, it will pass their tenure as constitutional justices which is only five years.⁴²

The change of the tenure to 2.5 years is also carried out in order to provide opportunity and evaluation for constitutional justices in selecting Chief Justice and Deputy Chief Justice. The good or bad performance of Chief Justice and Deputy Chief Justice can be seen after 2.5 years. The change of the tenure of Chief Justice and Deputy Chief Justice to 2.5 years is an agreement among DPR factions after a tough debate related to this matter because some DPR factions

⁴² Hukumonline, "Masa Jabatan Ketua MK Dipersingkat, Masa jabatan Ketua dan Wakil Ketua MK ditetapkan selama 2,5 tahun sebagai bahan evaluasi, <http://www.hukumonline.com/berita/baca/lt4df8706b5baae/dpr-pangkas-masa-jabatan-ketua-mk>, accessed 10 April 2016.

have their own opinions. The majority wanted a term of 2.5 years. Meanwhile, Golkar Party wanted a term of 5 years and Demokrat Party wanted the tenure is internally regulated by the Constitutional Court and did not need to be stipulated by the Constitutional Court Law.⁴³

The third model is the tenure arrangement which is not regulated by law, but it is regulated internally (code of conduct). People's Consultative Assembly (MPR), House of Representatives (DPR), and Regional Representatives Council (DPD) belong to this category. MPR has authority, including to amend and to ordain the Constitution, to inaugurate the President and/or Vice President, to decide on the DPR's proposal to dismiss the President and/or Vice President during their term of office in the event that the Constitutional Court resolves that the President and/or Vice President is proven guilty of violating the law, to inaugurate the Vice President as the President if during his term the President passes away, resigns, is impeached, or is unable to carry out his duties, to select a Vice President among two candidates nominated by the President if the position of the Vice President falls vacant.⁴⁴

Article 15(1) of the Law No. 17/2014 states MPR leaders consist of one Chairman and four Vice Chairmen elected from and by the members of MPR. Then, the Article 15 (2) of the Law No. 17/2014 regulates MPR leaders are elected from and by the members of MPR in a "package".

The Law No. 17/2014 does not regulate the tenure of MPR leader. Moreover, there is no provision of the Law No. 17/2014 delegates where will the arrangement of MPR leadership tenure be arranged. The only provision of the Law No. 17/2014 which delegates the arrangement of MPR leaders is Article 15(10) stating the further provision for the election procedures of MPR leaders are stipulated in MPR's Code of Conduct.

For the absence of tenure arrangement in the Law No. 17/2014, Article 24 of the MPR Regulation No. 1/2014 on Code of Conduct regulates the tenure of MPR leaders are equal to the tenure of MPR members, as referred to in Article

⁴³ *Ibid.*

⁴⁴ Article 3(1) and (2), Article 7B (6), Article 8(2) of the 1945 Constitution.

8(2). The Article 8(2) of MPR Regulation No. 1/2014 regulates the tenure of MPR members is five years and ends when the new MPR members take an oath/pledge. Therefore, according to MPR Regulation No. 1/2014 the MPR leadership tenure is five years.

The House of Representatives (DPR) has the power to enact laws together with the President, to approve or not to approve the government regulations in lieu of law submitted by the President to be endorsed into law, to jointly discuss with the President by taking into account the recommendations from the DPD and to approve the bill on the state budget submitted by the President, to give the President approval to declare war and make peace with other countries.⁴⁵ Article 84 (1) of the Law No. 17/2014 regulates DPR leaders consist of one Chairman and four Vice-Chairmen elected from and by DPR members. Then, Article 84 (2) of the Law No. 17/2014 stipulates DPR leaders referred to in paragraph (1) is elected from and by DPR members in a “package”.

The Law No. 17/2014 does not regulate the tenure of DPR leader. Moreover, there is no provision of the Law No. 17/2014 delegates where will the arrangement of DPR leadership tenure be arranged. The only provision of the Law No. 17/2014 which delegates the arrangement of DPR leaders is Article 84(10) of the Law No. 17/2014 stating the further provision for the election procedures of DPR leaders are stipulated in DPR’s Code of Conduct.

For the absence of tenure arrangement in the Law No. 17/2014, Article 27(4) of the DPR Regulation No. 1/2014 on Code of Conduct regulates the tenure of DPR leaders are equal to the tenure of MPR members. Then, Article 76(4) of the Law No. 17/2014 and Article 8(4) of the DPR Regulation No. 1/2014 determine the tenure of DPR members is five years and ends when the new DPR members take an oath/pledge. Therefore, according to DPR Regulation No. 1/2014 the DPR leadership tenure is five years.

The Regional Representatives Council (DPD) has the authority to submit to the DPR bills dealing with regional autonomy, relations between the center and the regions, the establishment and growth as well as the merger of regions,

⁴⁵ See Article 11(1), Article 20 (1) and (2), Article 22(2), Article 23(2) of the 1945 Constitution.

the management of natural and other economic resources, and matters related to the financial balance between the center and the regions, to supervise the implementation of laws regarding: regional autonomy, the establishment, growth and merger of regions, relations between the center and the regions, the management of natural and other economic resources, the implementation of the state budget, taxation, education, and religion as well as to submit the results of its supervision to the DPR.⁴⁶ Article 260 (1) of the Law No. 17/2014 regulates DPD leaders consists of one Chairman and two Vice-Chairmen elected from and by DPD members in a DPD plenary session.

The Law No. 17/2014 does not regulate the tenure of DPD leader. Moreover, there is no provision of the Law No. 17/2014 delegates where will the arrangement of DPD leadership tenure be arranged. The only provision of the Law No. 17/2014 which delegates the arrangement of DPD leaders is Article 260(7) stating the further provision for the election procedures of DPD leaders are stipulated in DPD's Code of Conduct.

For the absence of tenure arrangement in the Law No. 17/2014, Article 66 of the DPD Regulation No. 1/2014 on Code of Conduct regulates the tenure of DPD leaders are equal to the tenure of DPD members as referred to in Article 7(4). Then, Article 7(4) of the DPD Regulation No. 1/2014 determines the tenure of DPD members is 5 (five) years and ends when the new DPD members take an oath/pledge. Therefore, according to DPD Regulation No. 1/2014 the DPD leadership tenure is five years.

The Fourth Model is the tenure arrangement is not regulated by law and internal regulation. Supreme Audit Agency (BPK) is categorized to the fourth model. BPK has the authority to audit the management and accountability of the state's finances conducted by the Central Government, Regional Government, other Constitutional Organs, Bank Indonesia, State-Owned Enterprise, Public Service Agency, Region-Owned Enterprise, and other institutions or entities managing the state's finances.⁴⁷

⁴⁶ Article 22D(1), (2), and (3) of the 1945 Constitution.

⁴⁷ Article 23E(1) of the 1945 Constitution and Article 6(1) of Law No. 15 of 2006 on the Supreme Audit Agency.

Article 15(1) of the Law No. 15/2006 on BPK regulates that BPK leaders consist of one chairman and one vice chairman. The election procedures of BPK leaders are stipulated in Article 15(2) of the Law No. 15/2006 which regulates BPK Chairman and Vice Chairman are elected from and by BPK members in the BPK membership session not longer than one month after the date of BPK membership inauguration by the President.

The Law No. 15/2006 does not regulate the tenure of BPK leader. Moreover, there is no provision of the Law No. 15/2006 delegates where will the arrangement of BPK leadership tenure be arranged. The only provision of the Law No. 15/2006 which delegates the arrangement of BPK leaders is Article 15(5) stating the further provision for the election procedures of BPK Chairman and Vice-Chairman are stipulated in BPK Regulation.

BPK Regulation which implements Article 15(5) of the Law No. 15/2006 is the BPK Regulation No. 1/ 2009 on The Election Procedures of BPK Chairman and Vice Chairman. Based on the analysis of nineteen Articles in the BPK Regulation No. 1/2009, there is no provision regulating the tenure of BPK leaders. Article 18 of the BPK Regulation No. 1/2009 only states that BPK Chairman and Vice Chairman take oath or pledge according to their religion guided by MA Chief Justice soon after appointed as BPK Chairman and Vice Chairman. The absence of this arrangement causes problem related to when the tenure of BPK leaders will be over, although in practice the tenure of BPK Chairman and Vice Chairman is five years equals to the tenure of BPK members.

2.2 The arrangement of leadership tenure in primary constitutional organ that provides legal certainty.

Based on the four models of tenure arrangement in primary constitutional organs, i.e. regulated by the 1945 Constitution, regulated by law, not regulated by law but regulated in the internal regulation, and not regulated by law and also not regulated by internal regulation, it can be analyzed the degree of strength related to legal certainty. The first model, regulated through the Constitution, is the most ideal model and gives the strongest tenure certainty. Then, it is followed by the second model, i.e. regulated by law.

The model of leadership tenure arrangement in primary constitutional organs stated in the Constitution is the most powerful model in term of legal certainty for several reasons. First, Constitution as the state constitution is the highest legal order according to Hans Kelsen.⁴⁸ Constitution is considered to be a “constituent act”, and it is not an ordinary legislative act.⁴⁹

Constitution is a higher law or even the highest and most fundamental law, because constitution is the source of legitimacy or the authorization for other legal forms or legislation.⁵⁰ The consequence of constitution as the highest hierarchy of legislation is in accordance with the universal legal principle. Thus, legislation under the constitution must not conflict with the higher law in order to be valid and enforced.⁵¹

The recognition of constitution as the highest hierarchy of legislation is formally stipulated in the Law No 12/2011 on the Creation of Legislation. Article 7(1) of the Law No. 12/2011 sets the type and hierarchy of legislation as follows: 1945 Constitution; MPR Decree; Law/Government Regulations in Lieu of Law; Government Regulation, Presidential Regulation; Provincial Regulation; and Regency/City Regulation. Then, Article 7(2) of the Law No. 12/2011 states that the legal force of legislation is in accordance with the hierarchy.

Second, the tenure arrangement of primary constitutional organ leaders strongly associated with the structure and organization of primary constitutional organ constitutes the Constitution’s substance. According to Sri Soemantri, various constitutions in the world generally include three substance groups, i.e.: (1) The presence of human rights and citizens protection regulation; (2) The presence of fundamental constitutional structure regulation; and; (3) The presence of the limitation and division of fundamental constitutional duties.⁵²

Moreover, Merriam Budiardjo describes every constitution consists of some provisions as follows: (1) State Organization, e.g. division of power between the legislature, executive, and judiciary branches; division of power between federal

⁴⁸ Hans Kelsen, *General Theory Of Law and State*, translated By Anders Wedberg, New York: Russel & Russel, 1973, p. 156.

⁴⁹ Jimly Asshiddiqie, *Konstitusi & Konstitusionalisme Indonesia*, Jakarta: Konstitusi Press, 2005, p. 18.

⁵⁰ *Ibid.*, p. 19.

⁵¹ *Ibid.*

⁵² Sri Soemantri, *Undang-Undang Dasar 1945 Kedudukan dan Aspek-Aspek Perubahannya*, Bandung: Unpad Press, 2002, p. 3.

government and state government; problem solving procedure of jurisdiction violation by government agencies and so on, (2) Human Rights, (3) Procedure of Constitution Amendment, and (4) Some of them include prohibition to change certain natures of the Constitution.⁵³ The notion that the arrangement of state organization including primary constitutional organs constitutes the Constitution's substance is also proposed by William G. Andrews. He suggests that constitution's substance is intended to regulate three important things, as follows: (a) to limit the authority of constitutional state organs, (b) to regulate the relationship among constitutional state organs, and (c) to regulate the power relation between constitutional state organs and citizens.⁵⁴

The 1945 Constitution as the Indonesian constitution actually contains the arrangement of constitutional structure and state organization. AB Kusuma states the 1945 Constitution meets the qualification to be a constitution which includes some substances as follows: (a) preamble; (b) governance structure determining the function, duty, and authority of each constitutional organ; (c) citizens' rights and obligations according to Human Rights; (d) guarantee the constitutionality of law through judicial review which is the authority of Constitutional Courts; and e norms to amend the constitution.⁵⁵ However, it must be admitted that the 1945 Constitution does not fully regulate the state organization, e.g. it does not regulate the leadership tenure of primary constitutional organs such as MPR, DPR, DPD, MA, MK, and BPK.

Furthermore, the second model is the tenure arrangement of constitutional organ leaders through law. Although it is not as strong as provided by the Constitution, it is still acceptable. According to Hans Kelsen's opinion, the constitution material consists of regulations governing the creation of legal norms in general, especially law:

The material constitution may determine not only the organs and the procedure of legislation, but also, to some degree, the content of future laws. The

⁵³ Mirriam Budiardjo, *Dasar-Dasar Ilmu Politik*, Jakarta: Gramedia, 1989, p. 101.

⁵⁴ Jimly Asshiddiqie, "Islam dan Tradisi Negara Konstitusional", a paper presented at *Seminar on Indonesia-Malaysia*, UIN/IAIN Padang, Padang, 7 October 2010, p. 4.

⁵⁵ Dewa Gede Atmadja, *Hukum Konstitusi, Problematika Konstitusi Indonesia Sesudah Perubahan UUD 1945*, Malang, Setara Press, 2010, p. 80.

*constitution can negatively determine that the law must not have a certain content, e.g. that the parliament may not pass any statute which restrict religious freedom. In this negative way, not only the content of statutes but of all the other norms of the legal order, judicial and administrative decisions likewise, may be determined by the constitution. The constitution, however, can also positively prescribe a certain content of future statutes; it can, as does for instance the constitution of the United States of America, stipulate "that in all criminal prosecution the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district where in the crime shall have been committed which district shall have been previously ascertained by law, etc." This provision of the constitution determines the content of future laws concerning criminal procedure.*⁵⁶

To further regulate the incomplete arrangement of constitutional organs that exist in the Constitution is conducted by Law because constitution has a special nature or characteristic, i.e. its substance only regulates or contains subject matter so its norm level is at legal principle level which belongs to meta-norm. Thus, it requires further regulation, i.e. Law, which is at legal norm level (legal norm regulates certain behavior).⁵⁷ The Constitution is a basic principle or state principle containing goals to be achieved. The Constitution is expected to have an indefinite range of validity. To enable the achievement of these goals, the Constitution is commonly formulated to allow a great adaptability with the occurred changes.⁵⁸

The fact that the 1945 Constitution only includes presidential tenure and excludes other constitutional organ leadership tenure shows that the framers want to make it brief and flexible.⁵⁹ It is based on the mindset that the Constitution is enough to contain only the basic rules and the outline as an instruction to the central government and other state apparatus to organize the state. Meanwhile, the implementation of basic principles is given to the other legislation.⁶⁰

According to Moh. Kusnadi and Bintan R. Saragih, as a written constitution the 1945 constitution tends to be short. Its short nature is intended to simply arrange the outline or the main issue while the other problems can be arranged

⁵⁶ Hans Kelsen, *op. cit.*, p. 157.

⁵⁷ Dewa Gede Atmadja, *Hukum Konstitusi*, *op. cit.*, p. 40.

⁵⁸ Bagir Manan, *Pertumbuhan dan Perkembangan Konstitusi Suatu Negara*, Bandung: Mandar Maju, 1995, p. 7.

⁵⁹ Dahlan Thaib, *et. al.*, *Teori Hukum dan Konstitusi*, Jakarta: RajaGrafindo Persada, 1999, p. 140.

⁶⁰ *Ibid.*

by Law.⁶¹ Some provisions in the 1945 Constitution require further regulation through the Law although its implementation is not explained in the article of the Constitution in order to run the provision well.⁶²

Regarding the third regulation model that is not arranged by the Law but it is arranged in the internal regulation, and the fourth model that is not arranged by the law as well as internal regulation are models with the low level of legal certainty. It happens for several reasons, first, the internal regulation such as MPR regulation, DPR regulation, and DPD regulation does not fulfill the qualification as legislation.

According to Bagir Manan, legislation is any written decision issued by an authorized official which contains rules or behaviors in general.⁶³ In addition, A. Hamid S. Attamimi explains legislation is all laws created by constitutional organs in a certain form complemented by sanctions. It enforces and binds people.⁶⁴

T J Buys interprets that legislation binds generally, whereas JHA. Logemann added with the formulation “*naar buiten werkende voorschriften*”, so it becomes “*bindende algemeen en naar buiten werkende voorschriften*” (generally binding regulation and enacted out).⁶⁵ Article 1 (1) and (2) of the Law No. 12/2011 also defines legislation as a written regulation containing legal norm which binds generally and created or established by constitutional organs or authorized officials through the specified procedure in legislation

MPR’s code of conduct, DPR’s code of conduct, and DPD’s code of conduct is fulfilled the written legislation elements containing legal norms and created or established by constitutional organs or authorized officials through the specified procedure in legislation, but it cannot be classified as legislation because it only binds MPR members, DPR members, or DPD members and does not bind all people. The other things showing that MPR’s code of conduct, DPR’s code of

⁶¹ Moh. Kusnardi and Bintan R Saragih, *Susunan Pembagian Kekuasaan Menurut Undang-Undang Dasar 1945*, Jakarta: Gramedia, 1994, p. 35.

⁶² *Ibid*, p. 39.

⁶³ Bagir Manan, *Dasar-Dasar Perundang-undangan Indonesia*, Jakarta: In-Hill-Co, 1992, p. 3.

⁶⁴ A. Hamid S. Attamimi, *Peranan Keputusan Presiden RI dalam Penyelenggaraan Pemerintahan Negara*, Disertasi, Jakarta: Fakultas Pascasarjana Universitas Indonesia, 1990, p. 200.

⁶⁵ Amirudin Syarif. *Perundang-undangan, Dasar, Jenis, dan Teknik Membuatnya*, Jakarta: Bina Aksara, 1987, p. 32-33.

conduct, and DPD's code of conduct are not a legislation is they are not enacted in state gazette or official gazette, whereas Article 81 of the Law No. 12/2011 requires all people should be informed, the Legislation should be enacted.

Second, the exclusion of constitutional organ leadership tenure such as MPR, DPR and DPD in Law but only regulated in constitutional organs' internal regulations are vulnerable to create a turmoil and commotion in case the constitutional organ leader fails to perform his authorities and duties, fails to manage and maintain the trust of the members. Considering that it is enough to change the internal regulation by fulfilling the members minimal quorum (fifty present plus one vote of all the members), it is exactly what is happening to DPD.

For example is the DPR Regulation no. 1/2014 on DPR's code of conduct which can be amended at any time as long as the DPR members desire it. Article 322 (1) of the DPR Regulation no. 1/2014 on the Proposal of DPR's Code of Conduct Amendment can be proposed by at least 5 (five) parliament factions. Article 323 (1) regulates the amendment proposal referred to Article 322 (1) shall be proposed by the DPR leader in the DPR plenary session. Furthermore, Article 323 (3) regulates in the event the amendment proposal is approved, DPR plenary session submits it to the Legislature to be discussed. According to Article 323(5) regulates the result of the discussion referred to paragraph (3) shall be reported to the DPR plenary session for making a decision.

The same regulation also applies to the DPD Regulation No. 1/2014 on DPD's Code of Conduct which can be amended at any time as long as the majority of the members desire it. Article 243 of the DPD Regulation no. 1/2014 regulates the proposal of DPD's code of conduct amendment may be proposed to the plenary session through the Deliberation Committee by: (a) Ethics Council; (b) at least two Board Fittings; or (c) at least 30% members (thirty-five per one hundred) which reflects the representation of ten provinces and spread over three regions proportionally. Article 244(2) regulates in the event the amendment proposal is approved, the plenary session establishes a Special Committee to make the

improvements. Article 244 (4) regulates the results of the discussion referred to paragraph (2) shall be submitted to the plenary session for making a decision.

III. CONCLUSION

The regulations about the tenure of constitutional organs leader required at least based on two considerations. The first consideration is, as the implementation of the principle of power limitation; and secondly, as a manifestation of the political equality principle among the citizens as the characteristic of a democratic state. From the hierarchy aspect if it is viewed in terms of the primary position and function, the constitutional organs which can be said as the principal or major after the 1945 amendments are (i) the President; (ii) DPR (Representatives Council); (iii) DPD (Regional Representatives Council); (iv) MPR (People's Consultative Assembly); (v) MK (Constitutional Court); (vi) MA (Supreme Court); and (vii) BPK (Supreme Audit Agency).

Regarding the regulation of constitutional organs tenure which qualified as primary constitutional organs if it is seen from the type of legislation which regulates it, evidently does not have the uniformity because it has four variants/models: *First Model*, tenure regulation through a constitution namely 1945 constitution, belong to this category is the President and Vice President tenure. *Second Model*, state institutions tenure regulation through Law. Belong to this second category is Supreme Court (MA) and Constitutional Court (MK). *Third Model*, tenure regulations which are not regulated by law, but regulated in the internal regulations (code of conduct regulation), MPR, DPR, DPD include in this category. *Fourth Model*, tenure regulations which are not arranged in Law nor internal regulations. For instance, Supreme Audit Agency (BPK).

From the four models constitutional organs tenure regulations which regulated by the 1945 Constitution, regulated by the Law, are not regulated by the Law but regulated in the internal regulations of the primary constitutional organs, and are not regulated by Law nor by primary constitutional organs internal regulations, each of them has the degree of power related to the legal

guarantee. Model of primary constitutional organs tenure regulations in the 1945 Constitution is the most powerful model ensuring the legal guarantee because of some reasons which are the 1945 Constitution is the state constitution which placed in the highest order of national legal order and the arrangement of primary constitutional organs tenure regulations which is strongly associated with the structure and organization of primary constitutional organs is the substance of the 1945 Constitution. Next, the second model that is through the Law although it is not as strong as provided by the 1945 Constitution, but if this option is done then it still acceptable. Considering to organize incomplete constitutional organs regulation in the 1945 Constitution can be done by the Law because the constitution has its traits or characteristics namely the substance which only arrange or contains subject matter.

Concerning about the third model that is not regulated by the Law but is regulated in the internal regulations, and the fourth model that is not regulated by the Law nor in the internal regulations are the models which have a lower rank of legal guarantee. This is because the internal regulations, such as MPR, DPR, and DPD regulations, do not qualify as legislation. Furthermore, the exclusion of primary constitutional organs tenure regulations such as MPR, DPR and DPD in the Law only regulated in the internal regulations of primary constitutional organs are vulnerable create a turmoil and commotion because it is easy to change the internal regulation by only have to fulfill the members minimal quorum (over one from the half of total members) can change the tenure of the leader anytime.

To prevent the conflicts among the member of primary constitutional organs and prevent an unnecessary turmoil which can interfere the authority exercise of the primary constitutional organs, we need to conduct a change to the primary constitutional organs tenure regulations so that it is not regulated by the primary constitutional organs internal regulations, but it should be regulated in the 1945 Constitution or at least in the Law (UU) in order to better ensuring the legal guarantee.

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