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Juxtaposing Fiduciary Constitutionalism and Administrative Constitutionalism in the Context of Enhancing the Indonesian Constitution

David Tan

Faculty of Laws, Universitas Internasional Batam, Indonesia
Email: david.tan@uib.ac.id

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Abstract: *A lot of literature discusses the role of state administration, but there is still very little that emphasizes the unique picture related to juxtaposing aspects of fiduciary constitutionalism with administrative constitutionalism, especially at the stage of constitutional legal studies with the context of constitutionalism in Indonesia. Implementing a fiduciary state administration is very much needed, but the most significant obstacle is the enigma of administrative constitutionalism. The purpose of this inquiry is to analyze the development of the Indonesian Constitution in the future by elaborating the theory of fiduciary constitutionalism, issues related to administrative constitutionalism, and discussions related to the incorporation of the former and the latter into the practice of legal and political representation in the Indonesian Constitution using the perspective of judicial engagement theory. The research method used is the doctrinal legal approach using secondary data in the legal literature to gain academic insight. This research finally leads to a conclusion that focuses on the aspects of fiduciary and administrative constitutionalism, which can explain this phenomenon in enhancing the Constitution in Indonesia through several internalized recommendations.*

Keywords: *administrative constitutionalism, Constitution, fiduciary constitutionalism, government, legislative*

I. INTRODUCTION

A government that works in good faith for the welfare of its citizens is an obligation that becomes the positive rights of every citizen. This reaction is frequently referred to as a "positive right" in legal jurisprudence. The notion is that in some instances, the government of the state – owes something to people. It is not optional, nor something that is provided or not contingent on how benevolent people in authority are feeling. It is a right that every person has. The right to housing, education, sustenance, and the right to health, including medical attention, and the right toward certain environmental safeguards and required aid for the poor are all positive constitutional rights acknowledged in Indonesian judicial systems. The existence of a particular

affirmative right in a constitutional document is quite helpful.[1]

Positive rights' status is undoubtedly enhanced by a constitutional foundation of this sort, both realistically and politically. It also allows us to consider what a constitution is, beyond just an essential written document and the treatment of people that it should represent. The government's participation in our lives is frequently desired – and sometimes required – but it is also extensive and ongoing. Its actions unavoidably have a variety of consequences, not just on our individual decisions but also on the trajectory of our existence.[2]

In his book The Cosmopolitan Constitution, Alexander Somek highlights a thesis about the development of the Constitution in three separate epochs. Constitutionalism in the first era, best illustrated by the American experience, is about limiting government authority. The Constitution is the manifestation of a people's rights, as it is based on their sovereignty.[3] The legitimacy of the Constitution is based on the 'constituent power' of a free people.[4] Following World War II, a new version of the current Constitution evolved. Constitutional legitimacy, therefore, stemmed from a determination to the preservation of human rights rather than from the people. Therefore, the legitimacy of a constitution had become a matter of how well it withstood scrutiny in a network of global peer review.[5] This second period of constitutionalism paved the way for the third epoch of constitutionalism, dubbed "The Cosmopolitan Constitution" by Somek. The Cosmopolitan Constitution has two aspects to it. The first one is political. In addition to human rights protection, the Cosmopolitan Constitution prohibits discrimination based on nationality. The Cosmopolitan Constitution also establishes methods for governing governmental relationships with authorities beyond the state. Second, and much more sinisterly, the Cosmopolitan Constitution delegated political power to several international administrative bodies. As a result, some claim that a new type of constitutional power

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1 The difference between "negative rights" – liberty rights from any government action – and "positive rights" – rights that necessitate government action – is contentious. It is frequently highlighted out that rights generally perceived as negative rights – such as the right to free speech, religious freedom, right to due process, and the protection of individual rights- necessitate government measures in the form of enforcement or public spending of resources to be realized. Just about everyone refers to the United States Constitution as a charter of negative liberties. *See* Laura S Underkuffler, 'Fiduciary Theory: The Missing Piece for Positive Rights' in Evan J Criddle et al. (eds), *Fiduciary Government* (Cambridge University Press, 2018) 96, 104.

2 Andrew S Gold, 'The State as a Wrongful Fiduciary' in Evan J Criddle et al. (eds), *Fiduciary Government* (Cambridge University Press, 2018) 183, 195.

3 The Constitution of the United States declares that it was written by "We the People," a national, legally formed entity instead of a tangible, historical individual with natural states of mind. The writer attempts to connect with a broad audience, which implies a desire to appeal to a hypothetical reasonable reader. *See* Gary Lawson and Guy I Seidman, 'Authors' Response: An Enquiry Concerning Constitutional Understanding' (2019) 17 *Georgetown Journal of Law & Public Policy* 491, 498.

4 Martin Loughlin, 'The Concept of Constituent Power' (2014) 13(2) *European Journal of Political Theory* 218, 234.

5 Constitutionalism 1.0 was about people's ideals being realized voluntarily, but Constitutionalism 2.0 dismisses voluntarism in favor of the "universal values of freedom, equality, and solidarity." The emphasis has shifted from liberty to human dignity. As an example of the transition to Constitutionalism 2.0, Somek points to Germany's post-World War II constitutional history. In Constitutionalism 2.0, a constitution is formed by "an expression of rational acknowledgment of the highest significance and authority of human dignity and human rights," rather than by a sovereign people. The Indonesian Constitution of 1945, which has been amended and refined to accommodate the protection of human rights, is also an example of a constitution in this phase.

has emerged as the authority for a "managed global society."[6]

Although Somek's thesis appears to apply to the Indonesian Constitution, it is crucial to remember that the Constitution will keep growing and developing due to the effect of many determinants. As a result, improving the Indonesian Constitution is critical to satisfying the requirements of modern society. In this article, the author will discuss how the government administration can and should act, especially concerning its constitutional duties to maintain national integration. Several points of view are used in the elaboration of the explanation of this article, including fiduciary constitutionalism and fiduciary, administrative constitutionalism, which have been widely discussed in various literature abroad.

The majority of the study has concentrated on the government and legislature's potential involvement indirectly promoting constitutional values by regulative or legislative interpretation and the employment of executive branch regulations to compel the law's execution. However, little to no thought has been given to the negative consequences of discretionary administrative action in enforcing these authorities. This article is novel in that it examines Indonesia's Constitution from the standpoint of fiduciary constitutionalism and administrative constitutionalism, both of which have been well established in other countries. These two perspectives have never been presented together before to offer an insight into the future evolution of the Indonesian Constitution.

With the ever-changing Constitution, we must never forget that the sole purpose of the Constitution and the law is to maintain the rule of law in society. The rule of law is based on systems that revolve around the formation, implementation, and application of law as a body of legal norms, beliefs, customs, and institutions. Therefore, it is necessary to have a solid legal heritage, including legal institutions that teach and train attorneys. Legal professionals working in the public sector, private practice, and a variety of other legal settings, writing contracts, effecting the business transaction, protecting rights, bringing cases, and so on; jurists in multiple configurations who recommend, intellectualize, and criticize legal frameworks for addressing societal issues; legal associations that maintain professional, ethical standards; and so on. Law has a backdrop influence in social, economic, and political interactions because well-established legal traditions have strong ties and extensive ligaments that run across society.[7]

This article will first address what is meant by fiduciary constitutionalism along with the theory behind it. This was followed by an elaboration of administrative constitutionalism and issues that are often faced in the implementation of administrative constitutionalism. Finally, the discussion continues with the incorporation of fiduciary and administrative constitutionalism into the practice of legal and political representation

[6] The political/legal element of Somek's thesis is the account of a growing constitutional system, but this is not the main essential feature of his thesis. Although constitutionalism is the apparent issue, Somek's actual objective is global capitalism. Some think that the world financial elites are methodically subjugating the global polity. The interests of global capital are crushing democratic participation inevitably. People nowadays are ruled by the central institutions of contemporary capitalism. *See* Dennis Patterson, 'The Dark Future of Constitutionalism' (2015) 30 *Constitutional Commentary* 667, 669.

[7] Brian Z Tamanaha, 'Always Imperfectly Achieved Rule of Law: Comments on Jeremy Waldron' (2021) 10(1) *Global Constitutionalism* 106, 112.

in the Indonesian Constitution, which is wrapped in the view of the theory of judicial engagement. In the same discussion, the author also gives out ideas and recommendations for enhancements that might be applied in the nuances of the Constitution in Indonesia. At the very end, a conclusion is drawn, which summarizes the discussion mentioned above.

II. LEGAL MATERIALS AND METHODS

The legal research method used in this study is the normative juridical (doctrinal) research method that utilizes research data in the form of secondary data. Secondary data was obtained by conducting a literature study on available legal materials and literature. The secondary data search was facilitated with the help of the Google Scholar search engine because it was able to display various accountable and reliable works of literature and those relevant to the keywords being utilized. In addition, this search engine also facilitates searches with snowball effects so that more literacy is obtained over time.

The secondary data used in this research are primarily legal materials from secondary legal materials consisting of research articles published by well-known and recognized journals. The data that has been collected is then studied, researched, and analyzed using qualitative data analysis methods because the data referred to in this study are not numerical data that quantitative methods can analyze. In carrying out qualitative data analysis, the author tries to elaborate as much as possible on the data analytically to avoid descriptive explanations as much as possible.

III. RESULT AND DISCUSSION

The Notion of Fiduciary Constitutionalism: A System of Representation Based on Trust

The current re-discovery of governmental authority's fiduciary underpinnings may be traced back to Aristotle, Plato, and Cicero. However, the notion that government officials hold their offices in trust for their beneficiaries (the public) and that a sovereign's political authority should be restrained by fiduciary standards—such as the responsibilities of allegiance and care—is not novel.[8] The notion of recasting the state-people interaction as a fiduciary relationship is appealing because it enables the enforcement of obligations on the administration, such as fairness and reasonableness, even in the lack of concrete law measures for that purpose.[9] The concept of fiduciary government is appealing because it expresses a popular notion that public offices are kept in the interest of the people on a trust basis, that government authority is exercised for the benefit of a public or political community, and therefore that activities performed in the name of the state are implicitly impressed with, and constricted by public purposes.[10] By comparison, the state, various departments of government, and/or certain public positions are considered fiduciary because they involve connections comparable to one or more types of lawful fiduciary ties.[11] It has been suggested, for

[8] Ethan J Leib and Jeb Handelsman Shugerman, 'Fiduciary Constitutionalism: Implications for Self-Pardons and Non-Delegation' (2019) 17(2) *The Georgetown Journal of Law & Public Policy* 463, 464.

[9] Antonia Waltermann, 'Book Review: Sovereignty's Promise: The State as Fiduciary' (2013) 20(4) *Maastricht Journal of European and Comparative Law* 649, 649.

[10] Paul B Miller, 'Fiduciary Representation' in Evan J Criddle et al. (eds), *Fiduciary Government* (Cambridge University Press, 2018) 21, 21.

[11] Sung Hui Kim, 'The Last Temptation of Congress: Legislator Insider Trading and the Fiduciary Norm

example, that legislators are fiduciaries because they have a similar relationship with the voters as corporate executives *vis-à-vis* shareholders.[12]

In the annals of legal and political thinking, Thomas Hobbes probably gave the most influential representation description. First, the essential structure of representation, according to Hobbes, is based on interpersonal authorization. Second, Hobbes attempted to provide a comprehensive theory of legal or political representation.[13] Hobbes describes representation in terms of many interconnected legal ideas crucial to comprehending what representation is as a legal notion and how it functions in law and politics. The notion of legal personhood lies at the heart of Hobbes' argument. Hobbes starts with personality because he understands that people are the locus of agency and liability in law. To put it another way, the law presupposes the existence and engagement of natural and artificial individuals in diverse formal arrangements of jural relationships (e.g., right, obligation, duty, power, and liability). Moreover, the law as a method of social control is made active via people because it is aimed at people, requiring their compliance and/or facilitating their purposeful action.[14]

Recognizing that representation necessitates the insertion of a representative between meaningful action and a responsible subject, we must regard a bona fide representative's actions as lawfully dependent on his principal's underpinning assignment of authority(s). In this sense, the principal's author acts done by representations within the boundaries of their mandates merely imply they have permitted their representatives to act on their account. In this view of representation, a legitimate act of authorization is the centerpiece of justification for assigning a representative's actions to those he represents. As a result, the connection between those in positions of political power and those subject to it is adequately described as a social contract. However, the social contract only grants sovereigns privilege, not unmonitored freedom.[15]

The government-citizen interaction has long been regarded as having a fiduciary character due to the government's authority. Political theorists including John Locke, Jeremy Bentham, and Edmund Burke argued on the fiduciary nature of power and the duty of sovereign power to uphold its status of legitimacy and trust. The basic notion – that government is obligated to regard the wellbeing of the people because of its authority – has survived over the years and has remained an accent of the common law itself. In other words, in the circumstances involving connections between higher and lower parties, fiduciary relationships.[16] Are

Against Corruption' (2013) 98(4) *Cornell Law Review* 845, 871.

12 Miller (n 10) 26.

13 Representing does not indicate acting on behalf of someone else. There might be such relations. Just about all situations of responsive representation are accepted as standard examples of representation in political theory. The representation of a constituency in the legislature and the executive, both responsive, electorally regulated interactions, is afforded a prominent position. Government should be a government of responsive representatives who are voted to observe and answer to their constituents. At the same time, it must be a responsively representative government, which means that its electorally regulated judgments and choices must correspond to the national society at large, expressing popular values and beliefs. *See* Philip Pettit, 'Representation, Responsive and Indicative' (2010) 17(3) *Constellations* 426, 428.

14 Miller (n 10) 30.

15 Michael J Green, 'Authorization and Political Authority in Hobbes' (2015) 53(1) *Journal of the History of Philosophy* 25, 33.

16 A fiduciary relationship is where one person (the fiduciary) has discretionary freedom to accomplish an idealized other - such as a goal or another

enforced by law. Additionally, these are frequently circumstances in which the more substantial side wields authority due to a regulated, institutionalized, and hierarchical relationship.[17]

Fiduciary constitutionalism states that the government owes an obligation to operate in the best interests of its people regardless of whether or not the government has a complete claim to lawful authority. Therefore, as a fiduciary, the government owes it to its inhabitants to pay special attention to their interests as they exist.[18] Fiduciary principles, according to Fox-Decent, necessitate that public power is "constricted by moral and structural characteristics fundamental to legal order." This encompasses the "moral and structural aspects of the rule of law," such as the obligations of "fairness and reasonableness." Thus, for example, the sovereign must maintain "stability and harmony," pay attention to "basic principles," and keep track of people's wellbeing and human rights.[19] People build, construct, and empower government by jointly planning, developing, and enforcing the circumstances under which there will still be a government's fiduciary responsibility as long as their authority exists.[20]

Politicians and bureaucrats, after all, should be deemed as fiduciaries. The political-governmental connection may simply be simplified to legislation and enacting regulations, giving the impression that it is a very limiting relationship. Legislation or regulation, on the other hand, is entirely open-ended. This implies that, at the very minimum, legislators or regulators make all of the decisions for their beneficiaries. Furthermore, nearly every item of legislation or regulation might create a conflict of interest for some lawmakers or regulators. Elected politicians and regulators should likewise be considered as fiduciaries, with a duty of care that they violate when they misuse electoral laws or regulations to benefit themselves. Citizens cannot be considered to willingly accept political risk since they have no way of preventing it. Additionally, there are no grounds to think the citizens intend to encourage officials to engage in risky behavior.[21]

The fiduciary theory offers a practical framework of judicially enforceable rights and obligations that bind political actors to their principals' goals. Fiduciary theorists, in particular, believe that vigorous judicial scrutiny of government policy under the Constitution will restrict particular interest influence and arbitrary acts of the administration. Fiduciary theory aspires to a politics that is more than a ruthless business. Even as it characterizes regular politics in these terms, it denies raw power as a basis to use the state's forcible authority. They claim that treating the government as fiduciaries and respecting the public's confidence will prevent the polity from devolving into dishonesty, elitism, factionalism, arbitrariness, and fraud.[22]

person's critical practical interests. It is straightforward to see how government fits into this group if we use this definition. *See* Paul B Miller and Andrew S Gold, 'Fiduciary Governance' (2016) 57(2) *William & Mary Law Review* 513, 549.

17 Underkoffler (n 1) 109.

18 Gold (n 2) 202.

19 Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford University Press, 2011), 2.

20 Underkoffler (n 1) 115.

21 Julian Velasco, 'Fiduciary Judgment Rules' (2021) 62(4) *William & Mary Law Review* 1397, 1438.

22 Seth Davis, 'The False Promise of Fiduciary Government' (2014) 89(3) *Notre Dame Law Review* 1145, 1155.

Recognition of a duty of loyalty owed by elected officials is likewise congruent with two critical theoretical explanations for fiduciary duties in civil law: contract and delegated power. Constitutional democracy is founded on a contractual conception of governance, with the people delegating authority to the government as part of that agreement. Furthermore, Professor Geoffrey Miller has suggested that the Constitution should be viewed as a public charter that creates a "body politic and social organization," that transfers authority to agents and defines governance norms. According to contract theory, it may be seen as a contract establishing the relationships between the representatives (elected officials) and the principals (the people). Because enumerating all of the conditions of the social contract in the Constitution would be extremely expensive, the voids must be addressed by fiduciary duties. Representatives would also hold the duty of loyalty to the public, according to the notion that delegation of authority entails a mutual commitment to utilizing such authority in the sole best interest of the principal. The Constitution is based on the notion that authority comes from the people and is entrusted to the government by the people. People vote for representatives to serve as their agents and to rule the nation on their behalf. The principals assign authority to their agents via elections, allowing them to conduct discretionary control over their interests and juridically bind them. As a result, the people make themselves subject to their representatives, who can define and defend the people's interests. On the other hand, representatives bear a reciprocal duty of loyalty to the people since they assign their authority.[23]

The Notion of Administrative Constitutionalism

Administrative authorities have evolved as the primary players responsible for carrying out legislative mandates found in legislation throughout the last century. Administrative authorities practice constitutionalism. They answer issues about the interpretation and extent of statutes that have constitutional implications. Because the legislation is sometimes unclear given the lack of legislative foresight or a refusal to discuss politically sensitive subjects, authorities charged with enforcing them are frequently forced to interpret them. According to our constitutional structure, which provides the national government restricted authority based on the laws and legislation, the parliament can only make laws authorized by the Constitution.[24]

The term “administrative constitutionalism” refers to the traditional definition of how government agencies interpret and execute the Constitution ever since scholars who came upon the Constitution in agency records have compiled a growing body of knowledge about how agencies have interpreted and executed the law. [25] Administrative constitutionalism [26] It encompasses the implementation of existing constitutional

[23] D Theodore Rave, ‘Politicians as Fiduciaries’ (2013) 126(3) *Harvard Law Review* 671, 712.

[24] Bertell L Ross, 'Embracing Administrative Constitutionalism' (2015) 95(2) *Boston University Law Review* 519, 527.

[25] Sophia Z Lee, 'Our Administered Constitution: Administrative Constitutionalism From the Founding to the Present (2019) 167(7) *University of Pennsylvania Law Review* 1699, 1704.

[26] This symposium constructs on a decade of research on the role of administrative agencies in establishing and explaining constitutional meaning—a trend we now describe as "administrative constitutionalism." While some academics define the term differently, we use it to

provisions by administrative bodies and the development of new constitutional conceptions by administrative agents, and the establishment of the administrative state.[27] Administrative constitutionalism has been described as the interpretation and application of constitutional legislation by regulatory bodies. However, the word has since been expanded to include a broader range of administrative conduct and legislative construction. [28] Administrative constitutionalists accept that agency actors can follow "due process and equal protection principles" in perceiving and carrying out their responsibilities.[29]

Administrative constitutionalism refers to the practice of administrative authorities in interpreting and enforcing constitutional ideals while executing statutorily granted authority. That administrative authorities have the authority to interpret and execute constitutional principles, which means that the judiciary should recognize administrative determinations on constitutional issues if they are made fair, transparent, and reasonable.[30] The domain of administrative constitutionalism focuses on yet another issue: the possibility of administrative constitutionalism mimicking administrative law scholarship—ever observant to legislative and juridical limitations on agency behavior and, growingly, to the intricacies of day-to-day administrative decision-making.[31]

However, the term administrative constitutionalism has been changing and developing. One might argue that executive branch agencies should assume minor if any, involvement in determining constitutional law's parameters. Nevertheless, several legal academics disagree. The phenomena of administrative constitutionalism have been increasingly recognized and commended by these notions, the innovative interpretation, and development of statutory standards and moral-rights concerns by bureaucrats under the influence of social change, frequently acting outside or even in defiance of presidential, parliamentary, and judicial orders.[32]

There is an imminent danger in the notion of administrative constitutionalism. Administrative constitutionalism refers to the "substantiation of new constitutional value systems by administrative agents, and also the building of the administrative state via institutional and substantive means such as the constitution." Professor Ernest Young concludes that the courts do not resolve the majority of critical constitutional problems. Instead, different administrative actors, such as the administrations, depend on their interpretations of constitutional rules and principles. As a result, these administrators

pertain to "regulatory agencies' interpretation and application of constitutional law." *See* Karen M Tani, 'Administrative Constitutionalism at the "Borders of Belonging": Drawing on History to Expand the Archive and Change the Lens' (2019) 167(7) *University of Pennsylvania Law Review* 1603, 1604.

27 Gregory Ablavsky, 'Administrative Constitutionalism and the Northwest Ordinance' (2019) 167(7) *University of Pennsylvania Law Review* 1631, 1651.

28 Joanna L Griesinger, 'Municipal Administrative Constitutionalism: The New York City Commission on Human Rights, Foreign Policy, and the First Amendment (2019) 167(7) *University of Pennsylvania Law Review* 1669, 1670.

29 Yxta Maya Murray, 'What FEMA Should Do After Puerto Rico: Toward Critical Administrative Constitutionalism' (2019) 72(1) *Arkansas Law Review* 165, 197.

30 Matthew Lewis, 'Administrative Constitutionalism and the Unity of Public Law' (2018) 55(2) *Osgoode Hall Law Journal* 515, 519.

31 Tani (n 26) 1628.

32 K Sabeel Rahman, 'Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism?' (2016) 94(7) *Texas Law Review* 1329, 1352.

may frequently become prone to disregard the courts' precedent and the substance of the Constitution itself.[33]

Among the essential duties of the non-delegation concept is to keep the legislature accountable. John Locke, a seventeenth-century English philosopher, expressed this idea eloquently. Locke thought that the legislative branch possesses "supreme authority," No other group or person may issue edicts that have legal effect unless the legislature, which the people have chosen and elected, has permitted them to do so. Locke felt there were many key things a legislative body could not do, even though it received its authority from the people. Most importantly, Locke argued that the legislative body should not be able to delegate its legislative powers to anybody else. Locke highlighted the significance of legislative authority's derivative power, arguing that if the legislature delegated its lawmaking authority to people just outside of the legislative body, it would transform from a body that makes laws to one that makes legislators. He said that if lawmaking power was given to persons who were not voted in by the public, the legislature would not be made responsible for the laws passed. As a result, if such legislation proved unpopular with the people, the legislature could immediately blame the delegated authorities. This kind of delegation, according to Locke, would weaken the legislature's role as the people's voice and remove any responsibility from elected officials.[34]

The non-delegation concept is commonly believed to require that every legislation authorizing agencies to create legally enforceable regulations have an "intelligible principle" to limit the use of governmental power. A constitutional grant of discretion to an executive officer must be based on an "intelligible principle." The intelligible principle was initially coined by the J.W. United States v. Hampton, Jr., & Co. [276 U.S. 394 (1928)].[35] It is the touchstone for a constitutionally granted executive officer's discretion.

Furthermore, failing to address constitutional problems, especially in the context of legislative interpretation, comes with its own set of implications. When it comes to unclear legislation, the government frequently seeks deference to agency interpretations. This is especially troublesome when an agency has not used constitutional avoidance in its interpretation, and the resultant understanding raises severe constitutional problems. Whereas the agency's knowledge of some parts of the legislation may have an impact on the constitutional issue, the judiciary retains the authority to enforce constitutional principles where the agency has acted inappropriately.[36]

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[33] David E Bernstein, 'Antidiscrimination Laws and the Administrative State: A Skeptic's Look at Administrative Constitutionalism' (2019) 94(3) *Notre Dame Law Review* 1381, 1382.

[34] Meaghan Dunigan, 'The Intelligible Principle: How It Briefly Lived, Why It Died, and Why It Desperately Needs Revival in Today's Administrative State Why It Desperately Needs Revival in Today's Administrative Stat' (2017) 91(1) *St. John's Law Review* 247, 250.

[35] The President's authority was not viewed by the Court as a transfer of legislative authority. Rather, the Court saw the President's power as a way for the government to ensure the exact impact desired by its acts of legislation by placing discretion in such authorities to establish public rules interpreting a statute and regulating the specifics of its implementation. If Congress establishes an intelligible principle to which the person or body empowered is required to adhere by, such act is not considered as a prohibited delegation of legislative authority. *See* Cary Coglianese, 'Dimensions of Delegation' (2019) 167(7) *University of Pennsylvania Law Review* 1849, 1856.

[36] Alina Das, 'Administrative Constitutionalism in Immigration Law' (2018) 98(2) *Boston University Law Review* 485, 538.

Administrative agencies are not generally viewed as core areas for social movement action; therefore, they do not fit into direct popular constitutionalist narratives. Because the officials who manage agencies are not immediately voted in by the people, they do not fit into mediated popular constitutionalist narratives. Administrators must thus participate in a consultation exercise in which they analyze and assess public comments and offer solutions, make any required rule revisions, and resubmit the rule for further public discussion once they have done so. This approach necessitates a shift in attention from popular inputs, in which agencies engage the public in constitutional interpretation determinations through their activities, to administrative constitutionalism outputs.[37]

Legal and Political Representation and Its Nexus with Fiduciary and Administrative Constitutionalism into Indonesian Constitutional Outcomes

Article 1(3) of the 1945 Indonesian Constitution states unequivocally that Indonesia is ruled by the rule of law. Furthermore, the 1945 Indonesian Constitution specifies that human rights must be protected in conformity with democratic and law-based ideals. As a result, constitutional problems should be addressed in human rights legislation. The realization of human rights is guaranteed, controlled, and set out in the laws and regulations to preserve and safeguard human rights in line with the ideals of a democratic constitutional state. As a result, the 1945 Constitution expressly compels the state, specifically the government, to be accountable for the preservation, promotion, enforcement, and satisfaction of human rights based on democratic state law principles, which execution is assured and controlled by legislation.[38]

The notion of a single unitary country was incorporated in the 1945 Constitution of Indonesia, which was prepared swiftly to proclaim independence in the aftermath of the withdrawing Japanese occupation troops and in expectation of the returning Dutch. Organicist doctrines supported firmly centralized, integrative processes connecting state and society altogether, and this kind of Constitution was inspired by them. [39] In Indonesia, the Constitution is the primary source of law, superseding all other legal provisions in the case of a contradiction.[40]

It has become necessary to make some fundamental differences. Starting with legal representation, it is common knowledge that legal representatives act on behalf of others by exercising legal authority to change their principals' legal standing. Common properties of jural relations determine the opportunities for legal representation in this sense, such as rights and duty, power, and liability. Via the representative action, a legal representative can change the legal status of the people they represent by creating new rights or authorities. Put simply, a legal representative personates another by

[37] Bertell L Ross, 'Administrative Constitutionalism as Popular Constitutionalism' (2019) 167(7) *University of Pennsylvania Law Review* 1783, 1807.

[38] Nukila Evanty, 'Komnas HAM: Discrepancies Between Its Mandate and the Indonesian Constitutional Framework' in James Gomez and Robin Ramcharan (eds), *National Human Rights Institutions in Southeast Asia* (Palgrave Macmillan, 1st ed, 2020) 141, 150.

[39] Jacques Bertrand, 'Indonesia's Quasi-Federalist Approach: Accommodation Amid Strong Integrationist Tendencies' (2007) 5(4) *International Journal of Constitutional Law* 576, 577.

[40] Tim Lindsey and Simon Butt, 'State Power to Restrict Religious Freedom: An Overview of the Legal Framework' in Tim Lindsey and Helen Pausacker (eds), *Religion, Law, and Intolerance in Indonesia* (Routledge, First, 2016) 19, 20.

behaving in the same manner that a person with a legal personality might act under the law. Since the presence of a state is a prerequisite of a developed legal system, legal representation is different from political representation. Political representation, on the other hand, is the mechanism by which political groups attain their common goals. Political representation is a superordinate type of representation to the degree that government serves as an agent for political groups in formulating, interpreting, amending, and administering legislation for collective goals.[41]

We can now complete the set by demonstrating that public institutions, like private organization, is based on representation, and, given the formal distinctions between private and public directives, the representative nature of public administration upholds the fiduciary portrayal of government and public offices. Recalling that representation, according to Hobbes, is a type of connection in which an individual (or group) personates the other by working on their behalf with authority. A complicated mixture of legal and political representation is involved in public administration. On the one hand, it involves political representation to the degree that it is a method of achieving political community. The unique sense refers to the process through which a political society, through its representatives, assumes the structure of a state (or subordinate entity) and establishes law for itself. The auxiliary meaning refers to how public officials represent the nation by acting on its behalf within the law. Fiduciary governance is often implausibly claimed to provide legitimacy for the exercise of sovereign authority, the acknowledgment of particular rights, and/or the requirement that governments seek specified public goals. Only if the government is represented in the wide sense defined by Hobbes does the concept of fiduciary government make sense. This should not, however, imply that governance must be democratic. Rather, it indicates that a government's goal in governing must be to create and sustain a political community for and on behalf of its constituents.[42]

This study is based on a theory of judicial engagement with socio-economic rights that emphasizes the role of legislation and fills the void in previous methods. The concept of 'normative congruence,' a modification of Lon Fuller's rule-of-law notion of congruence, lies at the heart of this novel approach. The basic notion is that the administration and official behavior must be consistent not only with the technical rules and limitations of law but also with the constitutional values that serve as the fundamental underpinnings for these legal and regulatory standards. In two ways, dynamic regulatory constitutionalism seeks to refocus attention on the constitutionally enshrined normative substance of public policy. First, the judiciary should stress the constitutional basis of social legislation, expressing explicitly how constitutional principles permeate administrative, regulatory responsibilities. Secondly, judiciary contact with administrators should be directed at ascertaining if the latter are aware of the links between constitutional mandates and beneficial administrative public policy.[43]

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41 Miller (n 10) 38.

42 Ibid. 48.

43 Richard Stacey, 'Dynamic Regulatory Constitutionalism: Taking Legislation Seriously in the Judicial Enforcement of Economic and Social Rights' (2017) 31(1) *Notre Dame Journal of Law, Ethics and Public Policy* 85, 88.

In the fiduciary constitutionalism's point of view, the administrative oversight of administrators' decision-making has a major goal of ensuring that administrations follow particular deliberate procedures. Notice and comment periods are required for rulemaking, which ensures that agencies obey the guidelines that should regulate their actions. Actions by the authority must either be based on solid evidence or not be arbitrary or unjustified. The framework of so-called hard-look assessments, in particular, appears to be focused on determining if an administrative agency has deliberated properly. We assess if an administration has thoroughly reviewed the relevant information and provided a sufficient justification for its actions, along with a reasonable link between the facts discovered and the decision taken.[44]

To navigate the slippery slope of administrative constitutionalism, scholars occasionally differentiate between the rule of law and the rule by law. The governing method of "rule by law" used by an administration (or a governing body) in dealing with their subjects is referred to as when an administration governs by law, he or she does not rely solely on specific instructions, decrees, and discretionary choices. Rather, they rule within a context of relevant laws that have been established ahead of time so that they know where they stand and so that there is a particular and almost definable baseline, accessible to everyone ahead of time, on which they can address the conflicts and controversies that arise in any complex society.[45]

To combat the negative effects of administrative constitutionalism, rather than segregating the rule of judicial review so that administrative decisions affecting national policy are evaluated under a separate conceptual framework than those involving constitutional problems, the law of judicial review should be unified. The author advocates for a uniform legal structure for judicial review that aims to promote appropriate forms of integrating abstract constitutional principles with a dynamic social environment throughout a wide variety of administrative actions.[46] Agencies might be restructured to enable greater explicit stakeholder participation during policy development. From participatory budgeting to technology-facilitated forms of participation and public monitoring of government acts, we see initiatives in regulation to establish more participative policy-making procedures that can help rectify imbalances of power and influence.[47]

To fight the arbitrary act of the administrative agencies, given this, it would seem apparent that making it simpler for litigants to contest agency acts in administrative courts, as well as having such courts show fewer deference to agencies, would be a beneficial change. Another potential solution would be to create an instrument or system inside the executive branch that would be responsible for evaluating agency activities to ensure they comply with court precedent, statutes, and the Constitution. Yet, while this is a good notion, bringing it to reality would almost definitely need wider considerations. Furthermore, there would be the risk that this

[44] Ethan J Leib and Stephen R Galoob, 'Fiduciary Political Theory: A Critique' (2016) 125(7) *Yale Law Journal* 1820, 1858.

[45] Jeremy Waldron, 'The Rule of Law and the Role of Courts' (2021) 10(1) *Global Constitutionalism* 91, 96.

[46] Lewis (n 30) 519.

[47] Rahman (n 32) 1352.

very institute would become a rubber stamp, making each attempt to deny that any measure violated the Constitution in order to retain executive authority and discretion. These examples might serve as a warning tale.[48] Because of the judiciary's ability to assess administrative matters and contrast them to the Constitution and the law, administrative power to impose administrative constitutional actions has been limited.[49]

The capacity to make arbitrary policy decisions has become a hallmark of modern executive authority. Some academics have claimed that the executive branch administration, with its various departments and offices, may provide its own checks and balances to check in an increasingly strong executive. Interdepartmental scrutiny of national security policies and procedures, direct monitoring of national security operations by high-ranking members of the administration, and promotion of dissidents and whistleblowers might all be part of these checks and balances.[50]

In light of the foregoing considerations and analysis, Indonesia's increased compliance with international human rights and constitutional norms provides a chance for the country to counteract such trends. There are effective methods for bringing the 1945 Indonesian Constitution into compliance with the worldwide international constitutional framework for social welfare, one of which is to implement fiduciary and administrative constitutionalism.[51] At the national level, Indonesians see the 1945 Indonesian Constitution as the statement that creates national citizens' fundamental human rights, laying the groundwork for the implementation of Fiduciary and Administrative Constitutionalism in Indonesia.[52]

To highlight this nexus, the author would like to emphasize three notions of constitutionalism. The notion that the Constitution was written with the goal of gradually realizing greater and greater rights. This reasoning is backed up by the principle of non-retrogression, which stipulates that the progress of rights must go forward rather than backward. The second claim is constitutional morality, the notion that the Constitution embeds dedication to certain value systems that must be upheld even when they are not explicitly stated. The final point was that basic rights exist irrespective of the number of individuals involved, implying that they are not intended only to defend the majority. These rights cannot be withheld from a marginalized group just because they are in the minority.[53] These are assurances that each individual/citizen receives. A more rigorous manner of reasoning is required to reconcile this link and provide adequately examined justifications for its intrusions in favor of the fiduciary constitutionalism system. Only in this way can the people have a better knowledge of its position in the Indonesian Constitution, and only in this way will the administration gain the popular

[48] Bernstein (n 33) 1413.

[49] Bertell L Ross, 'Denying Deference: Civil Rights and Judicial Resistance to Administrative Constitutionalism' (2014) 2014(1) *University of Chicago Legal Forum* 223, 286.

[50] Anjali S Dalal, 'Shadow Administrative Constitutionalism and the Creation of Surveillance Culture' (2014) 2014(1) *Michigan State Law Review* 59, 119.

[51] Evanty (n 38) 155.

[52] Claudia Ituarte-Lima, Constance L McDermott and Mari Mulyani, 'Assessing Equity in National Legal Frameworks for REDD+: The Case of Indonesia' (2014) 44 *Environmental Science & Policy* 291, 293.

[53] Saskia E Wieringa, 'Criminalisation of Homosexuality in Indonesia: The Role of the Constitution and Civil Society (2019) 20(1) *Australian Journal of Asian Law* 227, 228.

support it needs to express its function in long-term constitutional support.[54]

IV. CONCLUSION AND SUGGESTION

The author believes that every elected official holds the trust of the public and should act as an agent representing the interests of the beneficiary (people/public) who voted for him. For this reason, a fiduciary relationship exists between those in power and the people who have collectively and conscientiously put their trust in him for the office. This belief must be accounted for and accountable because the aspect of its constitutionality emphasizes the same.

Regarding the idea of administrative constitutionalism itself, there are various understandings to this concept, but mostly the understanding of this notion leads to the implementation of the authority of administrative officials in carrying out the spirit of the law and the Constitution because of legislative conditions that tend to be generalist, unclear due to lack of legislative foresight, as well as the unwillingness of the legislature to discuss sensitive political topics. Indeed, this act is not inherently wrong. Yet, it does not rule out the possibility that, in practice, sometimes the implementation of the spirit of the law by the state administration may be prone to acts that are arbitrary, not transparent, or unreasonable so that it has the potential to conflict with the interests of the people. As a result, this can then result in a breach of fiduciary duty by the state administration against the people.

Juxtaposing the insight on the potential risk contained in administrative constitutionalism and the understanding of fiduciary constitutionalism is actually beneficial for the development of law and the Constitution in Indonesia. Apart from the complicated nature of political and legal representation involved in public administration, political representation contributes to the operation of the state to achieve the goals of the political community, while this process will also later through the representation process assume a position as a lawmaker and legal obligation so that it becomes a legal representation itself. The theory of judicial engagement emphasizes administration and official behavior, which must be consistent with technical rules and limitations of law, along with constitutional values, which are the reference sources for legal and regulatory standards.

The recommendations suggested for enhancing the Constitution through this understanding are, firstly, the urgency for a framework of so-called hard-look assessments to ensure that the state administration process has been properly deliberated. Secondly, understanding the negative potential of administrative constitutionalism, the idea of applying 'rule by law' must be strengthened to supplement the idea of the rule of law. A uniform legal structure to promote the integration of abstract constitutional principles into a dynamic social environment is also needed as a benchmark for various administrative actions so that they can be accounted for transparently. Finally, it is better internally that the state administration itself considers the existence of a checks and balances mechanism so that there is an internalized control as the fulfillment of the fiduciary duty of trust.

[54] Theunis Robert Roux and Fritz Edward Siregar, 'Trajectories of Curial Power: The Rise, Fall and Partial Rehabilitation of the Indonesian Constitutional Court' (2016) 16(2) *Australian Journal of Asian Law* 121, 138.

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