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RESEARCH ARTICLE

THE JUDICIAL POWER AFTER THE AMENDMENTS TO 1945 CONSTITUTION OF THE REPUBLIC OF INDONESIA.

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Abstract

A change (amendment) of the 1945 Constitution of the Republic of Indonesia regarding "Judicial Power" which consists of the Supreme Court, the Constitutional Court and the Judicial Commission. The problem is why the Judicial Commission is included in the chapter of Judicial Power, while the Judicial Commission only has primary responsibility or the authority to recruit and supervise Chief Justice. This is due to one argues that the duty or authority is closely related to the prosecuting authority. Therefore, the power of the Judicial Commission is included in "Judicial Power" chapter. Supposedly, according to the author, the Judicial Commission has no authority to adjudicate (hear), but it only has the authority to recruit and supervise the conduct of the Chief Justice, thus it is not included in the judicial power, however it can be arranged in a separate chapter of the Judicial Commission on the 1945 Constitution of the Republic of Indonesia, therefore the change (amendment) of the 1945 Constitution of the Republic of Indonesia is possible to be re-amended (another amendment).

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Introduction

Indonesia as a country of law has been mentioned before the amendment in the explanation of the constitution of 1945. Indonesia as stated by Ubaidullah and Razak (2002, p. 144) is a country of law (*rechstaat*) and not *machstaat*, then, after amendment, Indonesia is considered as a country of law which by law is clearly mentioned in article 1, paragraph 3.

State of Law (*rechtsstaat*) in the opinion of FJ Stahl (Continental Europe) has the following elements: a. The existence of human rights guarantees, b. The separation or division of powers, c. Government based on rules, d. The existence of judicial administration.

The elements of the proposed State of Law proposed by Stahl are different with Dicey. According to Dicey, State based on law (the rule of law) must meet the following three elements, they are: a. Supremacy of the law; that is, the sovereign or that has the highest authority is the law, b. Equality before the law; that is, everyone regardless of his or her social status has same rights in front of the law, c. Guaranteeing human rights in the law or the Constitution. Furthermore, according to Muhammad Alim (2001, p. 37), the concept of the rule of law is not only limited to what was stated by Dicey, but extends to include various aspects of life such as political rights, economic, and social. According to the International Commission of Jurists in the conference in Bangkok in 1965, a democratic

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government under the rule of law must meet the following conditions: Constitutional protection, The existence of a free general election, The existence of independent and impartial judiciary, The freedom to express opinions, Freedom of association / organization, and The existence of civic education.

Symposium regarding the State of law in Indonesia was ever held in Jakarta in 1966, i.e., at the beginning of the New Order, which tried to make the ideas of thought associated with the implementation of the 1945 Constitution of the Republic of Indonesia chastely and consistently (Anonymous, 2007, p. 42-43). The symposium generated characteristics of State of law (rule of law) as follows:

- a. Recognition and protection of human rights that contain equations in the politics, law, social, economic and culture;
- b. Independent and impartial judiciary also is not influenced by any power or strength;
- c. The limitation of power;
- d. The principle of legality.

The results of the Symposium in Jakarta in 1966 were combined with the provisions of the 1945 Constitution of the Republic of Indonesia resulting the elements of the State of Law as follows:

Recognition and Protection of Human Rights

One of the main objectives of the State is to protect human rights. Therefore, the law made in a State must also recognize and protect human rights. As a state of law, our country is not only to give recognition to human rights, but also to apply them in various aspects of life, such as politics, law, social, economic, and culture, including the field of education.

Legally, the guaranty of the recognition of human rights is included explicitly in Chapter-XA (Article 28A up to Article 28.I) of the 1945 Constitution of the Republic of Indonesia as further regulated by Law No. 39 of 1999 on Human Rights.

An independent and impartial judiciary is the executor of the law enforcement process as a branch of judicial power. In order to be able to function in enforcing the law and justice, the judiciary must be independent and impartial.

Article 24 paragraph (1) of the 1945 Constitution of the Republic of Indonesia stated that “the judicial power is an independent power to run judiciary to enforce law and justice”. The provision signals that in running their duties, judges should not be influenced by anyone as well as both because the interests of positions (politics) and economic interest.

Limitation of Power

Power tends to be abused by authorities. Therefore, the State should limit the power on the state authorities. The limitation is done by creating a rule of law stating the authority of State authorities that must not exceed the authority given to him or her. In addition, the limitation of power is also done by dividing and separating the branches of power in connection with each other based on the principles of mutual monitoring and offsetting.

The separation of powers in the 1945 constitution of the Republic of Indonesia is materialized to be; Legislative held by the Parliament, the executive by the President, and Judiciary by the Supreme Court and the Constitutional Court. The three branches of power have each authority predefined in the 1945 constitution of the Republic of Indonesia with mutual monitoring and offsetting.

The Principle of Legality

All government action should be based on the valid and written legislations. Similarly, the punishment on a person must be based on the rule of law that existed before the act, and set the limits of authority of state institutions. For example, Article 4 paragraph (1) of the 1945 Constitution of the Republic of Indonesia holds that the President of the Republic of Indonesia holds the power of government, all his or her action remains limited by the provisions of the 1945 Constitution of the Republic of Indonesia.

Analysis on State of Law of the Republic Of Indonesia

The Republic of Indonesia is the “State of Law” based on Pancasila (five principles). Likewise explanation of 1945 constitution, which is system of government regarding Indonesia is a country based on law (*rechtsstaat*). It is also

used as a base by Muhammad Yamin to point out that Indonesia is a country based on law. More firmly with the third amendment, it says "Indonesia is a country of law".

From the facts above, according to Muhammad Alim (2001, p.38), it is clear that the Republic of Indonesia is a state of law. The issue is whether the Law State of Indonesian adheres to rule of law in the formal law (narrow) or the material law (broad). As it is known, state of law in the narrow sense as proposed by Immanuel Kant and Fiecher is the State as a "night watchman" that means that country only secures the country solely, the new state will act if security or order is disrupted. Meanwhile, the definition of state of law in the broad sense or is also called "Modern Law State". A country in this sense not only secures the country but also participate actively in public affairs of the people. Therefore, the understanding the of the State of law in material meaning (broad) is very closely related to a "welfare state".

The position of the Government in the State of law of the Republic of Indonesia is based on the concept of Modern Law State or the Welfare State. It is consistent with the objectives of Indonesia as a country as listed in the Preamble to the 1945 Constitution in the fourth paragraph.

Such a large role given to the government is included in some cases and the government may establish a Government Regulation in lieu of Law (Peperpu) and make lesser regulations. The next role is as executing or implementing legislation. Therefore the Law only regulates basic things, so that in operation, it requires legislation that is lower than the law.

To determine the position and function of government in accordance with the 1945 Constitution, we, initially, must learn the constitutional structure of the State of Indonesia. Therefore, in the Constitution contains in constitutional structure of every country.

A British Political expert, C.F. Strong, said that "Constitution in collecting of principles According to which the power; of the government the rights of governed, and the relations between the two are adjusted "From the opinion of British expert above, it can be mentioned that constitutional matters are the subject of:

1. Government power (in the broad sense)
2. Rights that are governed, and
3. Relationship between the ordered and the ruler.

Another British expert named Lord Bryce, as quoted by ICC Where in his book Modern Constitutions, then further quoted by Sri Soemantri said that "constitution is a political frames of society organized through and by law. One in which law has established a permanent institution with Recognized function and definite rights.

If Lord Bryce's opinion compared to what was proposed by CS. Strong in Muhammad Alim (2001, p.32-33), it would be seen that the latter opinion is broader. Although Lord Bryce said that the constitution is a framework of political society (state) that is governed by law, but in the constitution is only there regulation of the tools of State (state institutions) equipped with functions and rights. In its limitation, DS. Strong like being said by Lord Bryce is included in the "power of the government".

By following the *Trias Politica* theory of Montesquieu, constitution regulates among other tools of State (state institutions) as legislative, executive and judicial institution.

If it is studied the background of power separation, originally it is known as absolute monarchy. Since the 16th until century, the power had been still centered on a king who had the power to make regulations and the power to run and maintain rules. But in the 17th century and the 18th century, it raised various ideologies which suggested that the power should be taken from the king to make regulations, then that power should be handed over to a independent state agency that cannot be influenced by the king, that is The House of Representatives.

The first person who presented this ideology is John Locke, a British expert in Constitutional, who was born approximately in 1632-1704, or through his book entitled "Two treaties on Civil Government"

Furthermore, John Locke in Anonymous (2007, p. 75) suggested that power of a state should be divided into three powers. namely: Legislative power, Executive power, and Federative power.

Each of these powers is separated from one another. The legislative power has the authority to maintain regulatory and hear the case, because John Locke thought that authority is not included in the legislative power. While foreign relations is the Federative power, and the judge or judicial authority is included in the executive as the executor of the legislation.

Then the ideology of John Locke inspires a judge in France whose name Chales Mountesquic, who was born in Bordeaux in 1689-1755, who became known in his book, L 'esprit des lois, which explained that a State has three kinds of different power and also must be separated from one to another or the so-called "Separation of Power, or which is known as *Trias Politica* ideology, namely: The powers that form the laws, The power that runs the law, and The power that prosecute or judicial authority.

In the development, *Trias politica* experienced a change of separation of power to pressing function of state structure that differentiate between separation of powers in the sense of material and separation of power to devisor of power that suppress the function of organs of the State structure that differentiate separation of powers in the formal sense. In material meaning or sense, the separation of powers is maintained firmly in the duties and functions of the state that is characteristically showed three spheres of power in the State, that is, legislative, executive and judicial branches, which then as separation of Power. Meanwhile, in the formal sense, separation is not maintained firmly, but division of powers.

Furthermore, welfare state has experienced a shift in power to make laws; the executive is not only as a law enforcement but active in the field of legislative, such as drafting legislation. That according to the law experts, state administration of government in a broad sense includes legislation.

Indonesia is a country that does not adhere to the doctrine of separation of powers as Mountequiue's ideology, although there is legislative body such as the House of Representatives. The executive is the President, the Judiciary in Supreme Court power, and division of Power/distribution of Power distributed normally. Besides, in addition to the three entities aforementioned, there are followed by other bodies such as the Supreme Audit Agency, the Regional House of Representative, and the House of Representatives and the trial combined into one entity called the People's Consultative Assembly, all these are called 'State Institutions'.

The establishment of the Constitutional Court is established by lying on statement 'Only with the freedom of the judiciary is expected that the decisions taken in one case will not be impartial and biased and solely based on the norms of law and justice without fear that his position is threatened. Similarly, the Judicial Commission, in an effort to realize a clean judiciary, it is good to recruit prospective Chief Justice and supervising the judge's demeanor in running his or her duties in the field of justice.

Furthermore, the amendments of the 1945 constitution regarding judicial power that was previously only regulated in Article 24 (1) and (2), as well as Article. After the first amendment, it was changed four times, that is, in 1999, 2000, 2001 and 2002 consisting in a manuscript of 1945 constitution regarding Judicial power set in Chapter IX consisting of Article 24 (1, 2, 3), 24 A (1, 2, 4, 5, Article 24-B) (1, 2, 3, 4), Section C (1, 2, 3, 4, 5, 6) and article 25. If those articles are studied, it can be said that judicial power consists of the Supreme Court, the Constitutional Court, and as if including the Judicial Commission. However, when looked from the view of the authority of the Judicial Commission, it is not including the judicial authorities; the question is why it is regulated in the judicial power. Therefore, the presence of the Judicial Commission needs realignment in the Constitution and the Law on Judicial Power.

Meanwhile, the three state institutions are reinforced by the Judicial Authority Law (Law No. 24 of 2004). Besides, the 1945 constitution has been set as the substance of the authority and responsibilities of the three institutions that can be explained as follows:

The Supreme Court (MA) has the authorities and obligations as the following:

- Authority to hear the cassation, examine legislation under the law on the law and has other powers provided by law (Article 24 A (1))
- Filed three members of the constitutional judges (Article 24 C (3))
- Giving judgment in the case of the President provides clemency and rehabilitation (in accordance with Article 14 (1) of the 1945 Constitution).

In addition, to be Chief Justice must, a judge must have honorable integrity and personality, fair and professional in the field of law (Article 24 A (2)). Also, the recruitment candidates for Chief Justice are done by a Commission, that is, the Judicial Commission proposed to House of Representatives. The candidates approved by President will be sworn in as the Chief Justice. (Article 24 A (3)), and the Chief Justice oversees the General Court, Military court, religion court, as well State Administration court.

The Judicial Commission (KY) has the authority as follows:

- Propose the appointment of Chief Justice (Article 24 B (1));
- Has the authority in order to preserve and uphold the honor, dignity, and the behavior of judges (Article 24 B (1)).

The Constitutional Court (MK) has the authority and obligations as follows:

- Authority to hear at the first and final level that approval is declared as final to test a law on the constitution, decide on the dispute the authority of state institutions whose authorities are granted by the Constitution, dissolution of political parties, and to decide disputes concerning the results of the elections (Article 24 C (1)).
- To give a decision on the opinion of House of Representative on alleged violations by the President and/or Vice President according to the 1945 Constitution (Article 24 C (2)).

Furthermore, to be Constitutional Court judge, a judge must have honorable integrity and personality, fair, statesman that has knowledge about state constitution, and not concurrently as officials of the State (Article 24 C (5)). Besides, the membership of the Constitutional Court judge is assigned by the President, proposed respectively by the Supreme Court as many as 3 candidate, the House of Representative 3 candidates, and President 3 candidates (Article 24 C (3)).

From the explanation above, it can be concluded substantially that, what has been stipulated in the 1945 Constitution, MA, MK, and KY have the same power, as well as in Law No. 24 of 2004 on Judicial Power which states that the three institutions as judicial authorities. The reality is that only the Supreme Court and the Constitutional Court are as judicial authorities, however, the state institutional structure of KY, it seems that KY is not equal with Supreme Court and the Constitutional Court. The KY should be equal to two other judicial powers because it has been arranged substantively in 1945 constitution as power giver to state institutions.

The issue why KY in reality is not acknowledged as a judicial authority is caused by the limited authority, only recruits and supervises the behavior of Chief Justice, so it does not have the function to hear/adjudicate, as inherent in MA and MK. Further issue is why KY is mentioned substantively in the 1945 Constitution and Law No. 24 of 2004 on Judicial Power. This suggests for further discussion of the special judicial authority of KY, how if constitution is re-amended on Chapter IX of the 1945 Constitution.

Closing

Judicial Commission as stipulated in the 1945 Constitution is one very important power that should be mentioned is not in the judicial power, but in a separate chapter. Therefore, it is necessary an amendment to the 1945 Constitution the next phase.

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