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Fifth Amendment of 1945 Constitution of Republic of Indonesia: It Is Not a Necessity but It Is a Must

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Abstract
Fifth Amendment of 1945 Constitution of Republic of Indonesia constitutes a political and constitutional must in order to increase people welfare. Amendments in 1999 and 2002 have not been able to answer the concept of Pancasila Rule of Law followed by Indonesian people so then it is necessary to be re-amended. This is due to the implementation of check and balance system among state institutions stipulated in 1945 Constitution of Republic of Indonesia is not ideal yet so it needs an empowerment through constitution amendment.
Keywords: Fifth Amendment, Rule of Law, Constitution, *Pancasila*

I. Introduction

Nowadays the life as nation and state of Indonesian nation seems far away from the hope of the founding fathers and all of us. One of the causes is that our several state institutions do not function as they should be. This problem happens in almost all state institutions, that are legislative, executive, and judicative institutions. Even though M. Oosterhagen (1993 ; 72-73) have argued that *"In this respect, the founding fathers resorted to such writers as Locke and Montesquieu, who both had stated that separation of powers would provide a safeguard against abuse of power". "The object of the separation of powers as advocated by Locke was the control and restriction of power".*

Other causes are factors of the power and the authority of each of state institutions is unbalanced, less reflecting checks and balances among state institutions, the implementation of people sovereignty that fully conducted by an institution, the power that theoretically must be conducted by representative institution (legislative) is given to executive institution (President). This causes the reduction of *Pancasila* democracy principles, i.e. a form/model of democracy that focuses on people's aspirations, interests and power of the people is always imbued with basic ideology/values of *Pancasila* which derive from the socio-cultural values of Indonesian society. It is not wrong if C.F. Strong (1966; 13) states that "*By democracy in this sense we therefore mean a system of government in which the majority of the grown members of a political community participate through a method of representation which secures that the government is ultimately responsible for its actions to that majority. In others words, the contemporary constitutional state must be based on a system of democratic representation which guarantees the sovereignty of the people".*

Indeed, it can be said that there is the carrying out the governance that disobey a system which has been stipulated in 1945 Constitution of Republic of Indonesia. Yet long before Hans Kelsen (1973: 282) has explained *"that all power should be exercised by one collegiate organ the members of which are elected by the people".*

Idealism of our national legal system basically is reflected in our Constitution, in particular in the preamble of 1945 Constitution of Republic of Indonesia, i.e. in order to help the realization of social justice and prosperity of society. Details and practical context of what was stated in the preamble of the 1945 Constitution of Republic of Indonesia we can see at the formulation of the articles contained in the Constitution of the Republic of Indonesia and derivatives legislation. It can be exemplified here, for example, one way to protect all the people of Indonesia, Article 1 (3) Third Amendment of the 1945 Constitution states that "Indonesia is a state based on the rule of law." This statement explicitly indicates that the law in the State of Indonesia normatively has a very basic and the highest (supreme) position. That then in the practical reality sometimes it was not well implemented, it is an anomaly that is urgent to be addressed (Imam Syaukani & A. Ahsin Thohari, 2013:82-83).

Post the last amendment of 1945 Constitution of Republic of Indonesia then we know the state institutions in our constitutional system, that are: MPR (People's Consultative Assembly), DPR (House of Representative), President, MA (Supreme Court), BPK (Financial Audit Board), DPD (Regional Representative Council), MK (Constitutional Court), and KY (Judicial Commission) with no more knowing the term of higher institution and the highest institution. Issues that often debated in relation with the existence of our state institutions recently is in the context of the carrying out of the role and function of the state institutions, among other are the existence of overlapping in term of authority. It is very often an authority contested as a domain of two or more state institutions. Another problem that sometimes also arises in relation with our state institutions is the existence of intervention between state institutions, so sometimes the independence of a state institution in issuing its policy constitutes a compromised result of elites in power circle. All those problems in fact reflected in one big problem, namely the problem of formulating and carrying out of stipulation (article) existing in our constitution (1945 Constitution of Republic of Indonesia).

II. Problem Statement

If we study more in depth the causing factor of the condition above by using legal system theory approach of Lawrence Meir Friedman, then at least what we have to study is how legal substance aspect of our constitution is? Then, how is legal structure of our constitution? And the last is how the reality of legal culture of our nation is nowadays?

Why should we use the systems approach? The Argument of the use of a systems approach is, first, the systems approach is a method of semi-metaphysical, which is in addition to have the ability to describe the characteristics of the integrity of the object, also has the ability to conduct an analysis of each component of the object. Second, the system approach always considers the connectedness factor of an object internally and externally. Thus, the third, this approach is more representative for ontology, epistemology, and axiology of science, according to its essential characteristics. The capacity of the systems approach lies in its ability to penetrate the characteristic weaknesses of modern science (Cartesian) (Lili Rasjidi & I.B. Wyasa Son, 2003; 4).

Due to the scope of our constitution is so broad, then in this paper, the author will focus the study and the analysis on two main problems, namely the problems of law and democracy post fourth amendment of 1945 Constitution of Republic of Indonesia.

III. Discussion and Analysis

As stated in introduction section above, the author will discuss and analyze the two problems.

1. Legal Problem in Post Amendment of RI Constitution of 1945

If we refer to the substance of our RI Constitution of 1945, then we will find out several articles stipulating about law. In this paper, however, the author will only discuss articles related to legal problem that the author thinks it has a problem either in its legal substance or in its implementation aspects. Those articles, among others, are Article 1 section (3), Article 14 section (1) and (2), Article 20 section (1), Article 20A section (1), Article 21, Article 22D section (1) and (2), Article 24 section (1) and (2), and Article 24B section (1). Furthermore the author will discuss and analyze each of those articles as follow.

a. Article 1 section (3) “The State of Indonesia shall be a state based on the rule of law.”

There are at least 11 (eleven) basic principles constituting the main pillars that hold up the establishment of a modern rule of law state (*rechtsstaat*). These eleven principles are Supremacy of Law; Equality before the law; Due process of law; Limitation of power; Independent executive organs; independent and impartial Judiciary; Administration state of Judiciary; Protection of human right; *Democratische rechtsstaat; and Welfare rechtsstaat* (Hamzah & HS Muh Ikhsan Saleh, 2009: 23).

Even A. Mukthie Fajar (2006; 5) has stated that In the dimension of order (the provisions making in the articles of the 1945 Constitution), as a result of ambiguity in the idea it can be understood either in the preamble or in the body of 1945 Constitution, except in the explanation of the 1945 Constitution which defined it in a winged sentence that full of doubt "Indonesia is a state that based on rule of law (*rechtsstaat*)", not merely based on power (*machtsstaat*)".

The statement above can be interpreted that Indonesia was actually "machtsstaat" (the primary), but also "rechtsstaat" (the secondary). It is obviously very different from the 1949 Constitution of The Republic of United Indonesia and Provisional Constitution of 1950 that in its Preamble and in Article 1 (1) firmly formulated that Indonesia is a state based on rule of law which is democratic.

In my opinion, if our state is a state based on rule of law as contained in the text of Article 1 section 3 of 1945 Constitution of Republic of Indonesia above, then the first question that must be answered is whether state based on rule of law concept that we follow is the same with the concept of *Rechtsstaat* or Rule of Law? This is important to be answered because either *Rechtsstaat* or the Rule of Law both is supported by the different background and legal system.

Rechtsstaat concept tends to be revolutionary in nature because it arises from the struggling process to oppose absolutism, whereas The Rule of Law concept develops evolutionary. Another difference is that *Rechtsstaat* concept rests and develops on European Continental Legal System that commonly mentioned as Civil Law or also commonly known as Roman Law and its characteristic tends to be administrative, whereas the Rule of Law concept develops and rests on Common Law system and its characteristic tends to be judicial.

Back to first question above, then which concept is followed by Indonesia? *Rechtsstaat* or Rule of Law? Considering the background of the emergence of the both concepts of state based on rule of law above (*Rectsstaat* or Rule of Law), then it is certain that the characteristic and the background of the both concepts of state based on rule of law must be different with the background of the Indonesia. It could be the one of causes why the substance of Indonesian rule of law concept does not firmly refer to *Rechtsstaat* or Rule of Law, even though it is hard to be denied that the emergence of Indonesian rule of law concept is very inspired by the *Rechtsstaat* and Rule of Law

concepts.

In my opinion, in fact Indonesian is still consistent with its existence and its identity in all forms of life as nation and state. If this consistent attitude is kept and maintained, then the choice of rule of law state concept for Indonesia nation should refer to *Pancasila* (five basic principles), so that the naming of Indonesian rule of law concept becomes rule of law state based on *Pancasila* is the same with the naming of our democracy, namely *Pancasila* democracy. If our choice then uses rule of law state based on *Pancasila*, then its consequence is that the our legal substance, legal structure, and legal culture in fact constitute the manifestation of values contained in *Pancasila*. In my opinion, the choice of the naming of rule of law based on *Pancasila* is the right choice and in line with the ideas of our Founding Fathers who want *Pancasila* becomes way of life of the whole of Indonesian. The discourse for the naming of our rule of law concept to be rule of law based on *Pancasila*, in my opinion, has its right moment at this government era, where the present government is actively to popularize and to implement *nawacita* (nine ideas) concept, which its substance is to require that the life as a nation and state runs in line with the initial will of the founding fathers of this nation. The problem of the naming becomes a special problem of the many legal problems in our country.

Further, the problem about state based on rule of law concept in Article 1 section (3) of 1945 Constitution of Republic of Indonesia will be much more when we move our focus on empirical level (reality). Theoretically, rule of law concept that becomes the choice of our nation is very good; however it is very different with the recent reality of our nation. It seems that Indonesian people nowadays will be really agree if we say that ideas which have goals to create state based on rule of law in fact it has not been fully embodied. Various reality and phenomenon about anarchism (disobedience of law), injustice, the disobedience of human right values, and judiciary mafia constitute real evidence that the form of rule of law in Indonesia is still far from it is hoped. Law has not been fully enforced in this republic. Indeed, law in our daily life still becomes subordination of power and politic.

The various bad records about law enforcer and law enforcement still become our daily reading and show through printing and electronic mass media. This reality has become the main factor triggering the emergence of community's distrust toward law enforcer institution and the law itself. Indeed, the further implication of community's distrust is the emergence of other various phenomena that more increasing the tangle of our legal practice, such as the increase of vigilantism, the attack by community member against law enforcer officer and law enforcer institution (police, prosecutor, and judge). All of these as the sign that our country is getting away from rule of law.

Depart from the understanding of *das sollen* (what it should be) and *das sein* (what it is) about the idea of state based on rule of law embodied in our constitution with its real implementation, then it is not an exaggeration to take conclusion that in fact the goal displacement of our constitution substance has occurred.

b. Further the author will study the provision formulation of Article 14 section (1) ruling that: "The President may grant clemency and restoration of rights by taking into account the consideration of the Supreme Court". As it is known that the right to grant clemency and restoration of rights by President constitutes prerogative right granted by our constitution to President, even though in its employment President is previously obliged to take into account the opinion of Supreme Court.

If we thoroughly study the provision formulation of the constitution above, then in fact the grant of prerogative right to President to grant clemency and restoration of right does have any problem. The problem then in fact emerges from the sentence "by taking into account the consideration of Supreme Court." The word "taking into account" tends to have meaning that President in using the right to grant clemency and restoration of right is not at all obliged to obey the substance of Supreme Court's consideration. In another word, it is very possible that President to grant clemency and restoration of right even though Supreme Court in its consideration wishing President does not grant clemency and restoration of right. Therefore the sentence formulation of Article 14 section (1) of our constitution have to contain word "have to" before words "taking into account the consideration of Supreme Court, so the ideal full formulation of the article should be "President before granting clemency and restoration of right *have to* take into account the consideration of Supreme Court."

Another problem related to the article formulation above at the implementation level (the use of President's prerogative right) also will be very clear if we see it from perspective of efficacy and effectiveness. Considering the practice of the grant of clemency and restoration of right by President taking place at this time, the grant of clemency and restoration of right is always conducted at the end of legal enforcement process. This such process if it is seen from the perspective of efficacy and

effectiveness, then it seems that such conduct of President is not efficient and effective at all, indeed it tends not to take into account human rights of the parties asking for clemency and restoration of right.

c. Further other articles of 1945 Constitution of Republic of Indonesia having a problem are the provision of Article 20 section (1) ruling "The House of Representative shall hold a power to make laws" and the provision of Article 20A section (1) ruling "The House of Representative shall have legislative, budgetary, and supervisory functions," as well as the provision of Article 21 ruling "The House of Representative members shall have the right to propose bills." The provision formulation of the three articles above is very ideal as "das sollen," its "das sein", however, is not as such it is. In the context of Article 20 section (1), it is clear and firm that the power to make laws is in the hand of the House of Representative. If we see thoroughly its reality, it seems that what occurs is in the contrary. Executive institution seems very dominant in initiating the making of laws in this republic. This we can see from the reality that so many bills constitutes proposal of executive rather than bills emerging from the employment of initiative right of the House of Representative. This matter is more due to, in my opinion, the influence of some aspects, such as the readiness of human resources aspect where human resources of executive institution tend to be better prepared than human resources of House of Representative. This is due to the system of recruitment and building of human resources of both institutions is very different. Recruitment and building system existing in executive institution tends is more well planned, systematic, and continuous from the beginning than recruitment and building system of human resources at the House of Representative (legislative institution). Based on such thinking, then the author thinks that the grant of power to make laws to legislative institution (House of Representative) in 1945 Constitution of Republic of Indonesia must consider the readiness and capacity of legislative members, so in the future the employment of the power can be more effective.

d. Next, the author would like to study the provision formulation of Article 23D sections (1) and (2), Article 23, Article 23E, and Article 23F.

   Referring to amendment result of 1945 Constitution of Republic of Indonesia, then it can be known that state institution Regional Representative Council (DPD) has functions, among others: proposing, discussing, and conducting supervisory on the implementation of laws, especially related to regional autonomy, and the relationship between central and local government. Beside those functions, Regional Representative Council of Republic of Indonesia under 1945 Constitution of Republic Indonesia also has task and authority to propose bill related to regional autonomy and to supervise its implementation (Article 22 of 1945 Constitution). In addition, Regional Representative Council also has authority to provide consideration to President concerning State Revenue and Expenditure Budget (Article 23 of 1945 Constitution), to accept the result of financial audit of Financial Audit Board (Article 23E of 1945 Constitution), and to provide consideration to House of Representative in selecting the members of Financial Audit Board (Article 23F of 1945 Constitution).

   Even though 1945 Constitution has been four times to be amended and many things have been changed, however the change has not given satisfaction to various groups in community who think that there are still many weaknesses, either in its substantial or procedural aspects. One of weaknesses that frequently becomes a topic of discussion is the existence of Regional Representative Council (RRC) which is very different with the concept of *bicameral* (two chambers). Some people think that 1945 Constitution post amendment does not follow two chambers system but three chambers system, indeed some people think that in fact we follow one chamber (unicameral) because from the three of state higher institutions only House of Representative (HR) having a clear legislation authority.

   By considering the task, function, and authority owned by Regional Representative Council, if it is compared to the task, function, and authority owned by other state institutions in Indonesian Constitutional system nowadays, moreover if it is compared to House of Representative that together with Regional Representative Council to have legislative function, then it can be said that the task, function, and authority owned by Regional Representative Council are very limited. Even though with the existence of Constitutional Court Decision Number 92/PUU-X/2012, where the decision can be said that it has made Regional Representative Council is no more the subordinate of House of Representative in legislation function, but it is equal with House of Representative and President, in which Regional Representative Council has right to propose and discuss a certain Bill from the beginning, however the problem is still exist in finalization (enactment) of an Laws. Therefore expecting the optimization of task, function, and the nature of the existence of Regional Representative Council institution in the recent era is a must. Moreover if want to compare with the

role, function, and existence of the House of Representative institution.

Actually from the beginning of amendment the Regional Representative Council is designed as the second chamber of Indonesian parliament in the future. However one of characteristics of *bicameralism* known in the world is if those two chambers (House of Representative/HR and Regional Representative Council/RRC) are together to do/run legislative function as it should be. However if it is seen thoroughly, Regional Representative as one of chambers in parliament does not have power at all in legislation function. Regional Representative Council (RRC) only has authority to give consideration, suggestions or recommendations, while the right to decide is in the Parliament. Therefore RRC and HR with that such authority does not deserve to be called as bicameralism in the usual sense, because the prevalent understanding to date is that bicameralism is when the two chambers have the same power (checks and balances). And when the both chambers in a parliament have the same power, then the parliament is called the strong bicameralism, but if one of the two chambers in the parliament stronger, then the parliament is referred to as soft bicameralism.

The funniest thing of the existence of HR and RRC in our parliament is the legitimacy of the existence of members of the two institutions, higher institutions of the country. If the legitimacy and the magnitude of the owned authority should be measured by the number of people's support that are represented, then in fact the legitimacy and authority owned by a member of the RRC should be a much stronger and its authority much greater than the legitimacy and authority that should be owned by a member of the House of Representatives. It can be seen from the stuffing mechanism of the two higher institutions of the State. For example, in East Java by using data from the last general election in 2014, then a member of the East Java's RRC requires about 5.5 million votes, while for a member of HR from East Java it is enough to gain about 550 thousand votes. Moreover the candidates of RRC's members are individuals, while the participants of general election for HR are Political Parties (the votes of the elected HR's members are not necessarily pure all their votes).

Considering the matter above, it can be said that one of the remained problems from the amendment of 1945 Constitution of Republic of Indonesia related to higher institution RRC is the issue of imbalance between RRC's authority and HR's authority; then the issue of injustice in terms of the stuffing mechanism of the both higher institutions; and the third issue is the existence of many partisans of the particular political parties driven by the political parties to get into parliament through the RRC, so at the end the elected RRC's members will tend to favor the interests of political parties that encourage them rather than to favor the interests of the region they represent. Related to the authority of RRC in the field of legislation, short-term measures that can be taken is to strive for the role strengthening through the revision of the Act and the Rules of Procedure governing the two institutions, the HR and RRC.

e. Furthermore, the formulation of the provisions of Article 24 section (1), (2), and Article 24B section (1) is the formulation of the provisions in the 1945 Constitution that will be the last part of the author's analysis and critics.In Article 24 section (1) stipulated that "The judicial power shall be independent and shall possess the power to organize the judicature in order to enforce law and justice." Reading the formulation of the provisions of the foregoing article is surely an ideal, but it is not as ideal as its reality. In the author's view, the formulation of the provisions of Article 24 section (1) above is clearly to seem contradictory with the substance of the formulation of Article 14 section (1). Imagine when our judiciary has processed a person starting from the first instance courts, appeal, cassation up to the judicial review and it has decided in final and binding phase, but not necessarily the President with his prerogatives right suddenly repealing it with the right of Clemency, Abolition and Amnesty. Notwithstanding that it has been also stipulated that the President in using his prerogative right is to consider the judgment of the Supreme Court. The problem then is in the formulation of the article with the existence the phrase "taking into account" without the word "must" or "shall", and thus there is no necessity for the President to consider the judgment of the Supreme Court in granting clemency and Abolition.

f. The last discussion of this paper is the author analysis on the provisions of Article 24B section (1) that "There shall be an independent Judicial Commission which shall possess the authority to propose candidates for appointment as Justices of the Supreme Court and shall possess further authority to maintain and ensure the honor, dignity and behavior of judges." Considering the formulation of the provisions of the foregoing article, the various analyzes can be put forward. For instance related to Chapter IX of the 1945 Constitution which regulates the Judicial Power in the 1945 Constitution is debatable because it regulates the Judicial Commission, whereas we all know that the Commission as a higher institution of state does not have judicial

power at all. In Judicial Commission there is no judge and no case, indeed as we know that typically an institution labeling Commission is almost certain that it is ad hoc in nature, not permanent. Thus, ideally Judicial Commission should not be stipulated in a constitution as the existence of other commissions existing in Indonesia. Moreover, if we consider it in terms of the urgency and scope of the authority owned by Judicial Commission if it is compared to other commissions, such as National Commission of Human Right, Corruption Eradication Commission, etc. Furthermore I am of the view that by putting Judicial Commission in our constitution, especially by putting it in Chapter stipulating the Judicial Power is indeed a real mistake of the writer/maker of the 1945 Constitution. Based on the discussion and analysis has been stated by the author above, it shows the truth of Eric Barendt's view (1998; 14) which states that; The framers of the US Constitution similarly saw a division of powers between Congress, the President, and the judiciary as essential to Prevent the concentration of power in the hands of particular parties, of faction "has found its justification in the practice of the constitution for the nation of Indonesia.

IV. Conclusion and Recommendation

1.Conclusion

Considering the problems existing in some provisions of our constitution, especially provisions stipulating the law issue and based on the analysis and discussion above, the author can draw some conclusions, as follows:

a. That the fifth amendment of the 1945 Constitution of Republic of Indonesia is inevitable, at least in the context of the effort to organize our state's higher institutions that today we can say they still have problems in terms of their existence, the process of the stuffing, functions and authority, and they do not reflect the actual rule of law state, and away from the principle of checks and balances;
b. That the failure of state institutions function as intended, it cannot be separated from the substance of 1945 Constitution of Republic of Indonesia which is in fact having a problem, as well as aspects of the mentality of human resources working at our state higher institutions, which in turn they have made our state's institutional functions facing stagnate and distortion. The attitude of the State officials which tend to work for themselves and their group/faction, as well as the attitude of the political elite who tend to be pragmatic and opportunist has made them lose their politics sense and their nationalism.
c. That moral consciousness and nationalism of our officials and political elite nowadays is questionable in the midst of widespread corruption, infringement of the laws and ethical deviance in the life as a state and nation.

2.Recommendations

Referring to the issue, discussions, analysis and the conclusion above, the authors suggest some recommendations, as follows;

a. That the decrease of spirit and understanding of nationalism not only happens among the state administrator elites but also in our society in general, which in turn it also contributes to the further decline of our state and legal institutions, which in turn leads to further decline of this nation.
b. the poor mentality and morality of some our State administrators should be paid a serious attention. The leaders of the State, especially the President as Head of State and the whole Regional Head (Governor, Regent / Mayor) should address the problem of mentality and morality seriously by setting up schemes and formulas comprehensively, systematically, continuously, and massively as a real effort to overcome the problems. It is the time for the head of state to embody revitalization concept of mental or mental revolution and the morality of the nation, which has been discoursed in order to save and develop the nation in general, and specifically in order to realize our goal to life as a state, namely to realize a just and prosperous society.
c. The process of revitalization or mental and moral revolution should ideally be done by imposing a culture of discipline, professionalism, law-abiding culture and eliminate all feudal practices, sectorial ego, and excessive institutional egocentrism and fanaticism. Mental and moral education in the formal education sector, especially among politicians should be more strengthened with an emphasis on aspects of character and religious educations.

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1945 Constitution of Republic of Indonesia
Law Number 32 of 2004 concerning Regional Government.
Law Number 12 of 2011 concerning Laws Making.
Law Number 17 of 2014 concerning People's Consultative Assembly, House of Representative, Regional Representative Council, and Regional House of Representative.

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