

The Dilemma of the State Institution in Indonesia

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Abstract

Indonesian Constitutional system has changed after amendment of The 1945 Indonesian Constitution. The most important amendment is the structure of state institutions which have similar hierarchy. However, in the 1945 Indonesian Constitution after amendment are many form and kinds state institution. Besides that in outside the 1945 constitution, there are state institutions. Based on this statement appear of dilemma in regulating state institutions. This paper analysis about the dilemma of state institutions in Indonesian Constitutional system. The method of study use normative approaches. Therefore, Indonesian must arrange the state institution strictly in The 1945 Indonesian Constitution.

Keywords: Constitutional, Constitution, State Institution, System

A. Background

The existing of the state institutions generally based on the statement of Baron De Montesquieu (1689 – 1785) about the concept of Trias Politica. This concept feature that the state must be divided in the three branch powers namely executive, legislative and judicative. This means that the states must represent the three branch powers.

Indonesia is the state which based on the 1945 Indonesian Constitution have formed the state institutions that appreciate to the three branch powers. Although, The 1945 Indonesian Constitution not only the three branch powers but also have formed the other state institution which have function inspection namely Badan Pemeriksa Keuangan (BPK), and Komisi Yudisial (KY).

The existing of the state institutions are provision in the 1945 Indonesian Constitution where it has been amended in 1999 – 2002. The result of amendment of the 1945 Indonesian Constitution not only make new institution but also erase the state institution which has not role and function in the Indonesian constitutional system namely Dewan Pertimbangan Agung (DPA). Besides that, amendment of the 1945 Indonesian Constitution also change the function of The People Representative Assembly (Majelis Permusyawaratan Rakyat / MPR) from the highest state institution to the state institution. It means that the position of MPR is similar with the other the state institutions. In this amendment, the 1945 Indonesian Constitution has not already used term the highest state institution and the high state institution. The institutions of the 1945 Indonesian Constitution is referred to as the state institutions.

The state institutions of the 1945 Indonesian Constitution are permanently institution because those institutions cannot be changed without through amendment of that constitution. While to amendment must through mechanism which has been regulated in the article 37 of the 1945 Indonesian Constitution. In this article has regulated amendment process strictly to change, to form, and to skip the state institution in sort time.

Besides the Indonesia state institutions are regulated in The 1945 Indonesian Constitution also regulated in the Indonesian laws. The state institution which is formed in Indonesian Laws can be called body or commission which have role and functions in governing the state government. Because that, the institution in the Indonesian constitutional system is divided in two institution namely the state institution and the government institution. The state institution is the institution which be regulated in the 1945 Indonesian Constitution while the government institution is the institution which be regulated in Indonesian Laws. But, the both appear problem in the forms of its institution. Because there are similar form of institution namely commission. In the 1945 Indonesian Constitution has two commission that is KY and Komisi Pemilihan Umum (KPU). While in Indonesian Laws have many commission such as Komisi Hak Asasi Manusia (Komnas HAM), Komisi Pemberantasan Korupsi (KPK), Komisi Penyiaran Indonesia (KPI), Komisi Perlindungan Saksi dan Korban (KPSK), Komisi Pengawas Persaingan Usaha (KPPU), and so on.

The appearance of the state institution such as commission in the 1945 Indonesian Constitution has mean that there is hesitancy MPR in contempt the commissions. Because of that, the 1945 Indonesian Constitution does not need to regulate it and it enough to be regulated in Indonesian Laws. It means that the commissions which have similar role and function to be regulate in Indonesian Laws. Therefore the state institution in the commission form must be arrange the position and function with the state institution in the 1945 Indonesian Constitution.

B. Research Purpose

1. Analyze the state institutions that are not regulated in the the 1945 Indonesian Constitution.
2. Analyze the legal basis for the existence of state institutions that are not regulated in the the 1945 Indonesian Constitution.
3. To evaluate the political analysis of the legal establishment of state institutions that are not regulated in the the 1945 Indonesian Constitution.

C. Research Methode

Based on the research object, this study uses several approaches. The first approach is the approach of the philosophical (philosophical approach) as meaning "examine fundamentally, thorough and speculative legal issues as well as peel radical and profound". Through a philosophical approach is expected to gain a holistic understanding of the presence and arrangement of the unclear (vague norm) setting form and legal basis of state institutions that are not regulated in the the 1945 Indonesian Constitution.

The second approach with the approach of law (statute approach) which means "to examine all legislation related to the legal issues and the need to seek the ratio legis birth of a law". Law approach used in this study, because the focus of research to analyze the various laws on state institutions that are not regulated in the 1945 Indonesian Constitution, such as: laws, government regulations, presidential decrees and decree.

Furthermore, a third approach, the approach to history (historical approach), that this approach "is done by examining the background of what is learned and development arrangements regarding legal issues facing". The approach used to examine the historical background of the legal basis for setting the state institutions that are not regulated in the the 1945 Indonesian Constitution. This approach will also be obtainable how the shape of the state institutions that are not regulated in the 1945 Indonesian Constitution.

While the fourth approach, the conceptual approach (conceptual approach). The conceptual approach "to move from the views and doctrines that developed in the jurisprudence, so by studying the views and doctrines that researchers will find the ideas that gave birth to notions of law, legal concepts and principles law relevant to the issues faced ". The conceptual approach used in this study, to examine and assess the legal concept of the existence of the state institutions that are not regulated in the 1945 Indonesian Constitution.

D. Discussion

1. The function of the constitution

Every state must have constitution either written constitution or unwritten constitution. This constitution is used by state to run their state in achieve their aim. Besides that, this constitution is a basic law which every people and government must to obey. According O. Hood Phillips and Paul Jackson, the constitution is divided into two senses such as the abstract and the concrete. They said that :

“The abstract senses is the system of laws, customs and conventions which define the composition and powers of organs of the state, and regulate the relations of the various state organs to one another and to the private citizen. A Constitution in the concrete sense is the document in which the most important laws of the constitution are authoritatively ordained”.¹

Besides that stated, the constitution have three functions in regulate the state. First, the constitution has function to composite the power of the state organs. Second, the constitution regulate the relation of the state organs toward one another. Third, the constitution regulate the relation of the state organs toward the private citizen. These function have important meaning for the state as basic law how the government can carry out their duties.

Neil Parpworth has also define the constitution in broadest sense namely a body of rules which regulates the system of government within a state requiring to establish the bodies and institution which form part of that system.² This means that the institutions state are one of part to exercise the system of state. However, the institutions state must have powers and function where it must be provided in the constitution. Even though, the constitution needs determine the relations between the government and the people such as O.Hood Phillips stated in his argument concerning the definition of the constitution above.

James Bryce and C.F. Strong also have definition the constitution. James Bryce put forward that a constitution as frame work of political society, organized through and by law. Meanwhile, C. F. Strong stated that a collection of principles according to which the powers of the government, the rights of the governed, and the relation, between the two are adjusted.³ There are different into lay down the point of the meaning of the constitution between Bryce and Strong. James Bryce more refer to law in organizing the government whereas

¹O.Hood Phillips and Paul Jackson, *Constitutional and Administrative Law*, (London : Sweet & Maxwell Ltd., 1989), p. 5.

²Neil Parpworth, *Constitutional and Administrative Law*, (London : Butterworths, 2000), p. 3.

³I Dewa Gede Atmadja, *Hukum Konstitusi, Problematika Konstitusi Indonesia Sesudah Perubahan UUD 1945*, (Malang : Setara Press, Edisi Revisi, 2012), p. 27 – 28.

C.F. Strong more priority the fundamental principles such as human rights in the constitution.

From the definitions of the constitutions it can conclude that the constitution must have regulate the power and function of the organ state, the organs state to exercise the system of laws, the relation the organs states toward one another and people, regulate the fundamental right and regulate the principle of the state. This is an important substance that must be present in the constitution. We can study the 1945 Indonesian Constitution which have regulated these things.

The 1945 Indonesian Constitution has been amended fourth time since 1999 until 2002. The result from this amendment among other change are the structure of the state and added human rights articles. Before the 1945 Indonesian Constitution amendment, there are two levels in the Indonesian structure namely the highest institution and the high institution.

However after the amendment, the 1945 Indonesian Constitution has been remove this levels with the result that the all of organs in the 1945 Indonesian Constitution is called organs state or institution state.

The reason why the 1945 Indonesia constitution has been amended, because in 1998 has been happen reform and protest to President Soeharto regime which has been power for 32 years. The protester ask Suharto resign from the President because he has conducted corruption, collusion and nepotism as along as became the President. Therefore, in May 1998, Soeharto announce to resign from the President and be changed by his vice President B.J. Habibie to be President of Republic of Indonesia. In Soeharto regime, the 1945 Indonesian Constitution is not possible to amendment. Otherwise, after general election in 1999, the People's Consultative Assembly (MPR) begins to amend the 1945 Indonesian Constitution.

This amendment is one important matter to be Indonesian democratic, transparent and good governance. Besides that, Indonesia exist the supreme of the constitution where the 1945 Indonesian Constitution as highest of law in Indonesia. This means that the system of law in Indonesia must refer to this constitution. Therefore in guarding the 1945 Indonesian Constitution is established the Constitutional Court.

2. The Position of the constitution in Indonesia

Every states must have constitution whether written or unwritten because it has important position in the system of laws. Constitution becomes basic law regulating the system of constitutional likes the organ state, protecting of human rights and the system of democracy. As basic law has means that the constitution becomes reference to another laws in a state or if the government in making laws must refers to the constitution.

Indonesian constitutional system has regulated the position of the constitution as a fundamental law. The Indonesian State has laws regulating kind and hierarchy of laws through law number 12 year 2011. This law states that the hierarchy of laws in Indonesian Constitutional system are:

1. The 1945 Indonesian Constitutions;
2. MPR Decision;
3. Laws/ Governmental Regulation in Lieu of Law;
4. Governmental regulation;
5. Presidential regulation;
6. Provincial Regional Regulation; and
7. Municipal Local Regulation

According the law number 12 year 2011, it had put the 1945 Indonesian Constitution in the first hierarchy of laws and it means that the 1945 Indonesian Constitution as the higher of laws in Indonesian laws system. It is very urgent that Indonesian Government must implement the supreme of constitution. Therefore, there are three position of the 1945 Indonesian Constitution in the Indonesian Constitutional System. The first, the 1945 Indonesian Constitution System as the basic law. It means that the Indonesian government in making laws must take reference from the constitution because it contents of basic norms which is used the government as instrument to govern the government.

The second, the 1945 Indonesian Constitution as higher laws in Indonesian Constitutional System as it is regulated in law number 12 year 2011. This law has means that all the laws cannot conflict toward the constitution. The third, the 1945 Indonesian Constitution as a written national document. In the 1945 Indonesian Constitution, there is national statement consisting of the form and the aim of Indonesian State and the basic norms.

3. The system state Institution in Indonesian Constitutional Law

Indonesian Constitutional Law has changed after amendment of the 1945 Indonesian Constitution in 1999 until 2002. There are many new article and regulation based on demand of reformer in reformation. This amendment refers to democracy, openness, protecting of human right, law enforcement and create good governance. Based on this amendment, structure of Indonesian constitutional law has changed such as before amendment Indonesia apply the higher organ state and the high organ state namely the People's Consultative Assembly (Majelis Permusyawaratan Rakyat/MPR) as the higher organ state whereas besides MPR which is stated in the 1945 Indonesian Constitution as the high organ state.

After amendment, the 1945 Indonesian Constitution is not state the higher organ state and the high

organ state. According this constitution, the all organ state in the 1945 Indonesian Constitution have similar position which namely organ state. This organ state have difference function reflecting the concept of separation of power derived Montesquieu such as executive, judicative and legislative. However, the 1945 Indonesian Constitution does not regulate the three branch of power further regulate the audit organ.

Based on the 1945 Indonesian Constitution, there are ten state institutions in implementing the system of the state namely The People's Consultative Assembly, the House of Representative, the Council of Representatives of The Regions, the General Election Commission, Bank Central, Supreme Audit Board, Supreme of Court, Constitutional Court, Indonesian National Military, and the Indonesian National Police.

This state institutions stated in the 1945 Indonesian Constitution with the result that it can be called permanent bodies because it is very difficult to remove or change that institutions. Removing the state institutions in the 1945 Indonesian Constitution must trough amendment mechanism regulating in article 37 stated that :¹

- (1) A proposal to amend the Articles of this Constitution may be included in the agenda of an MPR session if it is submitted by at least 1/3 of the total MPR membership.
- (2) Any proposal to amend the Articles of this Constitution shall be introduced in writing and must clearly state the articles to be amended and the reasons for the amendment.
- (3) To amend the Articles of this Constitution, the session of the MPR requires at least 2/3 of the total membership of the MPR to be present.
- (4) Any decision to amend the Articles of this Constitution shall be made with the agreement of at least fifty per cent plus one member of the total membership of the MPR.
- (5) Provisions relating to the form of the unitary state of the Republic of Indonesia may not be amended.

Based on this article, it is not possible to amend the articles of the 1945 Indonesian Constitution quickly. Therefore the 1945 Indonesian Constitution is called rigid constitution. Besides permanent institutions, there are un-permanent institutions regulating in another laws such Indonesia Law or government regulation. This regulation under The 1945 Indonesian Constitution. However, there are un-permanent institution having function important such as the Corruption Eradication Commission.

E. Summary

In the end the existence of the state institutions that are not regulated in the Constitution of 1945 NRI is a condition sine qua non for the country's growth. Conceptually the existence of the state institutions that are not regulated in the Constitution of 1945 the NRI for the functioning of the state as well as to conduct government functions. But that must be kept in mind, as submitted by Jellinek, that the notion of state institutions divided by 2 (two), namely:

- a. State agencies that directly (mittelbare organ);
- b. State agencies are not directly (unmittelbare organ).

This shows that a group of state institutions only 2 (two) similar to the division of the group of countries in this research proposal. Further Jellinek explains what is meant by the state institution directly (mittelbare organ) is the state agency in the Constitution. It means the same as the main state institutions or state institutions permanently referred to in this dissertation research proposal. While that is a state institution that indirectly (unmittelbare organ) is a state agency whose existence depends on state institutions directly.

¹ Article 37 *The 1945 Indonesian Constitution*.