

The Guarantee Of Independence Of Judicial Power Post-Amendment Undang-Constitution 1945

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Abstract

The amendments of the 1945 Constitution have provided a stronger guarantee for the independence of the judiciary in Indonesia. A new phenomenon in parliamentary decisions related to judicial power. The pre-amendment 1945 Constitution only mentions the guarantee of the independence of the judiciary in the Elucidation of the 1945 Constitution, whose legal force is not as strong as stated explicitly in Article 24 of the post-amendment 1945 Constitution. The explanation of the constitution does not stipulate a legal norm. On the other hand, the body of the constitution regulates binding norms. The absence of legal norms has become a gap for the practice of interfering with the executive power in the judiciary, as happened in the era of Sukarno's Guided Democracy and Suharto's New Order era. This study concludes that there is a strengthening of the guarantee of the independence of judicial power after the amendment to the 1945 Constitution.

I. Introduction

I.1. Basic Understanding

Judicial power is an independent power to administer the judiciary to uphold law and justice.¹ Independent judicial power requires judges to be free from interference, pressure, or coercion, either directly or indirectly from the power of other institutions, peers, superiors, and other parties outside the judiciary.² Judicial independence is a fundamental prerequisite for the realization of the ideal of the state of law. The independence of judges and courts is manifested in the independence of judges. The independence of the judge is not a privilege or privilege of the judge, but rather a right attached to the judge.

The history of the journey of the Indonesian nation under the Government of Soeharto's New Order intahan and the D Government of Soekarno's Guided Democracy provides a very valuable lesson, namely how important it is to live the life of the nation and state in the spirit of a democratic legal state

(demokratische rechstaats). In both eras of government, it was seen that the government was carried out not on the basis of the principle of the rule of law, but on the basis of the rule by law. In both eras of government, parliaments made many laws, but in substance, the legal product did not meet the prerequisites of State Law, because the law was held for the purpose of governmental activities, not a law to provide legal certainty and justice for citizens.

Law has become a tool of revolutionary rhetoric in the Soekarno era, In the Soeharto era, the law was used as a tool of the legitimacy of power and a facility of foreign capital in the context of global capitalist interests. Therefore, it is not surprising that the two governments created a Subversive Law and a Terrorism Law, which opened a wide gap for Human Rights violations. Laws have also been made in the context of the interests of global capitalists without considering the cultural roots that are lived in this country, for example, the Tax Law, the Capital Market Law, and the Money Laundering Act.

Another condition of the implementation of the power of the judiciary is the influence of the power of government on the independence of the judiciary. The independence of judicial power is influenced by other branches of power. The independence of judges and the judiciary is influenced by powers beyond judicial power. Studies have shown that influences outside the judicial power such as the executive and legislature have a significant role to play in the legal product and independence of judicial power.³

The conduct of judicial activity itself, according to the observations of Roscoe Pound, is a creative element in the legal system.⁴ Non-legal factors, such as politics, can influence the judicial process, due to the open possibility of interaction of political actors with the judicial process, especially in cases that offend the interests of important political actors.⁵

The importance of the discussion of the influence of muscularity government is at least dotted with four reasons.⁶ First, the muscular governmental power is constantly sought to be charitable and in various ways of influencing the judicial power both through the regulation of legislation and the direct intervention of the executive power in the judicial process.⁷

Second, the intervention of executive power into the judicial process has given rise to the courage in a number of judges to uphold independent judicial power in their rulings, especially in cases that offend the interests of the ruler. Indeed, the threat of authoritarian intervention by authoritarian governmental power has an influence on judges' decisions that are far from a sense of justice in cases that offend the interests of the ruler. However, if there is a court ruling that gives a sense of justice to the seeker of justice in the case, then such a ruling occurs because of the personal background of the judge who has dared to tell the future of *karirnya*. Theoretically, it can be said that in order for the

legal system to work, there must be synergy between the tools of legislation, the work of enforcement officers, and the growth of a legal culture that is conducive to the work of the legal system.⁸

Third, efforts to fight for independent judicial power have never stopped being carried out either through efforts to strengthen the independence of judicial power through amendments to the judicial power law or through a series of discussions and seminars.

Daniel S. Lev noted the debate around the idea of releasing judges from the justice department as desired by the judges on the one hand, and the desire of Justice Minister Seno Adjie representing the New Order Government not to release judges from the department he headed.⁹ S. Pompe noted the persistence of the Indonesian Judges Association to regain the power of an independent judiciary, which was castrated during the period of Guided Democracy.¹⁰ The judges fought not only through the means of hearings in the House of Representatives (DPR-GR) but also through legal seminar activities. Mass media coverage of all the talks in the seminar and the resulting recommendations are a strategic step to convey the aspirations of the judges to the wider community.

Fourth, the discussion of the independence of judicial power can also be separated from the theoretical debate about the independent judicial power itself. Obstacles to the exercise of independent judicial power are due to the weak constitutional basis of the freedom and independence of the judicial system. Article 24 and Article 25 of the 1945 Constitution feel too *sumir*. The explanation of the two articles does not spell out the principle of freedom and judicial power.¹¹ Therefore, Pompe proposed the importance of further elaboration of the two articles, which should not diminish and limit the

judicial power and assert its position as equal to the power of state government.¹²

Even if there are differences of opinion among legal scholars, they are of the same view that the presence of an independent judicial power is a must in a legal state. With regard to the independent debate of judicial power, political science scholars have long advocated a separation between executive power, legislative power, and judicial power. Montesquieu, one of the leading thinkers of the middleages, advocated the application of the theory of separation of power as published in *Trias Politica*. Montesquieu said that executive power, judicial power, and legislative power are separate both regarding duties and regarding the tools that exercise the power.¹³

The theory of separation of powers is used as a theoretical framework for the purposes of this research. For the purposes of problem analysis, the author felt the need to look at the correlation between the theory of separation of powers and independent judicial power as the topic of this dissertation. Still, in the context of the separation of state powers, independent judicial power can only be exercised on the condition of the extent to which the allocation of power between the three branches of state power.¹⁴ The division of state power itself is one of the important principles in the democratic system and the legal state system that Indonesia also adheres to.¹⁵

The commitment to the importance of independent judicial power is shown in the Explanation of the 1945 Constitution.¹⁶ This commitment is very important for the realization of the concept of a legal state, where a free judiciary will provide citizens with legal certainty and legal justice. Free justice can only be promulgated through the guarantee of the absence of state intervention in the judicial process. However, even more, fundamental is the absence of government interference in terms of the administration and organization of the judicial

power itself. These two things are a test of how far the officials of the judicial power can carry out judicial functions in a fair, honest, and impartial manner.

In an effort to sharpen the analysis of problems in this study, the concept of separation of power as proposed by Montesquieu is to be used as an analysis knife for this study.¹⁷ The selection of this theory of separation of powers is associated also with the concept of checks and balances since this study will look at how far the exercise of judicial power is without interference from the executive and legislative powers. The separation of powers in addition to raising the hope that one branch of power will not integrate another branch of power, but also at the same time how far one power can be a counterweight to the other two branches of state power. For example, executive power interferes in the affairs of judicial power.

Although John Locke and Montesquieu both view the need to divide state power into three branches of power, they differ in terms of naming institutions and institutional functions. Locke divided state power into legislative power, executive power, and federative power. Legislative power is the power of making rules and laws.¹⁸ Unlike Locke,¹⁹ Montesquieu divided state power into legislative power, executive power, and judicial power.²⁰ In the function of that branch of power, Locke understood executive power as the executor of laws and it included the power of adjudication. Federative power is a power that includes all measures to maintain the security of the state in relations with other states, such as making alliances, treaties, and everything related to foreign relations issues.

In contrast to Locke, Montesquieu wanted an express separation of the three branches of power, both with regard to duties (functions) and fittings (organs) that exercised such power. The desire to strictly separate the three branches of state power is based on the idea

that the separation of powers is a prerequisite for judicial freedom.²¹ Montesquieu emphasized especially the importance of freedom of judicial power since an independent judicial power would guarantee individual freedom and human rights. The principle of equality before the law is an important element in the concept of the rule of law.²²

The separation of power between the three branches of power was seen as something absolute by Montesquieu.²³ Regarding the separation of the legislature and the executive, he said:

"If legislative and executive powers are held by one person or a judicial body, then there is no freedom because citizens will worry if the king or senate who makes tyrannical laws will punish or rule them through tyranny."²⁴

Regarding the need for the separation of judicial powers to be separated from other branches of state power, Montesquieu put forward:

"Freedom does not exist if judicial power is not separated from legislative power and executive power. If the judicial power is united with the legislative power, then the power over the life and freedom of citizens will be exercised arbitrarily because the judge will be the lawmaker. If this judicial power is united with the executive power, then the judge can become an oppressor."²⁵

Hans Kelsen also wanted a separation of state power.²⁶ According to Kelsen, the functions of law in a country based on traditional legal theory are distinguished into three categories, namely legislation, administration (including government), and judiciary.²⁷ Legislative power is a power that includes lawmaking. Executive powers include the administration of laws. Judicial power is the power of adjudicating

violations of laws. The legislative organ is run by a parliament elected through orderly elections.²⁸ An organ of legislation serves to create common legal norms. The function of government in particular is a legal function in its narrow view intended to create and carry out common and individual legal norms. This individual here is the subject of law, whereby he is required to submit to some particular behavior due to his coercive nature.²⁹ The coercive nature of this principled rule arises because of the sanctions associated with the rule. The implementation of sanctions as referred to above is carried out by the state judiciary.³⁰ With this judicial function, according to Kelsen, the so-called jurisdictional and administrative state was born.

Kelsen sees this concept of separation of powers within the framework of political organization.³¹ His opinion is associated with the fact that the functions of the three branches of power in question function to perform public services, therefore there must be a line separating and dividing the three clearly. The three branches of power are also not allowed to be one more powerful than the other and must exercise their power under established laws.

An independent judicial process is understood as the absence of the influence of third parties or other institutions beyond judicial power in judicial proceedings, where the judge's ruling is born only on the basis of the correlation of the facts that arose in the trial and the interrelationship with the applicable law.³² There are two reasons that explain the importance of third-party neutrality to the judicial process.³³

First, the principle of third-party neutrality has to do with the application of court decisions. Ideally, when judges have no interest in a case and do not behave biased toward one of the litigant parties regardless of differences in their economic background, then the judges can apply

the parties in a position of equality before the law and are able to protect the rights and security of one party from the violation of the other party. Therefore, an independent judge is assumed to be able to decide cases based on the objective principles of the law, not based on the social position or political position of the litigants. Such an independent attitude of judges will prevent parties who have a strong position in society from manipulating the law for their benefit, just as any aggrieved citizen can obtain an improvement by submitting his case before an independent judge for a fair and impartial legal process.

Second, judicial independence becomes very important when the government is a party to a dispute or case because then the impartiality of the court is tested in handling disputes. If the independent nature and impartiality of the judicial process can be trusted, then the judges examining the dispute will not be biased in the interests of the government. That is why the position of judges is important to escape the clutches of the influence of government power. They are also protected from any form of threats, interventions, and manipulations that encourage judges to issue judgments in favor of the ruler or they do not issue judgments that should have been issued. In relation to the possibility of being bad for the independence of judges, the concept of a legal state will not work when its law enforcement agencies are composed of judges who are afraid to challenge the interests of the government or have the tendency to justify the actions of the government.

The discussion of the theory of separation of powers must be related to the debate of thought in the field of Constitutional Law in Indonesia. There is a very strong opinion in Indonesia that the 1945 Constitution is only about the separation of powers in the formal sense because the 1945 Law is not about the material separation of powers.³⁴ This opinion is supported by the division of power in state institutions, namely the existence of the House of Representatives, the Government, the Supreme Court, the Financial

Audit Agency, and the Supreme Advisory Council. But apart from the aforementioned debate, the independence of judicial power as a logical consequence of the separation of powers is recognized as a necessity in a state, because the independence of judicial power is one of the pillars of the state of law.³⁵ That is, the separation of judicial power from the other two branches of power still needs to be carried out, namely by means of enacting a law that guarantees the independence of judicial power and is guaranteed more emphatically in the 1945 Constitution.

1.2. Methodology

Based on the problems studied and the choice of data sources used in this study, the researcher used normative legal research.³⁶ Normative legal research methods, as understood in legal literature, are research that refers to legal norms contained in laws and regulations and court decisions. To obtain data in this research, researchers conducted literature research by collecting primary, secondary, and legal materials, such as concepts, doctrines, legal methods, and laws and regulations related to this research.³⁷

The author reviews written legal documents, laws, and regulations relating to the constitution, judicial power and judicial bodies perpetrators of judicial power, minutes of the Dewan P session represented Rakyat, decisions of the Constitutional Court, decisions of the Supreme Court, and judicial bodies under M ahkamah Agung, minutes of court hearings, other regulations under the law, decisions of Tata Usaha Negara relating to judicial power, legislative and executive power which have an effect on judicial power. Some legal cases are the object of study both those that have been decided and those that have not been heard because of factors that hinder the independence of the judiciary, both political and social factors. The documents and decisions of the court are examined with the intention of knowing the implementation of the

concepts, doctrines of legal science, and applicable legal methods.

II. Result and Discussion

As a basic law,³⁸ the constitution must contain basic principles that are important for the implementation of government activities by providing protection for citizens and regulating the obligations of citizens both in the context of relations between citizens and the relationship of citizens with the organs of the canyon. Jurists and political experts give diverse definitions, but the essence is the same, according to Bryce, for example:³⁹

“The instrument in which a constitution is embodied proceed from a source different from that whence spring other laws are regulated in a different way and exerts a sovereign force. It is enacted not by the ordinary legislative authority but by some higher and specially empowered body. When any of its provisions conflict with the provisions of the ordinary law, it prevails and ordinary law must give away.”

C.F. Strong understands the constitution as more operational in nature,⁴⁰ that is, regulating the composition and relationship between executive power, legislative power, and judicial power. The composition and relationship between the three powers are related to the issue of consideration of power (checks and balances). These three powers are the main pillars of State power, therefore it is necessary to clarify their arrangements in the constitution. All constitutions that have been in force and that are still in force in Indonesia also regulate these three powers, both in the sense of authority and organization.

In the Indonesian context, the understanding of the constitution as above is also a reflection of all constitutions that have existed and are still valid today. As is known, in addition to the 1945 Constitution, the State of the Republic of Indonesia has also enacted other constitutions, namely the 1949 RIS Constitution and the 1950 Constitution. At this time, the Constitution which

is the written basic law is the 1945 Constitution Amendment Results.

Understanding the constitution as the basic law and the highest source of law in a canyon is also embraced in the 1945 Constitution. The spirit and substance of the 1945 Constitution must be an umbrella for legal products at the lower levels. That is, if there is a legal product that is contrary to the 1945 Constitution, it must be held to annul the legal product through judicial review through the Supreme Court for legal review under the law or through the Constitutional Court for the testing of the law. The norm of *kewajiban* to obey the order of the legislation is a norm that applies universally.⁴¹

The commitment to upholding the democratic cause of law must be expressly contained in the constitution because the constitution is a pillar for a democratic State Hukum. In the discourse of Constitutional Law, the concept of "State Hukum" and the concept of "Democracy" are often juxtaposed and pronounced in one breath, i.e. "The democratic State of Law" or *Democratische Rechtsstaats*". In a simple sense, in a State Law, there are no citizens who are above the law and because of this, all citizens must obey hukum.⁴² In line with the thought mentioned, the spirit of State Hukum is emphasized through the provisions in article 1 paragraph (3) of the 1945 Constitution The fourth amendment, which is to become "The State of Indonesia is a Democratic State Hukum yang". The law provides guarantees for the protection of human rights, judicial independence, and equality before the law and law enforcement.

The Constitution also serves as a guard for the continuation of democracy (the guardian of democracy). The Constitution must be able to make guarantees for the implementation of the separation of powers of the canyon with a process of checks and balances between the powers of the judiciary, the powers of the legislatures and the powers of the legislature f and the powers of the theexequived powers and as its parameters. The phenomenon of executive heavy in the era of

President Soeharto and President Sukarno must be guaranteed not to be repeated through the arrangement of the distribution of power in a cross-section and propositional manner between the three branches of power in the constitution. On the contrary, the shift of the pendulum of power to parliament so that there is a parliamentary heavy as it happened in the reform era must also be stopped. The parliamentary heavy phenomenon became a political reality due to the erroneous structure of the constitution in the allocation of power between the three branches of the unbalanced and unbalanced canyon. The poor constitutional tour would have serious implications for democracy as it did during the Weimar Republic before Hitler assumed power in Germany.⁴³ A constitution without the regulation of checks and balances will give birth to a constitutional dictatorship, which ultimately buries the principle of the democratic rule of law state.

The balance of power (checks and balances) between judicial power, executive power, and legislative power will provide guarantees for the implementation of democratic processes of political and constitutional life. This reformatting of the balance of power is what is shown in the 1945 Constitution as a result of four amendments,⁴⁴ although corrections remain to be made to a number of provisions of the articles of the constitution. The reformatting of constitutional life is reflected in the shift of some areas of political power from the Pemerintah to the DPR, which is interpreted as empowering parliament. The most important example of the shift in power is the transfer of lawmaking power from the Government to the House which was passive in the past in lawmaking initiatives. Likewise, the submission of a bill from the House and then having to be passed by the President is a check and balance between the executive and the legislative. But it is too far if the reception of an ambassador or consul from another negara must also be asked for the opinion of the House [Article 13 paragraph (3)] and also the appointment of an ambassador or consul must also ask for the

consideration of the House [Article 13 paragraph (2)].

The amendment to the 1945 Constitution also gave power to the House of Representatives, which touched on aspects of judicial power. The election of the chief justice through the fit and proper test in the House of Representatives is a mechanics of checks and balances between judicial power and legislature.

In order to create checks and balances, especially in the submission of the Draft of Bills and its ratification, the president also needs to be given veto power over the draft of bills submitted by the House of Representatives. This needs to be contained in the Text of the Emic Agreement of the 1945 Constitution which will be made by the Constitutional Commission. The equilibrium of power will eventually give birth to the course of government and healthy life for the nation and state.

In addition to the change in the format of the balance of power as alluded to above, the amendments to the 1945 Constitution insinuated three new institutions. Two new institutions in the field of judicial power, namely the Constitutional Court and the Judicial Commission. Another one is the House of Regional Representatives, whose formation is inspired by the system of the Senate in the United States or the other Federal States.

In Indonesia, the Constitutional Court was introduced through the Third Amendment to the 1945 Constitution.⁴⁵ The Constitutional Court is regulated in Article 24 paragraph (2) and Article 24C of the 1945 Constitution. Article 24 paragraph (2) states, "Judicial power is exercised by a Supreme Court and the judicial bodies subordinate to it in the general judicial environment, the religious judicial environment, the military judicial environment, the administrative environment of the State and by a Constitutional Court."

Article 24C paragraph (1) of the 1945 Constitution stipulates the authority of the Constitutional Court, namely: "The Constitutional Court has the authority to adjudicate in the first and last instance whose

decisions are final to test the law against the Undang-Constitution, decide disputes over the authority of the negara institution whose authority is granted by the Constitution, decide the dissolution of political parties, and decide disputes about the results of elections."

In addition to these four authorities, the Constitutional Court also has one obligation as stipulated in Article 24C paragraph (2) of the 1945 Constitution, namely: "The Constitutional Court shall render a judgment on the opinion of the House of Representatives regarding alleged violations by the President and/or Vice President according to the Basic Law."

The composition of the judges of the Constitutional Court is regulated in Article 24C paragraph (3), namely: "The Constitutional Court has nine constitutional judges appointed by the President, three each by the Supreme Court, three by the House of Representatives, and three by the President."

Article 24 paragraph (4) specifies that "the Chief Justice and Deputy Chief Justice of the Constitutional Court are elected from and by constitutional judges."

To be appointed as a constitutional judge, the candidate for constitutional judge must meet the requirements as specified in Article 24C paragraph (5) of the 1945 Constitution, namely: "Constitutional judges must have integrity and personality that is not reprehensible, fair, statesmen who control the constitution and constitution, and do not concurrently serve as "State Officials ". Further arrangements regarding the Constitutional Court, including its procedure law, are regulated in Law Number 24 of 2013.⁴⁶

The results of the Third Amendment to the 1945 Constitution were determined by the People's Consultative Assembly of the Republic of Indonesia on November 9, 2001. Meanwhile, the presence of the Judicial Commission is intended as an effort to strengthen the supervision of judges both in the context of carrying out judicial duties and in the context of personal integrity. Many countries have established a kind

of institution of the Judicial Commission in the judicial environment.⁴⁷ In Indonesia, the Judicial Commission is regulated in Article 24B of the 1945 Constitution, which states the following:

- (1) The Judicial Commission is independent in nature which has the authority to propose the appointment of supreme court justices and has the authority to propose the appointment of supreme court justices and has other powers in order to maintain and uphold the respect, nobility of dignity, and the attitude of judges.
- (2) Members of the Judicial Commission must have knowledge and experience in the field of law and not have integrity and impeccable personality.
- (3) Members of the Judicial Commission are appointed and dismissed by the President with the approval of the House of Representatives.
- (4) The composition, position, and membership of the Judicial Commission are regulated by law.

The formation of this new institution can be said to be a continuation of the idea of forming an Honorary Panel of Judges which since the 1960s has developed.⁴⁸ However, this idea stopped with the Judicial Power Bill, which was later passed as Law No. 14 of 1970 concerning the Principles of Judicial Power. The idea of establishing an institution such as the Honorary Panel of Judges reappeared in the post-Soeharto era.⁴⁹ Amendments to the 1945 Constitution containing the Judicial Commission, Details of the regulation of the Judicial Commission there is Law Number 22 of 2004.⁵⁰

III. Conclusion

The amendments to the 1945 Constitution have brought about a change in the format of power of the country's institutions and also produced three new canyon institutions, namely the

Constitutional Court and the Judicial Commission for the field of judicial power, as well as the Regional Representative Council. The provisions of the 1945 Constitution shows at least the phenomenon of strengthening the concept of democratic law, the balance of power between executive power, judicial power, and legislative power, as well as the guarantee of human rights.

The amendment of the 1945 Constitution resulted in the balance of power (checks and balances) between judicial power, executive power, and legislative power will provide guarantees for the implementation of democratic processes of political and constitutional life.

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