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Strengthening Guarantees of Independence of Judicial Power Post Amendment to the 1945 Constitution

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Abstract

Amendments to the 1945 Constitution have provided even stronger guarantees for the independence of judicial power in Indonesia. The pre-amendment Constitution only mentions the promise of the freedom of judicial power in the Explanation section of the 1945 Constitution. The Explanatory Provisions have no binding legal force. The weakness of the law became a loophole for the interference of executive power in judicial power as occurred in the era of Sukarno (1959-1966) and the era of Suharto (1966-1998). In addition to strengthening the guarantee of judicial independence, amendments to the 1945 Constitution were also established by the Constitutional Court. The Constitutional Court exercises judicial power alongside the Supreme Court and the judicial bodies. Changes to the 1945 Constitution also assign duties to the Judicial Commission to supervise judges and judicial processes.

Keywords
judicial independent;
judicial accountability;
judicial corruption;
judicial commission

I. Introduction

Judicial power is the independent power to regulate the judiciary to uphold law and justice under Article 24 section (1) and (2) of the 1945 Constitution. The court must be independent of interference and pressure from other state institutions. Judicial independence becomes a fundamental prerequisite for realizing the ideals of the rule of law. Judges must have independence in carrying out judicial functions. However, the judge's freedom must be followed by the accountability of the judge.

The history of the Indonesian nation under the Suharto government and the Sukarno government provides an invaluable lesson in the enforcement of judicial independence. Both eras of government showed that the government was run not based on *the rule of law* but dominated by *political power*. In both periods of government, parliament made many laws, but in substance, the product of the law did not meet the preconditions for the principle of the rule of law. The law was more about strengthening power, not providing legal certainty and justice for citizens.

Government power intervention must be eliminated if there is to be independent of judicial power. There should be no attempt to influence the government on the judiciary. In the case of the establishment of judicial laws, it is difficult to avoid executive and legislative influence to reduce the independence of judicial power based on political interests.

Roscoe Pound said the elaboration of judicial activities was an essential element in the legal system. Non-legal factors, such as politics, can influence the judicial process, due to the openness of possible interactions of political actors with the judicial process, especially in cases that offend the interests of important political actors.

The importance of discussing government influence is based on at least four reasons. First, the power of the government always seeks to be systematic and various ways to influence judicial power both through legislation and direct intervention of executive power to the judicial process.

Second, the intervention of executive power over the judicial process also arouses the courage of some judges to uphold the power of an independent judiciary in their rulings, especially in cases that offend the interests of the ruler. Judges who dare to resist government power and other political elites usually have a background of courageous personality. Theoretically, it can be said that for the legal system to function, there must be synergy between legal and regulatory tools, the work of law enforcement officials, and the growth of a legal culture conducive to the work of the legal system.

Third, the fight for independent judicial power should not be made. Any attempt to strengthen the independence of judicial power can be made through amendments to the law or through a series of discussions and seminars.

Daniel S. Lev noted the debate around the idea of upholding judicial independence strengthened early in Suharto's rule. The government does not want to relinquish its grip on administrative, organizational, and financial arrangements. The Indonesian Judges Association argues that financial arrangements and oversight by the justice department will create a means for executives to influence judges subtly. History shows senior judges failed to fight for the independence of judicial power in establishing Law No. 14 of 1970 on Judicial Power. The government even judged the wishes of the judge's organization as wrong demands, hostility, and even treason.

Sebastian Pompe noted that the Indonesian Judges Association fought hard to regain independent judicial power after being blocked during Guided Democracy. The senior judges championed the ideal of independence of judicial power through the House of Representatives.

In establishing Law No. 2 of 1986 on The General Trial, senior judges also failed to fight for judicial independence. This law requires that a person be a civil servant to be appointed as a judge of the District Court and the High Court. The law requires mono-judge loyalty in organizing, namely being a member of the Civil Service Corps. Since the judge is a member of a government employee organization, they must support the ruling party.

Fourth, the discussion of the independence of judicial power is also inseparable from the theoretical debate about the power of an independent judiciary itself. According to Todung Mulya Lubis, judicial independence is inhibited due to weak constitutional guarantees. He said that Article 24 and Article 25 of the 1945 Constitution do not seem to support the implementation of the principle of freedom of judicial power. Weak guarantees of the independence of judicial power are exacerbated by the provisions of Article 11 of Law No. 14 of 1970.

According to Lubis, the demand for independent judicial power has a firm basis, which we can at least read in the minutes of the making of the 1945 Constitution. Lubis said both Sukarno, Hatta, Soepomo, and Yamin recognized the importance of independent judicial power. However, there were some differences in view regarding the place and location of judicial power. The idea of presenting independent judicial power is in line with the explanation of the 1945 Constitution.

Despite differences of opinion among legal scholars, they hold the same view that independent judicial power is a necessity in a state of law. Montesquieu supports applying the theory of separation of power. Montesquieu said that executive power, judicial power, and legislative power are separate on duty and the equipment that exercises power.

Suharto's resignation from the post of second President of Indonesia on May 21, 1998, paved the way for changes to the 1945 Constitution. Suharto's resignation from his post came amid a protest movement of students and ordinary people against economic conditions in mid-1997. Indonesia, along with other Asian countries, is experiencing a financial crisis.

The theory of separation of powers is used as a theoretical framework for this research. For problem analysis, the author feels the need to see the correlation between the theory of separation of powers and independent judicial power as the topic of this dissertation. Still, in the separation of state powers, can only exercise independent judicial power under the circumstances to the extent of the allocation of power between the three branches of state power.

The commitment to the importance of independent judicial power is shown in the Explanation of the 1945 Constitution. This commitment is crucial to the realization of the concept of a state of law, where a free judiciary will give citizens legal certainty and legal justice. A free trial can only be served by guaranteeing no state intervention in the judicial process. However, fundamental is the absence of government interference in terms of the administration and organization of judicial power itself.

To sharpen the analysis of problems in this study, the concept of separation of powers from Montesquieu to be used as an analytical knife for this research. The selection of separation of powers theory is also associated with the concept of check and balance. This study will examine how far the implementation of judicial power without an executive and legislative power interference is. The separation of powers, in addition to raising the hope that one branch of power will not interfere with another component 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.

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Although John Locke and Montesquieu both had views of the need to divide state power into three branches of power, they differed in naming institutions and functions of institutions. Locke divided state power into legislative, executive, and federative power. Legislative power is the power to make rules and laws. Unlike Locke, Montesquieu divided state power into legislative power, executive power, and judicial power. In the function of the branch of power, Locke understood executive power as the implementer of laws and included the power of adjudicating. Federative power provides for all measures to maintain the security of the state in relations with other countries, such as making alliances, treaties, and everything related to foreign relations issues.

In contrast to Locke, Montesquieu wants a strict separation of the three branches of power concerning the duties (functions) and the fittings (organs) that hold power. The desire to expressly separate the three branches of state power is based on the idea that separation is a prerequisite of judicial freedom. Montesquieu stressed the importance of freedom of judicial power, as independent judicial power would guarantee individual independence and human rights. The principle of equality before the law is an essential

element in the concept of the rule of law. The separation of power between the three branches of power was seen as absolute by Montesquieu.

Hans Kelsen also wants a separation of state powers. According to Kelsen, the legal functions in a country based on traditional legal theories are divided into three categories: legislation, administration (including government), and the judiciary. Legislative power is the power that includes the making of laws. Executive power provides for the implementation of laws. Judicial power is the power to prosecute for violations of the law. The legislative organ is run by a parliament elected through an orderly election. An organ of legislation serves to create standard legal norms. The function of government is permitted in its narrow view intended to develop and implement standard and individual legal standards. This individual is the subject of law, where he is required to submit to certain behaviors due to his coercive nature. The nature of forcing this behavior rule arises because of sanctions related to the law. As referred to above, the implementation of sanctions is carried out by the state judiciary. According to Kelsen, this judicial function then born what is called jurisdictional and administrative state.

Kelsen sees this concept of separation of powers within the framework of political organization. His opinion is attributed to the fact that the function of the three branches of power serves to perform public service. Therefore, there must be a line that separates and divides the three. The three branches of power are also not allowed to be more powerful and must exercise their control based on established laws.

An independent judicial process is understood as the absence of the influence of a third party or other institution outside the judicial power in the judicial process, where the judge's ruling is born only based on the correlation of the facts that arise in the trial and its association with applicable law. Two reasons explain the importance of third-party neutrality to the judicial process.

First, the principle of third-party neutrality is related to applying court rulings. Ideally, when judges have no interest in a case and are not biased against either party in the case regardless of differences in economic background, the judges can apply the parties in a position of legal equality and be able to protect the rights and security of one party from violations of the other. Therefore, independent judges are assumed to be able to decide cases based on objective principles of the law, not based on the social position or political position of the litigable parties. Such an independent judge's attitude will prevent those with a vital role in society from manipulating the law in their interests, just as any aggrieved citizen can get an improvement by making his case before an independent judge for fair and impartial due process.

Second, the independence of the judiciary becomes very important when the government becomes one of the parties to a dispute or case because then the impartiality of the court is tested in the handling of conflicts. If the independent nature and objectivity of the judicial process are to be believed, then the judges examining the dispute will not be biased in the government's interests. That is why the importance of the position of judges is free from the grip of government power. They are also protected from any form of threat, intervention, and manipulation that prompts judges to issue rulings in favor of the authorities, or they do not give orders that should be issued. Concerning the possibility of being bad for the independence of judges, the concept of a state of the law will not work when its law enforcement agency is made up of judges who are afraid to challenge the interests of the government or have the tendency to justify the government's actions.

The discussion of the theory of separation of powers should be related to the debate of thought in Constitutional Law in Indonesia. There is a firm opinion in Indonesia that the 1945 Constitution is only about separation of powers in the sense of formal because the

1945 Law does not materially divide the power. The opinion is supported by the division of power in state institutions, namely the House of Representatives, government, supreme court, audit board, and supreme advisory council. But despite the above 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. The separation of judicial power from the other two branches of power still needs to be done, namely by enacting laws that guarantee the independence of judicial power and guarantees more firmly in the 1945 Constitution.

II. Research Method

Researchers use normative legal research based on the problems studied and the choice of data sources used in this study. As understood in the legal literature, normative legal research methods are research that refers to the legal norms contained in laws 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.

The author examines written legal documents, laws, and regulations related to the constitution, judicial power and judicial bodies of judicial actors of judicial power, minutes of the trial of House of Representatives, the decisions of the Constitutional Court, the decisions of the Supreme Court, and court bodies under the Supreme Court, the minutes of the court hearing, other regulations under the law, the decisions of Tata Usaha Negara relating to judicial power, legislative and executive powers that affect the power of the judiciary. Some legal cases become the object of study, both those that have been decided and those that have not been tried because of factors that inhibit the independence of the judiciary, both political factors and social. The documents and judgments of the court are examined to know the implementation of the concepts, doctrines of legal science, and legal methods that apply.

III. Results and Discussion

As a *basic law*, the Constitution shall contain the basic principles essential to the maintenance of the activities of the government by providing protection for citizens and the arrangement of citizen obligations both in the context of relations between citizens and the concerns of citizens with the organs of the government. According to Bryce, jurists and politicians give varying definitions, but the essence is the same.

C.F. Strong understands the Constitution more operationally, and it regulates the composition and relationship between executive power, legislative power, and judicial power. The design and relation of the three powers are related to the issue of consideration of power (check and balance). These three powers are the main pillars of state power. Therefore, they need to be clarified in the Constitution. All constitutions that have been in force and still apply in Indonesia also regulate the three powers, both in terms of authority and organization.

In the context of Indonesia, the understanding of the Constitution as above is also a reflection of all the constitutions that have existed and are still valid today. In addition to the 1945 Constitution, the Federal State of the Republic of Indonesia also has the 1949 Constitution. Lasting less than a year, the 1949 Constitution was replaced with the Provisional Constitution of 1950. Currently, the Constitution is the Constitution of 1945 post amendment.

The understanding of the Constitution as the basic law and the highest legal source in one year is also embraced in the 1945 Constitution. The spirit and substance of the 1945 Constitution must be a concern for legal products at the lower levels. Suppose there is a legal product that is contrary to the 1945 Constitution. In that case, the legal product must be canceled through *judicial review* through the Supreme Court for legal review of the law or through the Constitutional Court for testing the law. The norm of piety to obey legislation is universally applicable.

The commitment to upholding democratic laws must be expressly contained in the constitution because the constitution is a pillar for the democratic State of Hukum. In the law of the state, the concept of "State of Law" and the concept of "Democracy" are often juxtaposed and spoken in one breath, namely "Democratic State of Law". In a simple sense, in a state of law, there are no citizens above the law and all citizens must obey the law. In line with this thought, the spirit of the Hukum State was strengthened through the provisions in article 1 paragraph (3) of the 1945 Constitution of the Fourth AmendmentThe legal ideal provides guarantees for the protection of human rights, judicial independence, and *equality before the law* and enforcement based on the law.

The Constitution also serves as a guard for the survival of democracy. The Constitution must be able to make guarantees for the implementation of the separation of powers due to the process *of check and balance* between judicial power, legislative power, and executive power and as parameters. The *phenomenon of executive heavy* in the era of President Suharto and President Sukarno must be guaranteed not to be repeated through the arrangement of the distribution of power in a continuous and propositional between the three powers in the constitution. Instead, the shift of the pendulum of power to parliament so that it happens *parliamentary heavy* as happened in the reform era must also be stopped. The *phenomenon of parliamentary heavy* becomes a political reality because of the constitutional structure that is wrong in the allocation of power between the three branches of unbalanced and propositional. Such a poor constitutional structure would have serious implications for democracy as it did during the Weimar Republic before Hitler took power in Germany.

The balance of power (*check and balance*) between judicial power, executive power, and legislative power will provide guarantees for the implementation of political life and democratic statehood. The reformatting of the balance of power is shown through the 1945 Constitution resulting from four amendments, although there is still a correction to several provisions of the constitution. The reformatting of state life is reflected through the shift of several areas of political power from the Government to the House of Representatives, which is interpreted as *empowering parliament*. The most critical example is about the power shift is the switching of law-making power from the Government to the House of Representatives, which was passive in the past in law-making initiatives. Likewise, the submission of the draft of the bill from the House of Representatives and then must be endorsed by the President is a *check and balance* between the executive and the legislature. But it is too far if must also ask the acceptance of ambassadors or consuls from other countries to the House of Representatives [Article 13 paragraph (3)], and the appointment of ambassadors or consuls must also ask for consideration of the House of Representatives [Article 13 paragraph (2)].

Amendments to the 1945 Constitution also gave the power of the House of Representatives to select the justice of the Supreme Court. The fit and proper test is a check and balance mechanism between judicial power and legislative.

In addition to changes in the balance of power format as mentioned above, the amendment of the 1945 Constitution introduced two new institutions in judicial power, namely the Constitutional Court and the Judicial Commission.

In Indonesia, the Constitutional Court was introduced through the Third Amendment of the 1945 Constitution. The Constitutional Court is regulated in Article 24 paragraph (2) and Article 24C of the 1945 Constitution.

Article 24C paragraph (1) of the 1945 Constitution regulated the authority of the Constitutional Court, namely: "The Constitutional Court is authorized to adjudicate at the first and last level whose ruling is final to test the law against the Basic Law, break disputes over the authority of institutions whose authority is granted by the Basic Law, break the dissolution of political parties, and break 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 give a ruling on the opinion of the House of Representatives regarding alleged violations by the President or Vice President according to the Basic Law."

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

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

To be appointed as a constitutional judge, the candidate of constitutional judges must meet the requirements as stipulated in Article 24C paragraph (5) of the 1945 Constitution, namely: "Constitutional judges must have integrity and personality that is not reprehensible, just, a statesman who controls the constitution and statehood. Further arrangements on the Constitutional Court are regulated in Law No. 24 of 2013.

Meanwhile, the judicial commission's presence is intended to strengthen oversight of judges both in the context of the implementation of judicial duties and the context of personal integrity. Many people have formed a kind of Judicial Commission in the judicial environment. In Indonesia, the Judicial Commission is regulated in Article 24B of the 1945 Constitution, which states as follows:

1. Judicial Commission is an independent who is authorized to propose the appointment of Supreme Court justices and has the authority to propose the appointment of chief justices and has other authority to maintain and uphold respect, dignity, and dignity of judges.
2. Members of the Judicial Commission must have knowledge and experience in the field of law and have no approachable integrity and 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 governed by the law.

The establishment of this new institution can be a continuation of the establishment of an Honorary Panel of Judges, which since the 1960s has developed. But the idea stopped at the Judicial Power Bill, which was later passed as Law No. 14 of 1970 on the Principals of Judicial Enforcement. The idea of establishing an institution such as the Honorary Assembly of Judges resurfaced in the post-Suharto era. Changes to the Constitution of 1945 then contain the Judicial Commission, Details of the arrangement of the Judicial Commission there is Law No. 22 of 2004.

IV. Conclusion

Amendments to the 1945 Constitution have brought fundamental changes to the justice system in the country. Change revolves around institutional and authority aspects. The revision of the 1945 Constitution has brought about changes in the format of power of state institutions and resulted in three new institutions, namely the Constitutional Court and the Judicial Commission on judicial power and the Regional Representative Council. The provisions of the 1945 Constitution at least show the phenomenon of strengthening the concept of democratic law, the balance of power between executive power, judicial power, legislative power, and human rights guarantees.

Amendments to the 1945 Constitution have also led to the separation of powers over branches of state power intended to ensure the independence of judicial authority. The assurance of an independent judiciary is an essential element of the concept of state law. There must be a line between the judiciary, the executive, and the legislature. Still, the organ power of the three states also has a relationship within the framework of check-and-balance between the three branches of state power. The selection of candidates is carried out by the Judicial Commission as an independent quasi-state-judicial institution and then passed by the House of Representatives and then the President in his position as head of state making a decree on the appointment of new judges.

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