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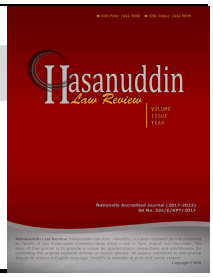

Arrangement of Relationship between State Institutions through the Fifth Amendment of the 1945 Constitution in Indonesia

Rommy Patra

Faculty of Law, Tanjungpura University, Indonesia. Email: rommypatra@yahoo.co.id

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ABSTRACT

The amendment of 1945 Constitution is deemed to have many weaknesses and shortcomings, especially related to the regulate institutional relationship between state institutions. There are some problem related to the obscurity of position of state institutions, the overlapping of duties, functions and authority which lead to the unrealized of checks and balances and the vulnerable for abuse of power. The direction of the arrangement of relationship between state institutions should be: First, to strengthen the implementation and purification of presidential system; Second, to clear up the position of the MPR as a joint session between DPD and DPR in an institutional relationship directed to create a strong bicameralism system; Third, the arrangement of judicial institutions should affirm the concept of MK as the court of law and MA as the court of justice. With the addition of constitutional complaint authority for MK and the authority of the previlegiatum forum for MA. While the arrangement of institutional relationship between MA and KY in supervising the judge should be developed based on the concept of share responsibility; Fourth, to make Attorney General as a constitutional organ that have the same constitutional authority and legal standing as other law enforcement agencies, namely National Police and the Courts (MA and MK). Fifth, the institutionalization of independent state commissions as constitutional organs based on the criteria of having the urgency and function of strengthening the constitutional democratic state and strengthening the mechanism of checks and balances.

1. Introduction

Since the stipulated of the amendment of the 1945 Constitution of the Republic of Indonesia (the 1945 Constitution) in the last 19 years, there are still many weaknesses and deficiencies in its regulate especially about relationship between state institutions that have implications for the state administration. The amendment of the 1945

Constitution in the process of drafting has indeed received much criticism. According to Indrayana,[1] the amendments of the 1945 Constitution do not have the key factors that should be available in a democratic process of Constitution-making: (i) there is no clear plan for determining key questions, e.g. when and how amendments will be made and what would it be like; (ii) the People's Consultative Assembly (MPR) as institution that have authority to amend and stipulate the Constitution have failed to win the people's trust; and (iii) public participation is very lacking and not well organized.

Despite facing a number of criticisms and theoretical problem in the amendment process of the 1945 Constitution, in the end the 1945 Constitution became more democratic in substance compared to the Constitution before. The amendment of 1945 Constitution presents a clearer concept of separation of powers between the executive, the legislature and the judiciary and the protection of human rights. This was possible due to the euphoria of transitional period from the authoritarian New Order regime to the reform era leading to democracy that provided a nuance that encouraged openly debates in the amendment process of the 1945 Constitution in the MPR and public participation were allowed in the debate. Although, there are still shortcomings in the MPR's working procedures to attract more public involvement.[2]

In addition to the lack of optimal public participation, the substantial weakness in the amendment of the 1945 Constitution is primarily related to the concept of authority regulation and the design of relationship patterns between state institutions that have not been able to established the *checks and balances* that have implications for the implementation of the tasks, functions and authorities of state institutions that are ineffective and vulnerable to abuse of power. Below we can see a number of weaknesses related to the regulation of authority and relations between state institutions after the amendment of the 1945 Constitution, namely:

First, related to the weakness of checks and balances of relations between state institutions, for example, legislative power between the House of Representatives (DPR) is so superior of its authority compared to the Regional Representatives Council (DPD) that can be considered has very minimalist authority. From the authority of legislation, supervision and budget, DPR is the institution that dominates and determines all of the process, while the DPD only has a mere authority as a functioning institution to propose and discuss a Bill related to regional autonomy but it has no authority to approve the Bill. Likewise, regarding the authority to conduct supervision, the supervision conducted by the DPD is indirect and must be submitted first to the DPR, it's also not binding. Based on these weaknesses of the authority of DPD, Mahfud MD called the existence of DPD only as an institution that is merely constitutional formality.[3] With such institutional design, it is unlikely that there will be checks and balances of institutional relationships between DPR and DPD as a coequal legislative body.

Second, besides the institutional relationship between the legislative body, there are also problems in the context of institutional relations in the field of supervision of judges, especially the disharmony between the Supreme Court (MA) and the Judicial Commission (KY). There are two institutions which have the authority to supervise the judges, namely MA as an internal supervisor and KY as an external supervisor. This is where there is often a point of intersection between MA and KY which often leads to a

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1 Indrayana, D. (2007). *Amandemen UUD 1945: Antara Mitos dan Pembongkaran.* Bandung: Mizan, p. 45-46.
2 *Ibid*, p. 46.
3 Mahfud, M.D. (2010). *Perdebatan Hukum Tata Negara Pasca Amandemen Konstitusi.* Jakarta: RajaGrafindo Persada, p. 70.

disharmonious institutional relationship driven by the reluctance of MA to accommodate the recommendations of the KY in the context of supervision of judges which regarded by the MA as a form of intervention on the independence of judicial power.

In contrast, KY finds that MA is less cooperative in implementing the recommendation given when the recommendation is very important in order to maintain the nobility, honor and dignity of the judges in the midst of the still widespread practice of judicial corruption in Indonesian judiciary. Unharmonious and yet synergistic relationship between MA and KY would be counterproductive in the effort to implement the judicial power reform because the energy that should be directed to improvement becomes drained by the constantly emerging conflict. For example, a judicial review to the Constitutional Court (MK) filed by MA judges in the Association of Indonesian Judges (IKAHI) who questioned the law that gives the authority of supervision and selection of judges to KY which later led to the cancellation of the law by MK.

Third, the uncertainty of criteria related to which state institutions existence is directly regulated by the 1945 Constitution and which state institution regulated only by the law or with other regulations. This issue emerges when there are "conflicts" between state institutions related to the authority they have, such as between the Indonesian National Police (hereinafter, Polri) and the Corruption Eradication Commission (KPK) in the handling of corruption cases or between the Attorney General and the National Human Rights Commission (hereinafter, Komnas HAM) in handling cases of gross violations of human rights.

Substantively, there is a mechanism of dispute settlement between state institutions regulated by the 1945 Constitution which gives authority to MK to resolve disputes of constitutional authority among state institutions whose existence and authority are directly regulated by the 1945 Constitution. However, problem emerges for institutions such as KPK, Attorney General and Komnas HAM which do not possess a legal standing in the constitutional authority disputes in MK because the three institutions are only regulated by the law, subsequently, when there is a dispute between these state institutions there is no legal mechanism to solve it.

The existence of disputes between state institutions raises questions regarding the status of state institutions because some state institutions are regulated by the 1945 Constitution and some are not. The question that emerged is, what is the criteria possessed by some state institutions to be directly regulated by the 1945 Constitution while other institutions are only regulated by the law. In terms of urgency, do state institutions directly regulated by the 1945 Constitution have more urgency than those that are not directly regulated by the 1945 Constitution? For example, viewed from the existence of state institutions that function and have authority in law enforcement, such as judicial institutions exercising judicial power, namely MK and MA whose existence is regulated under Article 24 paragraph (2)[4] and Polri under the Article 30 paragraph (4)[5], their existence are directly regulated by the 1945 Constitution. As for other law enforcement agencies, such as the Attorney General, its existence is not regulated directly by the 1945 Constitution.

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[4] Article 24 paragraph (2) of the 1945 Constitution: "*Judicial power shall be made by a Supreme Court and judicial bodies thereunder within a general judicature, religious court, military court, state administration court, and by a Constitutional Court.*"

[5] Article 30 paragraph (4) of the 1945 Constitution: "*Indonesian National Police as the state's instrument to maintain the public security and orderliness shall be assigned to protect, serve the public, and reinforce the law.*"

Whereas the judiciary institutions (MA and MK), Polri and Attorney General are the institutions which are in charge of law enforcement whose field of duty is interrelated. This certainly raises the question, why the judiciary institutions (MA and MK) and Polri are regulated directly by the 1945 Constitution while the Attorney General is not? Are the judiciary institutions (MA and MK) and Polri much more important than the Attorney General so that the existence of both are regulated directly as a constitutional organ while the Attorney General is only regulated by law? The emergence of the problem is suspected due to the unclear criteria of the existence of state institutions based on the amendment of the 1945 Constitution so that it's potentially causes institutional problems, such as authority disputes or overlapping tasks and functions between state institutions whose mechanism to settle are also unclear, especially for state institutions whose existence are not regulated by the 1945 Constitution.

Fourth, in addition to the unclear criteria for institutional regulate of state institutions in the 1945 Constitution, such as the existence of the Attorney General, the same is true for the regulate of state institutions in the form of independent state commissions. Because there are state commissions that are directly regulated by the 1945 Constitution, such as the General Elections Commission (KPU) and KY, while KPK, Komnas HAM and a number of other state commissions are only regulated by law. The question is, do the duties and functions possessed by the KPU and KY are much more important than the KPK or Komnas HAM so that both are regulated directly by the 1945 Constitution? Yet if we look at the actual issues related to the rise of corruption and the practice of human rights violations, KPK and Komnas HAM should have urgency to be directly regulated by the 1945 Constitution, but in the reality, they are not. This shows the unclear indicator of what is used to determine which state institution should directly regulated by the 1945 Constitution and which institution is not regulated by the 1945 Constitution.

Fifth, the amendment of the 1945 Constitution is based on one of its principles that is to strengthen the existence of presidential system which in its regulate still contains problem, especially regarding the legislation function related to institutional relationship with DPR. Viewed from the implementation of the Indonesian legislation function so far, the process of formulating a law involving the President and DPR in the discussion and to obtain mutual consent, this actually shows the implementation of legislation functions similar to the parliamentary system. Whereas generally, in the presidential system, the President is not involved or participate in the discussions and approvement of a bill discussed by parliament. However, the President has a veto to refuse to pass a bill from parliament which is a form of check and balances between the President and parliament. The law formation process in Indonesia based on the amendment of the 1945 Constitution have parliamentary characteristic amid the application of presidential system. That is unusual and not in accordance with the effort to strengthen the presidential system in Indonesia.

There are still a number of weaknesses in the context of institutional relationships between state institutions as described above, it is necessary for a comprehensive arrangement. Of course, the effort of the arrangement requires a re-amendment of the 1945 Constitution. Therefore, the arrangement of state institutions through the fifth amendment of the 1945 Constitution is worth doing, because theoretically and empirically the changes to the Constitution is something that is reasonable if it is associated with the improvement of state administration.

The study related to the institutional arrangement of the state is not new. However, in this paper, the authors focus on a more comprehensive institutional arrangement

through the fifth amendment of the 1945 Constitution. This arrangement has an urgency in order to establish an effective institutional relationship between the main power branches, such as executive, legislative and judiciary. In other side, this arrangement is also intended to strengthen the existence of a number of independent state commissions as branches of "new" powers that perform functions both in order to support existing state institutions or also to perform special functions. The author sees that only through the fifth amendment of the 1945 Constitution improvements to institutional relations and strengthening the authority among state institutions have a strong constitutional basis. Therefore, the arrangement of relations between state institutions are effort to realize the check and balances as a main purpose within the fifth amendment to the 1945 Constitution.

2. Urgency of Arrangement of Relationship between State Institutions in Indonesia

The Constitution as a "social contract" is not a "sacred" document that cannot be changed so it is necessary to always be adapted to the various changes that exist in all sector of state life. The need for flexibility in the amendment of the Constitution to conform with constitutional development is an unavoidable necessity. The main reason to conduct the fifth amendment of the 1945 Constitution has urgency in the framework of improvement and to make the 1945 Constitution as a living and working Constitution.[6] In the framework of the fifth amendment of the 1945 Constitution there are at least two reasons or urgency on why the 1945 Constitution needs to be amended: First, the fifth amendment of the 1945 Constitution is conducted in order to rectify the errors and weaknesses contained in the previous amendments, both in the process or substance; Second, the dynamics of state administration always moves and must be followed by the improvement of the Constitution so that it can be symmetrical with the ideals of the nation that has been agreed by the founding fathers.[7]

Regarding the weakness contained in the 1945 amendment in terms of substance, one of the most prominent issues is the unclear arrangement of institutional relations in realize checks and balances among state institutions. Whereas the existence of state institutions is a fundamental element that becomes the substance of a Constitution, where the state institution is an organ that functions in the implementation of a state. The importance of the existence of state institutions, according Asshiddiqie, the substance of the Constitution essentially regulates the principles of regulation and limitation of state power in order to realize the national purpose, especially to regulate two interrelated relationships: First, the relationship between government with citizens; and second, the relationship between one government institution and another. Therefore, usually, the substance of the Constitution is meant to regulate three important matters, namely: (a) restricting the power of state institutions; (b) regulating relationship between state institutions with each other; and (c) regulating relationship between state institutions and citizens.[8]

Thus, one of the important and constantly exist material in the Constitution is the regulate of state institutions. This is understandable because the power of the state is ultimately translated into the duties and authorities of state institutions. The

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6 See: Naskah Akademis Usulan Amandemen Komprehensif, Kelompok DPD di MPR RI, p. 1.

7 *Ibid*.

8 Asshiddiqie, J. (2008). *Hubungan Antar Lembaga Negara Pasca Perubahan UUD 1945.* Bahan ceramah pada Pendidikan dan Latihan Kepemimpinan (Diklatpim) Tingkat I Angkatan XVII Lembaga Administrasi Negara. Jakarta, 30 October 2008, p. 2.

achievement or failure of the state's goals ultimately leads to how the state institutions carry out their constitutional duties and authority as well as the relationships between state institutions. Because the arrangement of state institutions and relationships between state institutions reflects the choice of state fundamentals of which it's adopt.[9] Because of the importance of the existence of state institutions, there is a need for proper arrangements within the framework of clear division of tasks, functions and authorities in order to avoid overlapping and there should be a mechanism of power balance (check and balances) in institutional relations so that state institutions can be effective and spared of abuse of power in carrying out their functions.

Theoretically, the roots of the concept of check and balances cannot be separated from the classical theory of separation of powers from John Locke and Montesquieu by dividing the power of the state into three functions: the executive, the legislature and the judiciary. Meanwhile, based on the Black Law Dictionary, the definition of checks and balances is "arrangement of governmental power whereby the powers of one governmental branch check or balance those of other branches. See also separation of power ". Thus, checks and balances in the relationship between state institutions are creating constitutional relations to prevent abuse of power among branches of state power to establish a balance of relations in the practice of state administration. While the theory of separation of powers and power-sharing further illustrates the clarity of the position of every branch of state power in carrying out its constitutional functions, checks and balances emphasize more on the effort to build a balance mechanism for mutual control between branches of state power. However, checks and balances mechanisms can only be implemented as long as they have constitutional ground to prevent possible abuse by branches of state power.[10]

The purpose of strengthening the checks and balances system in the implementation of power is to enable mutual control between branches of existing power and to avoid the conduct of hegemonic, tyrannical and centralized power. This system prevents the overlapping of existing authority. The existence of checks and balances system leads to a state power that can be regulated, restricted and even controlled as well as possible, so that abuse of power by the state apparatus that occupy positions in state institutions can be prevented and overcome as well as possible.[11]

3. Arrangement of Relationship Between State Institutions Through the Fifth Amendment of the 1945 Constitution

In the spirit of the arrangement of relationships between state institutions in Indonesia through the fifth amendment of the 1945 Constitution, the main purpose is to improve the mechanism of checks and balances among state institutions that are considered to still contain many weaknesses after the four-time amendment of Constitution. Therefore, arrangement of relationships between state institutions in Indonesia through the fifth amendment of the 1945 Constitution should be based on the following principles:[12]

a. The affirmation of the principle of constitutionalism. Constitutionalism is an idea that requires the power of existing leaders and government bodies to be limited.

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9 *Ibid.*

10 Isra, S. (2010). *Pergeseran Fungsi Legislasi: Menguatnya Model Legislasi Parlementer Dalam Sistem Presidensial di Indonesia.* Jakarta: RajaGrafindo Persada, p. 78.

11 Rahmatullah, I. (2013). "Rejuvinasi Sistem *Checks and Balances* Dalam Sistem Ketatanegaraan di Indonesia", *Jurnal Cita Hukum,* 1 (2): 218-219.

12 Huda, N. (2007). *Lembaga Negara Dalam Masa Transisi Demokrasi.* Yogyakarta: UII Press, p. 202-203.

Such restrictions may be strengthened into a fixed mechanism or procedure. Therefore, the purpose of the establishment of state institutions is to affirm and strengthen the principles of constitutionalism so that the basic rights of citizens are more secure and democracy can be maintained.

b. The principle of checks and balances. There were number of abuse of power in the past, one of which is due to the lack of checks and balances mechanism in the state system, such as the supremacy of the MPR and the dominance power of the executive in the past practice have hampered the process of healthy democratic growth. The absence of a mechanism of mutual control between branches of power leads to a totalitarianized government and an increasing practice of abuse of power. The principle of checks and balances becomes the spirit for democratic development and progress. Therefore, the establishment of state institution must that leads to separation of power, to create checks and balances mechanisms.

c. The principle of integration. Fundamentally, the concept of state institution formation must have a clear function and authority, it should also form a unity that proceed in implementing the functions of the state in the actual system of government. The establishment of a state institution can not be done partially, its existence must be linked with other institutions that already exist. The formation of state institutions should be structured in such a way that it becomes a unified and mutually reinforcing process. The lack of integrity in the formation of state institutions can result in overlapping of existing governmental authorities resulting in ineffectiveness of government administration.

d. The principle of benefit for the community. The purpose of the establishment of the state institutions is, basically, to meet the welfare of its citizens and to guarantee the basic rights guaranteed by the Constitution. Both must be conducted for the public good as a whole and to protect the rights of individual citizens.

Based on the principles of constitutionalism, the checks and balances, integration and benefit for the community, arrangement of relationship between state institutions in Indonesia will be directed as follow:

First, the arrangement of the executive body. The context of this arrangement is directed to strengthening and purification of the presidential system. To purify the presidential system, the issue is primarily related to the authority involved in the law-making process, in which the President should no longer be involved in the process of formation of a bill. Thus, the mechanism of checks and balances in the discussion of the bill only occurs between DPR and DPD. So far, the legislative process in the formation of law in Indonesia tends to have the legislation character in a country that implements a parliamentary system where the government and parliament are involved together to discuss a bill. It happens because there is no clear separation between the legislative power and the executive power. The joint between the executive and the legislative branch is a characteristic that distinguishes the parliamentary system from other systems. With this involvement, the executive position become the member of the legislature as well. Consequently, in the discussion of a bill, there will also be involvement between the executive and the legislative. In a parliamentary system, the joint discussion of a bill between parliament and the government is a logical consequence of the there is no clear separation between the executive and the legislature. Even within the parliamentary system, executives (prime ministers, cabinets and bureaucracies) control the agenda of legislation[13]

[13] Isra, S. (2010). *Op.Cit*, p. 326.

Indeed, during this time there is a contradiction in the government system in Indonesia, on the one hand, applied the presidential system but in legislation process tend to apply of parliamentary system. Therefore, in the strengthening and purification of the presidential system, there is a need to arrangement the legislation function in order to match the characteristics of the mechanism of its legislation function in the presidential system. Because in the presidential system, the president or the executive is not involved in the discussion of a bill, as stated by C.F. Strong, as a comparison, in the practice of the presidential system in the United States, the only relationship between the executive and the legislature is through the "President's Message" and none of the presidential cabinet officials are allowed to participate in any session of legislature chamber. Such relationship patterns means the government is not involved in the discussion of a bill in Congress or in one of the rooms (Senate and House of Representative) in the United States of America Congress.[14]

The president (executive) participates after a bill is finalized and approved by the legislature. It proves that the function of legislation in the presidential system is a clear separation between the legislative power and the executive power. But in Indonesia mechanism of the formulation of law referred in the Article 20 of the 1945 Constitution after amendment, there is no separation of power between DPR and the President. What actually happens is the distribution of power and the reflection of the power in a law-making process between DPR and President together.[15]

As comparison, in the presidential system in United States of America, the president is not involved in the formation of a bill, but the president has a veto as a special right to reject the bill which has been approved by the legislature. However, the veto used by the president may be rejected with the support of a certain number of votes by the legislature. The president's veto that rejected by legislature is called overridden veto. In a presidential system, overridden veto and veto are part of the checks and balances mechanism between the president as executive and parliament as legislature. The importance of this veto in establishing checks and balances of institutional relations between the president and the legislature is also in order to protect the president as the executive power from the undermining of the legislature and the possibility of improper law.[16]

In the framework of institutional relations arrangement in the effort to conduct purification of presidential system in Indonesia, the president should no longer participate in the discussion of a bill with the parliament and the President shall be granted a veto on the bill that submitted to him after discussed in each legislative room (DPR and DPD). With this pattern, the direction of purification of the implementation of presidential system, especially in the field of legislation in which a strict separation of powers between the executive and the legislature and the checks and balances between both are expected to be realized.

Second, the arrangement of legislative body. The arrangement in this context is to clarify the position of MPR, DPD and DPR in their institutional relations as legislative bodies which directed to realize an effective bicameral system. However, with the fifth amendment of the 1945 Constitution, there was also an attempt to rebuild the MPR as the supreme body of the state, including to restore its authority in the establishment of GBHN as a blueprint of development in Indonesia. Of course the effort is deemed as a

14 *Ibid*, p. 326-327.
15 *Ibid*, p. 328-329.
16 *Ibid*, p. 329.

step backward which Indrayana termed as "*romantic ideological myth*".[17] This perspective can blur the real issues that lie ahead as a challenge that must be answered immediately in an effort to build and strengthen the check and balances system, and not instead getting stuck with the mythical romance of the past about the institutional strength of MPR that was actually manipulatively used by Soeharto regime to maintain his power.

The current representative system in Indonesia has not yet reflected a balanced institution between DPR and DPD so it has not been able to realize an effective bicameral system. In fact, based on Asshiddiqie's view, the parliamentary system in Indonesia is actually a "*tricameral system*" because based on the provisions of Article 3 juncto Article 8 paragraph (2) and (3) of the 1945 Constitution, the MPR has the authority to: (1) amend and to stipulate the Constitution; (2) discharge the President and / or Vice President during his / her term of office according to the Constitution; (3) elect the President and / or Vice President to fill the vacancy in the position of President and / or Vice President according the Constitution; and (4) Inaugurates the President and / or Vice President. These four authorities are not covered and related to the authority of the DPR or DPD, so the MPR session to decide on these four matters is not at all a joint session between the DPR and DPD, but the MPR session as a separate institution. Therefore, it can be concluded that MPR is the third institution in the structure of the Indonesian parliament, so that the Indonesian parliament system is more suitable to be named as a three-room system (*tricameral*). Today, no country in the world has adopted a three-room system like this. Therefore, Indonesia can be considered to be the only country in the world to implement this three-room system.[18]

This "tricameral" Indonesian parliament system means that the MPR is not only a joint session between DPR and DPD but an institution with its own institutional facilities, such as having leadership elements (Chairman and Vice Chairman of the MPR), secretariat and own organization structure. The existence of legislative bodies that established by the amendment of 1945 Constitution creates confusion due to the lack of clarity regarding of what kind of representative institution model is really desired. If the institutional model is directed to be bicameral with two representational models, namely the people's representation through a political party by DPR and a regional representative by DPD, it should have a balance of authority (checks and balances) between DPR and DPD. Whereas what happen in Indonesia is an imbalance in which the DPR is so superior in authority while the DPD is so weak. Meanwhile, MPR also has its own function and a complete institutional structure even though its regular authority is only once in every 5 years, namely to inaugurate the President and Vice President.

Therefore, in the framework of arrangement representative institutions or legislative body in Indonesia which direction to realize the bicameral system should be carried out a number of steps as follows:

a. Arrangement of MPR in the form of affirmation of MPR position as only become a joint session between DPR and DPD in the implementation of authority of MPR, such as to change and stipulate Constitution and some other authority.

b. Arrangement of institutional relationship between DPR and DPD to realize the existence of checks and balances in the representative institution, it is necessary to strengthen the DPD's authority to balance with the authority of DPR. The

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17 Indrayana, D. (2007). *Amandemen UUD 1945: Antara...Op.Cit* , p. 28.

18 Asshiddiqie, J. (2007). *Pokok-pokok Hukum Tata Negara Indonesia Pasca Reformasi*. Jakarta : PT Bhuana Ilmu Populer, p. 159.

strengthening measures that can be done especially on the DPD are as follows: (1) strengthening the legislative function held by the DPD should be equivalent with DPR in proposing, discussing and approval a law. Especially related with bill such as regional autonomy including the bill related to taxes, education, and religion; (2) the strengthening of the budget function for DPD in the discussion and approve of the state budget bill that equivalent with the DPR authority for the state budget that submitted by the president; (3) the strengthening of the supervisory function, the DPD should have the same authority with the DPR to have the right of interpellation, the right of enquette and the right of expression and to be involved if there is an impeachment process to the President and / or Vice President; (4) still in the context of the supervisory function, the DPD should be involved in the process of public official recruitment. The involvement DPD becomes a necessity because the recruitment of public official which only done by DPR is very likely to be bias based on the political interests of the party. That is, if the DPD is given sufficient space in the process of public official recruitment, political party interests in the DPR can be balanced by the DPD as a representation of regional interests.

The arrangement of representative institutions or legislative body (MPR, DPD and DPR) is emphasize to realize strong bicameralism in strengthening the check and balances of institutional relations in Indonesia. There are several considerations for Indonesia to strengthen bicameral system, namely:[19]

a. As Montesquieu puts it, a two-room system is a checks and balances mechanism between rooms in a legislative body.
b. Simplification of representative system. There is only one central legislative body that consists of two elements, namely elements that directly represent all the people and elements that represent the region. There is no need for certain group representative. Group interests are represented through elements that directly represent the entire people.
c. Regional representatives become part of the parliament functions (establishing laws, overseeing the government, establishing the state budget and others). Thus all regional interests are integrated and can be carried out day-to-day in parliament activities. This is one of the factors to strengthen unity, avoid disintegration.
d. Two-room system will be more productive. All duties and authority can be done by each element. There is no need to wait or depend on one institution as the current DPR.

Third, the arrangement of the judiciary. The arrangement of judicial institutions affirmed the concept of MK as "the court of law" and MA as "the court of justice". MK should be given the authority to judicial review for all laws and regulations. While MA should no longer handling judicial review and only focuses on handling legal cases that are expected to bring about a sense of justice for every citizen. In addition, MA should also be given the authority of the *previlegiatum* forum, to decide cases of crime at the first and final level for state officials. In addition, the authority of MK also needs to be added to examine of constitutional complaint and no longer be authorized to decide the General Election Results Dispute (PHPU) specifically for the regional head election. So that MK

[19] Isra, S. (2004). "Penataan Lembaga Perwakilan Rakyat: Sistem Trikameral di Tengah Supremasi Dewan Perwakilan Rakyat", *Jurnal Konstitusi,* 1(1): 118.

can focus in carrying out its main function in handling cases related to judicial review and constitutional complaint.

In addition, which is also very important in the fifth amendment of the 1945 Constitution is related to the arrangement of institutional relationships between MA and KY in order to build institutional synergies in the supervision of judges. There is a need to develop the concept of share responsibility to build synergy between MA and KY in the context of judge management related to the recruitment of candidates for judges, training, mutation, promotion, supervision, dismissal and retirement of judges. The focus of the institutional relationship between KY and MA should be in order to synergize the internal control mechanism by MA with the external control mechanism by KY in order to maintain and uphold the honor, dignity, and behavior of judges. This arrangement by the concept of share responsibility between MA and KY becomes very important in strengthening the oversight mechanisms of judges and as an effort to realize the public accountability of the judiciary without disturbing the independence of judicial power. The implementation of share responsibility concept is expected to change the direction of judge management to be more professional and with integrity because there is the involvement of other institutions, namely KY as a function of checks and balances.[20]

Fourth, arrangement of the Attorney General as constitutional organs. The position of the Attorney General in the through the fifth amendment of the 1945 Constitution, should be regulated directly by the Constitution. It is intended to make Attorney General possess constitutional authority and legal standing like other law enforcement agencies, namely Police and Courts (MA and MK). The strengthening of the existence of Attorney General in Indonesia to be regulated in the 1945 Constitution has a number of urgencies, namely:[21]

a. To strengthen the existence of Attorney General whose existence is directly regulated by the 1945 Constitution in accordance with its duties and functions which are very urgent in the life of the state as a law enforcement agency. The existence of Attorney General in the 1945 Constitution will make clear its position as constitutional organ within the state structure which possess a constitutional authority, namely the authority given directly by the Constitution so that the Attorney General has a legal standing which if in the exercise of its authority there is a dispute of authority with other constitutional organs, the settlement may be submitted to MK as the institution authorized to decide the dispute over constitutional authority among state institutions.
b. Strengthening the existence of Attorney General as constitutional organ should become a momentum of arrangement of institutional relationship with other institutions, such as the relationship between Attorney General and Komnas HAM in the settlement of cases of gross violation of human rights. The potential disputes of authority between state institutions may occur with there are dualism of investigative and prosecution authority, as in the handling of corruption cases between Attorney General, Polri and KPK. In the future, to be able to solve the problem of authority among state institutions, it is better to solve it through the dispute mechanism of authority in MK rather than to solve it politically. Of course, in the context of the fifth amendment of the 1945 Constitution, Attorney General

[20] Hukumonline. (2017). *Pentingnya Konsep Shared Responsibility dalam Rekrutmen Hakim*. Available online from: http://www.hukumonline.com/berita/baca/lt58edde8768de5/pentingnya-konsep-shared-responsibility-dalam-rekrutmen-hakim. (Accessed August 6, 2017).

[21] Patra, R. (2015). "Urgensi Kejaksaan Diatur Oleh Konstitusi", *Hasanuddin Law Review*, 1(3): 412-414.

shouldn't be the only institution whose existence being strengthen by the Constitution but also a number of other institutions that have the same urgency to be constituted as constitutional organs, such as KPK and Komnas HAM. In the event of a dispute, these institutions have the legal standing for litigation in MK in a constitutional authority dispute.

c. To strengthen the independence of Attorney General, its position should not be placed as a government institution that is merely a part of an executive, but to become an independent state institution which is reflected by the appointment and dismissal of the Attorney General not only by the President but also involves the role of parliament to give approval. This is a common practice in democratic countries, that the appointment of certain strategic positions, such as appointment Attorney General, requiring parliament involvement as a form of checks and balances between the executive and the legislature.

d. To affirm that Attorney General as the central in the field of prosecution authority. In this context, it is necessary to arrange the existence of the prosecution authority possessed by KPK and the authority possessed by Attorney General. The existence of this dualism is certainly not ideal in building an effective institutional relationship so that the potential for conflict will continue to overshadow when a function or same affairs undertaken by two or more institutions.

Fifth, the arrangement and institutionalization of independent state commissions as constitutional organs. Post-reform in Indonesia is marked by the rampant formation of a number of state institutions in the form of independent state commissions, such as Komnas HAM, KPU, KPK, KY and many more. Theoretically these institutions are named by various terms, namely quasi-state institutions, extra-structural institutions, independent and self-regulatory bodies, state auxiliary agencies, state auxiliaries institutions or supporting state institutions. Viewed from the legal basis of its formation, the existing state commissions in Indonesia have different legal basis of formation. Some are regulated by the 1945 Constitution, such as KY and KPU and some are regulated by law, such as Komnas HAM, KPK and others, and some even regulated by Presidential Decree, such as National Law Commission (KHN). Considering the varied legal basis for the establishment of the state commissions, it raises the question as what is the standard of a state commission that regulated by the Constitution while others commission are only regulated by law or Presidential Decree?

In terms of the duties and functions possessed by the independent state commissions, there is a similarity so there is vulnerability of overlapping with the tasks and functions of existing state institutions. For example, in the handling of corruption cases at least there are 3 institutions that have the authority, namely Attorney General, KPK and Polri. The handling of cases of gross violation of human rights involve the authority between Komnas HAM and Attorney General. While the supervision of judges involving the authority between KY and MA. The similarity of the duties of such functions has resulted in overlapping of authority that causing conflict among state institutions which of course is an unhealthy practice in relationship between state institution.

Actually, after the amendment of the 1945 Constitution there is a mechanism for the settlement of authority disputes between state institutions through MK but it's limited only to state institutions having constitutional authority, namely state institutions whose existence is regulated directly by the 1945 Constitution. As for the state institutions whose authorities regulated only by the laws or regulations under the 1945 Constitution, they have no legal standing for litigation in MK. It also affects state institutions in the

form of commission, because only KY and KPU are institutionally regulated directly by the 1945 Constitution, whereas the existence of other institutions, such as KPK and Komnas HAM only regulated by law so that they do not have the legal standing to litigate in MK. The implication is that when there is a conflict with other institutions related to dispute of authority, there is no legal mechanism that can be used as dispute resolution. Based on the problems of the existence of state commissions whose authorities are vulnerable to overlap each other, there is a need for the arrangement of the existence of these commissions. Therefore, arrangement effort through the fifth amendment of the 1945 Constitution should be comprehensive in that it includes institutions in the legislative, executive, judicative and include independent state commissions. All of these institutions need to be consolidated so that they do not develop without clear direction.[22]

The fifth amendment of the 1945 Constitution should ideally be accompanied by the arrangement of duties, functions, positions and even the nomenclature of independent state commissions. Technically, the arrangements on independent state commissions may be regulated separately in a Chapter in the constitution about state commissions. The setting up of independent state commissions can contribute to strengthening a constitutional democratic government.[23]

According to Indrayana,[24] the ambiguity of the position and overlap of authority possessed by the state commissions in Indonesia is due to the absence of a comprehensive concept about regulating of the state institutions, on what and how to regulate of the state commission should be. Finally, the state commission is only born as a reactive-responsive policy, but it is not precisely as a solution for the nationality issues. As instance of in the 1990s, South Africa and Thailand also transitioned from authoritarian governments and both countries experienced periods of established of state commissions. However, unlike Indonesia, South Africa and Thailand designed their state commissions in a more planned and comprehensive manner. The Constitution of South Africa sets out in detail the functions and duties of the state commission. Similarly in Thailand, the state commission has a place of honor in its constitution. Learning from South Africa and Thailand, the existence of Indonesia's state commissions should be strengthened. For example, as a form of commitment to eradicate corruption and human rights protection, KPK and Komnas HAM should be regulated to the Constitution. The existence of constitutional guarantees not only adds to the ammunition of life for both commissions, but also a strong signal to fight against corruption and human rights violations in Indonesia. On the other hand, it should also be accompanied by the maximization of supervision over the work of the commission.

The arrangement the existing state commissions in Indonesia and the institutionalization of its existence into the Constitution through the fifth amendment of the 1945 Constitution needs to be based on clear parameters or criteria, namely:[25]

a. An independent state commission that has the urgency and function that strengthen the building of the rule of law, namely the state commission that encourages and maintains an independent and integrated system of justice, human

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22 Huda, N. (2007). *Op.Cit*, p. 205.

23 Sukmariningsih, R.M. (2014). "Penataan Lembaga Negara Mandiri Dalam Struktur Ketatanegaraan Indonesia", *Mimbar Hukum,* 26 (2): 201.

24 Indrayana, D. "*Merevitalisasi Komisi di Negeri Kampung Maling*" as cited in Huda, N. (2007). *Op.Cit,* p. 205-207.

25 Indrayana, D. (2008). *Negara Antara Ada dan Tiada: Reformasi Hukum Ketatanegaraan*. Jakarta: Kompas, p. 282-284.

rights protection, freedom of the press, corruption eradication and keeping fair general elections in Indonesia.

b. An independent state commission that has the urgency to strengthen and realize checks and balances mechanisms in institutional relations. The existence of an independent commission is to strengthen the state administration, with a model relation of mutually balance and control among state institutions. Its existence not only as a support for other institution but also as a main state institution in terms of duties and functions. The independent state commissions that become to constitutional organs to complement KY and KPU are KPK, Komnas HAM, Ombudsman and the establishment of a new commission to provide protection and preserve freedom of the press, namely the Press Freedom Commission.

4. Conclusion

The fifth amendment needs to be done in order to improve the various weaknesses contained in the 1945 Constitution especially related to the arrangement of institutional relations such as problem of synergy and unclear status of state institutions, as well as overlapping duties, functions and authority. Therefore, it is necessary to arrange the state institutions with direction as follows: *First*, in the executive body, in order to strengthen the implementation and purification of presidential system; *Second*, the arrangement of legislative body, the purpose of arrangement is to realize a strong bicameralism system; *Third*, the arrangement of judicial institutions to affirmed the concept of MK as the court of law and MA as the court of justice; *Fourth*, the arrangement of institutional relationship between MA and KY in supervision of judge should be based on the concept of share responsibility; *Fifth*, making Attorney General as a constitutional organ and should be regulated directly by the Constitution; Sixth, the arrangement and institutionalization of independent state commissions as constitutional organs, based on clear criteria, namely: (a). independent state commission that has the urgency and function to strengthen the rule of law in Indonesia; (b) independent state commission that has the urgency to strengthen and realize checks and balances in relationship between state institutions.

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