THE CRISIS OF JUDICIAL INDEPENDENCE IN INDONESIA UNDER SOEHARTO ERA

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Abstract: The significant intervention of the government of the judicial power under the era of Soekarno and in the era of Soeharto has raised questions in the process toward the recent democratic government. Many scholars argue that previous interventions were considered important in stabilizing the state from political unrest, while others argue that such interventions cannot be tolerated anymore in the reform era now. This paper, using views and notes advanced in literatures discussed the crisis of judicial independence in Indonesia under Soeharto era. The study argued inter alia that the independence of the judicial authority in the present democratic political system should be considered as the principle of the equality before law for every citizen. The judicial process should also be independent as mandated in the 1945 Constitution and protect human rights regardless of race, gender, cultural background, economic and political conditions and the principle of legal certainty.

***Index Terms*: The judicial power, the equality before law, the intervention of government, separation of power, era of Soeharto.**

I. INTRODUCTION

The significant intervention of the government on judicial independence in Indonesia that happened in the era of Guided Democracy under the President Soekarno and in the era of the New Order government under President Soeharto has been questioned by many scholars recently. This question actually has been a hot issue in 1972 (Lev, 1972). The given concerns did not only relate with the implementation process of judicial power including rules making and judicial judgment, but it also related with other administration decisions aspects including finance and organizational rules (Pompe, 1996).

In the Soekarno era, for instance, the authoritarian role of the government related with the issuance of the Presidential Decree of July 5, 1959 (Alatas, 1997). Also, the intervention of Soekarno on the implementation of the independent judicial power through the Law No. 19 Year 1964. In this law, the president has power to intervene the judiciary system if the national interests were in danger. However, the issuance of the law upset judges (Lev, 1990).

The above government intervention further continued in the era of the New Order government under President Soeharto. In this context, President Soeharto through his power hampered the implementation of an independent judiciary through the issuance of the Act No. 14 of 1970. In this act, many judiciary independences including administrative arrangements, organizational and financial justice were given to the Ministry of Justice, instead of the formal judicial institution. This raised consequently a dualism in the implementation of judicial power in that the technical side of justice is under the Supreme Court, while the administrative side is under the control of the Ministry of Justice. Lev (1996) claimed that the issuance of the Law No. 14 of 1970 was none other than the defeat of the reformists.

This paper based on views and notes advanced in literatures is mainly aimed at discussing the crisis of judicial independence in Indonesia under Soeharto era. The discussion is divided five sections. Section 2 below highlights examples of the government intervention on judicial power during the era of Soeharto. Section 3 addressed efforts that were done in making the judiciary power becomes independence. Section 4 then discussed theoretical background to separate the executive and the judicative institutions in the judiciary power. Section 5 deals with the meaning of the judiciary power as the concluding remarks.

II. EXAMPLES OF THE INTERVENTION ON THE JUDICIAL POWER

There were many cases in which the judicial independence intervened by the government of Soeharto. In the mid-1970s, Suharto implemented the pattern of repression to suppress judges to be loyal to the interests of the authorities, especially in criminal cases to investigate and adjudicate politically. Trial against Syahrir and Hariman Siregar as well as other student activists that were convicted of involvement in the events January 15, 1974, for example, can be regarded as the starting point of the strong grip of an influence on the implementation of the judicial function. Hariman Siregar accused has been responsible for the explosion of riots in Jakarta after moving students and other community members to protest against government policy in the sector of Japan's investment in Indonesia. The Justice that was given to Hariman Siregar and Sjahrir actually was just a camouflage of the political elite level

conflict that is the political conflict between the Commander Controller of Security and Order (so called Kopkamtib) General Sumitro with Lt. Gen. Ali Murtopo, Personal Assistant of President Soeharto at that time.

The independence of judicial power was really at stake in the process of justice in which the interests of the country involved, among others. The examples of this case include the case of Imran bin Muhammad Zein, AM Fatwa case, Muchtar Pakpahan case, Tempo magazine's editor (Gunawan Mohamad) and the case of Kedung Ombo. The loyalty of judge seems to be confronted with the independence of judicial authorities in these cases. Judges who tried to be neutral in the judicial ruling that exposes a defendant certainly will get a penalty. As an example may be mentioned are the mutations of Judge, Mr. Benjamin Mangkudilaga of the Jakarta State Administrative Court to the High Administrative Court of North Sumatra after he won the accusation of Gunawan Mohamad against the Minister of Information of the Republic of Indonesia.

The above judicial practices which did not satisfy the community has long felt, which is contrary to the principles of justice that are cheap, fast and simple. Mochtar Kusumaatmadja (1996) proposed at least six factors underlying community dissatisfaction with the judicial process over the years. The first factor is the slow pace of settling disputes, which is caused by the distribution process of the court, the determination of judges body and the determination of the court for the examination of the case or petition.

The second factor is the impression that sometimes the judges are not trying to decide the case in earnest based on knowledge of the law, positive law and beliefs. The third factor is the frequent cases of bribery or attempted bribery of a judge that cannot be proved, because the technique of bribery made without evidence and without sufficient witnesses. The fourth factor is a matter being examined sometimes beyond the knowledge of judges is concerned, because of the complexity of the problem or laziness judge concerned for opening reference book about the case. Therefore, very few judges who are able to examine the case of modern dimension of economic transactions or multimedia case. The fifth factor is the lawyers who do not always act in a professional manner for the sake of clients who entrust the case to him and performing the task lawyers to participate in enforcing law and justice. The sixth factor is the search for justice itself that did not see the trial as a way to seek justice according to law, but only as a means to win his case in any way. All these factors are then degrade the performance of courts, public confidence in the courts and the legal profession as a whole (Budihardjo, 1996).

In a court of law enforcement services is exacerbated by the lack of certainty when a case decided by the judge finished, if a case to public attention may be completed in one year even on appeal, the cases that escape the attention of the public can take six to eight years to be completed on appeal. This can occur because of the lack of transparency when settling disputes, in addition to the factors stacked cases in the Supreme Court. In a situation of this uncertainty, there are opportunities collusion between the justice seekers with secretariat officials in court. If the justice seekers are eager to win his case, then the law officers would seek judges who can give a decision in favor to the justice seekers.

Ironically, irregularities still occur even if there is no collusion between judges and justice seekers, namely writing deliberate decision wrongly by clerks. Such action does not mean the other is to make decisions that winning parties colluded. This initial study also revealed that collusion, conspiracy or other popular terms. These did not just involve the justices, but also clerk of the Supreme Court in practice are not commendable at the highest judicial institution.

Also, the cases of Gandhi Memorial School and the verdict justices who indicated collusion and corruption illustrate the climax of all indications dirty practices in Indonesia's courts, even occur until the Supreme Court. Even if the evidence confirming allegations of corruption made by the accused, Ram was acquitted by a panel of judges at the Supreme Court. USD 1.4 billion issue of collusion is then sticking to the surface when Justice reveals Magazine Forum Adi Andojo letter to the Central Jakarta District Attorney suggested that the prosecutor filed a Judicial Review (PK) of that decision.

Other cases of alleged corruption and collusion between the litigants and judges in the Supreme Court can also be found. Indications of corruption and collusion can be traced through the decisions made by the judges as well as the mass media news coverage and interviews with judges, prosecutors and lawyers as a resource study, emergence of corruption and collusion in the Supreme Court, among others, due to the absence of control over practice of the law of the highest judicial institution. Ironically, the Supreme Court has been controlled by the government in the event of cases concerning the interests of the government, especially the civil lawsuit against the government. An example is a civil lawsuit against the government in the case Kedung Ombo, Central Java.

In an appeal hearing on 20 July 1993, the panel of judges, led by Chief Justice granted the demands of citizens Asikin Kusumaatmadja Kedung Ombo to punish the Central Java Regional Government to pay compensation of Rp 50,000, - per square meter of land, Rp. 30.000, - per square meter of plants as well as material losses amounting to Rp 2 billion to the plaintiffs who evicted her house for the construction of reservoirs Kedung Ombo. Not long after President Soeharto expressed objections to the verdict, the panel of judges led by Chief Justice himself Purwoto Gandasubrata Asikin overturn it. The panel of justices, led solely by Purwoto decided to reject the demands of the citizens Kedung Ombo. Thus, the lists of the intervention of the government on the judicial power and independence have been so many and almost impossible to be listed. So what has been the effort to optimize the independence of justice in Indonesia?

III. EFFORTS DONE FOR THE INDEPENDENCE OF JUDICIARY

The National Congress of the Indonesian Judge Association (locally called IKAHI) has been one of the organizations that played important role in making the judicial institution independence. IKAHI fifth National Congress in Yogyakarta on 18-20 October 1968 became a very important event for the struggle to establish an independent judicial authority. The Meeting of the judges in that year issued a decision, which, among other things, states that:

".... General Court and the State Administrative Court which directly serves the interests of the people in general and have relationship with absolute protection of human rights technical, organizational, administrative and financial should be placed directly under the authority of the Supreme Court, while the Religious and Military institutions specifically have jurisdiction over a particular class of people, technically under the Supreme Court, but organizationally, administratively and financially under the authority of the Department concerned. " (Pangaribuan and Baut, 1989).

Pompe (1996) further noted Suharto government efforts to co-opt the judicial power through Opsus (special operation), including consolidated their power and influence in the Supreme Court. Suharto government's desire to put a judicial authority under the influence of the executive power was evident in the Draft Law on Judicial Power, the government submitted to the Council of Mutual Cooperation Representatives (DPR-GR) in August 1968. The draft law has been discouraging for the initiators of independent judicial power in the Supreme Court, even though the Supreme Court is said to be the highest judicial institution. Even if there is a statement about further adjustment of the salaries of judges, but the disappointment MA (High Court) delegates at a hearing in the parliament house also cannot be hidden.

Stage of development is very important to the history of judicial power in the New Order era lies in the National Law Seminar in 1968, in which the judges want to make this momentum to fight for an independent judicial authority. The desire of judges to have independent judiciary is clearly expressed in the speech Chairman IKAHI Asikin Kusumaatmadja. Asikin wanted the Supreme Court as the highest judicial authority, which is aligned with the executive and legislature. However, according Asikin, just as if the myth of autonomy and judicial power is not significantly realized. The speech Asikin clarify the position of judges and their desires.

The judges again showed consistency in the spirit of upholding the ideals of judicial power that is free from the influence of and dependence on the executive, when they held a 'Working Group IKAHI from 14 to February 15, 1970. Working Deliberation IKAHI was successfully submitted several proposals to the Director General of Agencies Justice, among others, namely:

"In order to ensure independent and impartial judiciary of factors extra-judicial endeavored that within a period of 5 (five) years, organizational, and financial administration of justice in the General Courts and State Administration, which is temporarily in charge of the Director General of the General Court released and directly under the Supreme Court. "

The realization of IKAHI struggle for an independent judicial authority also received support from the advocates, namely Peradin (Indonesian Advocates Association). Peradin supported all the recommendations generated in meetings IKAHI. Peradin even suggested that the Supreme Court is given the right to examine materially legislation. The proposal Peradin was never realized until the end of the Suharto government on May 21, 1998.

Also, ideas about the independence of the judicial power posed by the judges in seminars that took place in 1968 has opened the debate with the government, mainly because the reasons are not in line with the idea. IKAHI and the Government stand on the opposite side of each other on autonomy and judicial authorities. The law seminar in Yogyakarta in 1968 recorded as this seminar is tragic, not only because it lowers Asikin Kusumaatmadja of office of the Chairman IKAHI because of suspicions over his close relationship with Opsus, but more than that because IKAHI began to show the attitude to start accepting defeat.

IKAHI implementing measures compromise with regard to the desire to fully regulate the judiciary under the Supreme Court. As one recommendation seminars, IKAHI urged the Supreme Court seeking the placement of a senior judge as Director General of Judicial Affairs at the Ministry of Justice. The Director General is administratively still within the Ministry of Justice, with the task of conducting the affairs and needs justice agencies. The placement of the senior judge can bridge the aspirations of the judges in the executive environment. IKAHI proposal was received by the Minister of Justice Seno Adji then issued a decree of the Minister of Justice No. JS 4/1/21/1970 dated January 27, 1970 on the establishment of bodies Director General of Justice, which is headed by a senior judge as Director General. Hadipurnomo became the first Director General of the Directorate General of Courts (Pompe, 1996)

Proposed placement of senior judges at the office of the Director General of Judicial Bodies has been regarded as a compromise measure IKAHI against the Government, ending a heated debate during the 27 months between the IKAHI by Government in finalizing the Draft Law of Judicial Power. Soeharto government did not stop its efforts to put the power of the judiciary under the influence of the executive power after the enactment of Law No. 14 of 1970 on the Principles of Judicial Power. In the following description will be explained that the two laws held after Law No. 14 of 1970, namely Law No. 14 of 1985 on the Supreme Court and Law No. 2 of 1986 on the General Court, do not give space for the presence of judicial authorities who escape the influence of outside judicial authority.

Discussion on the independence of the judicial power can also be released from a theoretical debate about an independent judicial authority itself. Barriers to implementation of the independent judicial power, according Todung Mulya Lubis (1999) has a rationale, namely the lack of constitutional basis of freedom and all independent justice system. Article 24 and Article 25 of the 1945 Constitution, according to Lubis (1996), was too vague and second explanation shall not describe the principles of freedom and judicial power. The vagueness paced allow the birth of another interpretation of that intended by the makers of the 1945 Constitution is another. Lubis interpretation was apparently can be seen from the presence of Article 11 of Law No. 14 of 1970. The former Chief

Justice Purwoto Gandasubrata have the same opinion with Lubis, namely Article 24 and Article 25 of the 1945 Constitution as well as the explanation does not explicitly regulate judicial authority. Therefore, he suggested the importance of the further elaboration of the second chapter, which should not reduce and limit the powers of the judiciary and reinforce its position equal to the power of the state government.

Indeed the desire to uphold the independent judiciary in line with the spirit contained in Article 24 and Article 25 of the 1945 Constitution Explanation of Article 24 and Article 25 states that:

"Judicial Power is an independent power, meaning that regardless of the influence of government power. In this connection it must be held collateral in the Act on the position of the judges."

The provision of the two articles of the 1945 Constitution prohibits the branches of state power to influence and power in the form any way. The statement shall be construed to imply that either condition, shape and structure, including the administrators, the judges must be governed by the Constitution and the organic law on the Supreme Court. The internal arrangement within the Supreme Court is also required in order to clear settings judicial duties, authority and supervision of the judge in the trial of internal judges. Researchers suggested that the internal arrangement of the first set in the form of a code of conduct, then compiled in the Charter of bodies of judicial power. However, academicians argued that the code of conduct should be drawn up in the form of legislation so that their application can have a strong legal basis, including in terms of sanctions against violators. Autonomy budget setting must also be in the hands of the Supreme Court, in which the state must provide a budget that apart from the budget of state government agencies.

Still in connection with the problem of independent judicial power, Subekti (1981) found that judicial independence be good judicial joints not only in terms of prohibition to influence the judicial authority by other powers outside judicial authority, but the Supreme Court also prohibited from interference or influence on a court subordinates who were to examine and decide a case. The Supreme Court only has power in the termination of a case, if there is examination request of appeal in the case. Oversight on the judiciary can be is practiced by the Supreme Court to the Court of subordinates, among other things, namely in terms of the settlement reprimand that has been too long, ordered the execution of the decision which has obtained permanent legal force is too long delayed, the command injunction uitvoerbaar bij bij voorraad who flagrantly violate the terms according to law.

According to Lubis (1989), demands that an independent judicial authority has a solid foundation, which at least can we read in the minutes of the making of the 1945 Constitution. Lubis (1989) said both Sukarno, Hatta, Supomo, and Yamin acknowledges the importance of independent judicial power, although there are some differences in perspective about place and layout of judicial authorities. Ideals to bring independent judiciary in line with the explanation of 1945, the independent Indonesian state is a state of law (rechtstaat), not state power (machstaat).

Even if there are differences of opinion among legal scholars, they share similar views that the presence of independent judicial power is a necessity in a state of law. Relating to debate all the independent judicial power early, the political scientists have long advocated the separation of powers among the executive, legislative and judiciary powers. Montesquieu, one of the leading thinkers in the middle (the middle ages), recommends the application of the theory of separation of powers (separation of power) as stipulated in the Trias Politica.Montesquieu said that the power of the executive, judiciary and legislative powers separately either on duty or on the appliance power supplies run it.

IV. THE THEORY OF POWER SEPARATION

Commitment to the importance of an independent judicial power was shown in the elucidation of the 1945 Constitution. The commitment is very important for the realization of the concept of rule of law, in which the free trial will give citizenship to a legal certainty and legal justice. Free judiciary can only be realized in the absence of the state intervention in the judicial process. However, more fundamentally it is in the absence of government interference in the administration and organization of judicial power itself. Two things are a test to what extent the officials executing judicial authority can run the judicial function in a fair, honest and impartial.

In an effort to sharpen the analysis of problems in this study, the concept of separation of powers as proposed by Montesquieu to be used as a knife analysis in this paper. Selection of the theory of separation of powers is associated also with the concept of checks and balances, as this study will look at how far the implementation of judicial power without interference from the executive and legislative powers. The separation of powers is in addition raises the hope that one branch of power will not intervene other branches of power, but also at the same time how much of the power can be a counterweight to the other two branches of state power. For example, the executive power to interfere with the judiciary.

Separation of powers among the three branches of power is viewed as absolutes by Montesquieu. There is a very strong opinion in Indonesia that the Act of 1945 only about separation of powers in a formal sense, since the 1945 Act is not about the separation of powers in the material. This opinion is supported on the division of powers in state institutions, namely the House of Representatives, Government, Supreme Court, Supreme Audit Board and the Supreme Advisory Council. But apart from the above-mentioned debate, the independence of the judicial power as a logical consequence of the separation of powers is recognized as a

necessity in a country, because the independence of judicial power is one of the pillars of state law. That is, the separation of judicial power from the other two branches of power still needs to be done, namely by way of holding a law that guarantees the independence of judicial power and guarantee more specifically in the Act of 1945.

V. CONCLUDING REMARKS

The debate about the judicial independence cannot be separated from the discussion of judicial power as outlined in the 1945 constitution. The independence of the judicial authority at least can be seen on any private placement are equal before the law and the validity of the jurisdiction of courts of general jurisdiction (ordinary Tribunals) for every citizen. In addition, the judicial process should also guarantee the protection of human rights regardless of race, gender, cultural background, economic conditions and political views and the principle of legal certainty.

As a consequence of the application of the principle of equality before the law, the authoritarian and autocratic rule should be excluded from the discourse of state law. This is simply because both types of power is almost certainly the implementation of governmental power loaded with absence of legal certainty, impartial judiciary and the failure of the application the principle of equality before the law. This affirmation is important as authoritarian and autocratic styles are against the democratic state of law.

Furthermore, the implementation of the concept of the rule of law should also guarantee the protection of the rights of citizens. The revocation of the rights of a citizen can only be done through a judicial process that is fair, honest and independent. Revocation of the rights of citizens without trial is a violation of human rights. Even revocation of the rights of the accused through the judicial process should be stated explicitly in the decision of the judges as judicial proceedings ruling package. That is, the revocation of the defendant's rights must be clearly refer to what material and how long a period of time. Thus, much remain to be done in improving the quality of the implementation of the rule of law in the present democratic government.

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