

Strengthening the judiciary in law enforcement in Indonesia

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Abstract

The amendment to the 1945 Constitution that is quite fundamental and changes the paradigm of the constitution is in Article 1 paragraph (2) of the 1945 Constitution which states that: "Sovereignty is in the hands of the people and is implemented according to the Constitution". This affirmation shows that democracy as a paradigm does not stand alone, but the democratic paradigm that is built must be guarded and even must be based on legal values, so that democratic products can be controlled normatively by the legal paradigm. This means that the democratic paradigm that is built is directly proportional to the legal paradigm. This paradigm has implications for state institutions, state power models, the principle of separation of powers and checks and balances, as well as normative control whose implementation is carried out by judicial institutions. Therefore, this paradigm changes the paradigm of parliamentary supremacy to the principle of supremacy. The principle of the rule of law means that all public policies, public institutions, and the election of public officials must be based on the rule of law. This principle reveals that the rule of law in the life of the nation and the state is an element of the foundation of the order of life, so that government is run according to and by the law. and not by man (a government of law and not of man). In order to realize the principle of the rule of law, law enforcement by law enforcement agencies such as judicial agencies, police, prosecutor's office, Corruption Eradication Commission (KPK), Judicial Commission (KY), Witness and Victim Protection Agency (LPSK) and other law enforcement agencies must run and function in accordance with the principles and objectives of the law enforcement agency.

Keywords

Judicial Institutions, Strengthening Positions and Functions, Law Enforcement

Introduction

The amendment to the 1945 Constitution that is quite fundamental and changes the paradigm of constitutional law is in Article 1 paragraph (2) of the 1945 Constitution. In Article 1 paragraph (2) of the 1945 Constitution it is stated that: "Sovereignty is in the hands of the people and is carried out according to the Constitution". This affirmation shows that democracy as a paradigm does not stand alone, but the democratic

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paradigm that is built must be guarded and even must be based on legal values, so that democratic products can be controlled normatively by the legal paradigm. This means that the democratic paradigm that is built is directly proportional to the legal paradigm and this is the paradigm of a democratic state based on the law or a democratic state of law.¹ This paradigm has implications for state institutions, state power models, the principle of separation of powers and checks and balances, as well as normative control whose implementation is carried out by judicial institutions.² Therefore, the paradigm changes the paradigm of parliamentary supremacy to the principle of the rule of law (the state, government and society are governed and governed by law). The principle of the rule of law means that all public policies, public institutions, and the election of public officials must be based on the rule of law. This principle makes the rule of law in the life of the nation and state an element of the foundation of the order of life, so that government is run according to and by the law and not by man (a government of law and not of man).

In order to realize the principle of the rule of law, law enforcement by law enforcement agencies such as judicial agencies, police, prosecutor's office, Corruption Eradication Commission (KPK), Judicial Commission (KY), Witness and Victim Protection Agency (LPSK) and other law enforcement agencies must run and function in accordance with the principles and objectives of the law enforcement agency. From the perspective of the institution of judicial power, the judicial institution as the executor of judicial power must function as a justice dispenser that works in accordance with the principles of transparency; fairness; impartiality; independence; and accountability, so that the judiciary becomes an authoritative and trusted law enforcement institution.³

The ideal of making an independent and authoritative judicial institution is a serious problem. This is because in the principle of constitutional supremacy, all legal conflicts over the interpretation of legal norms both within the state administration and those that occur in society (concrete legal events) are resolved by the judiciary, because the judiciary is considered a triadic dispute resolution that has the ability to use the principles of indeterminate norms and judicial discretion.⁴ These principles have an influence on strengthening the position of the judiciary in upholding the principles of a democratic state of law.

¹ Jimly Asshiddiqie, *Indonesian Constitution and Constitutionalism*, (Jakarta, Constitutional Court of the Republic of Indonesia and Center for Constitutional Law Studies, Faculty of Law UI, 2004), pp. 185 - 201.

² Paul Christopher Manuel, and Anne Maria Camissa, *Checks and Balances? How a Parliamentary System could Changed American Politics*, United State of America, Wesview Press, 1999, pp. 16- 17. Compare Rune Slagstad, *Liberal Constitutionalism and Critics Carl Schmitt and Max Weber*, in "Constitutionalism and Democrac", (Cambridge University Press, 1988), p. Sec. 107.

³ Zudan Arif Fakrulloh, *Jurisprudence*, Volume 2 No. 1, March 2005, p. 24

⁴ Alec Stone Sweet, *The Bird of Judicial Politics; The Constitutional Council in Comparative Perspective* (Oxford University Press, 1992), pp. 38-39

Sociologically, law is a reflection of the value system that society believes in as an institution in personal life, society, nation and state. In this perspective, law can be used as a reference for social renewal as Roscoe Pound's concept of, law as a tool of social engineering.⁵ This means that the legal content material should be able to capture the aspirations of the community that grows and develops, not only those that are contemporary, but also as a reference in anticipating social, economic, cultural and political developments in the future. This thinking shows that law is not just a static norm that prioritizes certainty and order, but is a norm that must be able to dynamize thinking and engineer people's behavior in achieving their goals.⁶ This view shows that legal norms are inherently inherent in the values that society believes in. But the force of the law cannot be separated from the institution of power, so that law, society and power are elements of a social order.

Thus, in order for the judiciary to become a locomotive for law enforcement as well as legal reform, the role and function of judges in addition to the management of judicial institutions is very important and strategic, because in essence judges are an important element in implementing and finding laws that rely on justice and utility. Judges are not merely mouthpieces of the law, but furthermore, judges are spokesmen for law and justice for the community.

Discussion

The essence of law enforcement and future law reform

The relationship between law and social dynamics that move centrifugal, then by itself the law must develop and compensate for its centripetal movement towards the formation of substantive values that are directly proportional to the social dynamics, and law is not just an empty box (empty box) which has no meaning and benefit. At this level, the law must have the spirit of human community values that are in the spirit of justice, guarantee certainty and have the value of utility and reasoned truth.⁷

Just as Kelsen's study of law is the legal norm, its elements, its interrelationships, the legal order, its structure, the relationship between different legal orders, and the unity of law in a pluralistic positive legal order. The reality of law is a phenomenon that is more often conceived of as "the positivity of law", and in this case Kelsen clearly distinguishes between "empirical law and transcendental justice by excluding the latter from specific

⁵ Roscoe Pound, *An Introduction to the Philosophy of Law - with a new introduction by Marshal L. De Rosa*, (New Brunswick (USA) and London (UK), 1999 - Originally published in 1922 by Yale University Press), p.4.

⁶ Bagir Manan, *Enforcing the Law of a Search*, First Edition (Jakarta: Indonesian Advocates Association, 2009), pp. 164 – 165.

⁷ Charles de Scondat, Baron de Montesquieu, *The Spirit of Laws*, translated by Thomas Nugent, revised by J.V. Prichard (London: G.Bell & Son, 1914), pp. 152 – 154.

concerns."⁸ Law is not a manifestation of a "superhuman authority", but is a social technique based on human experience. Consequently, the basis of a law or its "validity" is not in the principles of meta-juristics, but in a juristic hepotency, which is a basic norm established by "a logical analysis of actual juristic thinking". Thus, Kelsen does not speak of law as a reality in practice, but of law as a discipline, i.e. what happens with law in practice as opposed to what is studied in law, which only studies positive legal norms rather than ethical, political, or sociological aspects that can arise in legal practice.

The legal position becomes a problem when it is in the situation of transition from an authoritarian government power system to a democratic system like the one Indonesia is experiencing today. Indonesia is one of the largest countries that is undergoing a process of change from authoritarian regimes to democracy. However, the changes that occur do not necessarily result in a democratic regime. There is a time interval between the collapse of authoritarian regimes and the formation of a solid new regime marked by various uncertainties called transition periods.⁹

The legal functions described above are the study of law in society that has impersonal, autonomous, and rational characteristics. In this regard, the function of law as an instrument of social change is built on the assumption of law as "an agency of power; an instrument of government."¹⁰ This means that the state has a strong authority to drive change through legal instruments. The problem is that in the context of the transition period in Indonesia, the law works in the midst of drastic changes and fierce conflicts between political forces. In such a situation, it is difficult to obtain a strong and legitimate authority for the use of the law as an instrument of social change. Not only does the government authority become weak, but it also does not have strong legitimacy in front of the public, both executive, legislative and judicial institutions undergo a process of delegitimization in front of the public. This results in the ineffectiveness of law enforcement in today's society which is often marked by the use of violence and vigilante in resolving various social conflicts.

In this perspective, legal reform is a conscious, planned and sustainable effort within the framework of building a legal system, both in terms of substance (legal content) and legal institutions. Therefore, the law must be approached from all aspects of life in order to be visionary and operate in conjunction with other fields. In other words, legal reform seeks to make liberation, both in the way of thinking and acting in the law, so that the law is able to play a role and function to serve human beings and humanity. The logical consequence is that the law will always undergo changes both evolutionarily and revolutionarily. This has an impact on the interpretation of written legal rules will always

⁸ Hans Kelsen, *Pure Theory of Law*, (Berkeley, Los Angeles, London: University of California Press, 1978), pp. xiii - xiv.

⁹ Deliar Noer, *Participation in Development*, (Kuala Lumpur: Malaysian Islamic Youth Force, 1977), p.55.

¹⁰ Roger Cotterell, *The Sociology of Law: An Introduction*, (London: Butterworths, 1992), p. 44.

undergo changes with reference to higher values and morals. Therefore, the implementation and enforcement of the law must not be a prisoner of the law. The rule of law cannot be interpreted as the same as the rule of law. The change in the legal paradigm and how to apply it as described above is intended so that the law and its institutions, in this case, judicial institutions supported by reliable human resources with high legal thinking and integrity will be able to become a locomotive of social change.

Judicial institutions as a pillar of law enforcement as well as legal reform

Public attention to the legal world is increasing along with the atmosphere of openness enjoyed by the Indonesian people since entering the reform period. The current state of law and its enforcement is a product of an authoritarian political configuration that has not completely changed. The above legal conditions and law enforcement have given birth to a way of applying the law that loses moral and justice meaning. Ethical, moral, and sense of justice values are often ignored. If we are drawn to the fundamental problem, there is still ambiguity in the conception of the state of law that is adhered to, between the *rechtsstaat* that prioritizes legal certainty and the conception of the rule of law that emphasizes a sense of justice. In this perspective, the paradigm of law and its application must change, namely the emergence of fresh and comprehensive ideas about the law that rely on the essential values of humanity, the application of the law through strong institutions and legal apparatus, and attention to the role of human behavior in the law. The change in the legal paradigm and the way of applying the law is expected to be able to become a locomotive of social change, if supported by a strong and authoritative legal institution equipped with reliable management and human resources and high integrity.

A strong and authoritative legal institution is reflected in the judiciary, and reliable human resources and high integrity are reflected in judges, as well as management is reflected in judicial administration that always maintains its image as an independent institution, free from other power interventions whose decisions refer to the principles of certainty, justice, and utility. Such a judicial institution is one of the elements of the state of law,¹¹ so that a free and independent judicial institution is a general principle that must be used as a principle in building and realizing the state of law as mandated by Article 1 paragraph (2) and Article 1 paragraph (3) of the 1945 Constitution.¹² Therefore, the judiciary as a manifestation of judicial power should function as, *a) Pressure verou*, namely that the authority given by the constitution and the law is to suppress every action that is contrary to the law by punishing every violation committed by anyone and by any party. Each of these violations is *instconstitutional*, contrary to the

¹¹ Azhary, *The Indonesian State of Law - Normative Juridical Analysis of Its Elements*, Cet. First (Jakarta: UI-Press, 1995), p. 144..

¹² Article 24 of the 1945 Constitution affirms that, "Judicial power is an independent power to administer the judiciary to uphold law and justice". Article 1 paragraph (2) of the 1945 Constitution states that: "Sovereignty is in the hands of the people and is carried out according to the Constitution".

public order; and violations with the reasonableness; (b). *The ultimate weapon (Ultimum Remedium)*, that is, the constitution and the law place the judiciary as the ultimate weapon, in addition to being the last resort to seek and uphold truth and justice. This means closing the existence of institutions outside the courts to seek truth and justice; c). *The Guardian of citizen's constitutional rights and human rights*, namely that the judiciary must be able and uphold the constitutional rights of citizens and human rights (to respect, to protect and to fulfill of human rights); (d) *As Guardians of the Community (Judiciary are regarded as custodian of society)*, that is, the judicial bodies are a place of protection and restoration to their original state (*restitutio in integrum*) for members of society who feel persecuted or harmed or whose rights are raped either by individuals, groups or even by the rulers. e) *the Principle of Immunity Right*, namely that in the exercise of judicial functions, judicial institutions by law are granted immunity rights and f) *Court decisions like the Judgment of God (Judicium Dei)* are that this is a consequence of the principle of freedom and independence given by the constitution and laws to judicial institutions and judges.¹³ The adjudication process in reality is not a purely juridical process. The judicial process is not only the process of implementing articles and the sound of the law, but a process that involves the behaviors of the community and takes place within a certain social structure. From a sociological perspective, the court is a multifunctional institution and is a place for "record keeping", "site of administrative processing", "ceremonial changes of status", "settlement" and even law enforcement can be used as an opportunity ... negotiation", "mediations and arbitration", and warfare.¹⁴

In the framework of the effectiveness of law enforcement so that the law is authoritative, it does not detach from the organs of the state which is systemically a unity of flow. Just as the legislative organ is the parliamentary institution, the executive organ is the government bureaucracy, while the judicial organ is the bureaucracy of the law enforcement apparatus which includes the police, prosecutor's office, and courts and other enforcement institutions that were formed later including the Corruption Eradication Commission (KPK), and the Judicial Commission (KY), the Witness and Victim Protection Institute (LPSK) and others are a unit of a series of state institutions that have harmonious workflow in the context of law enforcement. Especially for law enforcement institutions that have an institutional hierarchy, all organs must be connected to their respective hierarchies from the highest to the lowest, which is related to the apparatus at the central level, provincial level, and district/city level. All elements, components, hierarchy and aspects that are systemic and interrelated are

¹³ Yahya Harahap, *Brief Review of the Court of Cassation*, paper was presented at the briefing of Supreme Court Justice Candidates at the Supreme Court Training Course, July 19, 2011.

¹⁴ Henry J. Abraham, *The Judicial Process; An Introductory Analysis of the Court of the United States, England and France*, Oxford University Press, 1975

included in the definition of the legal system that must be developed within the framework of the Indonesian Rule of Law based on the 1945 Constitution.

Normatively, the above affirmation can be found in Article 24 of the 1945 Constitution which states: "The power of the judiciary is a free power to administer the judiciary to uphold law and justice". The explicit affirmation of Article 24 of the 1945 Constitution shows that the judicial institution required by the constitution is not a judicial institution that only serves as a spokesperson for the law, but further as a spokesperson for law and justice. This means that the judiciary must function as an institution that is able to translate concrete principles when dealing with written legal norms/laws, and even must be able to create laws, when there is a legal vacuum.¹⁵ In this perspective, the judiciary is not only an institution for the application of law in the sense of written norms in the form of laws when dealing with concrete events (law enforcement), but also as an institution for legal discovery (*rechtsvinding*) and even as an institution that can create laws. This can be realized if the judiciary is always consistent and has a commitment to, a) maintain the independence of the judiciary; (b). Providing fair legal services to justice seekers; c). Improving the quality of management and leadership of judicial institutions; and d). Increase credibility and transparency principles. Therefore, the principles of legal services in judicial institutions can use or adopt the principles of good governance, namely, a) Transparency; (b) Fairness; (c) Impartiality; d) Independence; and e) Accountability. Improving judicial administration is an important part of the judiciary in providing fair legal services, because the running of judicial administration services is good or bad, will have an impact on the good or bad image and authority of the judicial institution.

Principles of a clean and authoritative judiciary

In line with the affirmation of Article 24 of the 1945 Constitution, that the judiciary can perform its function as a law enforcement institution as well as the function of legal discovery (*rechtsvinding*), and even the creation of laws within the framework of human rights enforcement, is a judiciary that can exercise its power freely, independently, and independently of the intervention of other state powers (*independence of judiciary*). Theoretically, the condition of such a judicial institution also depends on the choice of the legal and judicial system. According to C.F. Strong,¹⁶ in general the legal and judicial systems of countries in the world can be grouped into: "(1) Common Law States, in which the executive, being subject to the operation of the Rule of Law, and (2) Prerogatives States, in which the executive is protected by special system of administrative law". In the common law legal system, the rule of law is based on the judge's decision accompanied by the principle of precedent, and places the living law as a reference in the formulation of the law. In this legal system, rights are more important than

¹⁵ The Man Who Won the Prize, *Op.Cit.* thing. 170

¹⁶ C.F. Strong, *Modern Political Constitutions - An Introduction to the Comparative Study of their History and Existing Forms*, 8th revised and enlarged edition (London: Sidgwick & Jackson Limited, 1972), pp. 65-66

obligations, equality is more important than supervision and responsibility is more important than paternalism. Fault principle is a more dominant principle than strict liability which is reflected in the approach of protection of individualistic values and freedom. Therefore, in understanding the common law legal system, both citizens and state officials have similarities before the law. A further consequence is that in terms of law formation, judges are the central figure in law formation, so the judiciary is placed as an institution for the protection of individual rights as part of human rights.¹⁷

Management of Judicial Institutions Based on Information Technology

One of the important agendas that must not be forgotten in the context of the success of national reform is the continuation of efforts to reform the legal and judicial system. The basic aspect that greatly determines the success of efforts to improve the judicial system and law and justice enforcement in Indonesia is the problem of management. The main function of management itself includes (i) planning, (ii) staffing, (iii) organizing, (iv) controlling, and (v) directing. In every management process, it always starts with planning, followed by monitoring and evaluation. For this reason, the role of managers (leaders) who have qualifications and characteristics is needed: (a) problem solving; (b) logical thinking; (c) technical knowledge; (d) ethical thinking; (e) effectively communicating; and (f) reasonable and understanding. In the framework of realizing these six things in practice, there are several determining factors that need attention, namely: (a) The Substance Factor of the Rule. In this case, the most decisive thing is that the procedural law applied in the process, both criminal, civil, state administration, religious courts, and constitutional courts (state constitution), needs to be refined according to the needs of the times; (b) Human Resource Factors. Both clerks and administrative officers in general need to continuously keep up with the times, so that they can work efficiently and productively. Likewise, judges, from time to time, must also continuously update themselves with new knowledge of laws and regulations that are developing very dynamically; (c) Legal Information and Communication System Factors. Because the legal world today has developed increasingly complex, information and communication technology (ICT) (d) Facilities and Infrastructure Support Factors and Budget. The way the judiciary works must be maintained with various adequate facilities and infrastructure. Building infrastructure, courtrooms, technological equipment, remuneration systems and adequate welfare facilities are indispensable to ensure the quality and productivity of judicial work; (e) Leadership Factors. What is often overlooked is the importance of the role of leadership in the success of the agenda of improving the system and work climate in legal institutions.

¹⁷ Lili Rasjidi and IB Wyasa Putra, *Law as a System*, Cet. First (Bandung: PT. Remaja Rosdakarya, 1993), p. 31-32.

Placing Judges as Funnels of Law and Justice

A further consequence is that judges are less given the freedom to explore the laws that live in society, and judges are bound by the text of the law, but judges are free to decide a case without having to follow the decisions of previous judges (*jurisprudence*). From the perspective of legal reform in Indonesia, the judiciary will be faced with the influence of the two systems, and whether it is strictly based on one system or whether to combine the two systems with an approach to the urgency of concrete legal events, depends on the legal or political choices of the law-making institutions. The function of finding the law, meaning that the judge acts to give meaning to the written legal norms when faced with concrete institutions. The interpretation of a norm is carried out through clear instruments, namely methods of interpretation, analogy, legal refinement, and legal construction. Each method used must pay attention to the needs and logical order to obtain the precise, correct, fair and reasonable meaning in a concrete legal event.¹⁸ The function of creating the law is constructed as an effort by the judge who must decide a case, but there is no written legal norm that is used as a basis for a foothold or there is a legal vacuum. This function must be carried out by the judge, because in principle, the judge should not reject the case on the grounds that there is no written legal norm that is the basis for the concrete principle.

Conclusion

Legal reform is basically a change in the paradigm of law and its application, namely comprehensive thoughts about the law. The change in the legal paradigm and the way of applying the law is expected to be able to become a locomotive of social change, if supported by a strong and authoritative legal institution equipped with reliable management and human resources and high integrity. Such a legal institution is reflected in an authoritative judicial institution, judges who have intellectual, moral and professional competence and judicial administration that applies the principles of good governance.

The judiciary can function as a locomotive for legal reform, if the judiciary can be run freely and independently, and adheres to the principles of certainty, justice and utility. The judicial institution required by the 1945 Constitution is not a judicial institution that only serves as a spokesperson for the law, but rather as a spokesperson for law and justice. This means that the judiciary must function as an institution that is able to translate concrete principles when dealing with written legal norms/laws, and even must be able to create laws, when there is a legal vacuum.

¹⁸ *Ibid*, p. 169

Author's biography

Zainal Arifin Hoesein was born in Jombang on September 3, 1955, a graduate of the Bachelor of Science (S3) Law Study Program with a concentration in Constitutional Law at the University of Indonesia in 2006. He is currently a Lecturer at the Faculty of Law, University of Muhammadiyah Jakarta and several Faculty of Law. Member of the Muhammadiyah Professors Alliance, the Board of the Muhammadiyah Constitutional Law Society (MAHUTAMA), in addition to teaching, is also active as a Trustee of the Association of Teachers of Constitutional Law and State Administrative Law (APHTN and HAN), Trustee of the Association of Leaders of Indonesian Law Universities (APPTHI), Board of the Indonesian Legal Profession Association and the Board of the Association of Indonesian Law Study Programs. Chairman of the National Sharia Arbitration Agency, Indonesian Ulama Council

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