

# **The Idea of (Re)Amending the Constitution of Year 1945 (A Proposition to Strengthen the Power of DPD and Judiciary)**

**Ni'matul Huda**  
**Fakultas Hukum UII Yogyakarta**  
**e-mail: nimatul@fh.uui.ac.id**

## ***Abstract***

*The urgency of re-amending the Constitution of Year 1945 is due to the idea of enhancing the previous amendment, that is, to attain better administrative governance in Indonesia. As it goes without saying that the Constitution of Year 1945 is sacred, the amendment itself should be a well thought-out process that requires thorough and deep considerations and certainly cannot be taken carelessly.*

**Keywords:** *Amendment of The Constitution of Year 1945, The Regional Representatives Council (DPD), The Authority of Judiciary.*

## **Introduction**

At the beginning of year 2008, the Government and the House of Representatives agreed to set up the fifth amendment to the Constitution of Year 1945 by immediately formed a national committee. The agreement was made in the consultative meeting in the State Palace, Jakarta, Friday January 25, 2008. The new Constitution is expected to be used by the new government of 2009 general election.

The President Susilo Bambang Yudhoyono's and the House of Representatives' proposal to form a committee to set up the fifth amendment to the Constitution of Year 1945 created various reactions from the people. Some members of MPR and Constitution Forum disagree to the proposal saying that it is MPR who has the authority to establish such committee and it is really not within the presidential domain.<sup>1</sup> On the other hand, some members of DPD and state administrations experts support the proposal.<sup>2</sup>

Normatively, it is MPR that has the authority to amend the Constitution of Year 1945, therefore it would deem more appropriate if MPR were to establish the national committee. However, the proposed amendments to the constitution does not have to come from MPR. Every citizen who concerns about the future of the nation has the right to propose changes to the Constitution, and it is the duty of MPR to first review the proposal. Indeed, all members of MPR RI of 2004-2009 are due immediately to review the several proposed changes that have already been in the public discourse. Such proposals have come from many different sources such as Constitutional Commission, the Rector Forum, DPD, and other parties who have concerns over the results of the amendment of the Constitution of Year 1945.

---

<sup>1</sup> Kompas, Januari 31, 2008.

<sup>2</sup> Kompas, February 1, 2008.

The President's and the House of Representatives' proposal to form a national committee is worth the support since the amendment made by MPR of 1999-2004 leaves a number of issues. Therefore, the many ideas and proposals to resolve the problems and, hence, to make a better Constitution should be well appreciated. In this paper, however, the writer will only discuss the importance of strengthening the power of DPD and Judiciary as well as shaping up its institutional design.

### **The Unsatisfactory Amendment of Constitution of Year 1945**

The changes made by MPR of 1999-2002 is a positive contribution to the efforts of improving the Indonesia's state administration system. With changes in some Articles of the Constitution of Year 1945, the amended Constitution has been successfully set the check-and-balance system, including the limitations put on the authority of the Executives, firmly change the meaning of "the origin of sovereignty" (locus of sovereignty). MPR which consists of members of DPR and DPD is the realization of democratic representation. As state institutions, MPR only exist when the DPR and DPD are in the joint session. The member of parliament general election, the president and vice president election are also the results of political and legal innovation through the amendment of the Constitution of Year 1945 by the MPR. The political and legal struggle of MPR is the beginning of the desecration of the Constitution of Year 1945. The success in the amendment ends the prolonged constitutional-recess, and it is now moving forward to have a better state administration system.

The MPR has big commitment to change without necessarily disregard the national values. The national agreement on the preamble of the Constitution of Year 1945, the form of State Union and Republic, and the Presidential system are hard evidence of the historical commitment of the Holy Pact of the nation.

The first to fourth amendments of the Constitutional of Year 1945 were fundamentals consisting of so many materials as such it has changed the system, both the formulation and the flow of logic. Thus, the amendments of the Constitution of Year 1945 can no longer be called as following the tradition of the U.S. The techniques and procedures referred by the provisions of Article 37 of Constitution of Year 1945 must be understood as the model of European tradition instead of the U.S.<sup>3</sup>

A number of people think that the amendment is far from satisfactory. The amendment that should have been done by independent institutions such as Constitution Commission, as what happened in Thailand, The Philippines, South Africa, etc., has been carried out by an institution that should be the object of such amendment. Therefore, according to Bambang Widjajanto, it could be suspected from the very beginning that the direction and the substance of the change will not fulfill the needs of enabling the Constitution to become useful in serving in its entirety on the sovereignty of the people and building a democratic power system by providing the answer to the currently disorganized power system.<sup>4</sup>

The importance to institutionalize the process of constitutional reform outside the conventional political institutions can be based on several reasons. Constitutional reform

---

<sup>3</sup> Bagir Manan, *Teori dan Politik Konstitusi*, FH UK Press, Yogyakarta, 2003, page 232.

<sup>4</sup> Bambang Widjajanto, "Komisi Konstitusi, Instrumen untuk Mengatasi Krisis Konstitusional", in Bambang Widjajanto et. al. (Editor), *Konstitusi Baru Melalui Komisi Konstitusi Independen*, Pustaka Sinar Harapan, 2002, page 198.

that occurred in line with the political turmoil resulting from transition from authoritarian government will be full of collision of political interests between groups of status quo, who still carry the spirit of authoritarian, and the reformists who try to get to the democratic system.<sup>5</sup>

In such political situation, according to Denny Indrayana, the constitutional reform that was not free from political conflict such as giving it away to people's representative institutions like MPR, would be contaminated by short-term compromising political virus which normally became the pragmatic solutions in the political conflict in the time of transition. Therefore, it is best to let the process of constitutional reform taken care by independent professional institution such as Constitution Commission.<sup>6</sup>

The same reasons were also raised by Jimly Asshiddiqie<sup>7</sup> who said that members of the People's Assembly (MPR) do not have the adequate time to first have in-depth arguments about the matter. Even if the members choose the proven scholastic concepts, the dynamics and the atmosphere of the discussion process will also be influenced by interests involved in it. The conditions often discard the scholastic truth for the sake of political truth. For the best interest of the nation, the rewriting of the script of the Constitution of Year 1945 should be done by an independent committee called Constitution Commission or Constitution Preparation Board.

Another fierce criticism came from Mukthie Fadjar<sup>8</sup> who said that in amending the Constitution, it was clear since the beginning that MPR did not have the clearly formulated vision and mission. In other words, MPR did not have the desired paradigm of change, hence, the critics for both the process and the substance. To make things worse, there are two opposing opinions regarding the amendment by the MPR: the one who said that MPR has gone too far in amending the Constitution and therefore must be stopped from doing so, and the other who said that MPR do not have the capacity or even "bewildered" in amending the Constitution and therefore must admit the incapacity and pass the job to an independent Constitution Commission. MPR, then, will only have to ratify the amended Constitution.

It is well known that Constitution of Year 1945 set the procedure the of its amendment in Article 37. This means that the Constitution does not prohibit amendments, however, it does not set the technical procedures of amendment, that is, whether to apply the U.S model or the European Continental model. Neither does the Article explicitly specify which state institution are authorized to carry out the amendment, even though from the first until the fourth amendments the MPR has assumed that it is them who has the authority to amend the Constitution. Critics on the self-claimed authority of MPR, especially comes from people who thinks that the Constitution should be amended by an independent Commission, were answered by MPR with the amendment of Article 3 of the Constitution of year 1945 by instating the

---

<sup>5</sup> Guillermo O'Donnel, Philippe C. Schmitter and Laurence Whitehead (Editor), *Transition from Authoritarian Rule: Prospect for Democracy*, 1986.

<sup>6</sup> Bambang Widjajanto et.al. (Editor), *Konstitusi...*, *Op.Cit.*, page 178.

<sup>7</sup> Jimly Asshiddiqie, "Telaah Akademis Atas Perubahan UUD 1945", *Jurnal Demokrasi & HAM*, Vol.1, No. 4, September-November 2001, page 10.

<sup>8</sup> A. Mukthie Fadjar, *Reformasi Konstitusi Dalam Masa Transisi Paradigmatik*, In-TRANS, Malang, 2003, page 59-60.

authority to MPR to amend the Constitution besides the authority to ratify it (third amendment)<sup>9</sup>

From the comprehensive study of the amended Constitution of Year 1945 conducted from October 2003 until April 2004, the Constitution Commission believes that:<sup>10</sup>

1. The changes made by MPR of 1999-2002 is a positive contribution to the efforts of improving the Indonesia's state administration system. With changes in some Articles of the Constitution of Year 1945, the amended Constitution has been successfully set the check-and-balance system, including the limitations put on the authority of the Executives, firmly change the meaning of "the origin of sovereignty" (locus of sovereignty). MPR which consists of members of DPR and DPD is the realization of democratic representation. As state institutions, MPR only exist when the DPR and DPD are in the joint session. The member of parliament general election, the president and vice president election are also the results of political and legal innovation through the amendment of the Constitution of Year 1945 by the MPR.
2. The political and legal struggle of MPR is the beginning of the desecration of the Constitution of Year 1945. The success in the amendment ends the prolonged constitutional-recess, and it is now moving forward to have a better state administration system. The MPR has big commitment to change without necessarily disregard the national values. The national agreement on the preamble of the Constitution of Year 1945, the form of State Union and Republic, and the Presidential system are hard evidence of the historical commitment of the Holy Pact of the nation.
3. It could not be neglected that the amended Constitution of Year 1945 that has been done by MPR contains contradictions, both in theory and in concept and in state administration practice. Although the amendments in the substance are more than 50% and consists of 207 paragraphs, but the Constitution of Year 1945 is still there. In addition, there are also substance inconsistencies both juridical and theoretical. The inconsistent structure and systematic of the additional Articles creates legal and political innovations to the Constitution Commission. The constitutionalizing executed by Constitution Commission can be seen from the establishment of additional Articles. For example, is the election of independent candidates for President (Article 6A), the empowerment of authority of DPD that paralleled the DPR's, (Article 22C). Furthermore, the innovations are also in the law enforcement as can be seen that other than Polri, it also set the provisions on the judiciary and Ombudsman (Article 24 D, E, F), the Head/Deputy of Regional election (Article 18 paragraph (4)), retroactive principle in the case of serious violation of human rights (Article 281), the disabled (Article 34), and the independence of the

---

<sup>9</sup> A. Mukhie Fadjar, *Hukum Konstitusi dan Mahkamah Konstitusi*, Konstitusi Press, Jakarta and Citra Media, Yogyakarta, 2006, page 23.

<sup>10</sup> Komisi Konstitusi, *Buku I Naskah Akademik Kajian Komprehensif Komisi Konstitusi tentang Perubahan UUD Negara Republik Indonesia Tahun 1945*, MPR RI, Jakarta, 2004, page 122-127.

- press is guaranteed and regulated by law, people's involvement in the amendment of Constitution of Year 1945, and the Constitution Commission (Article 37 paragraph (7)).
4. Lack of references or scholastic script in the amendment of Constitution of Year 1945 is one of the cause of the persistent conceptual and theoretical inconsistency. This also applies to the procedure of amendment that does not involve the people. The participatory methods used by many modern countries must be used in the amendment of the Constitution.

Later, it turned out that the report sent to the Work Committee of MPR got less than positive response. It was allegedly even “rejected” by MPR as MPR believed that the Constitution Commission has crossed its jurisdiction and gone too far beyond the original task of comprehensive study of the amended Constitution of Year 1945 done by MPR, and instead, the Constitution Commission proposes amendment to the amended Constitution of Year 1945.

Apparently, there was a disagreement in the interpretation of the term “comprehensive study of the amended Constitution of Year 1945” between BP MPR and the Constitutional Commission. The Constitution Commission read the term in a broader meaning, that is, not only to study the results of the four-times amendments, but also to study the philosophical thoughts of the Founding Fathers at the time the script was formulated in the hearing session with BPUPKI and PPKI. Based on that interpretation, the report of the Constitution Commission consists of both findings on the comprehensive study (Book I) and amendment proposals to some Articles of the Constitution (Book II).

11

Meanwhile, according to BP MPR, a “comprehensive study of the amended Constitution of Year 1945” means only to study the amended Constitution of Year 1945, and not to propose amendment the amended Constitution. The results of the comprehensive study was supposed to be suggestions on how to implement the amended Constitution of Year 1945, for example, imparting scientific ideas on establishing organic Law as the complementary instruments for the Constitution so that the amended Constitution can improve the quality in the practice of governing a nation.

Recently, the discussion about the amendment of Constitution of Year 1945 are more widespread, be that among scholars, politicians and the common people. A lively democracy that has never before been seen in Indonesia. Before this time of ‘reformation’, a discussion about Constitution of Year 1945 was politically incorrect as well as “taboo”, and people did not have the chance to liven up democracy because suspicions were always there to remind them that discussion about Constitution would desecrate it and undermine the authority.

After more than five years of having the amended Constitution of Year 1945, its very existence is now, again, being questioned. The Constitution of Year 1945 has become the felon or the bad guy in the midst of a chaotic nation. The discrepancies and weaknesses of the design that had been warned by some people has started to appear, slowly but surely. Disputes about authority between state institutions is inevitable, for example, such as the dispute between the Supreme Court (MA) and the Judicial Commission (KY), and dispute between the House of Representatives (DPR) and the

---

<sup>11</sup> A. Mukthie Fadjar, *Hukum Konstitusi...*, *Op.Cit.*, page 63-64.

Regional Representatives Council (DPD). Another worrying issues are the emergence of new independent state institutions or commission which, too, often lead to dispute about authority (overlapping) among independent institutions and also among other institutions, for example dispute between the Corruption Eradication Commission (KPK), the Polri, and the State Attorney Office, between KPK and MA, between the State Secretary and KPK, and so forth. It happens because the such issues have not been properly set in Indonesia's state administration.

Currently, in the midst of a chaotic implementation of the state administration under the amended Constitution of Year 1945, there are at least three groups of people that have been trying to influence the people about the very existence of the amended Constitution. The first group is the so called "National Committee of the Guardians of Pancasila and Constitution of Year 1945". Among the prominent members are KH Abdurrahman, Soetardjo Soerjogoertino, Amin Aryoso, Ridwan Saidi, and Tyasno Sudarto, the leader of the Conscience Revolution Movement.<sup>12</sup> The group believes that the amendment of the Constitution of Year 1945, hence, become the Constitution of Year 2002, was made possible because of foreign intervention, and that will lead the people toward individualism, materialism, and liberalism, and further away from becoming the prosperous society. The group urges the restoration of the original Constitution of Year 1945<sup>13</sup>, and, if necessary, through a presidential decree.<sup>14</sup>

The second group, instigated by 128 members of DPD, and supported by members of National Awakening Party of MPR, members of PKS, and members of PBR, encourages the fifth amendment of Constitutional of Year 1945 on Article 22D, paragraph (1), (2), and (3). The group argues that such amendment would make the DPD becomes more effective in its endeavor for the regional's best interest, and would also increase the role of DPD in the state administration especially in developing the inter-institutional check and balance system.

The third group is dominated by the major political power in DPR, namely, Golkar Party, PDIP, PPP, and PAN. The group refuses the idea of re-amending the Constitution of Year 1945. According to the vice chairman of PPP, the re-amendment of the Constitution just for the sake of improving the role of DPD is a little to soon and untimely. Likewise, the secretary general of PDIP also said that the amendment of Constitution is nothing but a venture of a bunch of political elites.

---

<sup>12</sup> Budiman Tanuredjo, "Konstitusi di Tengah Tarikan Kepentingan", *Kompas*, March 7, 2007

<sup>13</sup> According Buyung Nasution, the urges to restore the original Constitution of Year 1945 is like turning back the time, to the time of Lead-Democracy (Old Order) or Pancasila Democracy (New Order), which was anti-democratic. Many scientific research shows that the Constitution of Year 1945 has weaknesses or conceptual flaws, which makes it inappropriate to become the foundation of a nation. See in Adnan Buyung Nasution, "Kembali ke UUD 45 Antidemokrasi", *Kompas*, July 10, 2006. Similar opinion also expressed by the Coalition of New Constitution. The group said that the desire of certain groups of people who systematically campaigning the restoration of the Constitution of Year 45 must be rejected. Such desire will only bring back the country to the bureaucratic-authoritarian system all over again. The idea could even just the entry point to certain hidden agendas. See "Upaya Kembali Ke Konstitusi Lama Harus Dilawan", *Kompas*, February 6, 2007.

<sup>14</sup> Presiden Susilo Bambang Yudhoyono, in a welcoming speech in front of The XIV Short Course of National Defense Institute at the State Palace on July 6, 2006, said that he respected the desire of restoring the original Constitutional of Year 1945. However, he did not agree that presidential decree is the solution. Instead, he said, ask the people of Indonesia. See "Decree Is Not the Solution" *Kompas*, July 7, 2006.

Outside the three groups, there is also proposition to restore the original Constitution of Year 1945 with the amended parts included in the addendum section. This idea was proposed by Dimiyati Hartono, an expert on Law, in his book *Restorasi Amandemen UUD 1945*. The phases, according to the book, are first, restore the original Constitution, and then, analyze the amended Constitution to find the flaws and to determine which can be used, and finally sort the results in a complete inscription of amended restoration of Constitution of Year 1945. In such inscription, there should be the script of Proclamation of August 17, 1945, the Preamble, Body, Description, and Analysis on the amended parts as an addendum section.<sup>15</sup>

### **A Proposition to Strengthen the DPD**

The MPR is actively socializing the amended Constitution of Year 1945 and at the same time campaigning for support on re-amending the Constitution, especially on the idea of strengthening the MPR position to become a permanent institution. This is necessary, according to MPR, because according to the amended Constitution, MPR now is in the indefinite position: it is either bicameral or tricameral system. Similarly, the DPD is recently actively seeking support on the idea of strengthening the DPD through amendment of the Article 22D of the Constitution of Year 1945. The DPD argues that the blueprint of the of the parliamentary system in the amended Constitution does not clearly state the system to exercise: it is neither the bicameral nor tricameral. The ambiguity affects the performance of DPD and the institutional relationship between DPD and DPR, and DPD with the President. The Constitution implies that, as a legislator, DPD is just an auxiliary to DPR, so that DPD can only be referred to as co-legislators. Indeed, the authority of the DPD is very limited.

Bicameral parliament is usually associated with the federation state which requires two board rooms. The two boards is required to protect the formula of federation itself. However, as there is a growing trend of shifting towards the state union, the bicameral system has also been practiced in the state union countries. There are two reasons why bicameral system is used:<sup>16</sup> a. the needs of stable balance between the executives and legislatives, which, the unbridled power of a single chamber being restrained by the creation of a Second Chamber recruited on different basis; b. the desire to have a more efficient or at least more smoothly-functioning parliament through a Revising Chamber so that it can carry out a careful check on the sometimes hasty decisions of a first Chamber.

The latter reason is as what experts call as 'double check' which allows the legislature to review each legislation twice to make sure the quality match to what the people expect. However, it is clear that to be able to really represent the people, then the members of both Chambers must represent different aspirations. The DPD represent the people in the context of regional interest while the DPR represent the people as a whole nation and for the best interest of the nation. In order to have two different representations, surely the election process for both Chambers is also different.

Unfortunately, the idea of having a bicameral parliament had a strong opposition from conservative groups within the Ad Hoc Committee of Amendment of Constitution

---

<sup>15</sup> *Kompas*, March 6, 2007.

<sup>16</sup> Jimly Asshiddiqie, *Pergumulan Peran Pemerintah dan Parlemen Dalam Sejarah Telaah Perbandingan Konstitusi Berbagai Negara*, UI Press, Jakarta, 1996, page 39.

of Year 1945 in the MPR of 1999-2002. Hence, the current Parliament system, which is not at all a bicameral system.<sup>17</sup>

The implementation of Bicameral system is very much influenced by traditions, customs, and the history of state administration of each country. Like federation, the state union country is also to protect certain territory, ethnics and certain interests of certain group of people –the interest groups, the minorities, and so forth– from the majority (the majority tyranny).

So, there are really not much differences between the unicameral and bicameral<sup>18</sup> system used in either the state union or the federation. The important thing to consider is to make both systems can really work in representing the people as well as overseeing the government.

There are countries that run the bicameral system due to historical background, for example, the U.K has bicameral system in order to maintain the presence of the nobles or royalties in addition to the common people. The U.K's bicameral system is due to the process of democratization of the representative body. Initially, the representative body in the U.K consists only of the nobles, or representation of religious groups and certain institutions. However, with the new movement of democratization and the emergence of new social class (the middle class), there was a need for a representation of the common people. Hence, the birth of House of Commons and House of Lords.

The bicameral system in the United States is the result of a compromise between the densely populated states with the less populated states. The House of Representatives (DPR) represents all the people with the number of representations is according to number of population of each state. Meanwhile, the Senate represents the state, and each state is represented by two Senators regardless of the population, whether it is New York or California or the less populated one such as Alaska or Nevada.<sup>19</sup>

The change of order in the MPR, which consists of DPR and DPD, looks like it is a bicameral system, however, from the order which stated that it consists of members of DPR and DPD, it does not reflect the concept of bicameral. In bicameral it is not the members, instead, it is the institutions like DPR and DPD that makes the substances of bicameral, just as the United States Congress consists of Senate and House of Representatives. If the members were the elements or substances the MPR would be an independent institution, that is, outside the DPR and DPD.

One of the consequences of the idea of bicameral (consisting of DPR and DPD), is there will be a need for a name for the representative body which has two elements of representations, such as the Congress as a representative body consisting of the Senate and House of Representatives. The proposed name for Indonesia's two-chamber body is to maintain the name of the People's Consultative Assembly (MPR). As a consequence for using the name of MPR as a two-chamber system, then the MPR will no longer be an echelon environment (independent work environment) that has its own authority. The

---

<sup>17</sup> Jimly Asshiddiqie, "Kata Pengantar" in Mustofa Muchdhor (Editor), *Bikameral Bukan Federal*, Kelompok DPD di MPR RI, Jakarta, 2006, page xv.

<sup>18</sup> The function of the council in the legislative in the unicameral system is concentrated on a single highest legislative body in the structure of the state. The rules on the duties and functions of the unicameral parliamentary vary in each country, but the it has the same main idea that, institutionally, the highest legislative functions is the responsibility of the highest institution elected by the people. See Jimly Asshiddiqie, *Pergumulan ...*, *Op. Cit.*, page 33-36.

<sup>19</sup> Bagir Manan, *Teori dan ...*, *Op.Cit.*, page 58.



authority of the (new) MPR is on the authority of the DPR and the DPD. The example for such system can be seen in the U.S Constitution and other two-chamber system countries: the defined authorities are the authority of Congress, Parliament, the Staten Generaal, and the implementations are carried out by its representative chambers.<sup>20</sup>

The Constitution does not define the relationship between DPR and DPD under the MPR, be it inter-chamber relationship or “inter-group-of-members” relationship, which means that there is no inter-institution (or inter-chamber) relationship. Thus, the MPR is a unicameral parliament with double membership (representation of parties and representation of regional). The next question would be: where is position of DPR and DPD in the context of the metamorphosis of MPR dan the change of legislation process?

When the function of inter-cameral between DPR and DPD takes place, it can be referred to as the joint session 'arena' of DPR and DPD. This happens when DPR invites DPD to the discussion about Bill on Regional Autonomy, or when the DPD submit the Bill on Regional Autonomy to DPR or request consideration on the State's Proposed Budget (RAPBN), or when DPD request consideration in the selection process of the BPK, and when DPR and DPD receive the HAPTAH of BPK. It is clear here that DPD has nothing but the “consultative function”.

It is clear that the relationship between DPR-DPD-President is not as MPR in the joint session, because the collective authority of the three institution is not the authority of MPR and the relationship among those three is not under the MPR's roof. The relationship of “legislature chambers” can be said as a hybrid type, three chamber legislature, but with the function of decision making is in the hands of only two chambers (the DPR and the President). Of course, then, it will not be appropriate to call the relationship of DPR-DPD-MPR as the three chamber parliament.<sup>21</sup>

There is a need for a grand design for the fifth amendment agenda of the Constitution of Year 1945. Besides, there is also a need to re-organize the legislation institutions, the DPR-DPD-President. In addition to strengthening the legislation function of DPD, the presidential authority in the establishment of law should now be limited and such authority should be given to DPR and DPD. Still, the President has to be given the right to reject or veto.

There are several proposition from experts and politicians in how to empower DPD. First, DPD does not have to be fully equal to DPR as legislature. Second, the legislative authority of DPD is limited to areas that are now listed in the Constitution of Year 1945, and even that is still with the DPR. Third, the legislative authority of DPD is formulated in various ways, as in other countries, starting from the rights of veto, send back to DPR, or just the postponement. Fourth, to make it more effective, the supervision authority of DPD should be with the one of DPR. To avoid duplication, an arrangement of supervision authority and responsibility can be set between DPR and DPD.

The same goes to MPR. Even though equipped with a number of authorities given by the (amended) Constitution of Year 1945 as discussed above, those authorities are just practically incidental authorities. Such authorities are: to amend the Constitution, to select Vice President in the case of vacant position of Vice President, to select the President and the Vice President if the President and Vice President are deceased, retired,

---

<sup>20</sup> Bagir Manan, *DPR .. ,Op. Cit.*, page 54.

<sup>21</sup> Krisna Harahap, *Konstitutsi Republik Indonesia Sejak Proklamasi Hingga Reformasi*, PT Grafitri Budi Utami, Jakarta, 2004, page 233.

resigned, fired, or cannot perform their duties together. Thus, the MPR is a joint session forum of DPR and DPD, so it does not have to be permanent. It will be more appropriate if there is only ad hoc a chairperson and there is no need to have a separated secretariat and chairperson. There is also a need to add more quality to the authority of DPD so that the regional's aspiration could be well proportioned so the regional autonomy can be obtained well under the guardian of the DPD.

The proposed limited amendments on Article 22D of the Constitution of Year 1945 by DPD can be regarded as a very elitist in nature. Why? First, the amended Constitution shows that one of the weakest point lies in the institutions that made the amendments – the MPR. If the amendment were to carry out by the MPR, persisting that it has to be done in this final period (2007 to 2009), perhaps the same mistakes would happen again, especially that this time the proposal has so much thing to do with the MPR itself. It seems that some kind of Constitution Commission is required to make the preparation and studies about amendment. Second, the MPR and the DPD have been urging for strengthening the respective institutions to better clarify the position of each. If changes were to be made on these two institutions, it would affect the other Articles in the Constitution, for example, the relationship between the DPD with the DPR, DPD with MPR, DPD with the President, and DPD with the Regionals. Similarly, If changes were to be made on the institution of MPR, it would also affect other institutions, such as the relationship between MPR with the President and Vice President, MPR with DPD, and MPR with DPD and DPR. The question is: has the MPR done a comprehensive study about the complexity of the problems?

It seems that the DPD's proposal on amending the Constitution of Year 1945 needs to be synchronized with the other institutions in order to have a comprehensive and impartial amendment. So, is it very unlikely that the solution to this problem is just amending the Law on MPR, DPR, DPD, and DPRD.

The seemingly academic proposal still requires a more in-depth and comprehensive study. However, most people seem to understand the idea that the amended Constitution of Year 1945 still needs further improvement. Therefore, before making the fifth amendment of the Constitution of Year 1945, it is better to prepare the grand design to clearly define the systems of governance, representatives, and judiciary of Indonesia. This immense work should be done by an special institution/agency such as an independent Constitution Commission, so that it will not be contaminated with short-term political interests. Such independent institution can be established by the mandate of MPR, which will ratify the results, or it can be explicitly provisioned in the Constitution of Year 1945.

### **A Proposition to Amend the Authority of Judiciary**

The complexity of issues in judiciary institution is also as complicated that it requires an immediate resolution. Some of the issues relating to the power of judiciary, among others, are: first, the Constitution Court (MK) Adjudication on Judicial Review on the authority of Judicial Commission (KY) that canceled the authority of KY to supervise judges and to exclude the judges of the MK from the supervision of KY, and decreed that KY is not an equally functional state institutional as with the MA and MK (even though it is within the same chapter of Authority of Judiciary). This issue makes it interesting to re-think about the design of authority of judiciary in the Constitution of Year 1945. The

impact of the cancellation of the authority in the supervision of Law on KY cannot be responded only by amending the Law on KY, but it has to be addressed from its constitutional design within the Constitution of Year 1945.

The KY's authority to supervise the judges is provisioned in Article 24B paragraph (1) of the Constitution of year 1945. The questions are: is it a right decision for MK to cancel the authority of KY, and make their own judgment that if all judges are selected by KY then these judges will be the ones that will be supervised by KY? While the provisions of Article 24C Paragraph (3) of the Constitution of year 1945 asserts that of the nine members of the constitutional judges approved by the President –three judges are endorsed by the MA, three by DPR, and three by the President– thus, does it make the constitutional judges excluded from supervision of KY? Who, then, supervise the constitutional judges?

In the future, there is a need to clearly regulate that the motion of appointing all judges, both supreme judges or constitutional judges, must come from the KY, so that KY as an external institution will supervise all of the judges. Then, both the MA and the MK do not need to establish a Tribute Council of judges to oversee the judges themselves. Judges should be responsible in executing the judicial process, while the administrative issues such as supervision duty, need not be done by fellow judges. In other words, the duty of supervising the judges (judges, supreme judges and constitutional judges) should be the duty of the Judicial Commission (KY). The results of the supervision will be submitted as a recommendation to both the Chairman of MA and the Chairman of MK, which then will be studied by both institutions in order to make any required follow ups. The Tribute Council of both institutions should only be an ad hoc institution and need not to be permanent one, since such boards would be established only upon the recommendation of the KY.

Why do the constitutional judges need also to be supervised by KY? The MK adjudication which stated that the constitutional judges are not included in the KY's supervision is not quite right because the constitutional judges are just mere judges that needs to be supervised by external supervisory institutions to avoid the supervision disparity by the KY. In the adjudication, the MK creates a conflict of interest within itself, especially with the fact that the judicial review on Law on KY was an *ultra petita*. Other *ultra petita* adjudications of MK are: Law on KKR, Law on KPK (corruption act court cases), and so forth. The probability of power abuse by the MK needs to be controlled so that the MK will not grow to become a super body as the MPR was once. The legislative institutions need to reconsider the authority of MK in judicial reviewing and re-think about the answer to the questions like 'is it true that MK is a constitution interpreter? How far can the authority of MK go in interpreting the constitution?'. It seems that a strictly defined rules and regulations are needed in answering those questions, because the unlimited power of judicial review could lead to a power abuse. Such abuse can be seen by looking at the new problems, both from the judiciary and politically perspective, that have been created by the MK's *ultra petita* adjudications.

Moh. Mahfud MD,<sup>22</sup> proposes to limit the authority of MK in judicial review by at least three of the following: first, in adjudicating, the MK is not to legislate because legislation is the rights of the legislatives body. The MK can only declare that a Law or

---

<sup>22</sup> See Moh. Mahfud MD's proposal in his book, *Perdebatan Hukum Tata Negara*, LP3ES, Jakarta, 2007, page 98-99.

part of the Law is annulled if it contradicts the Constitution of Year 1945. Second, the MK may not adjudicate to annul or not-to-annul a Law or a part of the Law that is attributed by the Constitution. It is the legislative's authority instead of the MK's. Third, the MK cannot adjudicate the non-petitioned case (*ultra petita*). No matter how important a certain case according to MK is, if it were not petitioned then MK could not adjudicate the case. If, however, the MK did adjudicate the non-petitioned case, then, besides violating its very principle, MK would also violate the common norm of law which stated that every petition should be well described in '*posita*'. Such norm is also included the Procedure of Constitution Court.

The idea of amending the Constitution of Year 1945 that eliminate the leveling of state institutions and, instead, turn to the authority separation system (horizontal) is to maintain the balance and mutual supervision among the state institutions. If the state institutions disregarded the principle of checks and balances, there would be no reason to choose such system to apply in the state administration.

MPR will need to reconsider the MK's authority to review a law, and ask whether to grant the MK the authority of Judicial Review (JR), Judicial Preview (JP), or both.<sup>23</sup> If it were to be the Judicial Review, then, there had to be a clearly defined provision in the Constitution of what the MK may and may not do. If it were to be the Judicial Preview, then, it had to be clearly defined that, first, whether it is an active or passive authority; second, whether such authority can be applied to all Bills or just certain Bills. As stipulated in Article 20, paragraph (5) of the Constitution of Year 1945, the MK's Judicial Preview will be useful should a problem arise. If the President did not ratify the previously discussed and agreed Bill, then the MK's authority on Judicial Preview can be useful in deciding whether the president's decision is wrong. Were both authorities (JR and JP) to be given to MK, it would be necessary to carry out an in-depth study to decide whether or not the reviewed Bill can again be reviewed after it is passed. Besides, it is also important to integrate the MA's judicial review authority to under the one roof of MK.

Third, in the frame of judiciary powers, the plurality of special judiciaries must have a clear design. After Law No. 4 Year 2004 created the one-roof policy, several special judiciaries were started to emerge such as fishery court, land court, tax court, industrial court, medical profession court, corruption act court, human rights court, and so forth. Strangely, such emergence did not at all involve the Supreme Court (MA).<sup>24</sup> There was no clarity as to where all those courts were going to and who would handle the cases.

Fourth, it is also necessary to consider the MK's authority on constitutional complaints on the fifth amendment of the Constitution of Year 1945. The Constitution does not stipulate which institution has the authority to handle and exam the cases of individual constitutional complaints, that is, complaints from a citizen who feels that his/her rights as a citizen has been infringed by public officials.<sup>25</sup>

---

<sup>23</sup> See Jimly Asshiddiqie, *Model-model Pengujian Konstitusional Di Beberapa Negara*, Konstitusi Press, Jakarta, 2005.

<sup>24</sup> *Kompas*, September 23, 2004.

<sup>25</sup> See M. Laica Marzuki, *Berjalan-jalan Di Ranah Hukum*, Buku Kesatu, Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi RI, Jakarta, 2006, page 91.

It can be seen that the revision of Law on KY, Law on MA, or Law on MK are not the answers to the chaotic law enforcement in Indonesia. The Constitution of Year 1945 has to accurately plot the design of the judiciary power in Indonesia.

## Conclusion

There is no such thing as perfect for a man's work, as perfection is only belong to Allah SWT. Therefore, the idea of re-amendment of the Constitution of Year 1945, which is simply to embrace the imperfections and enhance the previously amended Constitution, needs to get a positive response from the MPR RI. It seems that the year 2008 is the right time to start a comprehensive review on the proposals of re-amending the Constitution proposed by a number of people or by the Constitution Commission. The Constitution of Year 1945 is neither sacred like in the old time nor is it something to be taken lightly.

## References

- A. Mukthie Fadjar, *Reformasi Konstitusi Dalam Masa Transisi Paradigmatik*, In-TRANS, Malang, 2003.
- \_\_\_\_\_, *Hukum Konstitusi dan Mahkamah Konstitusi*, Konstitusi Press, Jakarta dan Citra Media, Yogyakarta, 2006.
- Bagir Manan, *Teori dan Politik Konstitusi*, FH UII Press, Yogyakarta, 2003.
- Bambang Widjojanto dkk. (Editor), *Konstitusi Baru Melalui Komisi Konstitusi Independen*, Pustaka Sinar Harapan, 2002.
- Guillermo O'Donnel, Philippe C. Schmitter dan Laurence Whitehead (Editor), *Transition from Authoritarian Rule: Prospect for Democracy*, 1986.
- Jimly Asshiddiqie, *Pergumulan Peran Pemerintah dan Parlemen Dalam Sejarah Telaah Perbandingan Konstitusi Berbagai Negara*, UI Press, Jakarta, 1996
- \_\_\_\_\_, *Model-model Pengujian Konstitusional Di Beberapa Negara*, Konstitusi Press, Jakarta, 2005.
- Komisi Konstitusi, *Buku I Naskah Akademik Kajian Komprehensif Komisi Konstitusi tentang Perubahan UUD Negara Republik Indonesia Tahun 1945*, MPR RI, Jakarta, 2004.
- Krisna Harahap, *Konstitusi Republik Indonesia Sejak Proklamasi Hingga Reformasi*, PT Grafitri Budi Utami, Jakarta, 2004.
- M. Laica Marzuki, *Berjalan-jalan Di Ranah Hukum*, Buku Kesatu, Sekretariat Jenderal dan Kepaniteraan Mahkamah konstitusi RI, Jakarta, 2006.
- Moh. Mahfud MD., *Perdebatan Hukum Tata Negara*, LP3ES, Jakarta, 2007.
- Mustofa Muchdhor (Penyunting), *Bikameral Bukan Federal*, Kelompok DPD di MPR RI, Jakarta, 2006.
- Jurnal Demokrasi & HAM*, Vol.1, No. 4, September-November 2001.
- "Dekrit Bukan Solusi", *Kompas*, 7 Juli 2006.
- Adnan Buyung Nasution, "Kembali Ke UUD 45 Antidemokrasi", *Kompas*, 10 Juli 2006.
- "Upaya Kembali ke Konstitusi Lama Harus "Dilawan", *Kompas*, 6 Pebruari 2007.
- Kompas*, 6 Maret 2007.
- Kompas*, 7 Maret 2007.
- Kompas*, 31 Januari 2008.
- Kompas*, 1 Pebruari 2008.