

# Analysis of Competence Conflict between Supreme Court, Constitutional Court, and Judicial Commission

**Prof. Dr. (Emer.) Ismail Suny, LL.M., M.C.L.\***

\*) Professor (Emer.) of Constitutional Law, University of Indonesia

## INTRODUCTION

There was only two articles regarding Charter IX on Judicial Power in the original of the 1945 Constitution of the Republic of Indonesia. Article 24 provided:

1. The Judicial power shall be implemented by a Supreme Court and such other court of law as provided by law.
2. The composition and powers of these legal bodies shall be further regulated by law.

Article 25 provided:  
The appointment and removal of justices shall be further regulated by law.

The Elucidation of the article 24 and 25 of 1945 constitution of the Republic of Indonesia provided as follows: The Judicial power is independent to such an extent that it is free from government interference. Thus, the status of judges should be guaranteed by law.

The 1945 Constitution of the Republic Of Indonesia as amended fourth times from 1999 to 2002 provided in article 1 paragraph:

1. The State of Indonesia shall be a unitary state in the form of a republic.
2. Sovereignty is in the hands of the people and is implemented according to the Constitution.
3. The State of Indonesia shall be a state based on the rule of law.

## THE RULE OF LAW

A. The Constitution it self provided in the Preamble and the Body of the constitution what is mean by the state based on the rule of law.

Paragraph one of the Preamble to the Constitution provided: Whereas independence is the inalienable of all nations, therefore, all colonialism must be abolished in this world as it is not conformity with *humanity and justice*.

Paragraph two of the Preamble to the constitution provided: And the moment of rejoicing has arrived in the struggle of the Indonesian independence movement to guide the people safely and well to the gate of the independence of the state of Indonesia which shall be independent, united, sovereign, just and prosperous.

Paragraph four of the Preamble to the Constitution provided: Subsequent thereto, to form a government of the state of Indonesia which shall protect all the people of Indonesia and all the land and its territorial integrity that has been struggled for, and to improve public

welfare, to educate the life of the people and to participate toward the establishment of a world order based on freedom, perpetual peace and social justice, therefore the independence of Indonesia shall be formulated into a constitution of the Republic of Indonesia which shall be built into a sovereign state based on a *belief in the One and Only God, just and civilized humanity, the unity of Indonesia, and democratic life led by wisdom of thoughts in deliberation amongst representatives of the people, and achieving social justice for all the people of Indonesia.*

- B. Democratic system based on the rule of law, as the opponent of the rule by decree, article 2, paragraph 1 of the Constitution stipulated the very important article on the system of democracy: The People's Consultative Assembly shall consent of the members of the House of Representatives and the members of the Regional Representatives Council who have been elected through general elections. This article not only importance because it stipulated the voice of the peoples in our democracy but also because that article is the only article voted during the amendments of the Constitution.

### THE PEOPLE SOVEREIGNTY

In the Constitution after the amendment there are several articles in the relation to "the sovereignty is in the hands of the people" (democracy). Article 6A promulgated the President and Vice President shall be elected as a single ticket directly by the people.

Article 19, paragraph 1 provided members of the House of Representatives shall be elected through general elections.

Article 22C, paragraph 1 regulated the members of the regional Representatives Council shall be elected from every province through general elections.

Article 22E, paragraph 1 stipulated the general elections shall be conducted in a general, free, secret, honest, fair and direct manner once every five years. And paragraph 2 general elections shall be conducted to elect the members of the House of Representatives, the

Regional Representative Council, the President and the Vice-President, and the Regional House of Representatives.

### JUDICIAL POWER

To complement House of Representatives (DPR), President, Supreme Court, Supreme Audit Board (BPK), the amended 1945 Constitutions formed three new decision making agencies, namely Constitutional Court, Judicial Commission and Election Commission.<sup>1</sup>

#### Judicial Power According to Article 24 of the 1945 Constitution

Chapter IX, article 24 of the amendment of 1945 Constitution regarding judicial power, declared that:

1. *The judicial power shall be independent and shall possess the power to organise the judicature in order to enforce law and justice.*
2. *The judicial power shall be implemented by a Supreme Court and judicial bodies underneath it in the form of public courts, religious affairs courts, military tribunals, and state administrative courts, and by a Constitutional Court.*
3. *Other institutions whose functions have a relation with the judicial powers shall be further regulated by law.*

#### Judicial Power according to Law No.4 the year 2004

Article 10, paragraph 2 of the Law No.4 the year 2004 provided:

- (2) Judicature agencies subordinate to the supreme court shall include judicature agencies within public judicature, religious judicature, military tribunal and public administration judicature.

Article 11 provided:

- (1) The Supreme Court shall constitute the highest state court among the four judicature institutions as meant in Article 10 paragraph (2).
- (2) The Supreme Court shall be authorized:
  - a. To judge appeal-level decisions made at the latest level by courts within all judicature subordinate to the Supreme Court;
  - b. To test legislation subordinate to the law againsts the law;
  - c. To exercise other authority granted by the law.

<sup>1</sup> See Ismail Suny, Keynote Speech Seminar National Law Development, VIIIth *Field of Politics and Security*, Bali 14-18 July 2003.

- (3) Statement that legislation as a result of the test as meant in paragraph (2) letter b does not apply can be made in both appeal examination and on the basis of direct application to the Supreme Court.
- (4) The Supreme Court shall conduct the highest supervision over actions of judicature within subordinate judicature on the basis of the provisions of the law.

**SUPREME COURT**

The supreme court according to article 24A of the 1945 Constitution

According to article 24A of the 1945 constitution:

- (1) The Supreme Court shall have the authority to hear a trial at the highest level of cassation, to review ordinances and regulations made under any acts, and shall possess other authorities as provided by law.
- (2) Each justice of the Supreme Court must possess integrity and an honourable personality, shall be fair, professional, and possess legal experience.
- (3) Candidate justices of the Supreme Court shall be proposed by the Judicial commission to the House of Representatives for approval and shall subsequently be formally appointed to office by the President.
- (4) The chief and deputy chief of the Supreme Court shall be elected by and from the justices of the Supreme Court.
- (5) The structure, status, membership, and judicial procedure of the Supreme Court and its subsidiary bodies of judicature shall be further regulated by law.

**Supreme Court according to the Law No. 5 the year 2004**

The Law of No 5 the year 2004 provided on the change on the law no. 14 the year 1985 on the Supreme Court, article 30 provided:

- (1) The Supreme Court shall annul verdicts or stipulations of all other courts because of the following reasons:
  - a. The courts have had no authority or have decided something beyond their authorities;
  - b. The courts have misapplied or violated the laws in force;
  - c. The courts have failed to comply with the conditions required by the laws threatening the failure by canceling the issued verdicts.

- (2) In the deliberation session, each justice must convey his or her consideration or opinion in writing on the examined cases and such consideration or opinion will become an inseparable part of the verdicts.
- (3) In the case that the deliberation session does not reach a consensus, differences of opinion must be contained in the verdict
- (4) Further enforcement of the provisions of paragraphs (2) and (3) will be stipulated by the Supreme Court.

The rule of the article 31 will be changed, and will be written as follows:

Article 31:

- (1) The Supreme Court is authorized to evaluate regulations lower than laws in adjustment to the laws.
- (2) The Supreme Court shall declare inapplicable all regulations lower than the laws with reason that such regulations are in contradictions with the higher regulations or the arrangement of which does not comply with the applicable rulings.
- (3) Decisions regarding inapplicability of the regulations as mentioned in paragraph (2) may be made either in relation to examination in the cessation level or based on direct requests to the Supreme Court.
- (4) The regulations declared inapplicable as mentioned in paragraph (3) will not have legal power.
- (5) The decision as mentioned in paragraph (3) must be published in the State Gazette of the Republic of Indonesia within thirty (30) working days since declaration of the decision, at the latest.

Between article 31 and 32 will include 1 new article, that is paragraph 31A as follows:

Article 31A:

- (1) Request for the evaluation of regulations which are lower than the laws in adjustment to the laws shall directly be submitted by the applicant or his or her proxy to the Supreme Court and made in writing in the Indonesian language.
- (2) The request shall at least contain:
  - a. Applicant's name and address;
  - b. Reasons and:
    - 1) Paragraphs, Articles, and / or parts of the regulations which breach the higher regulations; and/or
    - 2) Regulation which are arranged not in compliance with the applicable rulings.
  - c. Matters to be decided.

- (3) In the case that the Supreme Court has an opinion that the applicant or his or her request is unqualified, content of the verdict must state that the request is not accepted.
- (4) In the case that the Supreme Court is in the opinion that such request is reasonable, the content of the verdict must indicate that the request is accepted.
- (5) In the case that such request is accepted as mentioned in paragraph (4), the content of the verdict must indicate which paragraphs, Article and / or parts of the regulations are in contradiction with the higher regulations.
- (6) In the case that the regulations are not in contradiction with the higher regulations and / or the arrangement of those regulations is not in contradiction, the content of the verdict shall indicate that the request is rejected.
- (7) Further provisions regarding the evaluation of regulations lower than the laws will be stipulated by the Supreme Court.

Article 35 is amended to become as follows:

Article 35:

The Supreme Court shall convey its legal considerations to the President in requests for clemency and rehabilitation.

Between article 45 and paragraph 2 on General Judicature, a new Article, namely Article 45A is inserted and it reads as follows:

Article 45A:

- (1) The Supreme Court shall examine cases qualified to be submitted to cessation level, except cases which submission, pursuant to this Law, is limited.
- (2) The excepted cases as mentioned in paragraph (1) consist of:
  - a. Court verdict on pretrial;
  - b. Criminal cases threatened by an imprisonment of one (1) year at the maximum and/or penalty payment;
  - c. Constitutional cases which objects of the lawsuits are decisions of regional officials applicable in the pertinent regions.
- (3) The request for cessation of the cases as mentioned in paragraph (2) or cessation request which does not comply with the formal conditions shall be declared not accepted by virtue of stipulation of chief of the lower court; and documents of the cases shall not be delivered to the Supreme Court.

- (4) The stipulation of chief of the lower court as mentioned in paragraph (3) cannot be petitioned.
- (5) Enforcement of the provisions of paragraphs (3) and (4) will be further stipulated by the Supreme Court.<sup>2</sup>

## CONSTITUTIONAL COURT

### Constitutional Court according to the 1945 Constitution

Article 24C:

- (1) The Constitutional Court shall possess the authority to try a case at final and binding and shall have the final power of decision in reviewing laws against the Constitution, determining disputes over the authorities of state institutions whose powers are given by this Constitution, deciding over the dissolution of a political party, and deciding over disputes on the results of a general election.
- (2) The Constitutional Court shall possess the authority to issue a decision over a petition concerning alleged violations by the President and / or the Vice-President as provided by the Constitution.
- (3) The Constitutional Court shall be composed of 9 (nine) persons who shall be constitutional justices and who shall be nominated by the Supreme Court, 3 (three) nominated by the House of Representatives, and 3 (three) nominated by the President.
- (4) The chief and deputy chief of the Constitutional Court shall be elected by and from the constitutional justices.
- (5) Each constitutional justice must possess integrity and a honourable personality, shall be fair and be a statesman who has a command of the Constitution and the public institutions, and shall not hold any position as a state official.
- (6) The appointment and removal of constitutional justices, the judicial procedure, and other provisions concerning the Constitutional Court shall be further regulated by law.

### Constitutional Court according to law no. 24 the year 2004

Article 10 of the law no. 24 the year 2004 provided:

<sup>2</sup> See Ismail Suny, *Amendment Agenda of the 1945 Constitution in Plan and Think on National Law Amendment*, Publish by Law Expert Team, Department of Law and Human Rights Republic of Indonesia, 2nd edition, 2002

- (1) The Constitutional Court is authorised to hold trials at the first and final stage and will produce final decisions on the following:
  - a. Review of laws against the 1945 Constitution of the Republic of Indonesia;
  - b. Dispute settlement over the powers of state institutions whose authorities are mandated by the 1945 Constitution of the Republic of Indonesia;
  - c. Dissolution of political parties; and
  - d. Disputes on the results of general election.
- (2) The Constitutional Court is obliged to decide upon DPR's opinion in the case when the President and/or Vice-President is suspected of violating the law through an act of treason, corruption, bribery, other serious criminal offences, or through moral turpitude and/or no longer meet qualifications to serve as President and/or Vice-President as stipulated in the 1945 Constitution of the Republic of Indonesia.
- (3) The provisions as stated in sub article (2) comprise the following:
  - a. Treachery against the state is a crime against national security as regulated in the prevailing laws.
  - b. Corruption and bribery are corruption or bribery defined in the prevailing laws.
  - c. Other serious criminal offences are crimes with penalties of 5 (five) years imprisonment or more.
  - d. Moral turpitude is behaviour which may disgrace the credibility of President and/or Vice-President.
  - e. President and/or Vice-President no longer meets the qualifications as stipulated in Article 6 of the 1945 Constitution of the Republic of Indonesia.

**Article 11:**

To execute authorities as stipulated in Article 10, the Constitutional Court is authorised to summon state officials, government officials, or the community members to provide information.

**The Role of the Constitutional Court**

According to report submitted by the Chairman of the Constitutional Court, from the five authorities have been implemented 86 cases of the review of the law, 81 of that has been decided. "On disputes on the results of general election nearly 500 cases have been decided. Another cases on determining disputes over the authority of state

*institution have been decided, the Regional Representative Council, the House of Representatives and the Supreme Audit Board. Another two authorities, that is the dissolution of party and the Presidential impeachment where are no case yet."*<sup>3</sup>

**JUDICIAL COMMISSION**

**Judicial Commission According to Article 24A of the 1945 Constitution**

In the article 24A on the Judicial Commission provided:

- (3) Candidate justices of the Supreme Court shall be proposed by the Judicial Commission to the House of Representatives for approval and shall subsequently be formally appointed to office by the President.

**Judicial Commission According to Article 24B of the 1945 Constitution**

In the article 24B provided:

- (1) There shall be an independent Judicial Commission which shall possess the authority to propose candidates for appointment as justices of the Supreme Court and shall possess further authority to maintain and ensure the honour, dignity and behaviour of judges.
- (2) The members of the Judicial Commission shall possess legal knowledge and experience and shall be persons of integrity with a honourable personality.
- (3) The members of the Judicial Commission shall be appointed and removed by the President with the approval of the House of Representatives.
- (4) The structure, composition and membership of the Judicial Commission shall be further regulated by law.

**Judicial Commission According to Law no. 22 the year 2004**

Article 13 of the Judicial Commission provided the authority as follows:

- a. Propose the appointment of Supreme Judges to the DPR; and
- b. Uphold the honor and dignity of judges and control their attitudes.

Article 14 provided:

- (1) In carrying out the authority as meant in Article 13 letter a, the Judicial Commission is tasked to:

<sup>3</sup> Chairman of the Constitutional Court of the Republic of Indonesia, *Kompas*, 15 August 2006  
<sup>4</sup> *Republika*, 24 August 2006.

- a. Register Supreme Judge candidates;
  - b. Select Supreme Judge candidates;
  - c. Establish Supreme Judge candidates;
  - d. Propose Supreme Judge candidates to the DPR.
- (2) When the term of office of Supreme Judges expires, the Supreme Court shall send the Judicial Commission a list of relevant Supreme Judges in no more than 6 (six) months before the term of office expires.
- (3) The tasks as meant in paragraph (1) shall be executed in no more than 6 (six) months after the Judicial Commission has received a notification from the Supreme Court about the vacant post of Supreme Judges.

Although the amendment of the 1945 Constitution already give constitutional guarantee for the Judicial Power, not with standing there are many that must be done for the achievement of the state idea of just and prosperous, among other:

First, as soon as possible to finalize conflict between Judicial Commission and Supreme Court. The Decision of the Constitutional Court No. 005/PUU-IV/2006 on Review of law No. 22 the year 2004 on Judicial Commission and Review of law No. 4 the year 2004 on the Judicial Power to confront with the Constitution of the Republic of Indonesia,<sup>5</sup> must be brought the House of Representatives and the Government to finish the problem between the both constitutional institution in field of Judicial Power.

From what already above discussed could be concluded that in reality there no sharp conflict in the field of the Judicial Power, between the Supreme Court, the Constitutional Court and the Judicial Commission. That because every institution has their own function to enforce law and justice. The Judicial Commission have the function to ensure the uphold of law and justice are the individual that ensure.

Second, need to increase court management in every institution. Supreme Justice at the Supreme Court (1997-2001) Henry Pandapotan Panggabean in his book *Fungsi Mahkamah Agung dalam Praktek Sehari-Hari* (The Supreme Court Function in Every Day Practice) writes:

*This book has been writing with one idea, that the weakness in the working of the Supreme Court nowadays not because of less effective of court*

*management, however also the effect of system of government against the strategy to enforce law and justice.*<sup>5</sup>

Speaking on increasing court management, necessary to take means for:

#### Means for minimizing arrears of cases

There are must be limitation for the Supreme Court to try all the cases submitted to them. Not all of the case must be decided by the Supreme Court without to see money inforce in the case.

In the review of the regulations, only one level below the law could be asked for review. Limitation is need that not all of the small amounts of cases must reach the Supreme Court.

#### Many decisions of the Judge is not clear

Prof. Mardjono Reksodiputro, S.H. estimated that many decision of the judge of the Court, even in the Supreme Court not clear. Many of the decision are brief, especially in putting the legal interpretation with fact and argumentation every sides.

*This made the people not satisfy with the decision, that for the judge must begin to study making legal reasoning in detail. This must be part of responsibility of judge. Every Supreme Court judge begin with training legal reasoning in importance matter. With one decision that could be responsible decision of judge could not be desputed.*<sup>6</sup>

#### ENDING

In the framework to increase the judicial power ensured by the constitution, I would like to remind the words of Chief Justice William H. Rehnquist, who begin his career as a clerkship will Supreme Court Justice Robert Jackson at January 1952 in Washington, D.C., at last Rehnquist had serves as an associate justice of the Supreme Court, and succeeded Warren Burger and became the sixteenth Chief Justice of the United States. In Preface of his book *The Supreme Court, How It Was How It Is* he writes:

*"Alexander Hamilton writing in No.78 of the Federalist Papers, described the Supreme Court of the United States as "the least dangerous" of the three branches of the federal government. Whether or not the passage of time has proved that the Supreme Court is the least understood of the three branches."*<sup>7</sup>

<sup>5</sup> Henry P. Panggabean, *The Supreme Court Function in Every Day Practice*, Jakarta: Pustaka Sinar Harapan, 2001.

<sup>6</sup> See Mardjono Reksodiputro, *The Court: Many Decisions of the Judge is not clear*, Kompas, 2 Agustus 2006

<sup>7</sup> William H. Rehnquist, *The Supreme Court, How It Was How It Is*, New York, 1987.