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Shift of Political Determination upon Law in Indonesia

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Abstrac
During the Dutch Colonial Government until the end of the era of President Soeharto, law in Indonesia was a crystallization of political intentions interacting mutually and even competing each other, so that politics became determinant upon the law. Begins during reformation, the shift in political determination started to occur upon the law. Tidal of testing right to rules of law is significant influence to determinant upon the law. Since the establishment of Constitutional Court of the Republic of Indonesia in 2003, testing towards rules of law can be conducted below the law upon the law. Through the Testing Right to Rules of Law, the law becomes more determinant upon politics.
Keywords: Politics, Law, Testing Right to Rules of Law

Cambio de determinación política sobre la ley en Indonesia

Resumen

Durante el gobierno colonial holandés hasta el final de la era del presidente Soeharto, la ley en Indonesia era una cristalización de intenciones políticas que interactuaban entre sí e incluso competían entre sí, de modo que la política se volvió determinante sobre la ley. Comienza durante la reforma, el cambio en la determinación política comenzó a ocurrir sobre la ley. La marea de probar el derecho a las reglas de la ley es una influencia significativa para el determinante de la ley. Desde el establecimiento del Tribunal Constitucional de la República de Indonesia en 2003, las pruebas de las normas de derecho se pueden realizar por debajo de la ley sobre la ley. A través de la Prueba del Derecho a las Reglas de la Ley, la ley se vuelve más determinante sobre la política.
Palabras clave: política, derecho, prueba del derecho a las reglas del derecho

A. Introduction

Law and politics are parts of social life, in which their existences are closely related just like two sides of a coin that will be impossible to be separated. Based on this reality, Curzon as quoted by Achmad Ali states that "the close connections between law and politics, between legal principles and the institutions are obvious…". The said Curzon's opinion, explaining his outlook about law and politics that they have very principal and real closeness, and also that the law cannot be separated from the influence of politics (Achmad Ali, 2002). Even, Mahfud MD declares that law without politics (in the sense of power) is just a wishful thinking or imagination, whereas politics (in the sense of power) without law is a despotism (Moh. Mahfud MD-1, 1999).

In the respect of relationship between law and politics, there are at least 3 (three) forms of configurations explaining the relationship between both of them (law and politics). First, law is more determinant upon politics, in the sense that the political activities are regulated by and shall obey to the rules of law. Second, politics is more determinant upon law, because law is a result or crystallization or the political wills mutually interacting and even mutually competing to each other. Third, law and politics as sub-system of community lies on a place whose determination degrees are balanced to each others, because although law is a product of political decision, but as soon as the law comes to exist, all the political activities have to obey to the rules of law (Moh. Mahfud MD-2, 2009).

Since the beginning of the establishment of the State of Indonesia, it is undeniable that politics is always stronger and more powerful than other fields, including the law. However, in line with the development of concept of modern state, it seems that the influence of political power has lost its effectiveness although in each legal rule still uses political mechanism to form it. A shift of concept has occurred from the law establishment through the political process at the current period compared to that in the past period, in which the openness of the room for each citizen to test the validity of a rule of law, either formally or materially at the judicial institution (judicial review), in order to confirm and at the same time to guarantee that the rules of law constituting the said political product has been in conformity with the higher rules of law and the citizen rights.

The presence of the said right to test (toetsingsrecht), essentially constitutes a logical consequence of the legal state system (rechtsstaat and rule of law) which is almost used by all countries, including Indonesia. Whereas the legal state system in Indonesia is constitutionally confirmed in Paragraph (3) of Article-1 of Constitution of The Republic of Indonesia the year 1945 stating as follows, 'The State of Indonesia is a legal country'. In this way, the law practically shall be placed at the highest position above the power and the ruler himself. It is because every power of the state and authority of each ruler are always stated at the rules of law the so-called 'Constitution' (Supremacy of the Constitution). Therefore, there is no power Institution available above the constitution, including the political mechanism itself which is also specified in constitution, and described in lower rules of law (lex inferior).

According to Daniel S Lev, "the most determinant things in legal process are the concept and structure of political power, namely that the law either more or less always becomes a political tool, evolution of political ideology, economy, social and the like" (Daniel S. Lev, 1990). Daniel S Lev's opinion can be understood that although such legal process is not identical to the establishment goal of law, but in practice the process and dynamics of law establishment undergo the same things, namely concept and structure of politics applicable in community which is very determinant in the establishment of legal products.

In order to see the determination degree of politics and of the law, it can be analyzed from the 'das sollen' and 'das sein' perspectives (Moh. Mahfud MD-1, 1999). From das sollen perspective, the law is determinant upon politics, because each political agenda must obey to the rules of law. This thesis is strengthened by opinion of the idealist group who declares that the law must be capable of controlling and engineering the community development, including its political life. From the das sein perspective, politics is determinant upon the

law, because in reality, the law is a product of politics, so that whatever law is available before us, is just the crystallization of the political wills mutually compete each other. Starting from this outlook, each product of law will be very much determined or colored by the balance of power or political configuration which establishes it. Therefore, in this respect, it is very clear that politics will be very determinant upon the law.

Based on the outlooks in das sein perspective above, Mahfud MD conveys a thesis that "Democratic political configuration always produces the legal products with the responsive characteristics, while the authoritarian political configuration produces the legal products with the conservative nature" (Moh. Mahfud MD-2, 2009). In line with this matter, Satjipto Rahardjo confirmed that "The law nowadays has become a means full of political decisions (Satjipto Rahardjo, 2004). And Soetandyo Wignjosoebroto is also in the opinion that "Law as a product of legislative body, is actually not in neutral nature in its real sense, because in its process it is full of aspirational contents and entrusted political interests (Soetandyo Wignjosoebroto, 2008).

The establishment of law is always influenced by political power. Even, the interests of certain political elites accompany the establishment of law itself. In this way, the law is not neutral from the interests of a group of people entrusting them into its establishment process.

B. Methodology

Viewing Using normative juridical method of study, and statute and concept approach, an overview of cconfiguration between law and politic in Indonesia will be obtained.

C. Tidal of Testing Right to Rules of Law

In a concept of modern state, each state develops a rule of law (rechtsstaat) system in order to give a protection guarantee to the citizen rights. The principle of rechtsstaat is intended to give a limitation to the political power in a state in order not to be more dominant than the others. Therefore, the fundamental principal of a rechtsstaat is the existence of power separation (scheiding van machten), so that the activity of mutual supervising and mutual balancing will occur in holding the state life.

In a rechtsstaat there is no political strength or power which is more dominant than the law, even the ruler who runs the government shall obey to the law. Therefore, each establishment of law shall reflect protection to the rights of citizen and not merely reflects the political interests of a certain ruler. Because, in modern rechtsstaat, the law maker no longer stays above the law just like the concept of

the previous king's sovereignty, but each law maker based on self binding principle shall obey to and comply with and bound to the law he has made.

Those sense gave birth to concept of the right to test (toetsingsrecht) upon the legal product established within the political mechanism at the legislative institution and other institution given the authority to set up the rules of law including the establishment of local regulation (local wet). Protection to the rights of the citizen by giving the opportunity to each citizen to test the rules of law potentially cause the loss for himself.

During the Dutch Colony in Indonesia, the Dutch East Indies legal system did not give the rights to test the rules of law for the judges, as confirmed in Article 20 of Algemene Bepalingen van wetgeving voor Indonesie (S.1847-23): De regter moet volgens de wet regspreken. Behoudens het bepaalde bij art. 1 msg hij in geen geval de innerlijke waarde of de billijkheid der we beoordelen.

After proclamation of independence of the State of Republic of Indonesia in the year 1945, the rights to test the rules of law began to be known during the RIS (United States of the Republic of Indonesia). During that era, the Supreme Court was given the authority to declare that the law established by a state was unconstitutional. As stipulated in Paragraph (1) of Article-156 of the RIS Constitution determining that: If the Supreme Court or the other courts adjudicating in the civil case or in the case of civil penalty, assume that a provision in constitutional regulation or the law of a state in controversy with RIS Constitution, the judgment in that case was firmly declared unconstitutional. But the Federal Law itself cannot be contested as stated on Paragraph (2) of Article-130 of RIS Constitution.

During the enactment of Temporary Constitution the year 1950, the law could not be materially tested by the Supreme Court as stipulated by Paragraph (2) of Article-95 of Temporary Constitution 1950.

In the year 1970 (in the era of President Soeharto government), by virtue of Paragraph (1) of Article-26 of the Law No. 14 the year 1970 on Principles of Judicial Power, the Supreme Court is given the authority to declare invalid all rules of law lower than the law, if they are in controversy with the higher rules of law. However in practicality it is not being well conducted, due to:

1. In order to perform testing right to rule of law under law several things that become obstacle are required, they are:

a. It only applied towards rule of law lower than the law.

b. Decision from testing right to rule of law only able to conducted at the cassation level

c. Cancellation towards tested rule of law are conducted by relevant institution.

2. Power distribution on state administration are focused on parliament

under influence of executive, where judicial power are also included.
During reformation era after the Amendment to the 1945 Constitution, based on Paragraph (1) of Article-24A of Constitution of The Republic of Indonesia the Year 1945, "The Supreme Court is authorized to adjudicate at the cassation level, test the rules of law below the law upon the law....." The similar provision is also stated at Article-31 of Law No. 5, the year 2004 on Amendment to Law No. 14 the year 1985 on the Supreme Court stating as follows, "The Supreme Court has the authority to test the rules of law below the law upon the law." Whereas the one who deserves the right to convey such a test, according to the provision of Paragraph (2) of Article-31A of Law No. 3 the year 2009 on the Second Amendment to Law No. 14 the year 1985 on Supreme Court is each citizen who considers his right harmed by the enactment of rules of law below the law. The rules of law below the intended law if it refers to Article-7 and Paragraph (1) of Article-8 of Law No. 12 the year 2011 on the Establishment of Rules of Law covers the Government Regulation, President Regulation till Regional Regulation or even Regulation of Head of the Village.
In Indonesia, the concept to test the law completely is identified by the establishment of Constitutional Court on the third (3rd) amendment to Constitution of The Republic of Indonesia the Year 1945 held in 2001. This is confirmed in Paragraph (1) of Article-24C of the Constitution of The Republic of Indonesia the Year 1945, one of which specified that the Constitutional Court is authorized to adjudicate in the first and final instance of court whose judgment is final to test the law to the Constitution. In line with such provision, item a of Paragraph (1) of Article-10 of Law No. 24 the year 2003 on the Constitutional Court also specifies, "The Constitutional Court is authorized to adjudicate in the first and final instance of court whose judgment is final to test the law to the Constitution of The Republic of Indonesia the year 1945."
In reference to the said provision, the presence of political mechanism in establishment of a law does not influence the legal state principle which places the law above all powers of the state. Because, the political mechanism to establish and ratify the said law remains supervised by the legal mechanism at the judicial institution and can be filed by the whole citizens whose constitutional rights are harmed by the enactment of a law. Politics is no longer in power or more determinant upon the law, but it is on the contrary that the law is more determinant upon politics.
The aforesaid provisions constitute a confirmation that politics is no longer in power upon the law although in the establishment of law it must pass through a political process or political mechanism. Because, the other power is given an authority to carry out "checks and balances" by means of testing the rules of

law as political products. In this way, in practice, a certain political interest will be getting weaker in line with the presence of the testing right (toetsingsrecht) of the citizens in order to confirm that their rights will not be harmed by enactment of rules of law which are full of certain political nuance inside.

Based on the above description, ever since 2003 in a legal state of Indonesia, politics is no longer more determinant upon the law although the law establishment process since the legislative initiation until law making process is carried out through the political mechanism. Because, the political institution which is given the authority to establish the rules of law is no longer free to pour a certain political interests into the rules of law they have made. This is due to the presence of the contesting right (toetsingsrecht) to each rule of law considered harmful or even potentially harms the citizen rights guaranteed by the state constitution.

D. Conlusion

The law is more determinant upon politics is reflected by existence of the testing rights (toetsingsrecht) by the citizens conveyed through the testing mechanism at the judicial institution (judicial review). Which the judicial institutions consisting of Constitutional Court and the Supreme Court of The Republic of Indonesia are given the authority to carry out the testing legally to the rules of law established through the political mechanism. Based on this subject, a certain political interests poured into the rules of law will automatically loose its footing pedestal, because it is potentially annulled by the judicial institution (Constitutional Court or Supreme Court) if the enactment of such rules of law harm the citizen rights guaranteed by constitution and if the rules of law are proven to be in controversy with the higher rules of law (lex superior).

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