

## CHAPTER II

### LITERATURE REVIEW

#### A. Theory of Constitution and Law Enforcement

##### 1. Theory of Constitution

Constitution is the basic law that the fundamental basis of the practice of the state. According to Bryan Thompson, the simple question of “*what is a Constitution*” that can will be answer is “*a Constitution is a document which contains the rules for the operation of an organization*”.<sup>16</sup> The definition of organization in that statement is various, namely: student university organization, politic organization, the organization of societies and etc. All of them need the basic document which is call as a constitution. Also for the state, generally always have a basic document which is mentioned as a constitution.<sup>17</sup>

According to Indonesian dictionary the meaning of constitution is all of provision and regulation regarding the constitutional system. According to Wirjono Projodikoro, the term of constitution come from French Language (*Constituer*) which means is form. The use of the term constitution is intended to construct and declare a state. While the term of “Undang-Undang Dasar” in Indonesia that is translated from the “*Gronwet*” (Dutch language). The meaning of “*Wet*” in Indonesian is law, and the meaning of “*Ground*” is basic.

---

<sup>16</sup>Timky Aschiddiqie, 2011, *Konstitusi dan Konstitusionalisme Indonesia*, Jakarta, Sinar Grafika, p. 16

Constitution is all of provision and rule regarding the structure of state. In general, the constitution contains three main paragraphs, namely:<sup>18</sup>

- a. The guarantee of human rights of the citizens.
- b. The enactment of constitutional structure of state.
- c. The division and restrictions constitutional duties.

Every constitution always put the authority as the center of attention, because basically the authority has to be regulated and has to be limited. Generally, the limitation of authority is reputed as common mode of constitution. The important issue in every constitution is the regulation regarding on the supervision or the limitation of the government authority.

According to William G Andrews's the constitution such as:<sup>19</sup>

"The Constitution imposes restraints on government as a function of Constitutionalism, but it also legitimizes the power of the government. It is the documentary instrument for the transfer of authority from the residual holders (the people under the democracy or the king under monarchy) to the organs of state power"

Also according to Thomas Paine stated that Constitution also has a function as a national symbol.<sup>20</sup>

"It may serve instead of the king in that ceremonial function of exemplifying the unity and majesty of the nation. Or it may exist alongside the monarch, embodying capacity that Constitution are trundled about the country in shiny aluminums railroad trains under armed guard and exhibited to all comers"

## 2. Theory of Law Enforcement

The concept of law enforcement is not new. Since the beginning of recorded time, there have been people appointed to maintain the standards and rules of the tribe or other society. For example, ancient Chinese culture used a system involving prefects or protectors who were assigned by the ruling government. The role of the prefect was to protect the general public, hear the facts regarding alleged criminal activity, and impose fines or other forms of punishment as deemed appropriate.

Law enforcement is the collective term for professionals who are dedicated to upholding and enforcing the laws and statutes that are currently in force in a given jurisdiction. There are law enforcement jobs that focus on local settings, while others are focused more on upholding and enforcing national laws. In addition to enforcing laws, the function of legal enforcement also involves managing the punishment process for people who are convicted of crimes, up to and including managing the process of incarceration.

Law enforcement broadly refers to any system by which some members of society act in an organized manner to enforce the law by discovering, deterring, rehabilitating or punishing persons who violate the rules and norms governing that society. Although the term may encompass entities such as courts and prisons, it is most frequently applied to those who directly engage in patrols or surveillance to dissuade and discover criminal activity, and those who investigate crimes and apprehend offenders. Furthermore, although law enforcement may be most

concerned with the prevention and punishment of crimes, organizations exist to discourage a wide variety of non-criminal violations of rules and norms, effected through the imposition of less severe consequences.

Most law enforcement is conducted by some type of law enforcement agency, with the most typical agency fulfilling this role being the police. Societal investment in enforcement through such organizations can be massive; both in terms of the resources invested in the activity, and in the number of people professionally engaged to perform those functions. Law enforcement agencies tend to be limited to operating within a specified jurisdiction.

Law enforcement in concretely is the entry into force of positive law as it should be obeyed. Therefore, give justice in a case it is means that decide a case trough applying the law and also found the law *in concreto*. It is in maintaining and guaranteeing the substantive law obeyed trough using the procedural law which is determined by formal law.<sup>21</sup> According to Satjipto Rahardjo law enforcement is a process to realize the desires of law becomes a reality. The desire of law it is means that the legislator body minds which are codified on the regulation and laws. The making process of law also determined how law enforcement implemented.<sup>22</sup>

Law enforcement is an efforts to uphold and establishment the legal norms in reality as a guide of behavior of citizen in legal relations in the social life and

<sup>21</sup> Sirajuddin, 2007. *Komisi Pengawasas Penegak Hukum*, Malang Jawa Timur. Malang Coorruption Waath. p. 24

<sup>22</sup> Satjipto Rahardjo, 1983. *Masalah Penegakan Hukum*, Bandung. Sinar Baru. p. 24

state. Based on the subject of law enforcement, it can be exercised through broad subject and also can be exercised by limited and narrow subject. In the broad meaning of law enforcement is involve all of subject of laws in any legal relationship. Anyone who runs a normative rule, do something or don't do something based on legal norm and positive laws means that they enforce the rule of law. In the narrow meaning it only an effort from some apparatus to guarantee and ensure the law implemented in the citizen in line with law in the book. In implemented of laws the apparatus could be using the compulsively act to ensure that laws.

Based on the subject law enforcement, the definition of law enforcement is justice values contained in formal rules life in the community and citizen. In the narrow meaning, law enforcement it is related to the legal formal and written law only. From the definition above, it is clearly that the meaning of law enforcement is an efforts exercised to implement the rules in the broad and narrow meaning as a guide of behavior in all of legal action. It is trough all of subject of law as well as the laws apparatus which was given authorities and duties by the legislation to guarantee the legal norm implemented in the citizen.

Law enforcement apparatus in narrow meaning is including the law enforcement agencies involved in the enforcement of the law itself, starting from witnesses, police, attorneys, prosecutors, judges, wardens and correctional officers. Each apparatus and associated apparatus also includes the parties concerned with the task or role that is associated with activity reporting or

complaint, inquiry, investigation, prosecution, evidence, sentencing and sanctions, as well as the efforts of correctional return (resosialisasi) of the convict.

Law enforcement also includes other professionals who manage some aspect of the containment, punishment, and possible rehabilitation of criminals. Employees of state and federal penal systems are considered to be members of the law enforcement community. In like manner, private detectives are also often viewed as being associated with legal enforcement. Probation officers, district attorneys, and court judges are also enforcement professionals who help to protect the rights of all citizens and seek to minimize the incidence of crime within society.

In the process of law enforcement apparatus operation, there are three important elements that influence, namely: (i) law enforcement agencies along with a variety of devices supporting infrastructure and institutional mechanism of action; (ii) work culture associated with the apparatus, including the welfare, and (iii) supporting both sets of rules that govern the performance of its institution and legal materials are used as working standards, both its material legal or procedural law.

However, in addition outside of three factors above, actually the complaint relating to the performance of law enforcement in our country so far, it is still need a more analysis. Law enforcement it is only one element of the over all of problem for our state as a rule state which aspires and social justice for all of

Indonesian citizen. According to Soerjono Soekanto the main problem of law enforcement actually lies in the factors that may influence, namely:<sup>23</sup>

- a. Factors of laws itself in the form of legislation.
- b. Factors of law enforcement, the parties who perform and apply the law.
- c. Factor of facilities to support the law enforcement.
- d. Social factors, the environment of law enacted or implemented.
- e. Cultural factors, namely as a result of works in the social life.

## **B. Constitutional Court**

### **1. The History of Constitutional Court**

The idea of the establishment of the Indonesian Constitutional Court, basically has been appeared at the session of Committee for Preparatory Work for Indonesia Independence (BPUPKI) in 1945, when the second session of formulating the draft of 1945 Constitution. Muhammad Yamin as proposed that Indonesia need to establish the Constitutional Court that has an authority to examine the laws against 1945 Constitution, but his idea was rejected by Soepomo. The reason of rejection to Muhammad Yamin opinion, namely:<sup>24</sup>

- a. There was no approval between the constitutional legal experts regarding on this issue.

<sup>23</sup> Soerjono Soekanto, 2008. *Faktor-Faktor Yang Mempengaruhi Penegakan Hukum*. Jakarta. Rajawali Press. p.5

<sup>24</sup> Suhartono, 2003. *Mahkamah Konstitusi Lembaga Negara Baru Pengawal Konstitusi*, Jakarta.

- b. The problem about either law against with the constitution or not, generally it is not juridical problem but more political problem.
- c. There was judicial review authority of the Supreme Court as the consequence of Trias Politica that was not adopted by the constitution which was prepared by BPUPKI. Because of that, it was not appropriate if the legislative power (law maker) supervised by judicial power.
- d. The legal experts did not have any experience about this issue, so it is not time for the young Indonesia state to establish the Constitutional Court.

Then the idea of Constitutional Court establishment gradually disappears. But it was appeared again during the enactment of the Temporary Constitution (UUDS) in 1950. Meanwhile, it had not been realized. During the new order regime, the idea of Constitutional Court establishment appeared since various association, including the Association of Indonesian Judges (IKAHI) and the Indonesian Bar Association (PERADI), but however it same difficult to realized.

The emergence of political reform in Indonesia 1998, has forced the People's Consultative Assembly (MPR) in 1999 to accomplish amendment of 1945 Constitution. Then there was a massive amendment of the 1945 Constitution. This is accordance with the authority of People's Consultative Assembly based on Article 37 of 1945 Constitution. Until today, the 1945 Constitution has been amended four times. In the Third



Amended of 1945 Constitution the establishment of Constitutional Court becomes one of the results. By having this, it is expected that the court will check and important rule in upholding rule of law and democracy in Indonesia.<sup>25</sup>

Constitutional legal experts, Mahfud explains that the history of Constitutional Court establishment was started from the reform era in 1990. As we know at the time there was no institution has an authority to nullify the law which is against 1945 Constitution. In addition in Indonesia, President can be impeaching by political reason. In other word Indonesia need to have an institution to settle the issue. Therefore in August 2003, Constitutional Court established.<sup>26</sup>

In the context of judicial power, the amendment of 1945 Constitution has delegate to nine judges of Constitutional Court to guard the 1945 Constitution also to protect the constitutional rights of citizens.<sup>27</sup> The explanation regarding on the judge position of Constitutional Court regulated in Article 24C Paragraph 3, stated that "the Constitutional Court has nine members of the Constitutional judges assigned by the President,

---

<sup>25</sup> *Ibid.*, p. 11

<sup>26</sup> Mahfud MD, 2009. *Berdirinya Mahkamah Konstitusi Amanat Konstitusi*, Jakarta. *Jurnal Konstitusi*, No.27. p. 48

<sup>27</sup> Abdul Mukti Fajar, 2006. *Hukum Konstitusi dan Mahkamah Konstitusi*, Jakarta. Konstitusi Press. p. 109

who presented three persons by Supreme Court, three persons by DPR, and three persons by President”.<sup>28</sup>

In the Article 24 Paragraph 2 of 1945 Constitution explains that the judicial power implemented by a Supreme Court and the court under the Supreme Court, namely: General Courts, Religious Courts, Military Courts, State Administrative Courts and the Constitutional Court. This means that the judicial power is an integrated system conducted by the Supreme Court and Constitutional Court which are consider as the supreme institution based on 1945 Constitution.

## 2. The Position, Authority and Obligation of Constitutional Court

As a judicial power, the Constitutional Court is an independent organ in implementing its power to settle any constitutional disputes. The Constitutional Court held a judicial function to enforce law and justice based on Pancasila and the 1945 Constitution. The Constitutional Court decision is final and binding. It also has to be implemented by anyone, including other state institutions.

The Third Amendment of the 1945 Constitution determines that the Constitutional Court is one of state institutions that have equal position with other state institutions, such as the MPR, DPR, President and Supreme Court. As stated in Article 24 Paragraph 1 of 1945 Constitution

---

<sup>28</sup>Harjono, 2008. *Konstitusi Sebagai Rumah Bangsa*, Jakarta. Sekretariat dan kepaniteraan Mahkamah Konstitusi. p. 124

stated that the Constitutional Court is a judicial institution besides Supreme Court which implements of judicial power as an independent power to uphold law and justice. The existence of Constitutional Court affirms that the Indonesian constitutional system has adopted the principle of separation of powers and checks and balances system.

Based on 1945 Constitution the Constitutional Court has four authorities and an obligation as stated in Article 7B and 24C. The authorities of Constitutional Court are:

- a. Reviewing the law of the national policy law of Republic of Indonesia year 1945.
- b. Breaking the authority dispute of state institutions whose authorities are granted by the 1945 Constitution of the Republic of Indonesia.
- c. Deciding upon the dissolution of political parties.
- d. Deciding disputes concerning the general election results.

Then the obligation of the Constitutional Court is to give a decision on the opinion of DPR that the President/Vice President of accused; first, has violated the law in the form treason against the state, corruption, bribery and other offenses. Second or moral turpitude, and/or. Third, no longer qualify as a President/Vice President as stipulated in the 1945 Constitution of the Republic of Indonesia

The authorities given by 1945 Constitution to the Constitutional Court as a judicial institution reflect the rule of law (*rechstaat*) in the 1945 Constitution after amendment. It is also fundamentally affirmed in Article 1 Paragraph 2, which states that: "Sovereignty is in the hands of the people, and is implemented according to this constitution". The Article clearly explain that Indonesia is a state with the democracy principle in the constitutional system that leaned to the 1945 Constitution, through two ideal function of the Constitutional Court, namely: first as the guardian of the 1945 Constitution and the second as interpreter of the 1945 Constitution.

### C. The Theory of Supervision

The terminology of supervision is commonly known in management and administrative study as one of the elements of the management activities.<sup>29</sup> In the context of supremacy of law, supervision is one of the essential elements in realizing a clean government, so as the state institutions may not refuse to be supervised. Furthermore, the objective of supervision is to prevent absolutism and abuse of power by the judicial institution.

According to Geoge R Terry the definition of supervision is "to determine what is accomplished evaluate it, and apply corrective

<sup>29</sup> Ni'matul Huda, 2009, *Hukum Pemerintahan Daerah*, Bandung: Nuca Media, p. 101

measures, if needed to insure result in keeping with the plan".<sup>30</sup> From the definition above, it could be understood that the supervision is essentially an act appraised whether something has been implemented in line with the determined planning before. By conducting the supervision, the mistakes may be found and those mistakes will be corrected and moreover it will not be repeated in the future.

According to Newman, the supervision is "assurance that the performance conform to plan". Meaning to say that the aim of supervision is an effort to ensure the implementation of duties in line determined planning before.<sup>31</sup>

Based on perspective of law, the supervision is conducted to appraise whether the duties appropriate with the legal norm also whether the aim of supervision appropriate with the legal norm. In order to establish a clean and trustable court, accordingly the supervision system for the judicial power institution is urgently needed to avoid any illegal act and abuse of power.<sup>32</sup> In Indonesia, the supervision system has been regulated on the Presidential Instruction No. 5 of 1983. But the instruction does not provide explicit and clear explanation about the definition of supervision itself.

Then concerning of judicial power institution especially of Constitutional Court which has no any external supervision, it will give

---

<sup>30</sup> Newman, *Supervision of the Police*, p. 10. <sup>31</sup> Newman, *Supervision of the Police*, p. 10. <sup>32</sup> Newman, *Supervision of the Police*, p. 10.

opportunity for the judges and staffs to deviate and abuse their power. Moreover the Constitutional Court has more power compare to the other courts. In line with the opinion of Lord Acton "Power tends to corrupt, absolute power tends to corrupt absolutely".<sup>33</sup> From that opinion, it is important that all of institution must be having the supervision from external institution in establishing a clean and a trustable court without abuse of power.

#### **D. Trustable Court**

It is true that the sacred mission of Indonesian court is not to enforce the law for the law itself. In line with the opinion of Oliver Wendell Holmes that the Supreme Court is not a court of justice, it is a court of law in order to enforce law and justice for individual, citizen and state. This is reflected in every decision of the court in Indonesia with begin the session in very religious expression for the justice based on the God almighty.

The idea to supervise the judicial power has been started for a long time before the establishment of the Judicial Commission. The idea has appeared in the Research Committee of Judges Consideration (Majelis Pertimbangan Penelitian Hakim here after MPPH) in 1968. But the idea was not successfully put in law regarding on the Judicial Power. Furthermore, in 1998 the idea of judicial power supervision has been re-emerged after the integration of judicial power institution. The external independent supervision was very necessary in order to realize the

---

<sup>33</sup>Denny Indrayana, 2008. *Negara Antara Ada dan Tiada, Reformasi Hukum Ketatanegaraan*, Jakarta. Buku Kompas. p. 316

trustable court, clean, transparent, and professional. Based on this reason, the Third Amendment of 1945 Constitution explains the position of Judicial Commission in the chapter of judicial power.

In 1945 the Judicial Commission contained in section 24B of the 1945 Constitution which has the authority to propose the appointment of Supreme Court judges and others having authority in order to preserve and uphold the honor, dignity and behavior of judges. Relating to the supervision of judges it's seen that Judicial Commission position is regulated in Article 24B of 1945 Constitution which is deemed relevant only to the provisions of Article 24A of 1945 Constitution. This kind of monitoring is actually aimed to supervise the judges of Supreme Court. However, in the Law No. 22 of 2004 on Judicial Commission, the Constitutional Court judges are also incorporated into it.

The Judicial Commission supervision of judges aims to preserve and uphold the honor, nobleness and dignity of judges that have an important role in building a better court system. According to Jimly Ashidique, democracy may not be able to grow and thrive without a balanced and controlled by the rule of law which is based on a court system that can be trusted to maintain and build that trust need a separate agency that runs it.

Therefore, the position of the Judicial Commission as a state agency has an important role which indirectly will affect the efforts to build a court system which is reliable and free from corruption, bribery and the problems of judicial mafia. Hence, the effectiveness of Judicial Commission in implementing its duties

is also important in combating judicial mafia. Therefore, Judicial Commission needs a chairman and staffs which is qualified and possess the integrity of the Judicial Commission to implement this duties well.

In order to create the good and trustable court, there are many steps that can be done to restore the image of the court. It could be in normative reforms, the management system reform, the orientation reform, the renewal of human resources and others. These various steps are not yet fully able to restore the trust but not least as a determinant for the creation of good and trustable court.

Internally the court must be supported by the following some matters, namely:

1. The courts must be independent organ and free from all of forms corruption and bribery, the idea might be achieved by some effort, namely;
  - a. The judges should have great integrity.
  - b. Good control system.
  - c. Sufficient supported facilities.
  - d. The judges should be reliable and has good intellectuality.
2. The courts, particularly judges must be free from all forms of interference from social or political power which lead the judges in



3. Management system that ensures the efficiency, effectiveness, productivity, quality decisions and fairness satisfaction to the litigants or the public at large.

Externally the court must be supported by following some matters, namely:

1. Good society, the people must obey and respect the law. And does not do everything to win the case, it's also should be free from bribery culture.
2. The courts should have sufficient political support as the availability of sufficient budget.
3. The sufficient social support in solving the problem and not just filing the claim.
4. Create the good attitude of respect upon the decision of judges and the courts as a form of participation in order to establish the trustable