

## CHAPTER TWO

### LITERATURE REVIEW

#### 1. Rule of Law

The rule of law in leading literature has the same meaning as the law state. Likewise, in Indonesian literature the term law state is a direct translation of *rechtstaat*. In the concept of law state there is the concept of Rule by Law or commonly called the concept of state action, which must be based on the law, meaning that the law becomes a reference for practice or action by the state or government. According to Brian Z Tamanaha, Rule by Law in the formal version of the Rule of Law, and the concept of Rule by Law is very popularly used by modern countries. The concept of Rule by Law is an idea that law is the means of the state to do business, all actions taken by the government, must be in accordance with the rule of law. So anything that is said by law is a command that must be implemented by the government, and the government prefers the concept of Rule by Law as a way because it is considered the most comfortable to govern. Rule by Law is the antithesis as the exercise of the power of arbitrariness by the state or government. Rule by Law is part of a formal concept form within the legal system theory of Rule of Law.<sup>1</sup>

In discussing Rule by Law, of course, it is unfair to the relationship of law and power, where I Dewa Gede Atmaja in his Philosophy of Thematic & Historical Thematic Law, quoted that "law without power is a delusion, lawless power is despotism".<sup>2</sup>

Rule By law in the theory of the legal state of the Rule of Law which is the underlying intuition of the Rule of Law is that the law must be able to guide the

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<sup>1</sup> Made Hendra Wijaya, 2013, Keberadaan Konsep Rule By Law (Negara Berdasarkan Hukum) Didalam Teori Negara Hukum The Rule Of Law, *Jurnal Hukum*, vol. 21, No. 3, (January 2013), p. 4-5.

<sup>2</sup> I Dewa Gede Atmaja, 2013, *Filsafat Hukum ,Dimensi Tematis & Historis*, Malang, Setara Press, p. 63.

behavior of the subject. Another word that the Rule of Law also emphasizes are the characteristics and benefits of the rules, where the Act is considered as a type of rule in which the purpose is to guide the human behavior. It is the behavior of the ruler and his people, where the concept of Rule by Law is used as a barrier of the free act of the ruler which aim is to control the ruler so that he/she does not exercise his power arbitrarily and to limit the behavior and actions of his community in order to create order and security.

The concept of Rule by Law emphasizes the existence of legal certainty. Where the law can be a tool that has the certainty to provide a clear scope and limits for legal subjects, so that legal subjects will act in accordance with what has been determined, the determination of the actions of legal subjects is formulated in the form of Act. The principle of legal certainty is a principle in a state of law that prioritizes the basis of legislation, compliance, and justice in every policy of state administration. According to Arief Sidharta, the state law ensures legal certainty is manifested in society and its predictability is very high, so that the dynamics of common life in society are predictable.

The Rule by Law concept of the legal certainty principle certainly gives high legality in running the rule of law. Where legality is a core value, human rights, in the sense of *nullum crimen, nulla poena sine lege* (no crime, no penalty without law) actually means not only to guarantee human freedom, but also to protect individuals from acts of arbitrariness or abuse of power and unjust actions by the authorities to individuals and citizens, so that it could lead to the creation of a guarantee of justice and transparency of the judicial authority.

The concept of Rule by Law can provide a social control in the life of the society, where the activities of the authorities can be controlled so as not to carry

out acts of arbitrariness in carrying out their duties, and the community can more easily monitor the activities undertaken by the government, whether or not the activities undertaken by the government is in accordance with the law. On the other hand, the government could direct people's lives to be more orderly, so that people live in accordance to what the law says and according to what is predicted by law makers.

So as to obtain the suitability between the rules imposed by its application, it means that the individual community is protected in accordance with their expectations, and the government also sovereignly performs its actions in accordance with the rules. The concept of Rule by Law has also been used by Napoleon, and he believes that the Napoleonic Law anticipates all possible cases in the future, where detailed interpretation is presented in Act 14. At that time, the political and social climates in France were very stable. The lawyers and judges in France, as a whole, sincerely sought to apply the Law, in the hope of solving all the legal problems in France at that time.

The concept of Rule by Law is certainly not separated from the Legislation. Thus, the advantages of the concept of Rule by Law can be seen also through the function of the legislation regulation which is divided into two main groups, namely the internal and external functions:<sup>3</sup>

1. Internal function

- a. The function of legal creation (rechtschepping)
- b. The function of legal reform (Law reform)
- c. Integration functions Pluralism of the legal system
- d. The function of legal certainty (rechtzekerheid, legal certainty)

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<sup>3</sup> Made Hendra Wijaya, Keberadaan Konsep Rule By Law, OP. Cit., p. 8-9.

2. Eksternal function
  - a. Change function
  - b. Stabilization function
  - c. Easy function

In relation to the advantages or benefits of the Rule by Law system is manifested, in his opinion I Dewa Gede Atmaja stating "that the principle of a legal state embodied in the relationship of law and power, philosophically required:<sup>4</sup>

1. Power that is meaningful, must have a clear definition of its scope, direction and limits;
2. Rulers or parties in positions of power have the integrity, accountability and spirit of the public;
3. People as a controlled party possessing legal awareness in the sense of unity can use civil rights and political rights to exercise social control, and on the other hand, aware of the duty of civil obedience obligations as citizens.

Indonesia is a legal state, as it is contained in Article 1 Paragraph (3) of the 1945 Constitution which states: "The State of Indonesia is a state of law." One of the hallmarks of the state is the existence of a free and impartial judiciary that is influenced by any power, so in the practice of state, there must be a division of power in order to prevent an exploitation of excessive power.<sup>5</sup>

There are 6 (six) basic conditions for the implementation of a democratic government under the Rule of Law, namely constitutional protection,

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<sup>4</sup> I Dewa Gede Atmaja, *Filsafat Hukum, Dimensi Tematis & Historis*, OP. Cit., p. 65.

<sup>5</sup> M. Agus Santoso, 2012, *Kemandirian Pengadilan Tindak Pidana Korupsi Dalam Sistem Ketatanegaraan Di Indonesia*, *Jurnal Yustisia* Vol.1 No. 3, (September - Desember 2012), p. 17.

independence and impartial judiciary, free elections, freedom of expression, freedom of association and opposition, and civic education.<sup>6</sup>

The Constitution of our country states that the Republic of Indonesia is a democratic state based on the rule of law (*demokratische rechtstaat*) and at the same time is a democratic State based on constitutional democracy.<sup>7</sup> The text of the amendment of the 1945 Constitution of Article 1 Paragraph (3) closely relates to the welfare state or the state of the material law in accordance with the fourth paragraph of the Preamble and Article 34 of the 1945 Constitution. The implementation of the rule of law will support and accelerate the realization of the welfare state in Indonesia.

The principle of state on the rule of law is ideally developed by democratic principles or popular sovereignty (*demokratische rechtsstaat*). So the law is not made, defined, interpreted and enforced by an iron power. Thus the principle of a state based on the law can not be enforced by ignoring the principles of democracy stipulated in the 1945 Constitution. The peak of the rule of law is laid in the constitution which is essentially a document of agreement on the highest state system.

The relationship between democracy and the rule of law can be reflected in the elaboration that the constitution that guarantees the implementation of a democratic government are the laws that overshadow it. In other words, democracy is under the Rule of Law. The basic conditions for the implementation of democratic governance under the Rule of Law are:<sup>8</sup>

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<sup>6</sup> Zulkarnain Ridlwan, 2012, NEGARA HUKUM INDONESIA KEBALIKAN NACHTWACHTERSTAAT, *Fiat Justitia Jurnal Ilmu Hukum*, Vol. 5, No. 2, (mei 2012) ISSN 1978-5186, pages, 142-143.

<sup>7</sup> Jimly Asshiddiqie, <http://www.lfip.org/english/pdf/bali-seminar/Struktur%20Ketanegaraan%20RI%20-%20Jimly%20Asshiddiqie.pdf> Accessed on 28 March 2018 At 2:11

<sup>8</sup> Miriam Budiarjo, 2008, *Dasar-dasar Ilmu Politik, Edisi Revisi*, Jakarta, PT Gramedia Pustaka Utama, page. 116.

- a. Constitutional protection, in the sense that the constitution, in addition to guaranteeing the rights of individuals, must also determine the procedural way to obtain protection of guaranteed rights;
- b. Free and impartial tribunals;
- c. Free elections;
- d. Freedom of expression, freedom of association / association and opposition;
- e. Citizenship education (civic education).

If these six things' existence are identified and practiced within the country of Indonesia, it can be said that Indonesia has qualified as a constitutional state implementing a democracy based on the constitution.

Democracy and the rule of law are two conceptions of power mechanism in running the wheels of state government. The two conceptions are mutually interrelated, because on the one hand democracy provides the basis and mechanism of power based on the principle of equality and equality of human beings, on the other hand the state of the law provides a benchmark that the ruling in a state is not human, but the law.

In a state based on law, the law must be interpreted as a hierarchical unity of the legal norms that culminate in the constitution. This means that in a country the law requires the supremacy of the constitution. The constitutional supremacy, in addition to a consequence of the concept of the rule of law, is also the implementation of democracy because the constitution is the ultimate form of social covenant.<sup>9</sup> Based on the theory of social contracts, to fulfill the rights of every human being, it is impossible to achieve it individually; it must be achieved together. Hence, a social agreement is made by a common goal, the boundaries of

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<sup>9</sup> IJimly Asshiddiqie, 2005, *Konstitusi dan Konstitusionalisme Indonesia*, Jakarta, Konstitusi Press, pages. 152 – 162.

individual rights, and who is responsible for the achievement of those goals and executes the agreements that have been made with their limits. The treaty is manifested in the constitution as the supreme law of the land, which is subsequently elaborated consistently in law and state policy.<sup>10</sup>

Therefore, applicable laws and regulations may not be unilaterally defined by and or only for the benefit of the authorities. This is contrary to the principle of democracy, since the law is not intended only to secure the interests of some powerful figures, but to guarantee the interests of justice for all people so that the developed state of law is not an absolute rechtsstaat, but a democratische rechtsstaat.<sup>11</sup>

That is the basis of the mechanism of power given by the conception of democracy, which is based on the principle of equality and equality of human beings. In essence, power within an organization can be obtained based on religious legitimacy, ideological legitimacy of the elite, or pragmatic legitimacy.<sup>12</sup> However, power based on these legitimations, by itself, denies equality and the equality of men, for it claims higher positions for several groups of humans from other human beings. Moreover, power based on these three legitimates would be an absolute power, since the basic assumption placed the ruling group as the privileged who are more privileged in carrying out state power affairs. The power established under these three legitimates will certainly be authoritarian.<sup>13</sup>

## **2. Judicial System**

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<sup>10</sup> Jimly Asshiddiqie, 2008, *Menuju Negara Hukum Yang Demokratis, Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi*, Jakarta, pages. 532.

<sup>11</sup> *Ibid*, pages. 532.

<sup>12</sup> Frans Magnis Suseno, 1999, *Etika Politik: Prinsip-prinsip Moral Dasar Kenegaraan Modern*, Jakarta, PT. Gramedia Pustaka Utama, pages. 30 – 66.

<sup>13</sup> Jimly Asshiddiqie, *Menuju Negara Hukum Yang Demokratis*, Op. Cit., pages. 532.

Based on Law No. 48 of 2009 on Judicial Power, judicial power is the power of an independent state to administer the judiciary to enforce law and justice pursuant to Pancasila and the 1945 Constitution of Republic Indonesia, for the implementation of the State of the Republic of Indonesia.<sup>14</sup>

Judicial authority in Indonesia is experiencing progress and changes as the amendment of the 1945 Constitution has changed the system of state administration in the field of judicial or judicial authority as contained in Chapter IX on Judicial Power, Article 24, Article 24A, Article 24B, Article 24C and Article 25.

Based the judicial powers that were initially made by the courts within the general court, the religious courts, the military court and the administrative court of the state with the Supreme Court as the supreme court subsequently transformed into judicial powers by a Supreme Court and subordinate courts within the general court environment, the religious court environment, the military court environment, the state administrative court environment, and by a new judicial power executive called the Constitutional Court.<sup>15</sup>

Judicial power after the amendment of the 1945 Constitution becomes a very fundamental power and as part of a power axis that has the function of upholding justice. Judicial power in the composition of state power according to the 1945 Constitution after the change remains placed on independent power free from interference of other powers. In the composition of the newly created Unitary State of the Republic of Indonesia, judicial power is exercised by the Supreme Court (MA), other judicial bodies under the Supreme Court, namely general courts, state administrative courts, military courts and religious courts and the

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<sup>14</sup> Article 1 (1) Law No. 48 of 2009 on Judicial System.

<sup>15</sup> Article 24 (1) the Constitution.



Constitutional Court. Then to capture the judges who are professional and have integrity to their profession as law enforcement and justice, there is a special institution held for recruitment of candidates of judges namely the Judicial Commission.

Initially, the Chapter on Judicial Power in the 1945 Constitution only has two articles, namely Article 24 and Article 25. The changes are made by amending and adding to the articles and paragraphs, so that in the chapter there are 5 (five) articles, namely Article 24, Article 24A, Article 24B, Article 24C, and Article 25. The independent judiciary is a necessary condition for a country that declares itself to be a State based on the rule of law. The independent judicial power statements is one of the outcomes of the amendment of the 1945 Constitution, particularly Article 24 which states:

1. Judicial power is an independent power to administer justice in order to uphold law and justice.
2. Judicial power shall be exercised by a Supreme Court and the lower courts within the general judiciary, the religious court environment, the military court environment, the administrative court of the state, and by a Constitutional Court.
3. Body of another body whose function relates to the judicial authority is regulated in the law.

This article is the basis for the independent judiciary. It is independent in the sense that the Supreme Court and the Constitutional Court as the perpetrators of judicial power as stated in Article 24 paragraph (2) in carrying out its function regardless of the influence of other power holders and independent in the sense of

power to regulate the affairs of his own household. This is a consequence of the separation of state powers contained in the 1945 Constitution.

In performing the function of judicial power, Chapter IX of the 1945 Constitution mentions that there are three state institutions included in the scope of judicial authority, namely Supreme Court (MA), Constitutional Court (MK), and Judicial Commission (KY). However, according to Article 24 paragraph (2), only the Supreme Court and its subordinate courts and the Constitutional Court are the organizers of judicial power, while KY has no such authority. This body is often referred to as an extra-judicial body.

Judicial power is the estuary for all community problems to be resolved. Power is closely related to the sense of justice and the struggle of the people. The supervision of judge behavior is regulated in Law No. 22 Year 2004 concerning Judicial Commission as mandated by the 1945 Constitution as stated in article 24 B of the 1945 Constitution. The provision of supervision of judges' behavior in Law No. 22 year 2004 concerning Judicial Commission is regulated in five Articles namely Article 13 Letters (b), chapters 20, chapters 21, chapters 22 and 23. Some of these chapters are regulated on the functions of external control in upholding honor, dignity and the conduct of judges.<sup>16</sup>

### **3. Independent Judiciary**

In Article 24 Paragraph (1) of the 1945 Constitution of the State of the Republic of Indonesia (1945 Constitution of the Republic of Indonesia) stipulated that "Judicial power is an independent power to administer justice in order to enforce law and justice."<sup>17</sup> The provision is intended to emphasize that the duty of power of the judiciary in the Indonesian state administration system is to

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<sup>16</sup> Idul Rishan, 2013, *Komisi Yudisial, Suatu Upaya Mewujudkan Wibawa Peradilan*, Jakarta, Genta Press, p. 89.

<sup>17</sup> Article 24 (1) the Constitution.

administer an independent judiciary, free from any party intervention, to uphold law and justice.

The provision of Article 24 paragraph (1) of the 1945 Constitution of the Republic of Indonesia is further regulated in the Law on Judicial Power. Article 1 Sub-Article 1 of Law Number 48 Year 2009 regarding Judicial Power as a substitute for Law Number 14 Year 1970 and Law Number 4 Year 2004, stipulates that "Judicial Power is the power of an independent state to organize a judiciary to enforce law and justice based on Pancasila and Basic Law." Article 3 Paragraph (1) provides that "In carrying out its duties and functions, the judges and constitutional judges shall maintain the independence of the judiciary" and paragraph (2) states that "All interference in judicial matters by other parties outside the judicial authority is prohibited, except in matters referred to in the 1945 Constitution of the State of the Republic of Indonesia".

"Judicial independence" is defined as the state of being free from external interference and free from all forms of pressure, whether it is physical or psychological (Elucidation of Article 3 paragraph (1) of Law No. 48 Year 2009 on Judicial Power). Related to this independence character, Bagir Manan asserted that the protection of free judicial power, is:<sup>18</sup>

- a) to ensure that court rulings are obeyed;
- b) to prevent any form of interference or intervention against the judicial process; and
- c) to ensure an honest and impartial judiciary.

The judicial power that administers the judiciary is vulnerable to practices that undermine the institution. Degrading acts against personal and/or judicial

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<sup>18</sup> Sareh Wiyono M, 2015, Urgensi Pembentukan Undang-Undang Tentang Penghinaan dalam Persidangan (Contempt Of Court) untuk Menegakkan Martabat dan Wibawa Peradilan, *Jurnal Hukum dan Peradilan*, Vol. 4, No. 2, (Juli 2015), p. 257-258.

institutions are often conducted, either orally, in writing, and/or in physical deeds. The act of humiliation, often occurs both inside and outside the court. Even the media also participated in various efforts that led to the degrading attitude of the institution of the court. The authority of the formerly "sacred" court institution now seems to be an "ordinary" one in the "age of free expression" without limit. Many people assume that the era of "democracy" people are entitled to free expression regardless of existing rules. It is firmly stipulated in Article 28J paragraph (1) of the 1945 Constitution of the Republic of Indonesia that "everyone is obliged to respect the human rights of others in the orderly life of society, nation and state.