

## **CHAPTER TWO**

### **LITERATURE REVIEW**

There are several theoretical frameworks which will be explained in the theoretical review to avoid any misinterpretation upon some important terms and to limit the discussion in this undergraduate thesis.

#### **A. Constitutional Court**

Constitutional Court is one of the state institutions in Indonesia's constitutional system which constitutes the holder of judicial power which is equal to the Supreme Court with different authority.<sup>1</sup> In accordance with Article 24C paragraph (1) of the 1945 Constitution which is reaffirmed in Article 10 paragraph (1) of Law Number 24 of 2003 concerning Constitutional Court of the Republic of Indonesia, the Constitutional Court whose decision is final to review laws against the 1945 Constitution is authorized to administer justice in the first and final level, to resolve disputes on jurisdiction between state institutions whose authority is mandated by the 1945 Constitution, to resolve the dissolution of a political party and general election dispute.<sup>2</sup> Besides, the Constitutional Court also has one obligation to issue a decision over an opinion of the DPR concerning alleged violations by the President and /or Vice President of this Constitution.

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<sup>1</sup> The 1945 Constitution

<sup>2</sup> Ibid.

## B. State Institution

### 1. Definition

A state institution is not a concept which terminologically contains a single and uniform term. English literature, for example, uses the term ‘political institution.’ Meanwhile in Dutch terminology, it is known as *staat organen*. Meanwhile in Indonesian, it uses ‘state institution,’ state body’ or ‘state organ.’<sup>3</sup>

Succinctly, state organ or state institution can be differentiated from private organ or institution, civil society organization or widely known as Non-Government Organization or Non-Governmental Organizations (NGO’s).<sup>4</sup> Therefore, any institution established not as civil society organization may be called state institution. State institution may be under legislative branch, executive branch, judicial branch or hybrid system.<sup>5</sup>

According to Indonesian Dictionary (KBBI 1997),<sup>6</sup> “institution” is defined as follows:

#### a. Origin (to become something)

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<sup>3</sup> See: Sri Soemantri’s opinion in Public Discussion Transcript, “*Eksistensi Sistem Kelembagaan Negara Pasca Amendemen UUD 1945*”, National Law Reform Commission (KHRN), Jakarta, 9 September 2004. See also Xainal Arifin Mochtar, 2012, “*Penataan Lembaga Negara Independen Setelah Perubahan UUD 1945*,”Dissertation, Faculty of Laws of Gadjah Mada University Yogyakarta, page. 7-8.

<sup>4</sup> Jimly Asshiddiqie, *Perkembangan dan Konsolidasi Lembaga Negara Pasca Reformasi*, Sinar Grafika, Jakarta, 2012, page. 27.

<sup>5</sup> Ibid.

<sup>6</sup> Kamus Besar Bahasa Indonesia, see H.A.S. Natabaya, in Jimly Asshiddiqie dkk. (editor Refly Harun dkk.), *Menjaga Denyut Nadi Konstitusi: Refleksi Satu Tahun Mahkamah Konstitusi*, Konstitusi Press, Jakarta, 2004, page 60-61. See also Firmansyah Arifin dkk., *Lembaga Negara dan Sengketa Kewenangan antar-Lembaga Negara*, Secretariate General of Constitutional Court of the Republic of Indonesia and National Law Reform Consortium, Jakarta, 2005, hlm. 29-30.

- b. Original nature (form, shape)
- c. Reference, bond
- d. Institution or organization which aims to study science or make efforts
- e. Stable behavior pattern consisting of structured social interaction.

According to Dutch-Indonesian Laws Dictionary<sup>7</sup>, *staat organ* is translated as authorized state instrumentalities. According to Fockema Andreae Laws Dictionary translated by Saled Adiwinata cs, *orgaan* is defined as instrumentalities.<sup>8</sup> The term ‘state institution’ is often exchanged with state organ, state body and state instrumentalities. However, according to Natabaya, the drafter of 1945 Constitution prior to amendment, he tended to consistently use state body, neither state institution nor state organ. In the same context, the 1949 Constitution of the Republic of United States of Indonesia did not use another term except state instrumentalities. Meanwhile, the 1945 Constitution after the fourth amendment (2002), continued the practice of People’s Consultative Assembly prior to reformation era by inconsistently using organ institution, state institution and state body.

The term “body” has been consistently used in articles and Description of the 1945 Constitution prior to amendment as the definition of state organ in accordance with the 1945 Constitution. In constitutional

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<sup>7</sup> Marjanne Termorshuizen, *Kamus Hukum Belanda-Indonesia*, Djambatan, Jakarta, 2002, hlm. 390.

<sup>9</sup> H.A.s. Natabaya, *op.cit.*, hlm. 61-62.

practice and even practice conducted by People's Consultative Assembly, apparently it has been changed into or interpreted as "institution", i.e. "high state institution" (for The People's Representative Council, Supreme Advisory Council, President, Supreme Court, The Audit Board of The Republic of Indonesia) and "the highest state institution" (for People's Consultative Assembly).

When the amendment was implemented to the 1945 Constitution at the early reformation era by People's Consultative Assembly from 1999 to 2002, term "body" was still used in Chapter VIII A Article 23E, Article 23F and Article 23G concerning The Audit Board of The Republic of Indonesia. Likewise, the term "body" was still used in Article 24 paragraph (1) concerning "judicial body" and Article 24 paragraph (2) i.e. "other bodies." However, in Article 24C paragraph (1), the 1945 Constitution did not use term "body," but it uses the term "state institution." The term "state institution" was also used in Article II Transition Regulation which used "body" prior to amendment.

Therefore, the amended 1945 Constitution used two terms therein, i.e. "body" and "state institution". Term "body" is apparently used for preserving the masterpiece of the founding fathers, i.e. the 1945 Constitution produced by BPUPK (Investigation Body for Preparing and Working the Indonesia Independence) and term "state institution" is likely adopted aligning with *Bahasa Indonesia* development by the drafters of the 1945 Constitution who were included in Ad Hoc 1

Committee of People's Consultative Assembly whose deliverable was authorized by People's Consultative Assembly for the period of 1999-2004.

However, both the 1945 Constitution prior to amendment and the 1945 Constitution after amendment do not formulate the definition of "body" and "state institution." Ultimately, legal experts and observers formulate that definition. In that regard, the description of state institution is also made by the Constitutional Court through decision of judicial review concerning Broadcasting filed by Indonesian Broadcasting Commission (KPI).<sup>9</sup> In the decision, there is a brief description of "state institution status." In its decision, the Constitutional Court declares that in Indonesia's constitutional system, "state institution" does not always refer to state institution which is only specified in the 1945 Constitution, or established in accordance with constitutional mandate, but also other state institutions established on the basis of instruction of regulation under the Constitution such as Law or even Presidential Decree.

Therefore, there are several conclusions of judicial interpretation upon the term "state institution" as follows:

- a. "State Institution" (with capital S and I) shall be distinguished from "state institution" (with lower-case s and i) since each has different status and consequence.

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<sup>9</sup> Decision of Constitutional Court Number 005/PUU-I/2003

- b. The use of “state institution” (lower case) refers to institutions funded by government through State Budget, and those are independent institutions and free from any authority.
- c. Independent Commission (referring to Indonesian Broadcasting Commission as “state institution”) has an objective to implement check and balances principal for public interest.
- d. A “state institution” shall not conduct legislative, executive and judicial function at the same time in accordance to limited power principal in the rule of law.

According to Phillipus M. Hadjon, the meaning of a capacity of a state institution can be viewed from two perspectives. First, the capacity is defined as a position, i.e. the position of a state institution which is compared to another state institution. Second, the capacity of a state institution which is defined as the foundation which is based on its main function.<sup>10</sup> In relation to the capacity as position which is based on its main function, Philipus M. Hadjon gives an illustration related to the authority of the Constitutional Court that there is a term ‘state institution’ in the context where the Constitutional Court has authority to settle disputes among the state institutions whose authority is mandated by the Constitution.<sup>11</sup>

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<sup>10</sup>Philipus M. Hadjon, 1996, *Lembaga Tertinggi dan Lembaga Tinggi Negara Menurut UUD 1945*, Surabaya, Bina Ilmu, page. 10.

<sup>11</sup>Article 24C Paragraph (1) UUD 1945

In an attempt to understand the concept of state institution with comparative approach, Philipus M. Hadjon provides an example of Germany concept. The Constitution of Germany differentiates *state organ* and *constitutional organ*. Constitutional organ is only related to those institutions which status and authority are directly regulated by the Constitution. In Germany's Constitution, the highest *constitutional organ* is *Bundestag* as the institution which is directly elected by people, meanwhile *state organs* in Germany are institutions.

If we compare those with state institutions in Indonesia's constitutional system, the Highest State Institution of High State Institutions prior to the 1945 Constitution amendment in the Germany's Constitution version is *constitutional organs* in the context where its capacity and authority are directly regulated by the Constitution. By comparing to German's constitutional system, it can be differentiated that state institutions whose capacity and authority are directly regulated by the Constitution, and state institutions mentioned in the Constitution but their capacity and authority are delegated by laws.<sup>12</sup>

In relation to such a condition, in the constitutional system, there are at least three status of state institution: (1) state institution whose capacity is defined by the Constitution; (2) state institution whose capacity is defined by laws; (3) state institution whose capacity is defined

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<sup>12</sup> Titik T. Tutik, 2010, *Konstruksi Hukum Tata Negara Pasca Amandemen*, Jakarta, Kencana Prenada, page. 178

by presidential decree.<sup>13</sup> Viewing that, Sri Soemantri gives his analysis as follows:

“In Indonesia’s constitutional system which only relates to state agencies existing based on the Constitution, that is connected to constitutional system in the narrow context. Meanwhile, if that also means state agencies outside the Constitution, this is connected to constitutional system in the broader context”<sup>14</sup>

## **2. The Meaning of “State Institution” in Article 24C Paragraph (1) of the 1945 Constitution.**

The meaning of “State Institution” in Article 24C paragraph (1) of the 1945 Constitution shall be closely related and inseparable from the phrase “whose authority is mandated by the Constitution.” By being formulated in a dependent clause “state institution whose authority is mandated by the Constitution,” implicitly there is a recognition that there is “a state institution whose authority is not mandated by the Constitution.” Therefore, the definition of state institution shall be understood as general *genus* which can be differentiated among “state institution whose authority is mandated by the Constitution” and “state institution whose authority is not mandated by the Constitution.” In the Decision Number 005/PUU-I/2003 concerning Judicial Review Number 32 of 2002 concerning Broadcasting, Constitutional Court acknowledged the existence of state institution whose authority is not mandated by the

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<sup>13</sup>Josef M. Monteiro, 2014, *Lembaga-Lembaga Negara Setelah Amandemen UUD 1945*, Jakarta, Pustaka Yustisia, page. 8.

<sup>14</sup> Titik T. Tutik, Loc.Cit.



Constitution but other laws and regulations, in this context Indonesian Broadcasting Commission (KPI).<sup>15</sup>

The term “state institution” is mentioned in Article 24C paragraph (1) of the 1945 Constitution, so in determining who is referred to as state institution by Article 24C paragraph (1) of the 1945 Constitution or to determine whether an institution is a state institution as referred to in Article 24C paragraph (1) of the 1945 Constitution. The first thing which should be noticed is first certain authorities in the Constitution and then to what institution the authority is provided. Since authority is limited and for certain things, so the nature of state institution cannot be determined in general, but related to the authority granted or in other words an institution which is specified with any name has capacity as state institution pursuant to definition in Article 24C paragraph (1) of the 1945 Constitution if such an institution argues its authority mandated by the 1945 Constitution or its authority is to be argued.<sup>16</sup>

### **3. Concept of State Institution**

To understand the definition of state institution thoroughly, we can approach it from the perspective of Hans Kelsen concerning *the concept of the State-Organ* in his book *General Theory of Law and State*. Hans Kelsen elaborated that “*whoever fulfills a function determined by the*

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<sup>15</sup> Decision of Constitutional Court Number 004/SKLN-IV/2006, page. 87

<sup>16</sup> *Ibid.*

*legal order is an organ.*<sup>17</sup> According to Hans Kelsen, each individual, person or organization may be called as a state institution if function to create norm and to apply norm at the same time. For instance, The People's Representative Council based on Article 20 paragraph (1) of the 1945 Constitution that holds authority to formulate laws, is a state institution that creates norms and also applies the norm.

Besides the broad definition, Hans Kelsen also explains the definition of state institution in a narrow scope, i.e. definition of institution in its actual meaning. Individual may be called as a state institution only if it personally has a specific legal position.<sup>18</sup> The characteristics of state institution in this definition includes: (a) state institution is selected or appointed to place a certain position or function; (b) the function is performed as the main profession or even it is legally an exclusive one; (c) due to its function, it is entitled to receive salary from the government.

#### **4. Dispute Object among State Institutions**

What become the object of dispute among state institutions in terms of the Constitutional Court is dispute of constitutional authority among state institutions. The main issue is not laid on the institutional context, but on the Constitutional authority which in its implementation, if conflict of interpretation arises among each other, the authorized party

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<sup>17</sup> Hans Kelsen, *General Theory of Law and State*, Russell & Russell, New York, 1961, hlm. 192.

<sup>18</sup>*Ibid.*, hlm. 193.

to decide which institution should have the argued authority is the Constitutional Court.<sup>19</sup>

Requirements of dispute object among state institutions are: (a) constitutional authority specified in the Constitution; and (b) arising dispute in the implementation of such constitutional authority due to different interpretation between two or more related state institutions.<sup>20</sup>

## **5. Dispute Subject among State Institutions**

There are 28 institutional law subjects or legal subjects of constitutional law and state administration which existence is stated in the 1945 Constitution.<sup>21</sup> Those institutional law subjects can be named as state institutions in a broad scope. Textually, the organs according to the order of articles of the 1945 Constitution are explained as follows:

- a. People's Consultative Assembly is regulated in Chapter II of the 1945 Constitution which is also headed "People's Consultative Assembly." Chapter II contains 2 (two) articles, i.e. Article 2 consisting of 3 (three) paragraphs, Article 3 consisting of 3 (three paragraphs);
- b. President is regulated in Chapter III of the 1945 Constitution, starting from Article 4 paragraph (1) in the arrangement concerning Government Power which contains 16 articles;

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<sup>19</sup> Jimly Asshiddiqie, 2006, *Sengketa Kewenangan Konstitusional Lembaga Negara*, Jakarta, Konstitusi Press, page. 12-13.

<sup>20</sup>*Ibid*, hlm. 14-15.

<sup>21</sup>*Ibid*, page. 46

- c. Vice President is regulated in Chapter III of the 1945 Constitution Article 4, i.e. paragraph (2) of the 1945 Constitution. Article 4 paragraph (2) of the 1945 Constitution states, In performing its obligations, President is assisted by a Vice President;
- d. Minister and State Ministry are separately regulated in Chapter V of the 1945 Constitution, i.e. Article 17 paragraph (1), (2), (3) and (4);
- e. President's Advisory Board is regulated in Article 16 Chapter III concerning Government Power which states, President establishes an advisory board that takes charge of providing advice and consideration to President, hereafter specified in the laws;
- f. Ambassador is regulated in Article 13 paragraph (1), (2) and (3);
- g. Consulate is regulated in Article 13 paragraph (1);
- h. Provincial Government is regulated in Article 18 paragraph (2), (3), (5), (6) and (7) of Chapter VI of the 1945 Constitution;
- i. Governor as the Head of Regional Government is regulated in Article 18 paragraph (4) of the 1945 Constitution;
- j. Provincial Regional House of People's Representatives is regulated in Article 18 paragraph (3) of the 1945 Constitution;
- k. District Regional Government is regulated in Article 18 paragraph (2), (3), (5), (6) and (7) of the 1945 Constitution;
- l. Regent as the Head of District Regional Government is regulated in Article 18 paragraph (4) of the 1945 Constitution;
- m. District Regional House of People's Representatives is regulated in

- Article 18 paragraph (3) of the 1945 Constitution;
- n. Municipal Government is regulated in Article 18 paragraph (2), (3), (5), (6) and (7) of the 1945 Constitution;
  - o. Mayor as the Head of Municipal Government is regulated in Article 18 paragraph (4) of the 1945 Constitution;
  - p. Municipal Regional House of People’s Representatives is regulated in Article 18 paragraph (3) of the 1945 Constitution;
  - q. House of Representatives is regulated in Chapter VII of the 1945 Constitution containing Article 19 to Article 22B;
  - r. Regional House of Representatives is regulated in Chapter VIIA consisting of Article 22C and 22D;
  - s. General Election Organizing Commission is regulated in Article 22E paragraph (5) of the 1945 Constitution which determines that the general election is organized by a national, permanent and independent commission;
  - t. Central Bank is explicitly stated in Article 23D, i.e. “State Government owns a central bank whose composition, position, authority, responsibility and independence are regulated under the laws”;
  - u. Finance Auditor Body is separately regulated in Chapter VIIIA which is headed Finance Auditor Body and consists of 3 Articles, i.e. Article 23E (3 paragraphs), Article 23F (2 paragraphs), and Article 23G (2 paragraphs);

- v. Supreme Court whose capacity is regulated in Chapter IX, Article 24 and Article 24A of the 1945 Constitution;
- w. Constitutional Court whose capacity is regulated in Chapter IX, Article 24 and Article 24C of the 1945 Constitution;
- x. Judicial Commission whose capacity is regulated in Chapter IX, Article 24B of the 1945 Constitution;
- y. Indonesian Military is separately regulated in the 1945 Constitution, i.e. Chapter XII concerning State Defense and Security in Article 30 of the 1945 Constitution;
- z. National Police which is also regulated in Chapter XII Article 30 of the 1945 Constitution;
- aa. Regional Government Unit has special status as referred to by Article 18B paragraph (1) of the 1945 Constitution, regulated by the laws;
- bb. Other bodies whose function is related to judicial authority such as public prosecutor are regulated under the laws as referred to by Article 24 paragraph (3) of the 1945 Constitution which states, *“Other bodies whose function is related to judicial authority are regulated under the laws.”*

Of the 28 organs or subjects, not all of them is declared obviously in the context of their existence and authority under the 1945 Constitution. Only 23 institutions whose existence and authority are clearly stated in the 1945 Constitution. There are 4 (four) institutions

whose existence and authority are not clearly described in the 1945 Constitution, i.e. (i) central bank; (ii) ambassador; (iii) consulate; and (iv) other bodies related to judicial authority.

The definition of state institution whose authority is mandated by the 1945 Constitution is broader than the definition of state institution which is normally acknowledged in day-to-day discussion. Any organ or institution not included in the category or cannot be acknowledged as private organization (civil society) is state institution. However, what is relevant to the dispute among state institutions in terms of judiciary authority by the Constitutional Court is state institution which is stated in the 1945 Constitution and whose authority is regulated by the 1945 Constitution.