

Book Review

THE CHANGING CONSTITUTION IN INDONESIA AND THE UNITED KINGDOM: A COMPARATIVE STUDY

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The changing constitution or constitutional reform is not only occurred in Indonesia but also in the United Kingdom. The demand of the constitutional reform in Indonesia begins to appear when the economic crisis hit Indonesia in 1997. MPR or The People's Consultative Assembly has made a formal amendment of 1945 Constitution in 1999 followed by other series of amendments in 2000, 2001 and 2002. However, there are different pushing factors to the changes of constitution in Indonesia and the United Kingdom. Indonesian constitutional reform is the result of political and economic crises. Meanwhile, the United Kingdom constitutional reform occurred as a consequence of the United Kingdom Membership to the European Union.

"The Changing Constitution" is a good source for Indonesian academics and scholars who are interested in making comparative study on the latest development of constitutional reform in the United Kingdom. This book contains papers which contributed by professors, senior lecturer and research fellows from various universities in the United Kingdom who are expert in the area of public law. In general, this book contains the discussion and debate on the impact of The United Kingdom membership to the European Union on its Constitution. The impact is far-reaching; this is due to the changes on the fundamental and traditional doctrine of The United Kingdom legal system, namely the sovereignty of parliament. There is a limitation from the European Constitution, which reduced the UK's parliament sovereignty. In this regard, the United Kingdom parliament should respect and adhere to the European fundamental human rights.

The first interesting issue highlighted in this book is the review of the traditional doctrine of rule of law and the sovereignty or supremacy of parliament. These two fundamental principles are essential in the UK, considering that it does not have any written constitution. In relation to the situation in Indonesia today, the discussion to the rule of law principle is indeed relevant. Jeffrey Jowell in his chapter the “*Rule of law today*” interestingly provides us a room for analysis and debate of traditional doctrine. His writing invites us to think more critically about the implementation of the rule of law in practice.

The rule of law is the fundamental principle in guiding the officials in making decisions. This principle requires the officials to use the power fairly and just. It limits the abuse of power which usually exercises by junta military or the authoritarian government.¹ According to Dicey, “the rule of law has at least three meanings. The first is that individuals ought not to be subjected to wide discretionary powers. Secondly, it relates to equality. Thirdly, there is no separate constitutional code. Some critics on Dicey’s theory came from W. Ivor Jennings, Robson and Horwitz. They attacked Dicey’s theory on the ground that the rule of law failed to provide welfare state. However, Thompson argued that the rule of law has at least two functions as a principle of institutional morality or a fundamental of good governance and as the limit of government power.

There are two features of the rule of law, namely legal certainty and procedural fairness. These two features have benefits and defects both to administrators and the affected person. For example, in zoning system in planning, standard level of pollution, and speeding. The government usually exercises wide discretionary powers to address the above issues. However, basically if the official exercises the discretion, it should be subjected to public accountability, individual redress and public assessment. There should be balance between the rule and discretion. In this case the United Kingdom government uses rule and discretion mix together to gain a benefit to each other. However, to

¹ Here, Jowell mentions Myanmar as an example. Indonesia is experiencing almost similar with Myanmar in Soeharto’s era where many peoples have been caught and punished unlawfully without a trial, there is no freedom of information and expression and many human rights abuse cases.

facilitate the disagreement of decision has been made by the officials; The United Kingdom public administration is providing the adjudicative mechanism through appeal or special tribunal.

Jowell stated that Dicey's rule of law has been rightly attacked saying that the theory failed to recognize the necessity of official discretion to perform the welfare and regulatory functions of modern government. This is indeed sound really dreadful considering that the result not to comply with the rule of law is the tyrannies. The rule of law basically provides a foundation to create democratic government.

The second central issue is the far reaching impact of the UK Membership to the European Union. A.W Bradley and his colleagues analyzed the impact of British membership to the European Union on political and judiciary system in England. I will briefly present a debate on traditional doctrine of sovereignty of parliament versus fundamental rights and liberties. This is an interesting issue in the modern government today where the recognition to the human rights protection has been universally accepted in many countries. Within the New British constitutional context, the fundamental rule of the The United Kingdom Constitution which is the supremacy of parliament no longer becomes the most sovereign institution. The unlimited and uncontrolled power to make laws of the United Kingdom parliament has eroded by the very nature of community law. Bradley stated that as a consequence of UK's membership to the European Union, Westminster legislation authority is limited by community law and when there is conflict between the two, then the Community law will prevail. (AW Bradley, 2000:23)

It is an accepted legal doctrine that the parliament has a legislative power, a sovereignty to make laws, while the court has a power to interpret and apply this kind of legislation passed by parliament. Lord Bridge said in 1991 that rule of law in British society rest on "twin foundations" of (1) the sovereignty of the Queen in parliament in making law; and (2) the sovereignty of the Queen's court in interpreting and applying the law. Moreover, Dicey having a similar view with Lord Bridge, said that; "The principle of parliamentary sovereignty means neither more nor less than this, namely that parliament (defined as the Queen, the House of Lords and The house of Commons acting together)...has under the English Constitution the right to make or unmake any law whatever; and further that no person or

body is recognized by law as having a right to override or set aside the legislation of parliament.”

For the United Kingdom, the sovereignty of parliament is vital because it provides a pillar or structure for the whole legal system.² However, this has changed much, since judicial review of legislation on constitutional ground is widely practiced in many countries today including the United Kingdom and Indonesia. Judges can be able to review parliamentary act. This trend can be categorized as a democracy in different model.

The wind of change in constitutional law is inevitable. There is a trend to limit the sovereignty of parliament in regard to the protection of human rights and liberties. In Indonesia, the constitutional reform has made a significant change to legal and political aspects. The amendment of 1945 Constitution has clearly mandated the government to establish the Constitutional Court (article 24c). Basically, the objective of this court is to guard the constitution; to provide checks and balances; to encourage good governance practices; and last but not least to guarantee the protection of fundamental human rights. The constitutional court has an authority and power to make judicial review of the parliamentary act; to settle the dispute between different state bodies; to make a decision on dissolution of political party and to decide cases on the election result. So far, the Supreme Court in Indonesia has no power and authority to make a judicial review toward parliamentary act. This court only has power to make a judicial review on the subordinate legislation such as government regulation, president decree and local government regulation. The establishment of Constitutional court in Indonesia has a good impact on the protection of basic fundamental rights. For example, recently the Constitutional court made a decision that the government should allocate 20 % of its National budget on education sector. This duty is enforceable as an obligation being mandated by the Constitution and the government should not violate this obligation. The greater concern on the protection of human rights is the only reason that can make the doctrine of sovereignty of parliament is being challenged.

² As the Earl of Shaftsbury suggested “the parliament of England is supreme and absolute power, which gives life and motion to the English government.”

A wider protection of human rights is an important agenda brought by The European Union to be endorsed by all member state. The horrifying experience of World War II has made the European Community recognized and respected the fundamental human rights and freedoms. European Convention of Human Rights set out enforceable rights upon individuals against sovereign states. The Convention guarantees basic civil and political rights to everyone within member states.³ This has been a revolutionary venture where human rights are placed in higher position, even above the sovereign state.

For the first time individuals would be able to exercise personally enforceable rights under international law before an independent and impartial tribunal-The European Human Rights Court. Individuals can now sue public authorities of their own states. The decision of the European Court of Justice may involve findings that the executive; national legislatures and national courts have breached the convention. These judgments are binding upon state concerned according to international law.

The third issue is the central—local government relations. It is interesting and relevant to discuss this topic in this book review related to local autonomy issue in Indonesia. Marthin Loughin in his paper “Restructuring of central and local government relations” offers a great analysis on reorganizing the role of local government in social life and its conflict. He has identified four characteristic of local government these includes: (1) Multifunctionality; (2) Discretion; (3) Taxation; and (4) Representation.

The relation between local and central government now is being legalized. This is very different with the traditional value with emphasized on informality, consensual and bargaining as a foundations. Now the governments are restricted to use discretion. There is conflict

³ These include: the right to life (Article 2); the prohibition on torture and inhuman or degrading treatment or punishment (Article 3); the prohibition of slavery and forced labour (article 4); the right to liberty (Article 5); the right to a fair trial (article 6); no punishment without law (article 7); respect for private and family law (article 8); freedom of thought, conscience and religion (Article 9); freedom of expression (Article 10); freedom of assembly and association (article 11); the right to marry and found a family (article 12); the right to an effective national remedy (article 13) and non discrimination in enjoyment of convention rights (article 14).

and resistance from local government to the idea that limits the role of local government. However, the ruling Labour Government will restore the power of local government if they adhere to the “change agenda.” That is adopting new ways of working, improving local democracy and accountability.

The issue to limit local government power is really relevant to the condition of Indonesia today. The problem of local autonomy in Indonesia is that the local governments are not ready to exercise broad discretionary powers. The more power given to the local authorities there should be more responsible. In fact, local governments demand more power to exploit natural resources within their territory unsustainably. It causes illegal logging, deforestation, loss of biodiversity and habitat to flora and fauna. The most devastated impact is natural disaster which damaged cost higher than the benefit they gained. I believe there should be a centralized policy on forest conservation and its sustainable use. The central government should use his supervisory power to audit the activities of local governments. If local government’s policies sound unreasonable, then the Central Government can make an inquiry about that policy.

The fourth issue which consider in this book review is New Public Management. Gavin Drewry in his paper ‘*New Public Management*’ offers us description on public sector reforms in England from the Thatcher Government in 1979 to Blair Government. However, his paper only gives us no background of new public management theories. According to his writing, in a new public management regime, the efficiency of traditional bureaucratic methods is being questioned. This regime is more favorable due to its market oriented, performance driven and business-like modes of public service rather than a heavily intervention of state in economic system.

The Citizen’s Charter is one of the public service reform launched by the Major Government. The citizen’ charter consists of themes should be obeyed by central government, local government, National Health Service, the court and the police. These themes include: Higher Standards; Openness; Information; Choice; Non-Discrimination; Accessibility; Proper Redress when things go wrong; and value for money. The idea of launching citizen’s charter is to promote the empowerment of citizen-consumers of public services by giving them information and give good standards of service. And the Citizen’s

Charter is re launch again by Blair Government under the name of Service First.

I contend that the idea of new public management which more favorable of market oriented and business-alike can be successfully implemented if the government place a higher level of standard for business sector to perform their function in public sectors. Failures to set up higher standard will have a bad impact on the citizen as consumers. For example, the British Railway, privatization of train services, the system has grave problems of coordination and serious matter of safety procedures.

The fifth issue is freedom of information. In this part Rodney Austin paper on the "*Freedom of Information: the Constitutional Impact*" tries to convince that Freedom of Information Act is a denial of democracy. I believe he successfully gets his goal through his comprehensive analysis. Basically, the problem of the secretive government is not only faced by Indonesian but also the United Kingdom. He criticized the attitude of the United Kingdom government which remains excessively secretive even after the series of reforms. The monopoly over official information by the United Kingdom Government makes the doctrine of minister responsibility is difficult to operate which consequently undermines the effectiveness of public participation. Then, he also suggested that the public claim of the representative, responsible and democratic system government in England is the failure.

Some instruments have been made to control the official information such as positive vetting, classifying document, the civil service code, the media defense and using court to seek an injunction to restraint public information. Some instruments also have been made to make the information available to the public including: Croham Directive, Data Protection Act, Citizen Charter and the most fundamental instrument is Freedom of Information Act. However, Austin criticized this act as the sheep in wolf clothing. He suggested that the Freedom of Information Act should become an instrument that would restore the citizen power to choose, influence, control and dismiss the government by discarding the unnecessary secrecy of government.

Finally, the book contains a comprehensive analytical and critical thinking on the changing constitution in the United Kingdom. I

really recommend law students, lecturers and academic members to read this valuable book as a source on the constitutional law in The United Kingdom, which can be compared to Indonesian law. This book is indeed beneficial and helpful for giving understanding and new perspective about the latest development of constitutional law in the United Kingdom. Knowledge on the United Kingdom legal systems and the European Community Mechanism is indeed helpful to make easier to comprehend this book.