

The Implementation of Indonesia As the Rule of Law Based Constitution 1945 after Amendments

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Before amendment, the Preamble of the 1945 Constitution contained the statement that Indonesia is a state based on Law. In the explanation of the 1945 Constitution it is also explained that “Indonesia is a rule of Law”, as stated in article 1 (3). The provisions of the aforementioned article constitute the constitutional basis that Indonesia implements a constitutional system in accordance with the elements of the legal state; Law is placed as the only rule in the society of the nation and state (supremacy of Law). There is a difference in meaning between Indonesia that is a state based on Law and Indonesia is a state Law. The applicability of the 1945 before and after the amendment is followed by a different constitutional structure that gives a different meaning as a state based on Law. Continental European legal systems recognise “rechts staat (legal state)”, while other countries of the world recognise a concept of the rule of Law state extracted from anglo-saxon states. Both Laws’ state models prioritise different aspects. The rechts staat concept prioritises wetmatigheid principles that later became rechtmatigheid, while the rule of Law prioritises equality before the Law. Due to differences in emphasis of these operations, there arose the different elements between the Rechts Staat concept and the rule of Law concept.

Key words: *Implementation, Rule of Law, Constitution.*

Introduction

By reformation, including reformation in public administration, the desire to perfect the Constitution of 1945 as something switched so far can be accommodated. This Constitution was set on the day after the proclamation of Indonesian independence as temporary and needing to be improved and supplemented. Historically, the proclamation of Indonesian independence on 17 August 1945 is a historical event as well as a source of Law for the establishment of the Republic of Indonesia. Nevertheless, the proclamation of independence is not the final destination of Indonesia's state, but is a mean to achieve its goal to realise a just society based on *Pancasila*, as stated in the 1945 preamble at the fourth paragraph. Kansil (1984) states that the proclamation of Indonesian independence is broadly defined as: a) the birth of the Republic of Indonesia, b) the point of culmination of the Indonesian independence movement, after a decades long struggle beginning May 20, 1908, and c) the starting point on the implementation of the Message of People Suffering. The history of the Indonesian government began when Indonesia proclaimed its independence on August 17, 1945.

The history of the independence of the Indonesian nation's government started since Indonesia has not proclaimed even before independence. On April 29, 1945 in Jakarta, the Japanese government formed an agency called the "*Investigation Agency Efforts Preparation of Indonesian Independence*" (BPUPKI). This agency consisted of 62 members, led by Dr. Radjiman Wedyodiningrat. The Indonesian government principle for Indonesia is contained in the Indonesia Basic Law Constitution 1945. The history of its reign came into being with the implementation of the first Constitution of the State of Indonesia in 1945 that came into force on 18 August 1945, the day after the proclamation of independence of the Republic of Indonesia. BPUPKI performed twice, during meetings from May 29 until June 1, 1945, and from July 10 to July 16, 1945. In performing its duties as the investigative efforts of Indonesian independence, BPUPKI formed a small committee to formulate the results of the agency's negotiations. In addition, BPUPKI also managed to compile the draft of the Republic of Indonesia constitution. Having successfully established a draft of the Basic Law, the agency finally dissolved and formed a new agency called The Preparatory Committee for Indonesian Independence (PPKI) on August 9, 1945. The agency called PPKI is composed of well-known leaders and people from and who represent regions of Indonesia. The agency is therefore considered a Representative Body that represents all the people of Indonesia. The day after the reading of the Proclamation of Independence of the Republic of Indonesia, on August 18, 1945, PPKI convened and set the following points:

- a. The Preamble to the Constitution of 1945.
- b. The Constitution of 1945.

- c. Electing Ir. Soekarno and Drs. Moh. Hatta, respectively, as President and Vice President of the Republic of Indonesia.
- d. The President during this time is assisted by the entire National Committee.

On August 19, 1945, PPKI held a meeting and accomplished these two things:

- a. The establishment of 12 Departments of State
- b. Dividing Indonesia into eight provinces, and each province is divided into Residencies.

With the election of the President and Vice-President of the Republic of Indonesia on the constitution of 1945, Indonesia has formally fulfilled the terms of the formation of a State, namely:

- a. The existence of people of a particular country.
- b. The existence of specific regions of the country.
- c. Government with sovereignty
- d. Recognition of other countries.

Asshiddiqie (2005) states in the second period of the enactment of the 1945 Constitution, under Article 134 of the 1950 Constitution: "The Constituent Assembly together with the government shall as soon as possible establish the Constitution of the Republic of Indonesia which shall replace the current Constitution". From the provisions of the aforementioned article it is clear that the 1950 Constitution was applied for a short-term and the Constituent was ordered to make a permanent Constitution. At that time there was a problem in the constitutional system because the Constituent Assembly did not succeed in making the new Constitution as a substitution of the 1950 Constitution, hence President Soekarno issued a Presidential Decree on 5 July 1959, that contains:

- (a) The dissolution of the Constituent Assembly.
- (b) Determination of re-enactment of 1945 Constitution and withdrawal of 1950 Provisional Constitution.
- (c) The plan to establish the Assembly and the DPAS in the shortest possible time.

With the issuance of the Presidential Decree 5 July 1959, the 1945 Constitution was reapplied as a constitution for the State of Indonesia. Reformation that occurred in Indonesia in 1998 has caused a great change for Indonesia including in state administration. One of the reforms in the field of state administration is the four times amendment of the 1945 Constitution. Since the issuance of the Presidential Decree 5 July 1959, with one of the contents being to determine the re-enactment of the 1945 Constitution, until the enactment of the power of the Soeharto regime, the 1945 Constitution as the constitutional basis of the State of Indonesia has never undergone any changes. By reformation, including reformation in the field of state

administration, the desire to change and refine some paragraphs in the 1945 Constitution (which has so far been something sacred) emerged. The 1945 Constitution set one day after the Proclamation of Indonesian Independence is temporary and therefore needs to be refined and equipped. Article 1 Paragraph (3) of the 1945 Constitution states that: "The State of Indonesia is a rule of Law". The provisions of the article constitute the constitutional basis that Indonesia is a state based on Law, the Law is placed in the highest position in the life of the society, nation and state (Siahaan, 2005).

Methodology

This study used a normative method with data collection based on the prevailing Laws and regulations. It also used some related references.

Discussion

A. Indonesia is a Rule of Law

Waluyo (1991) states that reformation in 1998 in Indonesia led to great change for the nation, including the administration of Indonesia. One of the reformation outcomes in the field of administration is the four times amendment of the 1945 Constitution. Since the promulgation of the Presidential Decree on July 5, 1959 on the re-enactment of the 1945 Constitution to the enactment of the Soeharto regime, the 1945 Constitution as the constitutional basis of State of Indonesia has not been improved. With the reformation, including reformation in public administration, the desire to perfect the 1945 Constitution as something switched so far can be accommodated. Basically, the 1945 constitution set on the day after the proclamation of Indonesian independence is temporary and therefore needs to be improved and supplemented. Article 1 (3) of the 1945 Constitution states that "Indonesia is a country of Law". The statement that Indonesia is a rule of Law is also mentioned in the explanation of the 1945 Constitution, stating that there are seven main keys of the Indonesian State administration system, namely:

- 1) Indonesia is a country based on Law (Rechtsstaat) and not based on power (Machtstaat).
- 2) The Constitutional system.
- 3) The highest authority is in the People's Consultative Assembly (MPR).
- 4) The President is the highest state of governance under the MPR.
- 5) The President is not accountable to Parliament.
- 6) The Minister of State is the assistant of the President and is not accountable to Parliament.
- 7) The Power of the head of state is not limited.

Based on the first point of the explanation, it is clear that the Law is the good order of the national life in the political, economic, social, cultural and defence and security aspects. Before the 1945 Constitution, some constitutions have been applied in Indonesia including the Constitution of 1950 and the Constitution of the United Republic of Indonesia. The various kinds of constitutions indicate that Indonesia remains a country that is based on the Law until the implementation of the 1945 amendments as stated in Article 1 (3). Law in the life of society, nation and state has a function as a control and guide of people's lives, with the intention to create the order of the life of the nation that is safe and orderly, with the guarantee of legal certainty and the protection of human rights. Characteristics of the rule of Law, and specifically to the state of Indonesian Law, are known by the 1945 Constitution that is the constitutional basis of the Indonesian Legal State. The characteristics of a rule of Law can be explained by the results of a symposium at the University of Indonesia in 1966 in Jakarta. In the symposium it was stated that: "The nature of rule of Law is where the tool equipment can only act according to and bound by the rules that have been determined in advance by means of equipment that are authorised to conduct rules or simply called the principle of "rule of Law".

Characteristics of rule of Law are:

- 1) The recognition and protection of human rights that contains equality in the political, legal, social, economic and cultural aspect.
- 2) An independent and impartial judiciary not influenced by any power whatsoever.
- 3) Legality in the sense of all forms.

The concept of the constitutional state that is given a constitutional basis by 1945, basically cannot be separated from the history of the Indonesian people, especially during the pre-independence of "colonisation" and independence. This is understandable as the Indonesian people were colonised by the Dutch. In relation to the Law, the Dutch as a colonising country intends to the issue of a resident colony and land management by imposing Laws of the Netherlands through concordances of policy by implementing Dutch Laws in the colonies. Therefore, the concept of the rule of Law introduced in 1945 is a state Law similar to the existing rule of Law found in countries that embrace continental European legal systems. The European legal system uses *rechtsstaat*, also known as rule of Law in other parts of the world in anglo-saxon countries. Both models of the legal state, prioritize different aspects (Kusnardi, 1988). As stated by Mahfud (1999) the *rechtsstaat* concept prioritises *wetmatigheid* principles that later became *rechtmatigheid*, while rule of Law prioritises equality before the Law. As result of differences in emphasis in these operations, different elements between *rechtsstaat* and rule of Law emerge. The differences are as follows:

- 1) Elements of Rechtsstaat:
 - b. Protection of human rights (HAM)
 - c. Separation and division of state power to ensure the protection of human rights
 - d. Government by regulation
 - e. Administrative justice; and

- 2) Rule of Law element:
 - a. Existence of the rule of Law
 - b. Equality before the Law; and
 - c. Guarantee of human rights

Rechtsstaat and rule of Law possess both similarities and differences. Both rechtsstaat and the rule of Law have always been associated with the legal protection concept, as these concepts cannot be separated from the idea of giving recognition to and protection of human rights. The legal protection concept needs the efforts to provide protection for the rights to freedom for citizens, regarding the protection of basic rights, now with more insight regarded as human rights. Within a logical consequence of separation or division of power in the country, violations can be prevented or at least minimised. In addition, the difference between Rechtsstaat and rule of Law concepts apparent in the institutionalisation of the judicial world, Rechtsstaat and The Rule of Law offer different jurisdictions, in essence, both concepts of protection for the rights of the human family through the institutionalisation of an independent judiciary. In the Rechtsstaat concept, administrative judiciary is independent judiciaries, while in the rule of Law concept there is no independent judicial administration. This is because in the rule of Law concept, all people are considered equal before the Law, thus citizens should receive justice. As a legal state, Indonesia adopts rule of Law, where Law has supreme authority within a country. The characteristics of a rule of Law can be seen in the practice of governance in Indonesia; the judiciary is independent and impartial and it recognises human rights, although in practice its implementation is still not perfect and there are many irregularities occurring in the characteristics of the legal state. Given that Law almost covers all aspects of the life of the nation, it is necessary to increase the development of Law in line with the expected community development, so the results can be felt by society without exception.

B. The Implementation of the Second Period of Constitution 1945

July 5, 1959 to 1999 (1945 Constitution Before the Amendment)

Article 134 UUDS 1950 declares a "Constituent (Constitution creator meeting), together with the government as soon as possible establish the Constitution of the Republic of Indonesia, that will replace the Constitution of RIS". It clarifies that the Provisional Constitution of 1950 applies only temporarily and a *Constituent* is given the task to create a permanent

Constitution. As there was a problem in the state system due to the Constituent Assembly, they did not succeed in making a new Constitution as a replacement for the Provisional Constitution of 1950. Then President Sukarno issued the Presidential Decree of 5 July 1959 that contained:

- (a) The dissolution of the Constituent Assembly.
- (b) Determination of re-enactment of the 1945 Constitution and withdrawal of the 1950 Provisional Constitution.
- (c) The plan to establish the Assembly and the DPAS in the shortest possible time.

With the issuance of Presidential Decree of July 5th, 1959, the 1945 constitution was reapplied as a constitution for the State of Indonesia. In explanation of the 1945 Constitution it clearly and systematically defined seven key staple governance systems in Indonesia:

- (a) Indonesia is a state based on Law (*rechtsstaat*) and not based on power (*maachstaat*). This means that the government and other state institutions in taking any action must be based on Law and legally defensible.
- (b) A Constitutional system. This means that the government is based on the constitution (basic Law) and not absolutism (unlimited power).
- (c) Supreme state power in the hands of the People's Consultative Assembly (MPR).
- (d) The President is the highest organiser of State government under the MPR.
- (e) The President is not accountable to Parliament.
- (f) The Minister of State is the assistant to the President, and not accountable to Parliament.
- (g) Heads of state power is not unlimited.

C. 1999 Until Now (After Amendments)

Reformation taking place in Indonesia in 1998 has led to a great change for the nation including in the administration of Indonesia. One of reformation outcomes in the field of administration is the four times amendment of the 1945 Constitution. Since the promulgation of the Presidential Decree on July 5, 1959 on the re-enactment of the 1945 Constitution to the enactment of the Soeharto regime, the 1945 Constitution as the constitutional basis of State of Indonesia has not been improved. This occurs in The New Order era, committed to the implementation of the 1945 Constitution purely and consistently, thus giving the impression that 1945 is the constitution that is "sacred" and thus cannot be changed by anyone. There were also threats and a suppressive stigma toward anyone trying to change the 1945 Constitution because at that time only a new order of government was entitled to interpret the 1945 Constitution. This is ironic because in the body of the 1945 constitution, particularly Article 37 of the 1945 Constitution, provides the opportunity to make changes to the 1945 Constitution with rules that have been clearly set. However, it was "vanished" by

the issuance of MPR Decree No. I / MPR / 1983 MPR Decree No. VII / MPR / 1988 Law No. 5 of 1985 on Referendum. With reformation, including reformation in public administration, the desire to perfect the Constitution 1945 as something switched so far can be accommodated. Basically, the 1945 constitution, set on the day after the proclamation of Indonesian independence, is temporary and therefore needs to be improved and supplemented. In the Constitution of amendment, MPR factions agreed on a few things that do not concern or disturb the existence of the state. The contents of the agreement are:

- (a) Does not change the 1945 preamble.
- (b) Defending the Unitary State of the Republic of Indonesia.
- (c) Reinforce the presidential government system.
- (d) Abolition of the 1945 explanation, and includes normative matters of explanation into chapters in the body of 1945.
- (e) Amendment is made by addendum.

As a constitutional state, Indonesia embraces a rule of Law system, whereby Law has the highest authority in a state. The peculiarities of the rule of Law can be seen in the practice of governing Indonesia in the presence of free and impartial judiciary powers and the recognition of human rights, although its operation is still not perfect and there is a lot of misappropriation of the characteristics or elements of the legal state.

Indonesia is a state based on Law (*rechtsstaat*) and not based on power (*maachstaat*). This means that in taking any action, the government and other state institutions should be based on Law and can be legally accountable, which only bears meaning in accordance with the principle of legality. The principle of legality is one element of some elements of the rule of Law. Given that the Law covers almost every aspect of national and state life, it is essential to promote Law development in line with community development, so that the legal goals expected in the form of a legal state can be achieved and the results can be perceived by all levels of society, fairly (Huda, 2003).

Conclusion

The amendment of the 1945 constitution has a great influence on the change of the constitutional system in Indonesia. This includes changes in the structure of state administration, aimed at improving the Constitution 1945 in order to become basic Law, for the Indonesian nation to correspond with the rapidly developing era and to meet the needs of the people of Indonesia. The amendment originally constitutes that State in Law of the structure of the State of the Republic of Indonesia prior to the amendment and after the amendment shall have an effect on the difference of meaning, after expressly stating in Article 1 Paragraph 3 of the 1945 Constitution that the State of Indonesia is a legal state. In



Article 1 (2) the third Amendments to the Republic of Indonesia 1945 constitution states that: "Sovereignty belongs to the people and carried out in accordance with the Constitution". As a constitutional state, Indonesia embraces a legal sovereignty system or rule of Law. This means that Law has the highest authority in the state, and the peculiarities of the rule of Law can be seen in the practice of governing Indonesia in the presence of free and impartial judicial powers and the recognition of human rights, although in practice its operation is still not perfect and there is a lot of misappropriation of the characteristics of the legal state. Given that Law covers almost every aspect of national and state life, it is important to promote Law development in line with community development, so that the legal goals to be achieved in the form of a legal state that can be achieved and the results can be perceived by all levels of society, and fairly.



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