

The Development of Indonesia As The Rule of Law Based On 1945 Constitution Before And After Amendments

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ABSTRACT

Prior to amendment of the 1945 Constitution, constitutional basis of Indonesia that Indonesia is a state based on law is contained in the preamble of the 1945 Constitution body. Statement that Indonesia is a country of law is also mentioned in the 1945 Constitution explanation. Article 1 (3) of the 1945 Constitution states that "Indonesia is a state of law". The provisions of the aforementioned article constitute the constitutional basis that Indonesia is a state that implements a constitutional system in accordance with the elements of the legal state; law is placed as the only rule in the life of society, nation and state (supremacy of law). There is different meaning between Indonesia is a state based on law and Indonesia is a state law. Applicability of the 1945 before and after the amendment is followed by different constitutional structure, which will give different meaning as a state based on law. Continental European legal systems recognized rechtsstaat legal state while other parts of the world recognize concept of rule of law state extracted from anglosaxon states. Both laws state models prioritize different aspects. Rechtsstaat concept prioritizes wetmatigheid principles which later becomes rechtmatigheid, meanwhile the rule of law prioritize equality before the law. Due to differences in emphasis in these operations, there arose the different elements between rechtsstaat concept and rule of law concept.

Keywords: Constitutional structure, Constitution Amendment

1. INTRODUCTION

With the reformation, including reformation in public administration, the desire to perfect the Constitution of 1945 as something switched so far can be accommodated as 1945 constitution set in the day after the proclamation of Indonesian independence is temporary and therefore needs to be improved and supplemented (Yustianti & Roesli, 2018).

In the course of Indonesia's history, proclamation of Indonesian independence on 17 August 1945 is a historic 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, yet a means to achieve its goal to realize prosperous and justice society based on Pancasila as stated in the 1945 opening, paragraph IV.

According Kansil,¹ the proclamation of Indonesian independence is broadly defined as: a) The birth of the Republic of Indonesia, b) The point of culmination of Indonesian independence movement, after struggling for decades since May 20, 1908, and c) The starting point on the implementation of the Message of People Suffering. The history Indonesian government started since Indonesia proclaimed its independence on August 17, 1945.

The history of the birth of Indonesian nation government has started since Indonesia has not proclaimed even before independence. On April 29, 1945 the Government of Japan in Jakarta, formed a body referred to "DokuritsuJuunbiCoosakai" or "*Investigation Agency Efforts Preparation of Indonesian Independence*" (BPUPKI) , This body consists of 62 members, led by Dr. RadjimanWedyodiningrat. Indonesia government principle is contained in Indonesia Basic Law Constitution) 1945 and for Indonesia, the history of its reign came into force as the implementation of the first Constitution of Constitution of the State of Indonesia in 1945 which entered into force on 18 August 1945 or the day after proclamation of independence of the Republic of Indonesia.

BPUPKI performed twice meeting: on May 29 until June 1, 1945, and July 10 to July 16, 1945. In performing its duties as the investigative efforts of Indonesian independence, BPUPKI formed a small committee tasked to formulate the results of the agency's negotiations. A small committee consisting of nine members, was finally on June 22, 1945 managed to draft the Preamble of the Constitution of 1945. In addition, BPUPKI also has managed to compile a draft of the Republic of Indonesia constitution. Having successfully established a draft of the Basic Law, the agency finally dissolved and instead formed a new body called the Committee for Indonesian Independence (PPKI) on August 9, 1945.

An agency called PPKI is composed of well-known leaders and people who have and represent regions of Indonesia. The body is therefore considered as a Representative Body, which 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 finally managed to set the following points:

- a. The Preamble to the Constitution of 1945.
- b. Constitution of 1945.
- c. Electing Ir. Soekarno and Drs. Moh. Hatta respectively as President and Vice President of the Republic of Indonesia.
- d. President for the time being is assisted by the entire National Committee²

¹Kansil, C.S.T., *Hukum Tata Negara Republik Indonesia*. (Jakarta: Bina Aksara, 1984), p.267

²Ibid., Kansil, C.S.T., *Hukum Tata Negara Republik ...* p. 267-269.

On August 19, 1945, PPKI held a meeting and managed to establish two things:

- a. Establishment of 12 Department of State.
- b. Dividing Indonesia in eight provinces and each province is divided into the Residency³

With the election of President and Vice-President of the Republic of Indonesia on the constitution of 1945, formally Indonesia has 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.

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 applied for a short time only and Constituent is given the task of making permanent Constitution. As 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 substitute for the 1950 Constitution, President Soekarno issued a Presidential Decree of 5 July 1959, which contained:

- (A) Dissolution of the Constituent Assembly.
- (B) Stipulation of the re-enactment of the 1945 Constitution and the non-entry into force of the 1950 UUDS.
- (C) Plans for the establishment of MPRS and DPAS in the shortest possible time.

With the issuance of Presidential Decree 5 July 1959, the 1945 Constitution again applies as a constitution for the State of Indonesia. Reformation that occurred in Indonesia in 1998 has caused a great change for Indonesia including state administration. One of the reforms in the field of state administration is four times amendment of the 1945 Constitution. Since the issuance of Presidential Decree 5 July 1959 with one of the contents is 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 to be refined. With reformation, including reformation in the field of state administration, the desire to change refined the 1945 Constitution which has so far been something sacred emerged. 1945 Constitution set a day after the Proclamation of Indonesian Independence is temporary and therefore needs to be refined and equipped.

³Kansil., C.S.T., *Hukum Tata Negara Republik ...* p.270.

Article 1 Paragraph (3) of the 1945 Constitution stated that: "The State of Indonesia is a state 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 (supremacy of law).

2. METHODOLOGY

The writing of this paper uses the normative method, which means that data collection is based on the prevailing laws and regulations and its data collection used literacy relevant with the object of the paper.

3. DISCUSSION

Indonesia is a State of Law

Reformation taking place in Indonesia in 1998 has led to a very big change for the nation including in administration of Indonesia. One of reformation outcomes in the field of administration is four times amendment of the 1945 Constitution. Since the promulgation of 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 have not been changed for perfection.

With the reformation, including reformation in public administration, the desire to perfect the Constitution enhance 195 as something switched so far can be accommodated. Basically, 1945 constitution set in 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 provisions of article is a constitutional basis that Indonesia is a state based on law, law is placed at the highest position in the society, nation and state (supremacy of law).

In the era prior to the amendment of the 1945 Constitution, the constitutional basis of Indonesia that it is a state based on law is contained in the preamble of 1945 constitution body with the constitutional structure as follows:

Statement that Indonesia is a state of law is also mentioned in 1945 explanation, stating that there are seven main key of Indonesian State administration system, namely:

- 1) Indonesia is a country based on law (*rechtstaat*) and not based on power (*maachtstaat*).
- 2) Constitutional system.
- 3) The highest authority is in People's Consultative Assembly (MPR).
- 4) President is the highest state of governance under the MPR.
- 5) President is not accountable to Parliament.

6) Minister of State is the assistant of the President and is not accountable to Parliament.

7) Power of head of state is not limited⁴

Based on the first point of the explanation, it is clear that the law is good order of the national life in the political, economic, social, cultural, and defense and security aspects. Before 1945 Constitution the change and after the change, some constitutions have been applied in Indonesia including Constitution of 1950 and 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 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 (signs) of people's lives, with the intention to create the order of life of the nation that is safe, orderly, fair, with the guarantee of legal certainty and the protection of human rights. In addition, law also serves as a source of law in conflict resolution that occurs between the subject of law.

Indonesia remains as a state based on law to the enactment of the 1945 amendments, as stated in Article 1 (3) mentioned above, the structure of state administration is as follow

Characteristics of state of law, and specifically to the state of Indonesian law are known by 1945 Constitution which is the constitutional basis of the Indonesian Legal State. The nature and characteristics of a state of law can be explained by the results of a symposium organized by the University of Indonesia in 1966 in Jakarta. In the symposium stated that:

"The nature of state 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 authorized to conduct rules or simply called the principle of " rule of law ".⁵

Characteristics of state of law are:

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

The concept of constitutional state which is then given a constitutional basis by 1945, basically cannot be separated from the history of the Indonesian people, especially during the pre-independence of "colonization" and independence. This is understandable as Indonesian people were colonized by the Dutch. In relation to the law, as the Dutch as colonizing country intends to issue a resident colony and land management by imposing laws of the Netherlands through concordances policy by implementing Dutch laws in the colonies.

⁴Waluyo, Bambang, 1991. *Implementasi Kekuasaan Kehakiman Republik Indonesia*, (Jakarta: Sinar Grafika, 1991), p.1-2

⁵Ibid., Waluyo, Bambang. 1991. *Implementasi Kekuasaan Kehakiman ...* page.2-3

Therefore, the concept of state of law introduced by 1945, is a state law similar to the existing state of law in countries that embrace the Continental European legal systems. Continental European legal system uses *rechtsstaat* which is also known as rule of law in other parts of the world from anglosaxon countries. Both models of the legal state, according to SukoWiyono⁶ prioritize different aspects.

Rechtsstaat concept prioritizes *wetmatigheid* principles which later became *rechtmatigheid*, while rule of law prioritizes equality before the law⁷. As result of differences in emphasis in these operations, different elements between *rechtsstaat* and rule of law emerge. The differences are as follows:

- 1) Element 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 protection.\

Rechtsstaat and rule of law possess similarities and differences. Both *rechtsstaat* and the rule of law have always been associated with the concept of legal protection as these concepts cannot be separated from the idea to give recognition and protection of human rights.

Thus both have efforts to provide protection to the rights of civil liberties of citizens, with regard to the protection of basic rights, now more rights as Human, with logical consequence of separation or division of power in the country, violations can prevented or at least minimized.

In addition, the difference between *rechtsstaat* and rule of law concepts apparent on the institutionalization of the judicial world, *Rechtsstaat* and The Rule of Law offers different jurisdictions yet in essence both concepts conduct protection for the rights of the human family through the institutionalization of an independent judiciary. On *rechtsstaat* concept, administrative judiciary is independent judiciaries, while in the rule of law concept there is no judicial administration as a stand-alone environment. This is because in rule of law concept, all people are considered equal before the law, thus citizens should receive justice.

⁶Ibid., Waluyo, Bambang, 1991, *Implementasi Kekuasaan Kehakiman ...* page. 6.

⁷Mahfud M.D. Moch., *Hukum Dan Pilar-Pilar Demokrasi*, (Yogyakarta: Gema Media, 1999), page.127

As a legal state, Indonesia adopts rule of law, where law has supreme authority within a country. The characteristics of a state of law can be seen in the practice of governance in Indonesia, with the judiciary independent and impartial as well as their recognition of Human Rights, although in practice its implementation is still not perfect and there are many irregularities occurring on the characteristics of the legal state.

Given that the **law almost covers all aspects of the life of the nation**, it is necessary to enhance the development of the law as in line with the development of community to achieve and the results can be felt by society without exception.

The Implementation of Second Period of Constitution 1945

July 5, 1959 to 1999 (1945 Constitution Before the Amendment) Article 134 UUDS 1950 declares "Constituent (Constitution creator meeting), together with the government as soon as possible establish the Constitution of the Republic of Indonesia, which will replace the Constitution of RIS". This made clear that Provisional Constitution of 1950 applies only to temporarily and Constituent is given the task to create a Constitution that will be valid permanently. As there was a problem in the state system due to the Constituent Assembly did not succeed in making the Constitution a new one as a replacement Provisional Constitution of 1950, then President Sukarno issued Presidential Decree of 5 July 1959, which contains:

- (a) The dissolution of the Constituent Assembly.
- (b) Determination of reenactment 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 Presidential Decree of July 5th, 1959, 1945 constitution is re-applied as a constitution for the State of Indonesia.

In explanation of the 1945 Constitution clearly defined and systematically on seven key staple governance system in Indonesia:

- (a) Indonesia is a state based on law (*rechtsstaat*) and not based on power alone (*maachstaat*). This means that the government and other state institutions in taking any action must be based on law and legally defensible.
- (b) 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 organizers State government under the MPR.
- (e) The President is not accountable to Parliament.
- (f) Minister of State is the assistant to the President, and not accountable to Parliament.
- (g) Heads of state power is not unlimited.

1999 Until Now (After Amendments)

Reformation taking place in Indonesia in 1998 has led to a very big change for the nation including in administration of Indonesia. One of reformation outcomes in the field of administration is four times amendment of the 1945 Constitution. Since the promulgation of 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 have not been changed for perfection. This happens as the New Order era, committed to **implement the 1945 Constitution purely and consistently**, thus giving the impression that 1945 is one that is "sacred" and cannot be changed by anyone, as well as threats and stigma subversive for anyone who is trying to change the 1945 Constitution because at that time only a new order of government is entitled to interpret the Constitution, 1945.

This is ironic as in 1945 constitution body, particularly Article 37 of the 1945 Constitution provides chance on changes to the 1945 Constitution with rules that have been set clearly. However it was "vanished" by the issuance of MPR Decree No. I / MPR / 1983 jo MPR Decree No. VII / MPR / 1988 jo Law No. 5 of 1985 on Referendum.

With reformation, including reformation in public administration, the desire to perfect the Constitution enhance 195 as something switched so far can be accommodated. Basically, 1945 constitution set in the day after the proclamation of Indonesian independence is temporary and therefore needs to be improved and supplemented. In the Constitution amendment, MPR factions agreed on a few things that do not concern and disturbing existence of the state. The contents of the agreement are (Ni'matul Huda, 2003: 13).

- (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 1945 explanation, and include normative matters of explanation into chapters in the body of 1945.
- (e) Amendment is made by addendum.

As a constitutional state, Indonesia embraces a system of rule of law or rule of law, whereby law has **the highest authority within 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 Recognition of human rights, although in practice the 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 is not based on mere 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. 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 to be achieved in the form of a legal state can be achieved and the results can be perceived by all levels of society fairly and Even without exception.

4. CONCLUSION

Amendment of 1945 constitution has a great influence on the change of the constitutional system in Indonesia, including changes in the structure of state administration aimed at the improvement of the Constitution 1945 in order to become basic law the Indonesian nation corresponding with their rapidly developing era and to meet the needs of the people of Indonesia. Amendment originally constitutes as law-based State on 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 stated that the State of Indonesia is a legal state.

In Article 1 (2) the third Amendments 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 system of legal sovereignty or rule of law, that the 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 Recognition of human rights, although in practice the operation is still not perfect and there is a lot of misappropriation of the characteristics of the legal state.

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Legislation

Of the 1945 Constitution of the State of the Republic of Indonesia result of the amendment