

RESEARCH ARTICLE

THE IMPLEMENTATION OF THE LIVING CONSTITUTION IN INDONESIA

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ABSTRACT

The implementation of a living constitution in Indonesia is still something that has not been fully implemented because considering that the constitution is a fundamental law and is the highest law in regulating a country. A living constitution may evolve, change over time, and adapts to new circumstances without being formally amended. However, on the other hand, a rigid constitution may not evolve because the procedures for changes are heavy and complicated. This study aims to determine whether Indonesia can implement a living constitution or even a rigid constitution. This study uses qualitative research methods and can find results that should be remembered again. One way of actualizing the living constitution is official change, where amendment is one of the official forms of change. Indonesia can implement a living constitution, as long as it does not change the basics and goals of the country because we have done it in the past. In the past, the results still return to the 1945 Constitution.

Keywords: living constitution, rigid and flexible, amendment.

INTRODUCTION

The constitution is considered the fundamental law and the highest law in administering a country as a written constitution. It is in line with Hans Kelsen that argues the hierarchical structure of the state's legal order is rough as follows: presupposing the basic norm, the constitution is the highest level within national law.¹ According to Jimmy Asshiddiqie, if the procedure for amending the constitution is regulated so that the conditions are so heavy and complicated, then the conditions of the constitutions are rigid. On the other hand, if the constitution requires procedures for changes that are not too heavy with considerations that do not complicate the changes, the constitution can be adapted to the demands of changing times then it is a flexible constitution.² A living constitution may evolve, changes over time, and adapts to new circumstances without

¹ Fauzani, Muhammad Addi et al. "Living Constitution in Indonesia: The Study of Constitutional Changes without A Formal Amendment", *Lentera Hukum* 7.1., (2020), 69–84

² Jimly Asshiddiqie, 'Pengantar Ilmu Hukum Tata Negara', *PT. Raja Grafindo Persada*, (2009), 113-114.

being formally amended but at the other hand, a rigid constitution may not evolve because the procedures for changes are heavy and complicated.

In administering the state, the constitution then becomes a rule that limits the powers of the authorities so that they do not act arbitrarily so that every citizen can protect their human rights. Indonesia has a written constitution which is the primary basis for regulating the life of the nation and state, namely the 1945 Constitution. Article 37 of the 1945 Constitution mentioned that the submission of amendments to new articles could be scheduled if submitted by at least 1/3 of the total members of the MPR; to amend the articles, the MPR must attend the meeting at least 2/3; and to amend the articles can only be done with the approval of at least 50% + 1 of all members of the MPR. According to Yoyon M. Darusman, by taking into account the provisions governing the procedures for amendments to the 1945 Constitution as stipulated in Article 37 in the original text as well as in the amendment text, normatively, the 1945 Constitution is a constitution that still has a flexible nature (flexible) this is because the body or main text still regulates how procedures for amending the Constitution. On the other side, if seen empirically by looking at the provisions of the 1945 Constitution, which are mentioned in Article 37 Paragraphs (1) and (2) of the original text and Article 37 Paragraphs (1), (2), (3), (4) and (5) amendments to the 1945 Constitution are a rigid constitution. This rigid nature can be seen in empirical evidence that the People's Consultative Assembly, as a parliamentary institution, has the authority to amend the 1945 Constitution. It consists of political forces that are very difficult to quantify when there are desires to amend the 1945 Constitution.³

The form of the Indonesian state has changed several times as follows.

1. During the First 1945 Constitution.

Based on Article 1 paragraph 1 of the original 1945 Constitution that: “Negara Indonesia ialah Negara Kesatuan, yang berbentuk Republik”⁴. Based on the original 1945 Constitution, it can be concluded that during the enactment of the first constitution, the form of the Indonesian state was a unitary state. Based on Article 18 of the 1945 Constitution, Indonesia adheres to the form of a unitary state with a system of decentralization and deconcentration. However, in practice, if seen based on the organic law from article 18 of the 1945 Constitution, namely Law No. 22 of 1948 Basic Law regarding Regional Government in the Considering section and the articles only regulate the implementation of autonomous regional governments.⁵

2. During the 1949 RIS Constitution.

The constitution of the RIS is the constitution of a federation with a temporary parliament system. Article material in the RIS constitution has met the criteria to become a democratic constitution because it contains three critical points in the constitution: guarantees for human rights, the establishment of a constitutional structure that is fundamental, and there is a division and limitation of basic administrative tasks. It is said that the Constitution of RIS is the first constitution in

³ Yoyon M. Darusman, ‘Kajian Yuridis Urgensi Amandemen Kelima Undang-Undang Dasar 1945 Dalam Sistem Hukum Ketatanegaraan Indonesia’, *ADIL: Jurnal Hukum*, 4.2 (2013), 245-265.

⁴ Article 2 Section 3 1945 Constitution of the Republic of Indonesia

⁵ Soehino, ‘Hukum Tata Negara: Perkembangan Pengaturan Mengenai Pelaksanaan Desentralisasi dan Otonomi Daerah’, *BPFE-Yogyakarta*, Yogyakarta, (2010), 37.

the world that contains articles of Human Rights after the declaration of the United Nations (December 1948).

3. During the Provisional Constitution of the Republic of Indonesia, 1950
The 1950 Provisional Constitution was motivated by the spirit restore the integrity of the Republic of Indonesia into a unitary state as proclaimed on August 17, 1945. Even though the Dutch tried to divide the Unitary State and The Republic of Indonesia by establishing states, these efforts failed. As evidenced by the unification of the states, the part became the Republic of the United States of Indonesia or was incorporated into a federation. With that spirit, then do it changes to the 1949 RIS Constitution into the Basic Law While the Republic of Indonesia 1950 (UUDS RI 1950) concerning all states or regions that are members of the Republic United States of Indonesia to be changed regarding the form of the composition of the country from a state in the form of a federation to a state in the form of unity. The 1950 Constitution of the Republic of Indonesia officially entered into force on August 17, 1950, replaces the 1949 RIS Constitution, and ends after its promulgation Presidential Decree (Soekarno) on July 5, 1959, which stipulates: the re-enactment of the 1945 Constitution.
4. During the Return to the 1945 Constitution Until the Amendments Until Now
On 5 July 1959, President Sukarno issued a decree President known as the name Presidential Decree 5 July 1959. One of the materials is to re-establish the 1945 Constitution (original) as the state constitution. 1945 Constitution of the Old Order Era until the 1945 Constitution, the fourth amendment remains consistent regarding the form of the state; Indonesia is a unitary state. Article 1, paragraph 1 of the 1945 Constitution states that the amendments are: Indonesia is a unitary state, in the form of a republic.

Our constitution has changed many times, and in the end, it returned to the 1945 Constitution because that is the only constitution suitable for use in our country. Indonesia, reflected in a constitution, for Indonesia is the 1945 Constitution. A mechanism for achieving goals is needed, namely through a series of provisions or policies, which are fundamental because the state of Indonesia is a state based on the law under the conditions of Article 1 article (3) of the 1945 Constitution. The mechanism for achieving state goals is always based on law, the law should be understood and developed as a unified system, as a legal concept.

METHOD

This study uses a qualitative approach to determine the consequences of Indonesia using the Living Constitution. The data sources for this research include Primary Legal Materials, namely the 1945 Constitution of the Republic of Indonesia. Secondary Legal Materials, including Thesis, and Legal Dissertation; Legal journals; Books and Papers relating to Constitution Law; Internet to obtain valid and accurate data in this study. The following procedure was taken, a literature study.

RESULTS & DISCUSSION

THE IMPACT OF THE LIVING CONSTITUTION IN INDONESIA

Should courts interpret the Written Constitution's text as it would have been understood by ordinary citizens alive when the text was adopted? Or should they interpret the Constitution as a "living" organism, one meant to evolve to suit contemporary society's changing needs and values? Originalists believe that the Constitution must evolve to keep pace with our constantly changing world. Conversely, proponents of a Living Constitution believe that the formal amendment process is too "cumbersome" to keep the current Constitution because it is too difficult to amend the Constitution⁶.

According to Hamdan Zoelva, Chief Justice of the Indonesia Constitutional Court 2013-2015 period says, in looking at the constitution, people view the constitution in two dimensions. All he can say that there is a positive dimension and a negative dimension, which is:

1. The positive dimension is a perspective that sees the constitution as a source of authority or authority and is usually adopted by executive officials in government. So, the constitution is a source of authority. Because of that, he or executive officials can do anything to achieve personal goals that coincide with the ideals of the state, and sometimes the ideals of the state with personal will in the middle of the road often do not go the same way.
2. The negative dimension is a perspective that sees the constitution as a limiting power and is usually adopted by opposing parties, non-governmental organizations (NGOs), or civil society.

So, what is the impact in Indonesia if we use a living constitution?

A living constitution is not only in a formal (written) form but is capable of realizing a good government for a sovereign society as envisioned. The constitution can develop and be developed in line with the changes. In current practice, changes seem elastic and less aspirational because the constitution does not emerge from a vacuum.⁷

A living constitution understands that the state constitution can be changed and is flexible, and evolves with the times. However, the impact on society is that executive agency officials can change or manipulate according to the ideal thoughts of the official. From the definition of the constitution, it is an essential meaning for the state to regulate power, limit the power and become the foundation of state life. However, the original intent of the 1945 Constitution is designed to direct the behavior of the Indonesian people in the present and the future, so there are not only negative impacts but positive impacts, including:

1. The negative impacts:
 - a. Corruption is rampant at every level of government institutions because the new constitution of the 1945 Constitution is in harmony with their ideas.

⁶ Richard F Duncan. "Justice Scalia and the rule of law: originalism vs. the living constitution." *Regent UL Rev.* 29 (2016): 9.

⁷ Denny Indrayana. "Negara antara ada dan tiada: reformasi hukum ketatanegaraan". *Penerbit Buku Kompas.* (2008).

The corruption happens because the government elite can change the constitution according to what they want and dissolve a state institution that is considered unprofitable.

2. The positive impacts:
 - a. The 1945 Constitution can develop and adapt to the times that can be used as a reference to direct people's behavior without being formally amended.

CONCLUSION

Based on the results of research and discussion, it can be concluded that the constitution in Indonesia has often been amended several times, including the 1945 Constitution, the RIS Constitution, and the 1950 Constitution, and returned to the 1945 Constitution until it was amended for the 4th (fourth) time and is valid until now. The legal system in Indonesia adheres to a statutory hierarchy where regulations under the 1945 Constitution must regulate in more detail and more specifically. Evidence from constitutional changes in Indonesia in the past indirectly Indonesia has implemented a living constitution, namely developing over time which then returned to the original 1945 Constitution, which stated that the Indonesian state was a unitary state in the form of a republic. From these lessons, Indonesia learned that Indonesia does not need to change the basis and objectives of the state. We may apply a living constitution as long as it does not change the basis and objectives of the state.

REFERENCES

- Asshiddiqie, J. 'Pengantar Ilmu hukum Tata Negara. Sekretariat Jenderal dan Kepaniteraan', *Mahkamah Konstitusi RI*. (2006).
- Darusman, Yoyon M. "Kajian Yuridis Urgensi Amandemen Kelima Undang-Undang Dasar 1945 Dalam Sistem Hukum Ketatanegaraan Indonesia." *ADIL: Jurnal Hukum* 4.2 (2013): 245-265.
- Duncan, Richard F. 'Justice Scalia and the rule of law: originalism vs. the living constitution.' *Regent UL Rev.* 29 (2016): 9.
- Fauzani, Muhammad Addi, et al. 'Living Constitution in Indonesia: The Study of Constitutional Changes Without A Formal Amendment.' *Lentera Hukum* 7.1 (2020): 69-84.
- Indrayana, Denny. 'Negara antara ada dan tiada: reformasi hukum ketatanegaraan'. *Penerbit Buku Kompas*, (2008).
- Soehino. 'Hukum Tata Negara: Perkembangan Pengaturan Mengenai Pelaksanaan Desentralisasi dan Otonomi daerah', *Fakultas Ekonomika & Bisnis UGM*, (2010).