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URGENCY OF THE FIFTH AMENDMENT OF THE INDONESIAN 1945 CONSTITUTION

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Abstract

This article focuses on the idea of a fifth amendment to the Indonesian constitution, namely an amendment to the UUD NRI 1945. Stressing today's constitutional problems, which we identify as deriving from the norms in the UUD NRI 1945, this article presents the urgency of the fifth amendment and how to bring about a democratic constitution. Using a statutory and conceptual approach, this normative study identifies a number of foundational issues in the UUD NRI 1945. Thus, the fifth amendment of the constitution finds its urgency. Through this article, we encourage the fifth amendment to be conducted to present a democratic constitution, both materially and formally.

Keywords: Constitution, Fifth Amendment, the UUD NRI 1945.

1. INTRODUCTION

The greatest foundation for a democratic state grounded in the rule of law is a commitment to the constitutional state (Mathe, 2014: 37), which rests on a reliable constitution that can protect itself from threats coming from both within and outside the government. A constitutional state refers to a state that has produced recognized laws and conventions to perform the functions of the three powers of government, the executive, legislative, and judicial (Strong, 2004: 15). A reliable constitution can guarantee sustainable democracy, regulate in detail the lines of authority and power with the check and balance mechanisms (Mathe, 2014: 36-37), and provide sufficiently broad guarantees for the human rights and the rights of the citizen (Chiassoni, 2016: 40; Weinrib, 2014: 169; Fadjar, 2003: v).

During the old and new orders in Indonesia, the pre-amended constitution never resulted in a democratic and constitutional government. Although the established government had formally fulfilled the will of the constitution, a materially constitutional government is not simply a government in accordance with the articles of the constitution, but a government in accordance with the constitution that contains the principles of constitutionalism (Harijanti, 2003: 251-251). Unfortunately, the pre-amended constitution did not contain firmly and strictly the principles of limitation of power and check and balance mechanisms so it was easily abused by government actors, precisely by the people in charge of the executive sector (Lailam, 2021: 134). In addition, the pre-amendment constitution contained too many attributions of authority, contained articles with multiple interpretations, too much reliance on the people in charge of the government (Mahfud, 1999: 63-69), did not regulate the judicial review mechanism (Harijanti, 2003: 252), and did not contain a comprehensive human rights provision (Haryanto et al, 2008: 137).

Consequently, in 1999, the People's Consultative Assembly made the first constitutional amendment and continued with the second, third, and fourth amendments until 2002. Substantially, the current Indonesian constitution (UUD NRI 1945) has been fundamentally transformed since

1999, the first amendment, up to the fourth amendment in 2002. The amendments covered a vast amount of material, almost three times the amount of the original provisions of the pre-amended constitution. While the original text of the constitution contained 71 provisions, the total number of provisions included 199 after four amendments (Asshiddiqie, 2007: 31). Unfortunately, the amendment process was considered to be extremely unfavorable because it did not have an academic paper and lacked public participation (Tambunan, 2002: 216). However, in terms of the outcome, the UUD NRI 1945, the post-amendment constitution, is more democratic.

The amendment is an effort for the Indonesian people to find and form a materially constitutional constitution so that the grim history of the past does not happen repeatedly and the organization of the nation, state, and society is established democratically. Given that the constitution is a resultant as emphasized by Wheare (Wheare, 1975: 67), the constitution should be formed in accordance with the ideological, political, economic, social, cultural, and defense and security needs at a certain time (Mahfud, 2010: xxi).

After the amendment, several new problems began to be arisen Thus, the desire to reamend the UUD NRI 1945 came to the fore. Some of the problems are related to the authorities of the Regional Representative Council, which are still considered to be minimal and unbalanced with the authorities of the House of Representatives. The friction between state institutions and state auxiliary institutions that have recently occurred has also increased the problems in the Indonesian constitution, as well as many other problems. This indicates the need for a fifth amendment to the constitution. In addition to the substance of the problems, it is important to remember that the previous amendment process was also considered undemocratic and therefore lacked legitimacy in the public. Mukhti Fadjar says that the attempt to amend the constitution should not only revise the formulation and substance but should also constitute a paradigmatic change in the life of society, nation, and state (Fadjar, 2007: 44-47).

Therefore, the fifth amendment to the constitution must first be carefully planned. The amendment material in the form of an academic paper, who will execute the amendment process, and the mechanism for accommodating as many aspirations as possible from the public are the three main components that must be prepared. It is important to ensure that the resulting constitution can solve the nation's problems and bring Indonesia safely away from the current multidimensional crisis. In this regard, this article briefly analyzes the reasons for re-amending the constitution and the efforts that can be taken to develop a democratic constitution.

2. IMPLEMENTATION METHOD

This doctrinal study was written using a statutory and conceptual approach. The data is qualitative and sourced from secondary data, which consists of primary legal material and secondary legal material. The data is analyzed in a prescriptive manner.

3. RESULTS AND DISCUSSION

3.1 Constitution as A Resultant

The terms constitution and UUD NRI 1945 are often used interchangeably in this article. Indeed, some scholars argue that the two terms are distinguishable because the first is considered to have a broader sense than the letter one, but other scholars consider the two terms to be the same. Therefore, scientifically, there is no need to debate this since we used them in the same sense with certain arguments.

According to Mahfud MD, the substance of the constitution is a political choice agreed upon by the constitutionally authorized legislative body. The substance of the constitution has no absolute relation to the question of right or wrong and the choice of good or bad between different opinions and wills regarding the substance of the constitution. All can be right and good according to the perspective of the theories and arguments used. This is because scientific and constitutional goodness and truth are relative and depend on the theoretical perspectives and arguments used.

This is the same as a judge's decision which is not necessarily true because the judge's decision on a case can be different if the case is examined by another judge. However, once a judge's decision has been legally binding, it remains in force. The same applies to constitutions that have been legally enacted (Mahfud, 2010: xvi).

The enactment of a constitution is thus not based on whether it is more correct or better than others but because it was agreed to be adopted and enacted as the constitution in force. Accordingly, it is the constitution adopted by the competent authority that is binding to be implemented until it is constitutionally amended. Although some theories or comparisons are considered to be favorable from other countries, these are not binding to be followed because Indonesia produces its version of constitution with all its modalities.

Constitutional studies make a clear note that the constitution is a resultant of the agreement of its drafters in accordance with the political, economic, social, cultural, and legal circumstances when the constitution was made. Therefore, the constitution describes the needs and answers to the problems faced at that time. Given that society is always changing and following the challenges that are always changing too, the constitution as a resultant must also have the ability to be changed. However, the period of enactment must be longer and amendments must be regulated more complex than amendments to ordinary laws (Ginsburh & Melton, 2015: 686). For the constitution to be longer in force and more difficult to amend, two aspects must be considered in making the constitution. First, the substance of the constitution should be general and contain only the principles so that it can better accommodate new developments in society for a long time. Second, the provisions on how to amend are included in the constitution itself with procedures and conditions that are more complex than amending regular laws (Mahfud, 2010: 20-21).

Constitutions, when it is drafted and adopted, tend to reflect the dominant beliefs and interests or a compromise between conflicting beliefs and interests that characterize the society at the time. Moreover, constitutions do not necessarily reflect political or legal beliefs and interests per se. It may include conclusions or compromises on economic and social issues that the drafters of the constitution wanted to secure or express. A constitution is the resultant of the various modalities, political, economic, and social, operating at the time of its drafting (Wheare, 1975: 103).

Saying this is to say something close to a truism. However, saying this is necessary given that if we seek to understand the significance of constitutions, then we must understand the meaning behind the expression of "the people"; by whom and on whose behalf most modern constitutions are drafted as well as what and who are the main actors in drafting and adopting constitutions. "The people" encompasses a wide range of interests and opinions, many of which are conflicting. In truth, the people, or all the people do not mean much. They never have and will never draft a constitution directly. They have never drafted a constitution in consensus. Disappointed with the habit of traditional historians, who portrayed the American Constitution as a product of the people, Charles Beard in 1913 published his work An Economic Interpretation of the Constitution of the United States, in which he argued that, instead of being made by all the people, the constitution was the work of a group of people whose economic interests were adversely affected by the government and who were determined to draft a constitution that would protect and preserve their interests (Wheare, 1975: 104).

From the above description, it can be understood that a constitution is an agreement of its drafters that is aligned with the political, economic, social, and cultural needs of the time when the constitution was drafted. It is a compromise of conflicting interests. Therefore, due to the times and the rational state of society, a constitution is likely to be amended based on changes in political policy orientation, political configuration, the state of society, or for other reasons.

Indonesia's constitution, the UUD NRI 1945, is the same. It was the result of an agreement by the People's Consultative Assembly when amending it from 1999-2002, as well as a compromise of the conflicting interests of its drafters (Subekti, 2006). Therefore, many aspects

have changed since the amendment time to date, ranging from the orientation of political policies, political configurations, and societal needs. In recent years, even constitutional issues demanding constitutional change have emerged.

3.2 The Urgency to Amend the UUD NRI 1945: Discussing the Fifth Amendment to the Constitution

In general, the UUD NRI 1945, the result of four amendments to the original constitution from 1999 to 2002, is much more favorable than before. The policy preference for amending the constitution itself has been huge progress for democracy as in the past any idea of amending the constitution was categorized as subversive (Mahfud, 2010: xiii). As a result, there have been almost no substantive changes to the Indonesian constitution since the re-enactment of the Presidential Decree of July 5, 1959. The constitution at that time was even considered a sacred document that could not be challenged.

The UUD NRI 1945 has established a more proportional check and balance mechanism in the Indonesian constitutional system. The position of president, which was previously interpreted to be held for an unlimited period of time, which in practice allowed Soeharto to maintain his 32-year presidency, has been fixed by the provision of periodic general elections; that is, the president can be re-elected once more for the same term of office. The judicial review mechanism to test laws and regulations in accordance with their hierarchy is now well developed. Before the amendment, many laws and regulations were contrary to higher laws and regulations, but no testing institution could be operationalized. In fact, at that time, many laws were considered contrary to the constitution and many regulations under the law were considered contrary to the law (Mahfud, 2010: xiii).

Consider this now. Since the reformation era in Indonesia, particularly after the constitutional amendment process was completed in 2002, many laws have been tested in the Constitutional Court as an implementation of a check and balance mechanism that is favorable for the constitutional system. Now, the legislative and executive powers can no longer make laws arbitrarily or through certain political transactions. This is because legislative outputs can already be monitored and reviewed by a judicial institution, the Constitutional Court. In just 3.5 years since its establishment, precisely until the end of 2006, the Constitutional Court has tested no less than 99 laws (Yuliandri, 2010). The Supreme Court has also repeatedly decided on judicial review applications for the testing of regulations under the law. None of this was possible during the pre-amendment constitution.

The incorporation of human rights guarantee in the UUD NRI 1945 confirms the constitution's strong protection of citizens. The rights of citizens can no longer be interfered with through unauthorized ways. The results of the amendment, thus, have provided significant changes to three areas of power at once, including executive, legislative, and judicial. The expected output is the establishment of a well, democratic, and balanced constitutional system and process that can ultimately realize the objectives of the unitary state of Indonesia as stated in the preamble of the UUD NRI 1945.

Although it can be concluded that the UUD NRI 1945 is much better and legitimate with all its legal consequences, one fact that needs to be recognized is that the results of the amendment remain several issues. These problems are getting more complex and increasing because they occur not only at the practical level but also in the norms and institutional system. This led to the need for the fifth amendment to the constitution. This amendment is conducted merely to address the existing issues and prevent further problems that erode the soul of the nation and state.

In recent years, several major Indonesian constitutional problems have emerged, which have taken a lot of energy, finance, and time to address. Conflicts between state institutions, both those whose authority is directly attributed to the UUD NRI 1945 and by law, have continued to occur throughout the decades. Their settlement leaves the people disappointed because the output of the

settlement does not reflect the will of the Indonesian people. In the institutional sector, there are several state institutions whose existence still requires a lot of support in the form of norms from the constitution either because of their tremendously limited authority or because of other issues.

According to Ni'matul Huda, there are several issues in the application of the UUD NRI 1945. These problems include (Huda, 2015):

a. Regarding the Position of the People's Consultative Assembly (MPR) and the People's Consultative Assembly (DPD)

After the amendment in 2002, the constitution no longer places the MPR as the highest state institution. The MPR is structurally equal to other state institutions, so it is no longer authorized to formulate State Policy Directives and issue MPR Decrees as the basis of the law. This situation makes the MPR's existence equal to its absence. It can be said here that the urgency of the MPR is almost nothing. Some consider that the MPR's existence is a waste of state funds. Therefore, the existence and position of the MPR need to be reconstructed.

The following state institution is the DPD. This institution was established to represent the aspirations of the respective regions, but the role of DPD is not significant due to the lack of authority given. Similar to the MPR, its existence is the same as its absence. The authority of DPD as a legislative body is limited to the stage of proposing and discussing legislation. DPD has no space in decision-making, whereas their role as regional representatives is strategic. Therefore, the strengthening of DPD's authority is necessary.

b. Regarding The Mandate of Article 18 of the 1945 Constitution Has Not Been Implemented

Article 18 of the UUD NRI 1945 mandates broad regional autonomy to each region in Indonesia. However, in its implementation, the autonomy only covers political competence and has not reached the economic aspect. In addition, the criteria for special autonomy mandated by the UUD NRI 1945 have not been implemented, confusing the public.

c. Regarding the Ambiguity of the Judicial Commission's Position

As a state commission, the existence of the Judicial Commission in the UUD NRI 1945 is questioned. This is because Judicial Commission is not a state institution but a state commission. According to some experts, its original authority is to support the Supreme Court, but the Judicial Commission itself also supervises Supreme Court judges at the same time and has a separate organization from the Supreme Court. What is even more confusing is that the Constitutional Court's judges currently are not subject to supervision by the Judicial Commission, even though the supervision of judges is one of its authorities.

d. Regarding Friction between State Institutions

Indeed, the Constitutional Court has been established and can resolve inter-state institution authority disputes. However, it is still limited to state institutions whose authority is directly attributed to the UUD NRI 1945 and regulated in Law No. 8/2011. As a result, during the conflict between the Corruption Eradication Commission (KPK) and the National Police (Polri), for instance, this conflict became prolonged and interminable because the Constitutional Court did not have the authority to resolve this conflict. This can be minimized if the UUD NRI 1945 clearly defines the steps for settlement.

e. Regarding the Authority of the House of Representatives in the Fulfilling of State Officials

Based on recent experiences, the involvement of the House of Representatives in fulfilling state officials has created new issues and this has the potential to lead to institutional politicization, given that the House of Representatives is a political institution.

f. Regarding the President's Prerogative

The president has several prerogatives as both head of state and head of government, but the involvement of the legislature, the House of Representatives, in the appointment is considered troubling.

g. Regarding the Mechanism of Judicial Review

In the UUD NRI 1945, it is explained that there are two state institutions authorized to test laws and regulations, namely the Supreme Court and the Constitutional Court. This can cause some problems if, for instance, there are conflicting decisions between the Supreme Court and the Constitutional Court. This also includes the involvement of the executive in selecting regional regulations which are also vulnerable to being overruled by the central government. Therefore, it is important to make the mechanism for testing laws and regulations a one-roof system.

These are some of the reasons that became the basis for us to state the importance of amending the UUD NRI 1945; the fifth amendment to the constitution. Although the UUD NRI 1945 has had quite progressive changes, several other problems still arise. As a result, the amendment of the UUD NRI 1945 is a necessity.

3.3 Reconstructing the Constitution Toward a Democratic Constitution

A democratic constitution is the ideal construction of the constitutions of modern states. However, although democracy has been theorized completely in the West and the elements of democracy both in its universal and specific forms have been found in the economic, social, cultural, legal, and political fields, each country has the freedom to construct its democracy and it does not have to be similar to the Western democracy. This is because each country in its essence is built based on its philosophy, which is abstracted from the values that live in the society. Therefore, the democracy of a country may be different from that of another country. The adoption of Western democracy in a particular country will result in resistance and fundamental issues within that country, but if a country is ideologically in line with Western philosophy, then the adoption of the democratic system as a whole is acceptable.

To construct a democratic constitution, we divide it into two sections, namely a materially democratic constitution, in the sense that its provisions and substance are in accordance with the principles of democracy, and a formally democratic constitution, in the sense that the process of drafting is in accordance with the principles of democracy.

a. Materially Democratic Constitution

A constitution can be considered materially democratic when its substance is aligned with the principles of democracy. In this regard, there have been many theories from experts that describe how the substance of a constitution ought to be.

1) Pancasila as the Philosophy of the UUD NRI 1945 Amendment

Indonesia as a sovereign country with a long history has values that are different from the values that exist where the theory of democracy was invented. These values were constructed by the founding fathers to become the foundation of Indonesia, which serves as the basis for the life of the nation, state, and society. They are the basis for the legal, economic, political, social, and cultural systems of Indonesia. These values are known as Pancasila.

Pancasila is the state philosophy of the Republic of Indonesia (Titus, Smith, & Noland, 1984), which was officially authorized by the Indonesian Independence Preparatory Committee on August 18, 1945, and incorporated in the preamble of the UUD NRI 1945, enacted in the Official Gazette of the Republic of Indonesia Year II No. 7 together with the body of the constitution (Kaelan, 2004: 10). Although the preamble and body of the UUD NRI 1945 do not contain the term "Pancasila", but from the phrase "which is formed in an organization of the Republic of Indonesia

which has the sovereignty of the people based on ...", the phrase "based on" indicates Pancasila, considering that Pancasila itself means the foundation of the state.

There are various understandings and status of Pancasila, each of which must be understood in its respective context. For example, Pancasila as the way of life of the Indonesian Nation, as the philosophy of the Republic of Indonesia, as the ideology of the Indonesian Nation and State, and many other positions and functions of Pancasila. The entire position and function of Pancasila do not stand on its own, however, if we categorize it, it will return to the two positions and functions of Pancasila, namely as the Foundation of State Philosophy and as the Way of Life of the Indonesian Nation (Kaelan, 2002: 46).

Before the formulation and approval of Pancasila as the Foundation of State Philosophy, its values already existed in the Indonesian nation which is a way of life in the form of customs and cultural values as well as causa materials. In this sense, Pancasila and the Indonesian are inseparable so Pancasila is also referred to as the Indonesian National Identity. After the Indonesian established the state, the state formers recognized Pancasila as the State Foundation of the Republic of Indonesia. As a nation and state, Indonesia has ideals that are considered the most appropriate and correct so that all ideals and ideas are put into Pancasila. In this sense, Pancasila serves as the ideology of the Indonesian Nation and State and as the principle of Unity of the Indonesian nation and state. Thus, Pancasila as a state philosophy is objectively raised from the way of life which is also the philosophy of life of the Indonesian nation that has existed throughout the history of the nation itself (Kaelan, 2002: 47).

Pancasila as a philosophical system is essentially a value, the source of all norms, including legal norms, moral norms, and other state norms. In the philosophy of Pancasila, critical, fundamental, rational, systematic, and comprehensive thoughts are embodied in it and this system of thought is a value. Therefore, a philosophical thought does not directly present norms, or guidelines, in an action or praxis aspect but rather a fundamental value (Kaelan, 2004: 85).

As a value, Pancasila provides fundamental and universal foundations for individuals in social, national, and state life. When these values will be applied in praxis or real life in society, nation, and state, the values are elaborated in clear norms. These norms include, first, moral norms, which are related to behaviors that can be measured in terms of good or bad, polite or impolite, moral or immoral. In this capacity, the values of Pancasila have been elaborated in norms of morality or ethical norms so that Pancasila becomes a system of ethics in society, nation, and state. Second, legal norms are a system of laws and regulations that apply in Indonesia. In this sense, Pancasila serves as a source of law. As a source of law, the values of Pancasila have long manifested as a noble moral ideal that was manifested in the daily life of Indonesian before they formed the state.

Thus, the principles of Pancasila are essentially not a directly normative guideline or praxis but a system of ethical values, a source of norms including both moral norms and legal norms, which in turn must be further elaborated in ethical, moral, and legal norms in the life of the state and nationality (Kaelan, 2004: 86).

In the field of law, the Pancasila-based legal system also has signs and creates guiding rules in national law politics. The most common sign is the prohibition of the issuance of laws that are contrary to the values of Pancasila. There should be no law that contradicts the values of divinity and civilized religion, no law that contradicts human values and human rights, no law that threatens or has the potential to damage the ideological and territorial integrity of the Indonesian nation and state, no law that violates the principle of popular sovereignty, and no law that violates the values of social justice (Mahfud, 2010: 8).

This principle is strengthened by the existence of four rules in politics or legal development (Tanya, 2006; Mahfud, 2010: 9). First, national law must be able to maintain integration (integrity) both in ideology and territory in accordance with the aim of protecting the entire Indonesian nation.

The issuance of legal products that have the potential to divide the integrity of the nation and state must be prevented, including discriminatory laws based on primordial relations.

Second, national laws must be developed democratically and nomocratically in the sense that they must involve participation and absorb the aspirations of the wider community through fair, transparent, and accountable procedures and mechanisms. Laws that are processed cunningly, secretive, and transactional must be prevented. Third, national law must be able to provide social justice in the sense that it must be able to provide special protection to weak groups in dealing with strong groups both from outside and from within the country itself. Without special protection from the law, weak groups will always be inferior if they are released to compete or fight freely with strong groups. Fourth, the law must guarantee freedom of religion with full tolerance among its adherents. There should be no privileged treatment of religion just because it is based on the size of the number of adherents. The state may regulate religious life limited to maintaining order to avoid conflict and facilitating so that everyone can practice their religious teachings freely without disturbing or being disturbed by others.

2) The Elements of a Democratic Constitution

In addition to embracing the values of Pancasila, a democratic constitution in the Indonesian context must also fulfill several other elements conceptualized by constitutional law experts. However, if there is a conflict between these concepts of Pancasila, then Pancasila must be prioritized. According to Bagir Manan, democracy in Indonesia can only be established by consistently applying the notion of the rule of law, namely applying the principle of constitutional government, namely limiting government power through a constitution, having and implementing an independent and fair judicial system, respecting the principle of equality before the law, ensuring the protection of human rights, conducting free, honest and fair elections (Indrayana, 2007: 115).

According to Denny Indrayana, two important elements must be included in a democratic constitution: the separation of powers and the protection of human rights. In line with Lane's opinion, current constitutionalism contains at least two different sets of institutions, namely: human rights and the separation of powers (Indrayana, 2007: 123). Thus, the main prerequisite of a materially democratic constitution is the limitation of power, to prevent arbitrariness and overreaching of power between state institutions, and there is the protection of human rights, to protect citizens from tyrannical and repressive governments because, in a democratic state, sovereignty rests with the people.

b. Construction of a Formally Democratic Constitution

How to formulate a democratic constitution in terms of the method or process of making it? According to Vivien Hart, the process of constitution-making is as important as the substance of a final document to legitimize a new constitution. Therefore, a constitution should not only guide the democratic substance of the document but also the process of its making (Indrayana, 2007: 85).

According to Denny Indrayana, several guiding principles need to be followed in the process of making or amending a constitution. First, the process should be done according to a specific schedule. This is because a specific schedule ensures that everything can be measurably prepared in advance. Second, the constitution-making body should be chosen carefully. In the Indonesian context, we see a special institution should be established to manage constitutional amendments. This is based on experience, including experience in other countries, where constitution-making by parliamentary institutions is highly sensitive to the lobbying of political elites and this has resulted in outputs that are far from what is expected.

Third, setting the basic agenda should be done in advance, long before the day of the event. This includes, for instance, whether the existing constitution will be amended or replaced. Fourth, the mobilization of public participation needs to be well organized to involve as many people as

possible. This participation is important to secure more legitimacy for the constitution that will be established.

4. Conclusion

This article argues that amending the constitution is a necessity given that the substance of the constitution will always depend on the context of time and place. In the Indonesian context, this study identifies the urgency for the fifth amendment to the constitution, amending the UUD NRI 1945. This, among other things, is important to do because the current constitutional problems also come from problems with the norms in the UUD NRI 1945. For this reason, this article encourages amendments to be conducted by being mindful of two equally important aspects. First, amendments must be conducted to ensure that the constitution after the fifth amendment contains materially democratic substance and places Pancasila as the material source of law. Second, amendments should be conducted by encouraging the widest possible public consultation and participation so that the fifth amendment constitution is formally democratic.

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