

THE VICE PRESIDENT REPLACES THE PRESIDENT WHO PERMANENTLY UNABLE TO PERFORM HIS OBLIGATION BASED ON INDONESIAN CONSTITUTION OF 1945

Siti Nurmawan Damanik

Doctoral Program of Legal Studies of Faculty of Law, Universitas Udayana, Bali,
INDONEISA.

damanik_city@yahoo.com

ABSTRACT

According to the constitution, the President holds the highest power in the government. In performing his obligation, the President is abetted by a Vice President. The Vice President acts as the assistant of the President and Vice President can replace the position of the President if he permanently unable to perform his obligation until the end of his tenure, pursuant to Article 8 of Indonesian Constitution of 1945, if the President permanently unable to perform his obligation due to demise, sick, impeachment and inability to perform his obligation, the President shall be replaced by the Vice President. In addition, according to Article 7 of Indonesian Constitution of 1945, the tenure of President and Vice President is 5 years and they can be re-elected for another 5 years.

Keywords: Vice President Replaces President's position, permanent inability of performing obligation as president.

INTRODUCTION

The Unitary State of the Republic of Indonesia (The Republic of Indonesia) is a unitary state in form of a Republic as stipulated in Indonesian Constitution of 1945, Article 1 paragraph (1). As a republic state, the power of President comes from the people because the President is elected by people and based on the will of the people. The Republic of Indonesia uses a presidential system which means that the Republic of Indonesia is in the form of a Republic, thus the power of its government is hold by the President, and therefore, the president has a function as head of state as well as head of government. It is also affirmed by A. Hamid S. Attamimi,² which states that : “the Head of the Republic of Indonesia has the highest position in the government, which also acts as the head of government as stipulated in the general explanatory note of Indonesian Constitution of 1945”.

In Indonesian government, there are several state institutions that have a certain function, the division of power is distributed to several state institutions inter alia:a) The People's Consultative Assembly (MPR), b) The House of Representatives(DPR), c). The Council of Local Representative (DPD), d). President, e). The Financial Auditory Board (BPK), f). The Supreme Court (MA), and g). The Constitutional Court (MK). Each of these state institutions has its own function and authority based on the Indonesia Constitution of 1945.

Based on the constitution, the President and Vice President is directly elected by the people through general elections, because sovereignty lies in the hands of the people, thus the people determine through their right to vote. Based on Article 6A of the Indonesian Constitution of

² A. Hamid S. Attamimi, 1990, Disertasi *Peranan Keputusan Presiden Republik Indonesia Dalam Penyelenggaraan Pemerintahan Negara, Suatu Studi Analisis Mengenai Keputusan Presiden Yang Berfungsi Pengaturan Dalam Kurun Waktu Pelita I-Pelita II*, Fakultas Pasca Sarjana Universitas Indonesia, h.139-140.

1945, "The President and Vice President is elected as one by the people. Hence, the President and Vice President carry out their obligations together as stipulated in the constitution. The role and position of the President and Vice President are regulated in Article 4 paragraph (1) of the Indonesian Constitution of 1945, that: "The President of the Republic of Indonesia holds the power of government according to the Constitution". Subsequently, paragraph (2) determines that "In carrying out its obligations, the President is assisted by a Vice President".

In performing their obligation, the President and Vice President are limited to a certain period of tenure based on the provision in the Indonesian Constitution of 1945. Pursuant to Article 7: "President and Vice President rule for a period of 5 years and entitled to be re-elected". However, after the amendment of the Indonesian Constitution of 1945, there is a limitation where President and Vice President only can be re-elected for another 5 years. The amendment of Article 7 of the Indonesian Constitution of 1945 concerning the limitation of tenure of President and Vice President for only two periods is aimed to prevent absolutism of power. As stated by Lord Acton that: "the accumulation of power in one hand tend to be abused and used arbitrarily. The accumulation of power in one hand, in this case the President, can give the authorities the opportunity to act arbitrarily."³

With regard to the limitation of tenure of President and Vice President, in some occasions, the President cannot complete his tenure due to resignation, impeachment, inability to perform his obligation, and thus the President can be replaced by the Vice President as stipulated in Article 8 of the Indonesian Constitution of 1945: "permanent inability of the President, demise, resignation, impeachment and inability to perform his obligation as a President".

Besides President, the Vice President also has an important role in the government because the Vice President is the one who will assist the president in performing his obligation in case of permanent inability and thus the Vice President will be the President until the end of the tenure.

The replacement of the President must be conducted through consideration from other state institutions such as: MPR, DPR, and MK. It shows that the Vice President can takeover the President position in case of resignation, impeachment or demise in accordance with the procedure stipulated in Article 7A and 7B of the Indonesian Constitution of 1945.

Hence, the Vice President who replaces the position of President in case of permanent inability entitled to be re-elected for another period of tenure (5 years) pursuant to Article 7 of Indonesian Constitution of 1945.

OBJECTIVE

The study aims to provide an analysis based on Indonesian Constitution of 1945, with regard to the rules on the tenure of Vice President who replaces the position of President in case of permanent inability.

METHODS

The study is a normative legal research which uses a statutory approach, conceptual analysis approach, comparative approach and historical approach. This study is conducted by analysing the legal sources to justify the rules on the takeover of president position by the Vice President based on the Indonesian Constitution of 1945.

³Jazim Hamidi, Mustafa Luffi, 2010, *Hukum Lembaga Kepresidenan Indonesia*, Alumni Bandung, h.3

ANALYSIS

Based on above consideration, the legal issues related to the takeover of president position by the Vice President based on the Indonesian Constitution of 1945 that will be discussed are:

1. Based on the constitution, the Vice President will fill the vacancy of president position in case of permanent inability, as stipulated in Article 8 of the Indonesian Constitution of 1945.
2. The mechanism of the tenure of the Vice President who replaces the position of the President in case of permanent inability as a basis to determine the Presidency's tenure.

A. The Vice President who Replaces the President in case Permanent Inability Can be Re-elected for another Period based on Article 7 of the Indonesian Constitution of 1945

The Republic of Indonesia's constitutional system in accordance with the Indonesian Constitution of 1945 regulates the position of the President as the Head of State as well as the Head of Government. The President has greater powers as in the 1945 Constitution both before and after the amendment. The position of the President is very crucial as defined in the Indonesian Constitution of 1945, and thus, to carry out such obligations, the President is assisted by a vice president. According to Wiryo Prodjodikoro the term "assisted by" implies that the President is *the first man* and the Vice President is *the second man*.⁴ Thus it can be said that the position of the Vice President cannot be separated from the President, because it is a unity of incumbency that is elected directly by the people through general elections. The President and Vice President as the government or executive power holders, in carrying out these powers are restricted with a limited time period namely 5 (five) years and can be re-elected in the same position for only one term.

Similarly, Jimly Asshiddiqie stated that :⁵

Position is a permanent work environment that entails certain functions which overall reflect the goals and work procedures of an organization. The entire function of all positions or the permanent environment reflects the organization's objectives, the relationship between positions with each other, including the work procedures of each of these positions.

Hence, the takeover of president position by the Vice President can be conducted through one of the following mechanisms:

- a. The takeover of president position can be conducted through a general election.
- b. The takeover of president position can be conducted through appointment.
- c. The takeover of president position can be conducted through a general election and appointment (as a form of support statement).

Furthermore, a republican state is a country established for and in favour of the public interest. Therefore, in a republican state with a presidential system, all forms of administration and accountability of the government are in the power of the President who is elected through public election.

Normatively, the tenure of the President is regulated under Article 7 the Indonesian Constitution of 1945, which last for five years, and the former President or Vice President can be re-elected for another period of five years.

⁴ Wiryo Prodjodikoro, 1989, *Asas-Asas Hukum Tata Negara Di Indonesia*, Dian Rakyat, Jakarta, hlm. 61.

⁵ Jimly Asshiddiqie, 2004, *Konstitusi dan Konstitusionalisme Indonesia*, PSHTN, FHUI, Jakarta, hlm. 33.

In performing his obligation, there is a possibility that the President can be replaced by the Vice President in case of permanent inability thus the President cannot perform his obligation during his tenure. In order to exercise the power of the President in case of permanent inability, the President is replaced by the Vice President in accordance with the provisions of Article 8 of the Indonesian Constitution of 1945. Permanent inability can be caused by demise, resignation, impeachment and unable to perform his obligation as stipulated in Article 8 of the Indonesian Constitution of 1945. Based on this provision, the word stop implicitly gives the possibility that a President can be dismissed in the middle of his position, which could mean stopping because he file an resignation application as in President Soeharto's era and was dismissed because of his position or the impeachment process by the MPR as in President Soekarno and President Abdurahmad Wahid tenure. Subsequently, the position of the President will be replaced by the Vice President until the end of the tenure.

Furthermore, rules on permanent inability is regulated in Article 4 of MPR Decree Number III/MPR/1978 concerning The Position and Relationship between High State Institutions with another/or among the High State Institution that the Assembly can dismiss a President before the expiry of his tenure, upon his request, permanent inability, or great violation of state policy. The cause of dismissal of the President within his tenure based on the MPR RI Decree Number III/MPR/1978, particularly the third cause namely great violation of state policy, can be interpreted broadly. In this Decree, there is no explanation concerning the meaning of the phrase "great violation of state policy". Therefore, MPR can dismiss a President upon a great violation of state policy.

The procedures for dismissing the President before the expiration of the tenure in accordance with the provisions of Article 7 of the Republic of Indonesia MPR Decree Number III / MR / 1978, are:

First, DPR give a memorandum to warn the President.

Second, if the President does not respond such warning within 3 (three) months, DPR shall give the second memorandum.

Third, if the President does not respond the second warning within 1 (one) month, DPR can ask the assembly to hold a special session requesting the President's accountability.

In Article 7 of the MPR Decree Number III / MPR / 1978, there was no regulation which stipulate that the President will be dismissed as the consequences of the rejection of the accountability of the President at the special session of the MPR. Based on the above description, MPR is the only state institution who is authorized to dismiss the President prior to his tenure, upon the request from DPR to hold a special session in order to hold the President accountable, after giving memorandum I and II to the President.

Whereas rules on the dismissal of the President after the amendment to the Indonesian Constitution of 1945 in accordance with Article 7A of the Indonesian Constitution of 1945 change, where the President can be dismissed by the MPR at the suggestion of the DPR if he violates the law on the recommendation of the Constitutional Court. Whereas the dismissal procedure is in accordance with the provisions of Article 7 B of the Indonesian Constitution of 1945, where DPR proposes to the Constitutional Court to examine, hear and decide related to legal violations committed by the President.

B. Amendment Model of the Provision concerning the Tenure of the Vice President who Replaces President's Position due to Permanent Inability as a Basis to Determine One Time Tenure

The dynamics of the administration of government are caused by the developments due to four times amendments of the Indonesian Constitution of 1945, in which the fourth amendment was enacted in 2002. The amendments to the Indonesian Constitution of 1945 are permitted, in accordance with the laws and regulations as stipulated in the provisions of Article 37 of the Indonesian Constitution of 1945. The amendment of the constitution is conducted to improve and add the existing provisions, for example the existence of legal vacancies which have not regulated yet in the constitution. These amendments, for example, amendment to Article 7 of the Indonesian Constitution of 1945 concerning the tenure of the President and Vice President which last for five years and thereafter can be re-elected. Previously, there is no rules which explain further how many times the President and the Vice President can be re-elected. After Article 7 of the Indonesian Constitution of 1945 amended firstly in 1999, it is clear that President and the Vice President only can be re-elected for only one more period. Furthermore, it is necessary to regulate Article 7 of the Indonesian Constitution of 1945 concerning the term of office of the Vice President who replaces the President's position due to permanent inability, whether the Vice President entitled to be re-elected for two more periods or he only entitled to be re-elected for only one more period. Article 7 of the Indonesian Constitution of 1945 does not provide explicit rules regarding this matter. Therefore, amendment to Article 7 of the Indonesian Constitution of 1945 must be conducted by adding a provision in Article 7 of the Indonesian Constitution of 1945 in accordance with the mechanism stipulated in Article 37 of the Indonesian Constitution of 1945.

According to K.C. Wheare in his book "*Modern Constitutions*" there are several powers of the amendment of constitution, as quoted by Dewa Gede Atmadja, there are 4 (four) ways of amending constitution, namely: ⁶

- a. *Formal Amendement*, the amendment of constitution which conducted in accordance to the rules provided in that particular constitution;
- b. *Some Primary Sources*, the amendment of constitution which carry out due to perubahan konstitusi karena pressure from political parties that control parliament;
- c. *Judicial Constitution*, the amendment of constitution through legal interpretation by judges. It can be conducted through judicial review by the supreme court or constitutional review by the constitutional Court; and
- d. *Usage and Convention*, the amendment of constitution which triggered by the process in the society through usage and convention based on the agreement of the society.

In addition, C.F. Strong stated that there are 4 (four) procedure of amendment of constitution, namely: ⁷

- a. The amendment of constitution which conducted by legislatif institution with special requirement (in terms of decision making, for instance the legitimate amendment must be approved by majority vote of *gequalifisir*, which is 2/3 from the parliament member who presence.

⁶ Dewa Gede Atmadja, Atmadja, 2012, *Hukum Konstitusi, Problematika Konstitusi Indonesia sesudah Perubahan UUU 1945*, Setara Press Malang, h. 62

⁷ C.F. Strong, 1963, *A History Of Modern Political Constitutions An Introduction to the Comparative Study of Their History and Existing Form*, Sidgwick & Jackson Limited London, h. 153

- b. The amendment of constitution which conducted through referendum, which carry out by using *plebisit* which asking the people's opinion, whether they accept or reject the draft of amendment of constitution initiated by the authorized institution formally. If the people accept it, then the amendment is succeed while if the people reject it, there will be no amendment.
- c. The amendment of constitution of federal state through agreement in the convention of the member states.
- d. The amendment of constitution through convention which conducted by a specialized institution that given authority to carry out the amendment.

The procedure for amending the Basic Law in accordance with Article 37 the Indonesian Constitution of 1945 which states:

- (1) The proposed amendment to the articles of the constitution can be scheduled in the session of the People's Consultative Assembly if submitted by at least 1/3 of the members of the People's Consultative Assembly.
- (2) Each proposed amendment to the articles of the Constitution is submitted in writing and clearly indicated the proposed section for amendment and the reasons.
- (3) In order to amend the articles of the constitution, the People's Consultative Assembly session must be attended by at least 2/3 of the number of members of the People's Consultative Assembly.
- (4) The decision to change the articles of the Constitution must be made with the approval of at least fifty percent plus one member of the People's Consultative Assembly.
- (5) Changes cannot be made specifically on the form of the Unitary State of the Republic of Indonesia,.

Based on the opinions of experts and the provisions of Article 37 of the Indonesian Constitution of 1945, it is possible to amend the articles in the 1945 Constitution, in accordance with the mechanism stipulated in Article 37 of the Indonesian Constitution of 1945. The amendment can be conducted formally as stipulated in Article 37 of the Indonesian Constitution of 1945 by using addendum method and inserting paragraphs in Article 7 of Article 37 of the Indonesian Constitution of 1945.

The mechanism for amending the tenure of the Vice President who replaces the President in case permanent inability can also be done through amendments to the Act.

One of the characteristics of the rule of law is the government which based on the law. This means that all actions of the government or authorities must be based on law. The act is one type of legislation as stipulated in Article 7 of Law Number 12 of 2011 concerning the Establishment of Legislation. Legislation is a written regulation that contains binding legal norms and is established or stipulated by a state institution or an authorized official through the procedures stipulated in the legislation in accordance with Article 1 point 2 of Act Number 12 of 2011. There should be no conflict between laws and regulations in the establishment of legislation pursuant to hierarchical order. The establishment of laws and regulations can be used as a basis for forming the law as a mandate from the Indonesian Constitution of 1945.

Prior to the issuance of Law Number 12 of 2011, Bagir Manan mentions five grounds to enact an Act, namely: first, the delegation of regulation based on the constitution; second, the order stipulated in the existing law; third, the needs to revoke or add some provisions to the existing law; fourth, the Law which enacted because it concerns matters relating to basic

rights or human rights; and fifth, matters relating to the public interests. Meanwhile, A. Hamid S. Attamini clarified nine contents of the Law, inter alia: firmly ordered by the Constitution and the MPR Decree, further regulating the provisions of the constitution, regulating Human Rights, regulating citizens' rights and obligations, division of power, regulates the principal organization of high state institutions, regulates the division of regions or regions of the country, regulates who is a citizen, regulates the distribution of regions / regions of the country, regulates citizenship and how to obtain / lose citizenship and stated by the constitution to be regulated by law.⁸

Pursuant to Article 10 Paragraph (1) of Law Number 12 of 2011, an Act can be enacted based on one or more of the following grounds:

- a. Further arrangements regarding provisions stipulated in the Indonesian Constitution of 1945;
- b. Act orders to be regulated by law;
- c. Ratification of a particular treaty;
- d. Follow up on the decision of the Constitutional Court; and/or
- e. To accommodate the society needs.

Letter 'a' emphasizes the delegation of regulation from the Indonesian Constitution of 1945 to the Act. In this case, there are two different formulations. First, the formulation of provisions in the Indonesian Constitution of 1945 which explicitly delegates arrangements to the Act. For example, Article 6A of the Indonesian Constitution of 1945, which regulated further in the Act Number 42 of 2008 concerning the General Election of the President and Vice President. Second, the formulation which does not mention clearly or in other words the provision impliedly refer to further regulations, thus, it must be interpreted broadly. For instance, Article 7 of the 1945 Constitution of the Republic of Indonesia, which regulates the term of office of the President and Vice President, does not explicitly mention that it will be further regulated by act, but the regulation of Article 7 of the Indonesian Constitution of 1945 is further regulated in Article 5 of Act No. 42 of 2008, which regulates the term or period of the President and Vice President's tenure. Third, the fulfillment of the legal needs of the community as conveyed by Bagir Manan that the Act is formed to revoke or add to the existing Law namely the rules on the one-time term of the President or not for the Vice President who replaced the President in case of permanent inability. Formation and amendment of the Law in Article 5 of Act Number 42 of 2008 to ensure the orderly process of implementing the government system in relation to the term of office of the vice president who replaces the President in case of permanent inability or in other words, the President who cannot complete his tenure.

The election of President and Vice President candidates as described above are regulated in accordance with the provisions of Act Number 42 of 2008 concerning General Elections of the President and Vice President. Law Number 42 of 2008 is a mandate from a higher law, namely Article 6A paragraph (4) of the Indonesian Constitution of 1945 which mandated that the procedures for the implementation of the presidential and vice presidential elections are further regulated in the Act. In relation to the basis of determining the term of office of the Vice President who replaces the President in case of permanent inability, in addition to amending Article 7 of the 1945 Constitution of the Republic of Indonesia, it can also be done through amendments to Article 5 of Law Number 42 of 2008. Article 5 regulates one of the requirements of the President and Vice President candidates in accordance the provisions of

⁸*ibid.*,

Article 5 letter 1 that has not served as President or Vice President for 2 (two) times the term of office in the same position.

CONCLUSION

The Republic of Indonesia is a unitary state in form of republic and in performing the governance, the power is in the President's hand, as a head of state as well as head of government. In exercising his obligation, President is assisted by a Vice President. The Vice President assists the president in performing his obligation but in case of permanent inability due to resignation, impeachment, demise or permanent inability, then the President's position will be replaced by the Vice President until the end of his tenure. This rule is stipulated in Article 8 of the Indonesian Constitution of 1945. The model of change as a basis for determining the term of office of the Vice President who replaces the President in case of permanent inability is to initiate amendment of the Constitution and the Acts.

BIBLIOGRAPHY

- [1] Assiddieqie, J. (2015). *Pengantar ilmu hukum tata Negara*. Jakarta: Raja Grafindo Persada.
- [2] Atmadja, I., & Dewa, G. (2012). *Hukum konstitusi, problematika konstitusi indonesia sesudah perubahan UUU 1945*, Malang: Setara Press.
- [3] Bagir, M. (2006). *Lembaga kepresidenan*. Yogyakarta: FH UII PRESS.
- [4] Jazim, H., & Luffi, M. (2010). *Hukum lembaga kepresidenan Indonesia*. Bandung: Alumni.
- [5] Mahmud, M. P. (2005). *Penelitian hukum*. Jakarta: Kencana Prenada Media Group.
- [6] Margarito, K. (2014). *Pembatasan kekuasaan presiden, pergeseran kekuasaan presiden pasca amandemen UUD 1945*. Malang: Setara Press.
- [7] Soemantri, S. (1986). *Tentang lembaga-lembaga Negara*. Bandung: Alumni.
- [8] Strong, C.F. (1963). *A history of modern political constitutions an introduction to the comparative study of their history and existing form*. London: Sidgwick & Jackson Limited.