

THE UNAMENDABLE ARTICLES OF THE 1945 CONSTITUTION

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Abstract

The amendments of the 1945 Indonesian Constitution between 1999 and 2002 have significantly changed the state system in Indonesia. In such a short period, the Constitution has been amended four times, provokes enormous additional norms and causes the establishment of several new institutions, including the Constitutional Court and Judicial Commission. However, after the amendments to the 1945 Indonesian Constitution on Chapter XVI about Amendments to the Constitution, the framers of the amended Constitution created Article 37 paragraph (5) that stated, the form of the unitary state of the Republic of Indonesia may not be amended. The Preamble is also implicit unamendable. My purpose in this article is to understand the original intent of Article 37 paragraph (5) of the 1945 Indonesian Constitution, the real function of the article and also to describes original intent arguments explaining why the Preamble of the Constitution also unamendable. Before the amendments between 1999 and 2002, there is no article and provision like that, especially in the original 1945 Constitution. At last, I found that two important points that explain why this new provision created. First, the framers still afraid of separatism based on experience in 1950's when federalism occurred in Indonesia. Second, the procedure to amend the articles of the 1945 Constitution shows that the framers only wants to strengthen the important system of unitary state because there is no differences process to amend articles of the 1945 Constitution.

Keywords: 1945 Constitution, Constitutional Amendment, Unamendable Articles.

I. INTRODUCTION

A. Background

According to Jimly Asshiddiqie, the original text of the 1945 Constitution contains 71 points of provisions, then, after going through four amendments, between 1999 and 2002, the material of content of the 1945 Constitution covers

199 points of provisions.¹ The amendment was stipulated and conducted gradually and became one of the agendas of the Meetings of the People's Consultative Assembly (Majelis Permusyawaratan Rakyat) from 1999 until 2002.² It happened after the resignation of President Soeharto on May 21, 1998, that already in power for almost 32 years.³

In the reform era, Indonesia has taken comprehensive reform measures by bringing the sovereignty back to the hand of the people. The peak of such efforts was the amendments to the 1945 Constitution which were made within four consecutive years, namely the First Amendment in 1999, the Second Amendment in 2000, the Third Amendment in 2001, and the Fourth Amendment in 2002. (MPR).⁴ The objectives of the Amendments were to complement the basic rules of living as a state, which caused the abuse of power in the past.⁵ These those amendments, according to Jimly Asshiddiqie, resulted in a blueprint of state administration system which is totally different from the previous one. Two of the fundamental principles adopted and reinforced in the new formulation of the 1945 Constitution are: (i) the principle of constitutional democracy, and (ii) the principle of democratic rule of law or "*demokratische rechtsstaat*".⁶

Finally, Indonesian Constitution adopts the principle of democracy (people's sovereignty) as well as nomocracy (the rule of law) as expressly stated in Article 1 paragraph (2) and paragraph (3) of the 1945 Constitution (UUD 1945). In a

¹ Jimly Asshiddiqie, "Struktur Ketatanegaraan Indonesia Setelah Perubahan Keempat UUD Tahun 1945", paper was presented at the Symposium convened by the National Law Fostering Agency (Badan Pembinaan Hukum Nasional), the Department of Justice and Human Rights, 2003, p. 1. on Jimly Asshiddiqie, "The Role of Constitutional Courts In The Promotion of Universal Peace and Civilization Dialogues Among Nations", paper was presented at the International Symposium on "he Role of Constitutional Courts in Universal Peace and Meeting of Civilizations", Ankara, April 25, 2007, p. 6-7.

² Jimly Asshiddiqie, "The Role of Constitutional Courts", p. 5.

³ Moh. Mahfud MD, in his speech at the World Conference on Constitutional Justice, Cape Town 2009, states, "In the era prior to the amendments to the 1945 Constitution made in 1999–2002, authoritarianism had always been the actual practice, despite the fact that Indonesia adheres to a democratic system in the formal provisions of the Constitution. During this era, many legislations were deemed to be contradictory to the Constitution, but there was only one way to have them amended, namely through legislative review. It was difficult to do considering that the legislative body was politically dominated by the President, either due to his position as a state body which is also involved in the law-making process together with the People's Legislative Assembly or his cooptation of all political parties. Such executive heavy configuration placed the President as the determiner of all national political agenda." Moh. Mahfud MD, "Speech" in the World Conference on Constitutional Justice, Cape Town, 2009, p. 2.

⁴ M. Jusuf Kalla in his speech at International Symposium on Constitutional Complaint, 15-16 August 2015 held by the Constitutional Court of Indonesia states, "The Indonesian Constitution, in the 70 years since it was first written, has undergone four changes. When we first achieved Independence, the Constitution was very short at just 37 paragraphs, but it has played a very important role in the founding of this nation. Then in 1949, when Indonesia became a federal state, The Unitary State of Indonesia, we transformed the Constitution into the Constitution of the Unitary State of Indonesia. Upon becoming a united state, we implemented a temporary Constitution before, In 1959, by Presidential Decree we returned to the Constitution of 1945. Finally, after the reformation, we amended the Constitution to its current state."

⁵ Moh. Mahfud MD, "The Role of the Constitutional Court in the Development of Democracy in Indonesia," paper is presented at the World Conference on Constitutional Justice, Cape Town, January 23-24, 2009, p. 1.

⁶ "Jimly Asshiddiqie, "Creating a Constitutional Court In a New Democracy," paper presented in Australia, March 2009, p.1.

democratic constitutional state, democracy, and nomocracy complement each other. Democracy is selected by many countries, including Indonesia which has abandoned authoritarianism because of democratic values the principles of humanity more, guarantees the principal interest of the citizen and prevents absolute power.⁷

There is an underlying agreement for conducting the amendment using addenda gives rise to the consequence that the official text of the Constitution of 1945 consists of 5 (five) parts, namely:

- a. The Constitution of the State of the Republic of Indonesia of the Year 1945 (the original text);
- b. The First Amendment to the Constitution of the State of the Republic of Indonesia of the Year 1945;
- c. The Second Amendment to the Constitution of the State of the Republic of Indonesia of the Year 1945;
- d. The Third Amendment to the Constitution of the State of the Republic of Indonesia of the Year 1945;
- e. The Fourth Amendment to the Constitution of the State of the Republic of Indonesia of the Year 1945.⁸

The First Amendment that stipulated on October 19, 1999 was conducted in the General Meeting of the People's Consultative Assembly in 1999 which covers Article 5 paragraph (1), Article 7, Article 9, Article 13 paragraph (2), Article 14, Article 15, Article 17 paragraphs (2) and (3), Article 20, and Article 22 of the 1945 Constitution. Under the provisions of the amended articles, the objective of

⁷ The Constitutional Court of Indonesia, *Annual Report 2011: Upholding the Constitutional Democratic State*, Sekretariat dan Registry Branch of the Constitutional Court of Indonesia, Jakarta 2012, p. 1. [<http://www.mahkamahkonstitusi.go.id/public/content/infomum/laporantahunan/pdf/laporan%20tahunan%202011%20english.pdf>].

⁸ By standing on the said basic agreements, the Constitutional Court of Indonesia had publishes a compilation book containing the Constitution of 1945 in its standard official text namely by containing the composition of the text of the Constitution of 1945 prior to its amendment which is followed by the text containing the result of the amendment to the Constitution of 1945 in four stages as mentioned above. Nevertheless, besides containing the official text of the Constitution of 1945, this book also contains the Constitution of 1945 composed in one manuscript. The Chief of Constitutional Court in Foreword of the book said, "To be known, the making of the Constitution of 1945 in the said one text was initially an agreement of the Ad Hoc I Committee of the Workers Body of the People's Consultative Assembly during its session term 2001-2002. In the said agreement, the Constitution of 1945 in the said one manuscript is not an official text of the Constitution of 1945, but rather minutes of the session of the plenary meeting of the Annual Session of the People's Consultative Assembly of the year 2002. Therefore, with the intention for the society to understand easier the Constitution of 1945 systematically, holistically, and comprehensively, this book contains the Constitution of 1945 in One Manuscript containing the material content of the articles of the text of the Constitution of 1945 which have not been amended as well as the material content of the articles as amended by the four amendments." Arief Hidayat, "Foreword of Compilation UUD 1945 and Constitutional Court Law", The Office of the Registrar and the Sekretariat General of the Constitutional Court of the Republic of Indonesia, Jakarta, 2015, p. v-vi.

the First Amendment to the 1945 Constitution is to restrict the authority of the President and to strengthen the position of the House of People's Representatives as a legislative institution.⁹

The Second Amendment that stipulated on August 18, 2000 was conducted at the Annual Meeting of the People's Consultative Assembly in 2000, which covers Article 18, Article 18A, Article 18B, Article 19, Article 20 paragraph (5), Article 20A, Article 22A, Article 22B, Chapter IXA, Article 28A, Article 28B, Article 28C, Article 28C, Article 28D, Article 28E, Article 28F, Article 28G, Article 28H, Article 28I, Article 28J, Chapter XII, Article 30, Chapter XV, Article 36A, Article 36B, and Article 36C of the 1945 Constitution. This Second Amendment covers issues regarding state territory and regional governance, perfecting the first amendment in the matters about the strengthening of the position of the House of People's Representative, and detailed provisions regarding Human Rights.¹⁰

The Third Amendment that stipulated on November 9, 2001 was conducted at the Annual Meeting of the People's Consultative Assembly in 2001, which amended and or added the provisions of Article 1 paragraphs (2) and (3), Article 3 paragraphs (1), (3), and (4), Article 6 paragraphs (1) and (2), Article 6A paragraphs (1), (2), (3), and (5), Article 7A, Article 7B paragraphs (1), (2), (3), (4), (5), (6), and (7), Article 7C, Article 8 paragraphs (1) and (2), Article 11 paragraphs (2) and (3), Article 17 paragraphs (4), Chapter VIIA, Article 22C paragraphs (1), (2), (3), and (4), Article 22D paragraphs (1), (2), (3), and (4), Chapter VIIB, Article 22E paragraphs (1), (2), (3), (4), (5), and (6), Article 23 paragraphs (1), (2), and (3), Article 23A, Article 23C, Chapter VIIIA, Article 23E paragraphs (1), (2), and (3), Article 23F paragraphs (1), and (2), Article 23G paragraphs (1) and (2), Article 24 paragraphs (1) and (2), Article 24A paragraphs (1), (2), (3), (4), and (5), Article 24 B paragraphs (1), (2), (3), and (4), Article 24C paragraphs (1), (2), (3), (4), (5), and (6) of the 1945 Constitution. The material for the Third Amendment to the 1945 Constitution covers the provisions regarding the Principles for the foundation of state affairs, state institutions, relations among state institutions, and provisions relating to the General Election.¹¹

⁹ Jimly Asshiddiqie, "The Role of Constitutional Courts", p. 5.

¹⁰ Jimly Asshiddiqie, "The Role of Constitutional Courts", p. 5-6.

¹¹ Jimly Asshiddiqie, "The Role of Constitutional Courts", p. 6.

The Fourth Amendment that stipulated on August 10, 2002, was conducted at the Annual Meeting of the People's Consultative Assembly in 2002. The Fourth Amendment covers Article 2 paragraph (1); Article 6A paragraph (4); Article 8 paragraph (3); Article 11 paragraph (1); Article 16, Article 23B; Article 23D; Article 24 paragraph (3); Chapter XIII, Article 31 paragraphs (1), (2), (3), (4), and (5); Article 32 paragraphs (1), (2), (3), and (4); Chapter IV, Article 33 paragraphs (4) and (5); Article 34 paragraphs (1), (2), (3), and (4); Article 37 paragraphs (1), (2), (3), (4), and (5); Articles I, II, and III of the Transitional Rules; Articles I and II of the Additional Rules of the 1945 Constitution. The provisions of the amendment in the Fourth Amendment are the provisions regarding state institutions and relations among state institutions, the elimination of the Supreme Consultative Board, provisions regarding education and culture, provisions regarding economics and social welfare, and transitional rules as well as additional rules.¹²

However, the provisions of the Fourth Amendment includes Article 37 paragraphs (5) that stated, "Provisions relating to the form of the unitary state of the Republic of Indonesia may not be amended." Before the amendments between 1999 and 2002, there is no unamendable article and provision like that, especially in the original text 1945 Constitution.

Chapter XVI. Amendments to the Constitution (Original Text)	Chapter XVI. Amendments to the Constitution (the Fourth Amendment)
<p>Article 37</p> <ol style="list-style-type: none"> 1. In order to amend the Constitution, not less than two-thirds of the total number of members of the People's Consultative Assembly shall be in attendance. 2. Decisions shall be taken with the approval of not less than two-thirds of the number of members in attendance. 	<p>Article 37</p> <ol style="list-style-type: none"> 1. A proposal to amend the Constitution may be placed on the agenda of a session of the People's Consultative Assembly if it is proposed by not less than one-third of the total number of members of the People's Consultative Assembly. 2. Each proposal to amend the Constitution shall be submitted in writing and shall clearly show the parts which are proposed to be amended, with reasons.

¹² Jimly Asshiddiqie, *The Role of Constitutional Courts*, p. 6.

	<ol style="list-style-type: none">3. In order to amend the Constitution, not less than two-thirds of the total number of members of the People's Consultative Assembly must be present at the session.4. Decisions to amend the Constitution shall be made with the agreement of not less than fifty percent plus one member of the entire membership of the People's Consultative Assembly.5. Provisions relating to the form of the unitary state of the Republic of Indonesia may not be amended.*
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The Preamble after and before amendments is still same, but there is difference implicitly. Article II Additional Provisions the 1945 Constitution after amendment states, "With the finalization of this amendment of the Constitution, the 1945 Constitution of the Republic of Indonesia is comprised of the Preamble and the Articles." It means that amendment only possible for articles exclude the Preamble.

THE 1945 CONSTITUTION OF THE REPUBLIC OF INDONESIA, BEFORE AMENDMENT	THE 1945 CONSTITUTION OF THE REPUBLIC OF INDONESIA, AS AMENDED BY THE FIRST, SECOND, THIRD AND FOURTH AMENDMENTS
<p>THE PREAMBLE TO THE CONSTITUTION</p> <p>Whereas Independence is truly the right of all nations and therefore colonization in the world shall be abolished, as it is not in accordance with humanity and justice.</p> <p>And the struggle of the movement towards the independence of Indonesia has now reached the moment of rejoicing to guide the people of Indonesia safely and soundly to the threshold of the independence of the State of Indonesia, which is independent, united, sovereign, just</p>	<p>THE PREAMBLE TO THE CONSTITUTION</p> <p><i>No change.</i></p>

* This translation is taken from Denny Indrayana, "Indonesian Constitutional Reform 1999-2002: An Evaluation of Constitution-Making in Transition", thesis, University of Melbourne, 2005.

and prosperous. By the Grace of God the Almighty and impelled by the noble desire to live a free national life, the people of Indonesia at this moment declare their independence.

Subsequent thereto, to form a Government of the State of Indonesia which shall protect the whole Indonesian nation and the entire native land of Indonesia and to advance the public welfare, to educate the life of the nation, and to participate in the execution of world order which is by virtue of freedom, perpetual peace and social justice, therefore the National Independence of Indonesia shall be composed in a Constitution of the State of Indonesia, which is structured in the form of the State of

the Republic of Indonesia, with people's sovereignty based on the belief in One and Only God, just and civilized Humanity, the Unity of Indonesia and a Democratic Life guided by wisdom in Deliberation/Representation, and by realizing social Justice for all the people of Indonesia.²

B. Research Method

This paper examined the discussion of the People's Consultative Assembly in 1999-2002 to understand the original intent related to unamendable articles and also to understand the effect of the unamendable articles for constitutional activity in the future.

II. DISCUSSION

A. The Original Intent¹³

Based on meeting proceeding of the People's Consultative Assembly in 1999-2002 that collected comprehensively by books with title "*Proses dan*

¹³ Original intent is a conservative theory in constitutional law: only those guarantees intended by the framers and outlined in the text of the Constitution are valid. [<http://www.merriam-webster.com/legal/original%20intent>],

Hasil Perubahan UUD 1945, Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, Latar Belakang, Proses, dan Hasil Pembahasan, 1999-2002” published by the Constitutional Court of Indonesia in 2008, there are substantive and hard discussion about the Article 37 paragraphs (5) and position of the Preamble.¹⁴

In the Fourth Meeting of the A Commission that responsible to discussed the Amendment of Constitution on August 8, 2002. Some important information shows what happened at that time. On that session, the draft of Article 37 paragraphs (5) the 1945 Constitution has been created by a particular Drafting Team and read by Speaker of the A Commission, Jakob Tobing, to get input from the member.

Draft of Article 37

1. A proposal to amend the Constitution may be placed on the agenda of a session of the People’s Consultative Assembly if it is proposed by not less than one-third of the total number of members of the People’s Consultative Assembly.
2. Each proposal to amend the Constitution shall be submitted in writing and shall clearly show the parts which are proposed to be amended, with reasons.
3. In order to amend the Constitution, not less than two-thirds of the total number of members of the People’s Consultative Assembly must be present at the session.
4. Decisions to amend the Constitution shall be made with the agreement of not less than fifty percent plus one member of the entire membership of the People’s Consultative Assembly.
5. Provisions relating to the form of the unitary state of the Republic of Indonesia may not be amended.¹⁵

Hartono Mardjono from Perserikatan Daulatul Ummah Faction delivered a statement about the Draft.

“I examine the changes in Article 37 paragraph (5) draft. Originally in the draft, which is produced by the Working Committee, there was special rules for changing of the Unitary State of the Republic of Indonesia through a

¹⁴ Read more Fulthoni and Luthfi Widagdo Eddyono, *Proses dan Hasil Perubahan UUD 1945, Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, Latar Belakang, Proses, dan Hasil Pembahasan, 1999-2002, Buku X Perubahan UUD, Aturan Peralihan, dan Aturan Tambahan*, Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, Jakarta, 2008.

¹⁵ The A Commission Meeting Proceeding, the People’s Consultative Assembly, Agustus 8, 2002, p. 10.

national referendum and the approval of at least 2/3 of the number of people who have the right to vote. Now the Chairman said that the Unitary State of the Republic of Indonesia could not be changed. I just want to remind that in the formulation of Article 37 like this there is “*contradiction insubstantial’s*” because the authority of the Assembly itself not only to change the article but also able to change the entire of Constitution. I want to remind us about the fallacy of the New Order that states, to make changes to the 1945 Constitution must be carried out referendum which results declared more than 90% of voters who have the right to approve the referendum. Even for the rules like that, we able to pull out. So, I remind this Assembly does not do anything that contains contradictions in substantial because the authority of the Assembly to change the constitution beheaded by the Assembly itself. If we return to the old formula, we do not diminish the authority of the Assembly but give more requirement regarding changing the Unitary State of the Republic of Indonesia, not just filled as regulation in Article 37.¹⁶

Moh. Askin from Reformasi Faction also delivered his opinion.

“If we look at paragraph (5), everything was locked, and in my view, it seems there was a conflict in the terminology, and also in substantially, but also in the meaning of popular sovereignty ... in debate only the Preamble can not be changed. Why? Because in that Preamble Indonesia declared independence so that it should not be modified. And this provision that should be included if we want to include and not the paragraph (5) ... These things, in my opinion, is contrary to the principles of democracy. Different with the case with the ban to change the Preamble of the Constitution of 1945 because the Preamble is the declared of independence.”¹⁷

Nurdiati Akma from Reformasi Faction delivered her opinion.

“The words of Article 37 paragraph (5) that we’ve discussed before being taken to Draft Team and Lobby Team seems better which means what is written on this screen same and related to the special rule on changes to the Unitary State of the Republic of Indonesia conducted through a national referendum, and the national approval of at least 2/3 of the number of people who have the right to vote. It means, in fact, the unitary state essentially can not be changed because it is so complicated too ... There is still a slight chance if anytime there are needs to be a change...”¹⁸

¹⁶ The A Commission Meeting Proceeding, the People’s Consultative Assembly, Agustus 8, 2002, p. 13-14.

¹⁷ The A Commission Meeting Proceeding, the People’s Consultative Assembly, Agustus 8, 2002, p. 16-17.

¹⁸ The A Commission Meeting Proceeding, the People’s Consultative Assembly, Agustus 8, 2002, p. 17.

J.E. Sahetapy from Partai Demokrasi Indonesia Perjuangan Faction supports the Draft.

“In democracies, such as in Europe, is known that there are provisions unamendable. I, concerning the opinion of my colleague Mr. Hartono Mardjono who argued about the contradiction in substantial, want to remind that in the world of law there are also provisions, the edge on blah blah blah, it means that there were always exceptions. Well, I am here do not want to argue academically, but I do not agree that in Article 37 paragraph (5) not included the Preamble of the Constitution of 1945.”¹⁹

As a Speaker of A Commission, Jakob Tobing tried to explain the drafting process.

“Of course, this commission need to check before giving a decision. Although this proposal is the results conducted by a Working Team which we assigned and also through Lobby Team which are elements of faction leaders which we entrusted. So, several things that parts of information we can deliver. The first, whole concept of the Constitution is the Preamble which position is very high and do not part of the object of the amendment. So, it can not be changed. Therefore, Paragraph (1) of Article 37 have clear and clearly state that changes can only be made on the Articles. In the discussion at the initial level occurred disagreements that illustrate the opinions that delivered right now. As a piece of information, I just want to convey that in the end, Lobby Team have agreed with the established formulas in the slide earlier. With a careful consideration and it does take a very long conversation, all of us finally decided It is an assertion that states by several speakers as attitudes which are incorporated herein reflect our will this time. As unamendable articles that are also known in the practice of other democratic countries. But the important thing is already an existing agreement.”²⁰

Immanuel Ekadianus Blegur from Golongan Karya Faction asked a question about the status of the Preamble of Constitution.

“There are constitutional guarantees about unamendable articles, the Preamble to the 1945 Constitution, which refers to Article 37 paragraph (2) of the proposed amendments. Thus there is no proposal to change the Preamble. But the provisions of paragraph (2) of Article 37 is an article... What is the guarantee that the Preamble will not be modified? The provisions about it are in Article 37 paragraph (2). Article 37 paragraph (2) is an article. So, people can also change the proposed amendment of this Article 37.”²¹

¹⁹ The A Commission Meeting Proceeding, the People's Consultative Assembly, Agustus 8, 2002, p. 18.

²⁰ The A Commission Meeting Proceeding, the People's Consultative Assembly, Agustus 8, 2002, p. 20-21.

²¹ The A Commission Meeting Proceeding, the People's Consultative Assembly, Agustus 8, 2002, p. 25.

Jakob Tobing then explained.

“Articles of the Constitution of 1945 consists of the Preamble and the Articles. Article 37 paragraph (1) states the change related to the articles. So, the Preamble can not be changed. It is a construction that we have agreed before. There is proposal as proposed by Pak Sahetapy earlier, but that is precisely had agreed at that time. So the proposal that was discussed by Pak Sahetapy has presented at that time. That’s the things that we reached.”²²

With that explanation, all member of the A Commission finally agreed with the Draft. Then the Commission send the Draft to Plenary Session of the People’s Consultative Assembly, and in acclamation process, all faction agreed on Agustus 10, 2002.

B. Constitutional Amendability

According to Mohammad Mahfud MD., in theory, and practice, a constitution is a form of the transfer of the people’s sovereignty, whereby the people state their willingness to surrender a portion of their rights to the state. That is the idea articulated in Article 1 Paragraph (2) of the 1945 Constitution that declaring *“Sovereignty shall be in the hand of the people and shall be implemented in accordance with the Constitution.”* This provision implies that the implementation of the people’s sovereignty is not to be performed arbitrarily; rather than that, it must be by, and it must be based upon the Constitution.²³

Article 37 paragraph (5) of the 1945 Constitution is the norm that experts of constitutional law referred as a rule which can not be changed or can be said as an immortal article (unamendable constitutional provision). The uniqueness of the article is confirmed that the Unitary State of the Republic of Indonesia (NKRI) can not be changed. The norm is related to Article 1 paragraph (1) of the 1945 Constitution which reads, “The state of Indonesia is a Unitary state which has the form of a Republic .”

²² A Commission Meeting Proceeding, the People’s Consultative Assembly, Agustus 8, 2002, p. 25.

²³ Moh. Mahfud MD, Constitutional Review: Doctrine and Practice under Indonesia’s Constitutional System, Paper presented at the International Conference “Constitutional Review: Doctrine and Practice” held in the commemoration of the 20th Anniversary of the Constitutional Court of the Russian Federation, on October 28-30, 2011 at Palace’s of Congresses, Saint Petersburg, Russia, p. 4.

According to Tom Ginsburg, many constitutions purport to make some provisions immune from common amendment processes.²⁴

“The Constitution of Turkey, for example, states that the character of the country as a secular democracy and republic cannot be changed, and forbids any proposal to amend these provisions. Thailand’s constitution entrenches the monarch as head of state. Other countries purport to prohibit amendments with regard to such features as term limits, official languages and religions, flags and anthems, and the boundaries of sub-national units. I would tentatively suggest that we might begin by distinguishing the substantive provisions being entrenched from second-order proscriptions on debate or proposal of amendments. The latter seem to be of more serious concern, as they freeze the deliberative process that the constitution may be designed to encourage. Indeed, the prohibition on debate may conflict with other parts of the Constitution that are of equivalent normative authority, in particular, a right to free speech.

On the other hand, a substantive prohibition on amendment may perhaps be best effectuated by nipping proposals in the bud. And some issues such as the religious or republican character of the state may indeed be best handled by removing them completely from ordinary or constitutional politics. But others, in particular, the issue of term limits, do not seem so contentious as to prohibit all discussion of them. Term limits, after all, restrict democratic choice. Perhaps the only conclusion then, is that constitution-makers should tread cautiously when purporting to make some provisions unamendable: different issues seem differentially suited to this approach, and second-order prohibitions on debate risk the unintended consequence of premature constitutional death.”²⁵

As Yaniv Roznai has observed, the content of unamendable provisions varies, but despite some minor exceptions, one can identify several common components. The first notable protected group is the form and system of government. The second notable group is the state’s political or governmental structure. The third prominent component is the state’s fundamental ideology or “identity.” The fourth notable group is that of basic rights. The fifth notable group is that of the state’s integrity. Then, some constitutions protect unique constitutional subjects, such as immunities, amnesties, reconciliation and peace agreements,

²⁴ Tom Ginsburg, “The Puzzle of Unamendable Provisions: Debate-Impairing Rules vs. Substantive Entrenchment”, [<http://www.iconnectblog.com/2009/08/the-puzzle-of-unamendable-provisions-debate-impairing-rules-vs-substantive-entrenchment/>].

²⁵ *Ibid.*

mandatory international law norms, the institution of chieftaincy, taxation, or rules governing nationality.²⁶

In Indonesian context, the content of unamendable provisions is the form and system of government. The strength of the norms enshrined in Article 37 paragraph (5) of the 1945 Constitution which is part of the Fourth Amendment in 2002 which expressly states, "Provisions relating to the form of the unitary state of the Republic of Indonesia may not be amended ."²⁷

Why does this happen? From the historical point of view, the existence of the form of the unitary state of the Republic of Indonesia is a very important part in the course of constitutional history in Indonesia. There are two main substances in the phrase "the unitary state of the Republic of Indonesia," namely the form of state and form of government. A unitary state is a form of state, and a Republic is a form of government.

After Indonesia's independence in 1945 and the enactment of the 1945 Constitution since August 19, 1945, the Dutch military occurred aggression that made the founding fathers held meetings and negotiations with Dutch. After that, as part of negotiations, Indonesian state administration have changed its system into a federal system within the framework of the Republic of Indonesia States. At that time, Indonesia are divided into various states.²⁸

But the desire to return to a unitary state system was still quite high. Finally, by the expertise of Mohammad Natsir who is the Chairman of the Masjumi that ultimately filed an integration Motion in the Parliament of the Republic of Indonesia States and also delivered compromise to put forward the idea that all states jointly establish a unitary state with parliamentary procedure, the proposal was finally accepted by leader of other factions. The government, represented by Mohammad Hatta as a Vice President and/or Prime Minister also approved the Motion. Finally, on August 15, 1950, President Soekarno declared the Charter

²⁶ Roznai Yaniv, "Unamendability and the Genetic Code of the Constitution" New York University Public Law and Legal Theory Working Papers. Paper 514. 2015. P. 11-13. [http://lsr.nellco.org/nyu_plltwp/514].

²⁷ "Compare with Turkey Constitution at Article 4 that states, "the provision of Article 1 regarding the form of the State being a Republic, the characteristics of the Republic in Article 2, and the provisions of Article 3 shall not be amended, nor shall their amendment be proposed."

²⁸ Luthfi Widagdo Eddyono, "Norma Konstitusi yang Tidak Dapat Diubah," *Majalah Konstitusi*, March 2016, p. 5-6.

of the Establishment of the Unitary State. On August 17, 1950, the President announced the birth of the Republic of Indonesia who is remembered as the Second Proclamation of the Republic of Indonesia.²⁹

The discussion of the 1945 amendment that has resulted in substantial changes in the four times from 1999 to 2002 has apparently not made specific changes regarding the form of the unitary state of the Republic of Indonesia.³⁰ It was based on an agreement since the beginning of the changes. Meanwhile the amendment specified states, “the Constitution of the Republic of Indonesia Year 1945 (UUD 1945) as amended by the first amendment, the second amendment, the third amendment and fourth amendment is the Constitution of the Republic of Indonesia Year 1945 is set on 18th in August 1945 and was reintroduced by Presidential Decree on July 5, 1959, and confirmed unanimously adopted on July 22, 1959, by the House of Representatives “.

While stipulating the amendment to the Constitution of 1945, the People’s Consultative Assembly has stipulated 5 (five) basic agreements, namely: (1) not to amend the Preamble of the Constitution of 1945; (2) to retain the Unitary State of the Republic of Indonesia; (3) to reaffirm the presidential government system; (4) to incorporate the Elucidation to the Constitution of 1945 containing normative matters into the articles; and (5) to conduct the amendment by means of addenda.³¹

However, there is a fairly tough debate related to the perennial norm in Article 37 paragraph (5) of the 1945 Constitution that has to be settled in Working Team (Draft Team) and Lobby Team. Chairman of Commission A at Annual Session of 2002, Jakob Tobing, in the A Commission Meeting on August 8, 2002, states: “As information, I just want to convey that in the end, Lobby Team have agreed with the established formulas in the slide earlier. With a careful consideration and it does take a very long conversation, all of us finally decided ... It is an assertion that states by several speakers as attitudes which are incorporated herein reflect our will this time. As unamendable articles that

²⁹ Luthfi Widagdo Eddyono, “Mohammad Natsir: Sang Penggagas “Negara Demokrasi Islam,” *Majalah Konstitusi*, January 2015, p. 63.

³⁰ Arief Hidayat, “Foreword of Compilation UUD 1945 and Constitutional Court Law”, p. iv.

³¹ *Ibid.*

are also known in the practice of other democratic countries. But the important thing is it's already an existing agreement".³²

C. Discourse "Unamendable Constitutional Provision"

The existence of the eternal norms in the Constitution that often called as "an unamendable constitutional provision" for some experts considered being very disturbing for the journey of a nation state administration. Since there is such an obstacle to change a constitutional norm and this can be seen as contrary to the principles of republicanism³³ and democracy. However, if the norm that considered as the spirit of the constitution has changed, it will change not only the structure of the Constitution but also the constitutional system of the state, so that is the primary reason we need obstacles to change it.

In the context of Indonesia, the unamendable constitutional provision has two meanings. *First*, the norms explicitly state so there is a substantial obstacle that can not be interpreted differently. *Second*, although there are some significant barriers, there were no procedural barriers to transforming the perennial norm.

According to Yaniv Roznai, if unamendable provisions are non-self-entrenched, unamendable principles or rules may be amended in a double amendment procedure.

"The first stage is to repeal the provision prohibiting certain amendments through an amendment, an act that is not in itself a violation of the constitution. The second stage is to amend the previously unamendable principle or provision, which is no longer protected from amendments. This approach finds supporters in the French, Norwegian, and American debates."³⁴

Article 37 UUD 1945 after a complete amendment of the Constitution reads,

1. A proposal to amend the Constitution may be placed on the agenda of a session of the People's Consultative Assembly if it is proposed by not less than one-third of the total number of members of the People's Consultative Assembly.

³² Minutes of Meeting of Committee A MPR, August 8, 2002.

³³ According to [<http://www.merriam-webster.com/dictionary/republicanism>], republicanism means adherence to or sympathy for a republican form of government and the principles or theory of republican government.

³⁴ Yaniv Roznai, "Amending 'Unamendable' Provisions", [<http://constitutional-change.com/amending-unamendable-provisions/>].

2. Each proposal to amend the Constitution shall be submitted in writing and shall clearly show the parts which are proposed to be amended, with reasons.
3. In order to amend the Constitution, not less than two-thirds of the total number of members of the People's Consultative Assembly must be present at the session.
4. Decisions to amend the Constitution shall be made with the agreement of not less than fifty percent plus one member of the entire membership of the People's Consultative Assembly.
5. Provisions relating to the form of the unitary state of the Republic of Indonesia may not be amended.

Based on these norms, there is no differentiation procedure to change the Article 37 paragraph (5) of the 1945 Constitution and other provisions of the Constitution. When People's Consultative Assembly want to modify the shape of the country, they only need to change Article 37 paragraph (5) of the 1945 Constitution first. Thus, it is appropriate to say that the provision of Article 37 paragraph (5) of the 1945 Constitution is only a moral message.

III. CONCLUSION

After the amendments of the 1945 Indonesian Constitution, on Chapter XVI about Amendments to the Constitution, the originators created Article 37 paragraph (5) that stated, the form of the unitary state of the Republic of Indonesia may not be amended. Meanwhile, based on original intent, the Preamble also implicitly unamendable.

Before the amendments between 1999 and 2002, there is no article and provision like that on Constitution, in particular on the original 1945 Constitution. There are two important points related to this new rules. *First*, the originator still afraid of separatism based on experience in 1950's when federalism occurred in Indonesia. *Second*, the procedure to amend the articles of the 1945 Constitution shows that the originators only wants to strengthen the important system of unitary state because there is no differences process in amending articles of the 1945 Constitution. That is why the support of unamendable provisions such as

states in Article 37 paragraph (5) of the 1945 Constitution may be amended in a double amendment procedure.

As Yaniv Roznai states, “unamendable provisions tie the past, present, and future, and carry out expressive functions serving as important symbols for the policy”, the provisions of Article 37 paragraph (5) of the 1945 Constitution act as a “moral message” and also offer a record of the memories and hopes of their originators.

BIBLIOGRAPHY

Books and Articles

Denny Indrayana, “Indonesian Constitutional Reform 1999-2002: An Evaluation of Constitution-Making in Transition”, thesis, University of Melbourne, 2005.

Fulthoni and Luthfi Widagdo Eddyono, *Proses dan Hasil Perubahan UUD 1945, Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, Latar Belakang, Proses, dan Hasil Pembahasan, 1999-2002, Buku X Perubahan UUD, Aturan Peralihan, dan Aturan Tambahan*, Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, Jakarta, 2008.

Jimly Asshiddiqie, “The Role of Constitutional Courts In The Promotion of Universal Peace and Civilization Dialogues Among Nations”, paper was presented in the International Symposium on “the Role of Constitutional Courts on Universal Peace and Meeting of Civilizations”, Ankara, April 25, 2007.

Jimly Asshiddiqie, “Creating a Constitutional Court In a New Democracy”, paper presented in Australia, March 2009.

Luthfi Widagdo Eddyono, “Norma Konstitusi yang Tidak Dapat Diubah”, *Majalah Konstitusi*, March 2016.

Luthfi Widagdo Eddyono, “Mohammad Natsir: Sang Penggagas “Negara Demokrasi Islam”, *Majalah Konstitusi*, January 2015.

Moh. Mahfud MD, Constitutional Review: Doctrine and Practice under Indonesia’s Constitutional System, Paper presented at the International Conference “Constitutional Review: Doctrine and Practice” held on the commemoration

of the 20th Anniversary of the Constitutional Court of the Russian Federation, on October 28-30, 2011 at Palace's of Congresses, Saint Petersburg, Russia.

Moh. Mahfud MD, "The Role of the Constitutional Court in the Development of Democracy in Indonesia," paper is presented at the World Conference on Constitutional Justice, Cape Town, January 23 – 24, 2009.

Moh. Mahfud MD, "Speech" in the World Conference on Constitutional Justice, Cape Town, 2009.

The Constitutional Court of Indonesia, *Compilation UUD 1945 and Constitutional Court Law*, The Office of the Registrar and the Secretariat General of the Constitutional Court of the Republic of Indonesia, Jakarta, 2015.

Internet

Constitutional Court of Indonesia, *Annual Report 2011: Upholding the Constitutional Democratic State*, Secretariat dan Registry Branch of the Constitutional Court of Indonesia, Jakarta, 2012, [<http://www.mahkamahkonstitusi.go.id/public/content/infoumum/laporantahunan/pdf/laporan%20tahunan%202011%20english.pdf>].

Proceeding International Symposium on Constitutional Complaint, 15-16 August 2015 held by the Constitutional Court of Indonesia, [<http://www.mahkamahkonstitusi.go.id/public/content/infoumum/proceeding/pdf/PROSEDING.pdf>].

Roznai, Yaniv, "Unamendability and the Genetic Code of the Constitution" (2015). New York University Public Law and Legal Theory Working Papers. Paper 514. [http://lsr.nellco.org/nyu_plltwp/514].

Tom Ginsburg, "The Puzzle of Unamendable Provisions: Debate-Impairing Rules vs. Substantive Entrenchment", [<http://www.icconnectblog.com/2009/08/the-puzzle-of-unamendable-provisions-debate-impairing-rules-vs-substantive-entrenchment/>].

Yaniv Roznai, "Amending 'Unamendable' Provisions", [<http://constitutional-change.com/amending-unamendable-provisions/>].