

PANCASILA, THE 1945 CONSTITUTION, UNAMENDABLE ARTICLES

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Abstract

One of the fundamental changes in the 1945 Constitution is the emergence of articles containing the unamendable constitutional norms, namely Article 37 Paragraph 5 of the 1945 Constitution which reads, " Particularly regarding the form of the Unitary State of the Republic of Indonesia no amendment can be made." What is interesting to ask is why the "Unitary State of the Republic of Indonesia" cannot be changed. Why not Pancasila that always mentioned as the basis of the state and should be more critical made as an unamendable constitutional norm. This paper intends to examine the importance of Pancasila in the amendment of the 1945 Constitution, as well as to know why unamendable articles of the constitution such as Article 37 Paragraph 5 of the 1945 Constitution appear in the amendment of the 1945 Constitution. This paper also tries to analyze the position of Pancasila as the state ideology. The result is Pancasila whose narration is in the Preamble to the 1945 Constitution can also be categorized as an unamendable constitutional provision. The Pancasila narrative embodied in the Preamble of the 1945 Constitution, of course, give consequences that the five precepts contained are part of the constitution of the state, although there has apparently been no mention of Pancasila in the 1945 Constitution explicitly as the state ideology or the basis of the state. The absence of any mention of Pancasila in the constitutional text is, of course, one weakness, since the narrative in the Preamble may be interpreted as a common narrative. Thus, any government regime could have made another jargon as the state ideology.

Keywords: 1945 Constitution, Unamendable Articles of the 1945 Constitution, Pancasila

1. PRELIMINARY

The amendment of the 1945 Constitution which was conducted in four stages in 1999, 2000, 2001, and 2002 is one of the essential agreements of the Indonesian nation. The amendment of the 1945 Constitution explicitly changed almost all the constitutional system and the mechanism of democracy in Indonesia. Initially, the original manuscript of the 1945 Constitution contains 71 points of provision, after four changes, the content of the 1945 Constitution covers 199 points of provision. Therefore, the amendment of the 1945

Constitution covers almost all the material of the 1945 Constitution.¹

While stipulating the amendment to the Constitution of 1945, the People's Consultative Assembly (MPR) has stipulated 5 (five) necessary 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*.²

One of the fundamental changes in the 1945 Constitution is the emergence of articles containing the unamendable constitutional norms, namely Article 37 Paragraph (5) of the 1945 Constitution which reads, " Particularly regarding the form of the Unitary State of the Republic of Indonesia no amendment can be made." The article is in Chapter XVI of the Amendment of the Revised Constitution on the Fourth Amendment to the 1945 Constitution.

What is interesting to ask is why the "Unitary State of the Republic of Indonesia" cannot be changed, why not Pancasila that cannot be changed when Pancasila is always mentioned as the basis of the state and should be more important? Even the mention of Pancasila is not contained in the 1945 Constitution. Does this mean that the state ideology can be changed immediately without amendment or amendment of the 1945 Constitution because Pancasila is not mentioned expressively and openly in the written constitution of Indonesia and as the source of all sources of law?

This paper intends to examine the importance of Pancasila in the amendment of the 1945 Constitution conducted in 1999-2002, as well as to know why unamendable articles of the constitution such as Article 37 Paragraph (5) of the 1945 Constitution appear in the discussion and amendment of the 1945 Constitution. This paper also tries to analyze the position of Pancasila as the state ideology.

2. EFFORTS TO INCORPORATE PANCASILA IN CONSTITUTION

Various efforts to change the Constitution in Indonesia since the beginning is always based on the view that the prevailing Constitution is still not perfect and needs to be improved. Nevertheless, Indonesia's written constitution has repeatedly changed but has never attempted to eliminate or change the state's base and state ideology, namely Pancasila.

As set forth in the *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, Latar Belakang, Proses, dan Hasil Pembahasan, 1999-2002, Buku I Latar Belakang, Proses, dan Hasil Perubahan UUD 1945* (2010), in the process of amendment to the 1945 Constitution, the Preamble was not changed and became a guide in the amendment of the 1945 Constitution. The values of Pancasila as outlined in the Preamble of the 1945 Constitution are regarded as a "sublime agreement" for the assurance and upholding of the nation-state, star guide that leads to the achievement of the ideals of society, nation, and the State of Indonesia.³

From the first change process to the fourth change, the MPR has a basic agreement relating to changes that have surfaced since the MPR Working Group III Committee and reaffirmed in the PAH I BP MPR. The initial agreements are not changing the Preamble to the 1945 Constitution and retaining the form of the Unitary State of the Republic of Indonesia. This fundamental agreement provides guidance on how the substance of refinement during meetings of changes in the articles of the Constitution take place.

However, there are also quite progressive proposals, namely by incorporating Pancasila in the narrative (body of the 1945 Constitution). Nazaruddin Sjamsuddin from the Political Expert Team of BP MPR had submitted a proposal in the form of alternatives outside the preparation of BP MPR, including about Pancasila. Prof. Dr. Afan Gaffar, M.A. as one of the members of the Political Expert Team also believes that Pancasila as the basis of the state is not wrong to be included in Article, so there is a constitutional basis. Also, Prof. Dr. Jimly Asshiddiqie, S.H. from the Legal Expert Team argued that the form of state and the form of government in the amendment of the 1945 Constitution indeed need to be clarified and corrected in the formulation of the sentence. So there is an affirmation of the formation of a unitary state and the form of a

¹ 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, p. 6-7.

² Arif Hidayat, "Foreword the Chief Justice of the Constitutional Court of the Republic of Indonesia", *The Constitution of The State of The Republic of Indonesia of the Year 1945 In One Manuscript*, the Office of The Registrar and The Secretariat General of The Constitutional Court of The Republic of Indonesia, Jakarta (2015), p. iii-iv.

³ Luthfi Widagdo Eddyono, "Pancasila dalam UUD 1945", *Majalah Konstitusi*, Januari 2018.

republican government, while the formulation of a state of law existing in the Explanation is adopted into a chapter and constituted as a unity in the chapter.

From these various views, Pancasila also got included in the draft amendment of the 1945 Constitution as the work of A Commission which was also reported in the Sixth Plenary Session of MPR Meeting which took place on 8 November 2001. In a meeting chaired by MPR Chairman, Amien Rais, Chairman of A Commission, Jakob Tobing, presented a report on the work of A Commission. Here is the quote from the report.

"CHAPTER 1A BASIC COUNTRY

Article 1A

The basis of the State is the Pancasila, belief in the one supreme God, just and civilized humanity, the Unity of Indonesia, democracy led by the wisdom of deliberations among representatives, social justice for the people of Indonesia which is a unified whole as contained in paragraph 4 Preamble of the 1945 Constitution."

However, the MPR at that time decided the article used be the old article. The Third Amendment in 2001 did not include the proposed narrative as proposed by A Commission. Disappeared the opportunity to incorporate Pancasila into the 1945 Constitution, even though its existence was already present in the Preamble of the 1945 Constitution which did not change as agreed by the Ad Hoc III (PAH III) Committee of the MPR Working Body and PAH I BP MPR.

The fourth Paragraph of the Preamble 1945 Constitution expressly mentions the narrative of Pancasila as follows:

"... 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."

3. ORIGINAL INTENT ARTICLE 37 OF THE 1945 CONSTITUTION⁴

The most important meeting to find out the original intent of Article 37 of the 1945 Constitution and the existence of Pancasila is at the 4th Meeting of A Commission, August 8, 2002, with the agenda of reporting on the work of the Formulating Team. At the meeting, the draft Fourth Amendment of the 1945 Constitution has been formulated well compared to the previous formulation. Several inputs from the views of the fraction about paragraph 5 when the 3rd meeting of A Commission is not all accommodated. Initially, some factions wanted this verse to include material on the Preamble to the Constitution, on territorial integrity, and on the form of the state. However, having seen the design shown in this fourth meeting, only material in the form of the state entered into the formulation of Paragraph 5.

The 4th Meeting of A Commission ST MPR 2002 finally approved the draft formulation of Article 37, and it was also approved by acclamation at the Sixth Plenary Session of the MPR Annual Session on August 10, 2002. Thus, the draft of Article 37 becomes part of the Fourth Amendment to the Constitution 1945.

Comparison of manuscript Article 37 of the 1945 Constitution before the amendment and after the amendment as follows:

⁴ In the discussion of the amendment of the 1945 Constitution, there are so many alternative contents of the articles revealed and the various alternatives when compared with the 1945 Constitution are now quite different. The problem is how to determine a discussion is the original intent of a norm so that it can become a grip in interpreting the 1945 Constitution. Such matter can be determined by examining the discussion coherently and looking back on the relationship with the norm of the 1945 Constitution which is to be interpreted.

| Before the Amendment | After the Amendment |
|---|--|
| <p>(1) To amend the Constitution at least 2/3 of the total members of the People's Consultative Assembly shall be present.</p> <p>(2) A decision shall be made with the consent of at least 2/3 of the total members of the present People's Consultative Assembly.</p> | <p>(1) A proposal for amendment to the articles of the Constitution can be set out in an agenda for a session of the People's Consultative Assembly if submitted by at least 1/3 of the sum of the members of the People's Consultative Assembly.</p> <p>(2) Every proposal to amend articles of the Constitution shall be submitted in writing and clearly indicate the part proposed for amendment and the reason therefor.</p> <p>(3) In order to amend articles of the Constitution, a Session of the People's Consultative Assembly shall be attended by at least 2/3 of the sum of the members of the People's Consultative Assembly.</p> <p>(4) The resolution to amend articles of the Constitution shall be conducted by the approval of at least fifty percent plus one member of the People's Consultative Assembly.</p> <p>(5) Particularly regarding the form of the Unitary State of the Republic of Indonesia no amendment can be made.</p> |

4. DISCOURSE "UNAMENDABLE ARTICLES"

Article 37 Paragraph (5) of the 1945 Constitution is a norm by the experts of constitutional law referred to the unamendable constitutional norm. The uniqueness of the article is to affirm that the form of the Unitary State of the Republic of Indonesia cannot 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 in the form of a Republic."

Article 1 Paragraph (1) of the 1945 Constitution in the constitutional reform was still maintained by the People's Consultative Assembly which made changes to the 1945 Constitution in the period 1999-2002. The strength of the norm is enshrined by Article 37 paragraph (5) of the 1945 Constitution which is part of the fourth amendment in 2002 which expressly states, "Especially regarding the form of the Unitary State of the Republic of Indonesia cannot be changed."

Why does this happen? From a historical point of view, the existence of the Unitary State of the Republic of Indonesia forms a vital part of the journey of Indonesian state administration. There are two solid substances in the phrase "Unitary State of the Republic of Indonesia," namely on the form of state and form of government. The unitary state is a state, and the Republic is a form of government.

After Indonesia gained independence in 1945 and enacted the 1945 Constitution since 19 August 1945, there was Dutch military aggression which made the founders of the nation hold various peace and negotiation meetings so that the Indonesian state administration system changed into a federal system within the framework of the Republic of the United States of Indonesia. At that time, factually the Indonesian territory was divided into various states.⁵

However, the desire to return to the unitary state system at that time was still dominant. Finally, thanks to the expertise of Mohammad Natsir who is the Chairman of the Faction of Masyumi made an Integration Motion that successfully submitted to the parliament of the Republic of Indonesia. The lobbying was done for months until Natsir proposed a compromising notion that all states jointly establish a unitary state through a parliamentary procedure. Furthermore, the proposal was finally accepted by other faction leaders.

The government, represented by Mohammad Hatta as the Vice President and also the Prime Minister, also approved the motion. Finally, on August 15, 1950, President Soekarno read out the Charter of Establishment

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

of the Unitary State. On August 17, 1950, President Soekarno announced the birth of the Unitary State of the Republic of Indonesia which is remembered as the "Second Proclamation of the Republic of Indonesia."

In the discussion of amendments to the 1945 Constitution which has resulted in four substantial changes in 1999-2002, there has been no specific change in the form of the Unitary State of the Republic of Indonesia. This is indeed an agreement since the beginning of the change will take place. The 1945 Constitution as amended by the first amendment, the second amendment, the third amendment, and the fourth amendment is the 1945 Constitution established on 18 August 1945 and re-enacted with the Presidential Decree of 5 July 1959 and confirmed by acclamation on July 22, 1959, by the House of Representatives.

Members of the MPR in the discussion in 1999 have also made an agreement to make changes, namely by: not changing the Preamble of the 1945 Constitution; maintaining the Unitary State of the Republic of Indonesia; reinforce the Presidential government system; and the Elucidation of the 1945 Constitution is abolished, as well as the normative matters in the Explanation are included in the articles. Also, constitutional changes are made by *addendum*.

Nevertheless, there is considerable debate related to the existence of an unamendable article in Article 37 paragraph (5) of the 1945 Constitution even to be completed in the Lobby Team. Chairman of Commission A of the 2002 MPR Annual Session, Jakob Tobing, in the 4th Commission A Meeting of MPR, August 8, 2002, briefly explained:

"In the initial level of formulation, there are differences of opinion that illustrate the opinions here. As information, I want to convey that in the end, the Lobby Team agreed to then go into the formulation that existed aired earlier. With deep consideration and it did take a long time once the conversation. All of us have finally agreed to do so by understanding that the principle of people's sovereignty can be exercised no matter what is here because of the way in which decisions are made which, if necessary, indeed revise any verse that is considered disturbing in the future development. This is what some speakers have said as the attitudes included here reflect our will today. As a non-amendable article that is also known in the practice of other democracies. However, the important thing is that there are already agreements."⁶

What about Pancasila? Does Pancasila is also an unamendable constitutional provision, so it cannot be changed? It has also been answered by Chairman of Commission A of the MPR Jakob Tobing who gave the following explanation:

"Surely this commission is necessary to look at and before finally giving a decision. Although this is already the result done by the Team, we assigned and also through the Lobby Team which is the elements of leadership that we are entrusted. So, some things that are indeed informative nature, of course, we can deliver. Firstly that of the whole concept of this Constitution, the Preamble occupies a very high position and is not the object of change at all. So it cannot be changed."⁷

This means that the Preamble of the 1945 Constitution and Pancasila is also a constitutional norm that cannot be changed (unamendable article/constitutional provision). The Pancasila narrative itself is indeed contained in the Preamble of the 1945 Constitution. Article 37 of the 1945 Constitution also only mentions that the changes can be made in the articles of the 1945 Constitution alone and exclude the Preamble to the 1945 Constitution,

The existence of the eternal norm in the constitution or the so-called unamendable constitutional provision/article for some experts is considered very disturbing for the nation's constitutional journey. Because there are some obstacles to the attempt to change a constitutional norm and this can be considered contrary to the principle of republicanism and democracy. Though it could be possible, there is a change of perspective for the nation at a specific time for generations to come. Another point of view, of course. If the "important" norm regarded as the spirit of the constitution is changed, it will change not only the constitutional structure but the state's administrative system, so there needs to be more resistance in changing it.

In the Indonesian context, the existence of unamendable article/constitutional provision has two meanings. First, the norm explicitly exists so there are substantial barriers that cannot be interpreted differently. Second, although there are substantial barriers, there is no procedural obstacle to changing the eternal norm.

Between Article 37 Paragraph (5) of the 1945 Constitution and other articles, there is no distinction of

⁶ Minutes of the 4th A Commission Meeting of MPR, August 8, 2002.

⁷ *Ibid.*

procedure to change it, so it can be said that the norm of unamendable article / constitutional provision is merely a reinforcing norm. If the next generation wants to change the form of state or the Preamble of the 1945 Constitution, it is only necessary to change simultaneously Article 1 Paragraph (1) or Preamble of the 1945 Constitution and Article 37 Paragraph (5) of the 1945 Constitution, Compared with the norm before and after the 1945 Constitution, tightening the terms for making changes to the article compared to before the change.

5. CLOSING

One of the new matters in the 1945 Constitution after the amendment is the emergence of articles containing the unamendable constitutional norms, namely Article 37 Paragraph (5) of the 1945 Constitution which reads, "Particularly concerning the form of the Unitary State of the Republic of Indonesia cannot be amended." According to the original intent is considered in the discussion of the article, it can be seen that the Preamble of the 1945 Constitution also includes unamendable articles.

Thus, Pancasila whose narration is in the Preamble to the 1945 Constitution can also be categorized as an unchangeable constitutional norm known as unamendable articles or unamendable constitutional provision. Nevertheless, by allowing twice the process of change, namely, to amend Article 37 first and then to change the narrative of the Preamble to the 1945 Constitution, in fact, the norm is mere moral value.

The Pancasila narrative embodied in the Preamble of the 1945 Constitution, of course, give consequences that the five precepts contained are part of the constitution of the state, although there have apparently been no mention of Pancasila in the 1945 Constitution explicitly as the state ideology or the basis of the state. The absence of any mention of Pancasila in the constitutional text is, of course, one weakness, since the narrative in the Preamble may be interpreted as a narrative in the opening phrase or other passages. Thus, any government regime could have made another jargon as the state ideology.

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