
**THE EXISTENCE OF THE UNAMENDABLE PROVISION OF THE
UNITARY STATE OF THE REPUBLIC OF INDONESIA: THE ROLE OF THE
CONSTITUTIONAL COURT**

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ABSTRACT

This paper seeks to answer whether the existence of the unamendable provision in the 1945 Constitution of the Republic of Indonesia, which prohibits amending the form of the Unitary State of the Republic of Indonesia can be a basis for the Indonesian Constitutional Court to use the doctrine of unconstitutional constitutional amendment, which authorizes Constitutional Courts to review the constitutionality of the amendment. In some countries, its existence becomes the basis for constitutional tribunals to use the doctrine to protect the unamendable provision contained in its constitution, though this is not based on the authority stated in its constitution. Therefore, in this paper I try to use a comparative approach, to see how the constitutional tribunals in other countries that is, Germany, Turkey and France, which have unamendable provisions in their constitutions, play a role in protecting their Constitution. Is the unamendable provision legitimizing the constitutional tribunal to review the constitutionality of the amendment?

INTRODUCTION

The existence of the unamendable provision or an explicit limitation on the power of constitutional amendment in the Constitution¹ is not something uncommon, but its existence can be traced back to the 18th century. However, it seems that the existence of unamendable provisions in the constitution is now becoming a universal trend in the world's constitutions, as its presence is increasingly encountered in these constitutions. According to Roznai's estimates, currently 53 percent (76 of 143) of the world's constitutions (formed

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¹ Yaniv Roznai, *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers*, ETHESES (February, 2014), http://etheses.lse.ac.uk/915/1/Roznai_Unconstitutional-constitutional-amendments.pdf. (Hereinafter "Roznai").

from 1989 to 2013) include unamendable provisions, contrary to the conditions before the Second World War, when only 17 percent (52 of 306) of the constitutions established during that time (1789 to 1944) had unamendable provisions.²

Although it has become a universal trend of the constitutions of the world, the content of the unamendable provision in each constitution varies from one to the other. As an example, in Norway, the country with the second oldest documented constitution in the world,³ Article 112 of the Constitution stipulates that any amendments made to its constitution must never contradict the spirit and principles embodied in it.⁴ Slightly differing from Norway, France in the Constitution of the Third, Fourth, and Fifth Republic prohibits amending of the form of the republican government.⁵ Indonesia itself also has an unamendable provision in its constitution, in Article 37 (5) of the 1945 Constitution of the Republic of Indonesia, wherein it is forbidden to amend the form of the Unitary State of the Republic of Indonesia.⁶

The unamendable provision in respect of the Unitary State of the Republic of Indonesia did not exist when the 1945 Constitution was established,⁷ and only emerged during the amendment of the 1945 Constitution four times between 1999 and 2002, especially in the fourth amendment conducted in 2002.⁸ The unamendable provision in the Indonesian

² *Id.* at 28.

³ Eivind Smith, *Old and Protected? On the "Supra-Constitutional" Clause in the Constitution of Norway*, 44 *ISR. L. REV.* 365, 365 (2011).

⁴ G.R.L. CONST., 1814, Art. 112, . "Such amendment must never, however, contradict the principles embodied in this Constitution, but solely relate to modifications of particular provisions which do not alter the spirit of the Constitution".

⁵ L.A.CONSTI. DU, 1958, Art. 89 (5); Art. 2 (Law partially raising the constitutional laws. August 14, 1884).

⁶ U.U.D. CONSTI., Art. 37 (5), 1945, "Particularly regarding the form of the Unitary State of the Republic of Indonesia no amendment can be made."

⁷ The 1945 Constitution was enacted on August 18th 1945, or one day after Indonesia declaring itself independent on August 17th, 1945. The drafting process of the 1945 Constitution took place during the period of independence struggle, which is why before the amendment in 1999, the 1945 Constitution was relatively a short document having many vague provisions, as it was intended to be a temporary document. However, because of that temporary character and vagueness, many regimes in Indonesia used the 1945 Constitution to establish an authoritarian government. *See* Moh. Mahfud M.D, *Perdebatan Hukum Tata Negara Pasca Amandemen Konstitusi [CONSTITUTIONAL LAW DEBATE AFTER CONSTITUTIONAL AMENDMENT]* 21-28 (2011).

⁸ Tim Lindsey, *Indonesian Constitutional Reform: Muddling Toward Democracy*, 6 *SING. J. INT'L. & COMP. L.* 244, (2002); *See also* Denny Indrayana, *Indonesian constitutional reform 1999-2002: an evaluation of constitution-making in transition* (2008).

constitution regarding the Unitary State of the Republic of Indonesia has the purpose of ensuring that no changes are made to Article 1 (1) of the 1945 Constitution, which states that Indonesia embraces ‘unitary’ as a form of state and ‘republic’ as a form of government.⁹ What are the implications of the inclusion of the unamendable provision of the Unitary State of the Republic of Indonesia? The provision is supposed to act as a limitation on the power of the People’s Consultative Assembly (Majelis Permusyawaratan Rakyat or MPR)¹⁰ to amend the 1945 Constitution.¹¹ However, if the MPR goes on to change the form of the Unitary State of the Republic of Indonesia and violate such limitations, how can the prohibition to amend the form of the Unitary State of the Republic of Indonesia be implemented? This problem is required to be solved, since the 1945 Constitution does not have an answer to it, till date.

Interestingly, today many courts in the world use the doctrine of “unconstitutional constitutional amendment”, which enables constitutional tribunals to review the constitutionality of amendments. The German Federal Constitutional Court, for example uses this doctrine to protect the subject of amendment from breaching the unamendable provision.¹² The Supreme Court of India, on the other hand, even without having an unamendable provision in its Constitution uses this doctrine, the Supreme Court having interpreted that the amendment mechanism is appropriate, only if the amendment does not violate the ‘basic structure’ of the Constitution which includes, *inter alia*, constitutional supremacy, democracy, and separation of powers.¹³

⁹ U.U.D. CONSTI., Art. 1 (1), “The State of Indonesia is a Unitary State in the form of a Republic”.

¹⁰ MPR is joint session legislative bodies, which consist of the member of People’s Representative Assembly (*Dewan Perwakilan Rakyat* or DPR) and Regional Representative Assembly (*Dewan Perwakilan Daerah* or DPD).

¹¹ U.U.D. CONSTI., Art. 3 (1), “The People’s Consultative Assembly has the authority to amend and to stipulate the Constitution.”

¹²Gabor Halmai, *Unconstitutional Constitutional Amendments: Constitutional Court as Guardians of the Constitution?*, 19 CONSTELLATIONS 182, 182 (2012).

¹³ The Supreme Court of India first adopted the basic structure doctrine to review the constitutionality of the amendment in the case of *Kesavananda Bharati v. State of Kerala*, [1973] 4 SCC 225 (India). In this case, the Court reviewed the validity of the 24th, 25th and 29th Amendments to the Indian Constitution. With a majority of 7-6, the Court ruled that the power to amend does not include the power to alter the provisions deemed to be the basic structure of the Constitution; Richard Albert has distinguished formal unamendability from informal unamendability, as in the Indian Constitution. Informal unamendability is a condition where some provisions of the constitution are not explicitly prohibited to be changed, but the court with its interpretation declares that it cannot be changed with the amendment mechanism. See Richard Albert, *The Unamendable Core of the*

Therefore, this paper tries to discuss the possibility of using the “unconstitutional constitutional amendment” doctrine by the Indonesian Constitutional Court, especially in relation to protecting the unamendable provision of the Unitary State of the Republic of Indonesia. In my attempt to achieve this, I shall use the comparative approach to examine how the constitutional tribunals in other countries namely, Germany, Turkey, and France, which also have unamendable provisions in their respective constitutions play a role in their protection, by using this doctrine.

THE USE OF “UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENT” DOCTRINE IN OTHER COUNTRIES

A. Germany

The discourse on the unamendable provisions of the constitution is not something new in German constitutional law, having already existed since the time of the Weimar Constitution. Carl Schmitt, a controversial jurist of the time claimed that amending the constitution is very important to preserve the “identity and continuity of the constitutions.”¹⁴ Because there is a difference between “amending the constitution and replacing it”, he argued that amendments cannot be made to fundamental principles in a constitution, such as changing the principle of a republic in the constitution into a monarchy, or changing the federal state to one that is unitary. Changes made to these fundamental principles do not deserve to be called amendments, but “constitutional annihilation”.¹⁵

Although the idea of the unamendable provision was initiated a long time ago by Schmitt, when the Constitution of the Federal Republic of Germany 1949 (Hereinafter “Basic Law”) was formed after the Second World War, none of Schmitt’s ideas were made a reference by the authors of the Basic Law,¹⁶ when formulating Article 79 (3), stating the prohibition to amend some of its provisions such as the principles of federalism, human rights, democracy,

United States Constitution, 9-10 (Boston College Law Sch. Legal Studies Research Paper Series, Research Paper No. 361, 2015).

¹⁴ CARL SCHMITT, *CONSTITUTIONAL THEORY* 150 (Jeffrey Seitzer trans., Duke University Press 2008) (1928).

¹⁵ *Id.* at 151-153.

¹⁶ Monika Polzin, *Constitutional identity, unconstitutional amendments and the idea of constituent power: The development of the doctrine of constitutional identity in German constitutional law*, 14 INT’L. J. CONST. L. 411, 422 (2016).

and the rule of law.¹⁷ The author of Basic Law actually forbade changing some of these provisions because they were influenced by the idea of “militant democracy” initiated by Karl Loewenstein, a concept that considers the need for democracy to create certain barriers to those who are anti democratic/fascists from abusing the mechanism of democracy in order to gain power, as it ultimately did when Hitler and his Nazi Party seized power.¹⁸

The Basic Law does not itself state that there is special authority resting with the German Federal Constitutional Court to review the constitutionality of the amendment with the aim of protecting the unamendable provisions therein. Even without the authority to review the constitutionality of the amendment, the German Federal Constitutional Court during its earliest establishment in 1951 actually accepted the doctrine of unconstitutional constitutional amendment through the decision known as *Sudweststaat (Southwest Case)*. In that case, while the Court was not actually reviewing the constitutionality of the amendment and was reviewing the constitutionality of a statute, however, it interpreted the Basic Law to “represent a logical unity”, therefore affirming:¹⁹

“A constitution has an inner unity, and the meaning of any one part is linked to that of other provisions. Taken as a whole, a constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate”

Through the decision, the German Federal Constitutional Court ruled that a constitutional amendment could be reviewed and declared unconstitutional if it violates what are referred to as “overarching principles and fundamental decisions”. The Court considers democracy and federalism included in the Basic Law as among the overarching principles.²⁰

¹⁷ G.G. CONSTI., Art. 79 (3) “Amendments of this Constitution affecting the division of the Federation into States [*Länder*], the participation on principle of the States [*Länder*] in legislation, or the basic principles laid down in Articles 1 and 20 are inadmissible.”

¹⁸ Ulrich K. Preuss, *The Implications of “Eternity Clauses”: The German Experience*, 44 ISR. L. REV. 429, 441 (2011); See also Svetlana Tyulkina, *Militant Democracy* (2011) (Unpublished Ph.D. Dissertation, Central European University), http://www.etd.ceu.hu/2012/tyulkina_svetlana.pdf.

¹⁹ See Elene Janelidze, *Judicial Review of Constitutional Amendments in Georgia, France, and Germany – The Quest for Eternity* (April 1, 2016) (Unpublished LL.M. Short Thesis, Central European University) (Manuscript at 24), http://www.etd.ceu.hu/2016/janelidze_elene.pdf.

²⁰ *Id.*

The German Court has reviewed the constitutionality of amendments to the Basic Law in multiple cases, specifically in the *Klass case* (1970)²¹, *Land Reform I* (1991)²², *Land Reform II* (1996)²³, *Asylum Case* (1996)²⁴, and *Acoustic Surveillance of Homes* (2004)²⁵. In these five cases, the German Federal Constitutional Court considered invalid any amendments that violate the unamendable provisions in the Basic Law.²⁶ In the five cases above, the Court did not use the method of interpretation it did in the *Southwest Case*; which considers that there are certain substances in the constitution, which are implied and positioned higher than other constitutional norms; but directly referred to Article 79 (3) Basic Law which explicitly states that there are certain provisions in the constitution that cannot be amended.²⁷

More recently, in 2009 through its decision in the *Lisbon case* when the German Federal Constitutional Court reviewed the constitutionality of the Act on the ratification of the Lisbon Treaty, it interpreted:²⁸

“From the perspective of the principle of democracy, the violation of constitutional identity codified in article 79.3 of the Basic Law is at the same time an encroachment upon the constituent power of the people. In this respect, the constituent power has not granted the representatives and bodies of the people a mandate to dispose of the identity of the constitution. No constitutional body has been granted the power to amend the constitutional principles which are essential, pursuant to article 79.3 of the Basic Law.”

This interpretation shows that unamendable provisions contained in Article 79 (3) Basic Law have an essential position within it, and also reaffirms the approach used by the Court

²¹ 30 BVERfGE [German Federal Constitutional Court] 1, (1970).

²² 84 BVERfGE 90, (1991).

²³ 94 BVERfGE 12, (1996).

²⁴ 2 BvR 1938/93; 2 BvR 2315/93.

²⁵ 1 BvR 2378/98; 1 BvR 1084/99.

²⁶ See KEMAL GOZLER, JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENT: A COMPARATIVE STUDY 56-64 (Bursa, Ekin Press, 2008).

²⁷ *Id.* at 83.

²⁸ BverfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 - para. (218), http://www.bverfg.de/e/es20090630_2bve000208en.html.

through the doctrine of unconstitutional constitutional amendment, which considers the unamendable provisions unchangeable through any mechanism contained in the Basic Law, including amendment.

B. Turkey

The Turkish Constitution has long known the existence of unamendable provisions. It is noted that the unamendable provision has existed since the entry into force of the Turkish Constitution of 1961, specifically in Article 9, which prohibits amending the form of government as a republic.²⁹ The prohibition to amend the republican form of government did not necessarily authorize the Turkish Constitutional Court to review the constitutionality of the amendment, until 1971. The Turkish Constitution of 1961 did not contain any provision giving the Turkish Constitutional Court the authority to review the constitutionality of the amendment. However, in 1970 the Court declared itself competent to review the constitutionality of the amendment in question.³⁰ In its decision, though the Turkish Constitutional Court reviewed the constitutionality of the amendment only on the procedural aspect, the Court stated that they were competent to review the constitutionality of the amendment in terms of its substance.³¹

After declaring itself competent to review the constitutionality of amendment in terms of substance, a year later in 1971, the Turkish Constitutional Court once again reviewed the constitutionality of an amendment. This time the Court actually did the review in terms of substance, amendments that postponed the Senate election for a period of one year and four months.³² In this decision the Turkish Constitutional Court reviewed the substance of the amendment with reference to the republican form of government, which was prohibited to be amended. It interpreted “the republican form of government” broadly by incorporating the characteristics of republican government held by Turkey such as secularism, democracy,

²⁹ T.C. Ana CONSTI., 1961, Art. 9, “The provision of the Constitution establishing the form of the state as a republic shall not be amended nor shall any motion therefore be made.”

³⁰ Turkish Constitutional Court decision of June 16, 1970, No. 1970/31.

³¹ Roznai & Serkan Yolcu, *An Unconstitutional Constitutional Amendment – The Turkish Perspective: A Comment on the Turkish Constitutional Court’s Headscarf Decision*, 10 INT’L. J. CONST. L. 175, 195-196 (2012).

³² Turkish Constitutional Court decision of April 3, 1971, No. 1971/37.

rule of law, and social state.³³ Ultimately though, it declared that the amendment did not violate Article 9 of the Turkish Constitution of 1961 which prohibited the amendment of the republican government.³⁴

In 1971 the Turkish Constitution of 1961 was amended, and the amendment to Article 147 of the Turkish Constitution gave the Constitutional Court the authority to review the constitutionality of the amendment, however the authority to review the constitutionality of the amendment was limited to review in terms of the procedure alone and not the substance of the amendment. After this, the Court reviewed five amendments made against the 1961 Turkish Constitution. Interestingly in these five decisions³⁵, the Turkish Constitutional Court interpreted the meaning of the procedure broadly, not only in relation to the mechanism of amending the constitution, but also by reviewing whether or not amendments were against the republican form of government which is prohibited to be amended.³⁶

The Turkish Constitutional Court interpreting the authority to review the constitutionality of amendments in terms of procedures as in the above mentioned five cases invited some comment such as the criticisms of Kemal Gozler that stated:³⁷

“The question of whether a constitutional amendment affects the immutability of the republican form of state is not a question of form or procedure, but a question of substance because, without looking at the text of the constitutional amendment, it is impossible to determine if it violates this immutability.”

As a result of the interpretation of the Turkish Constitutional Court on its authority to review the constitutionality of the amendment procedurally, when in 1982 Turkey formulated a new constitution, the drafters also asserted in the constitution the limits to

³³ T.C. Ana CONSTI., Art. 2, “The Turkish Republic is nationalistic, democratic, secular and social State, governed by the rule of law, based on human rights and the fundamental tenets set forth in the preamble.”

³⁴ Roznai, *supra* note 31, at 196.

³⁵ Turkish Constitutional Court decision of April 15, 1975, No. 1975/87, March 23, 1976, No. 1976/19, October 12, 1976, No. 1976/46, January 28, 1977, No. 1977/4, September 27, 1977, No. 1977/117.

³⁶ See GOZLER, *supra*. note 26, at 42-45.

³⁷ *Id.* at 46.

reviewing the constitutionality of the amendment procedurally,³⁸ by stating explicitly in Article 148 that the meaning of reviewing constitutionality of amendment procedurally is that the “verification of constitutional amendments shall be restricted to consideration of whether the requisite majorities were obtained for the proposal and in the ballot, and whether the prohibition on debates under expedited procedure was observed”.³⁹

Besides asserting limitations in reviewing the constitutionality of the amendment, the Turkish Constitution of 1982 also has unamendable provisions in Article 4 of its Constitution. The unamendable provision is almost the same as those of the 1961 Constitution of Turkey, both of which prohibit the amendment of republican form of government. The difference is Article 4 of the Turkish Constitution of 1982 also asserts that the characteristics of republican forms of government such as democracy, secularism, rule of law, and the assertion that Turkey is a social state are also forbidden to be amended.⁴⁰

In the period of the Turkish Constitution of 1982, until 2008 the Turkish Constitutional Court had been called three times to review the constitutionality of amendments. Of the three decisions, the Court declared they had no jurisdiction to review the substance of the amendment with respect to unamendable provision in the Turkish Constitution of 1982, the Court also stated that they were only authorized to review procedures of the amendment as outlined in Article 148 of the Turkish Constitution of 1982.⁴¹ However, the interpretation of the Turkish Constitutional Court which attempted to limit its authority to review the constitutionality of the amendment only in terms of the procedure, changed in 2008 through a decision known as the *Headscarf decision*,⁴² in which the Turkish Constitutional Court

³⁸ *Id.* at 47-48.

³⁹ T.C. Ana CONSTI., Art. 148, 1982.

⁴⁰ T.C. Ana CONSTI., Art. 4, “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.”

⁴¹ *See* Roznai, *supra* note 31, at 197.

⁴² Turkish Constitutional Court decision of June, 5, 2008, No. 2008/116.

invalidated the amendment which included the following phrase in Article 42 of the Turkish Constitution of 1982:⁴³

“No one can be deprived of the right to higher education due to any reason not explicitly written in the law. Limitations on the exercise of this right shall be determined by the law”

The purpose of the inclusion of the phrase into the Turkish Constitution of 1982 was to eliminate the prohibition on female students using headscarves when entering higher education institutions, and in the decision the Turkish Constitutional Court, controversially invalidated the amendment on the ground that the substance of the amendment violated the state secular character, which was prohibited from being amended in Article 4 of the Turkish Constitution 1982. Through this decision the Turkish Constitutional Court declared that it was competent to review the substance of the amendment with unamendable provision in the Turkish Constitution of 1982, even though its authority had been strictly limited only to review the constitutionality of the amendment in terms of the procedure alone.⁴⁴ The Court was of the view that the first three articles of the Constitution constitute a basic choice of the political system of the country and hence, any amendment to the first three articles or any amendment to other constitutional provisions causing the same effect would be void and must be invalidated by the Court.⁴⁵

C. France

France is one of the oldest countries to have an unamendable provision in its constitution, where the provision prohibits amendment to the republican form of government. The provision originated in the period of the Constitution of the Third Republic, which marking the end of the French Revolution with the victory of republicanism made the republic a form of government over monarchism and bonapartism, ending the two as well.⁴⁶

⁴³ See Ali Acar, *Tension in the Turkish Constitutional Democracy: Legal Theory, Constitutional Review and Democracy*, 6 ANKARA LAW REVIEW 141, 147 (2009); See also Roznai, *supra* note 31, at 197.

⁴⁴ Acar, *supra* note 47, at 145-148.

⁴⁵ Roznai, *supra* note 31, at 186.

⁴⁶ See David Bates, *Political Unity and the Spirit of Law: Juridical Concepts of the State in the Late Third Republic*, 28 FRENCH HISTORICAL STUDIES. 69, 69 (2005).

Initially, when the Constitution of the Third Republic was formed in 1875, in the form of three special laws called Constitutional Laws, the form of republican government was not directly used as an unamendable provision. It was only declared forbidden to amend in 1884, when the French Parliament adopted the Law of August 14 1884, Partially Revising the Constitutional Law. Law of August 14 1884 was formed to revise Law on The Organization of Public Power on February 25 1875 which is one part of the Constitutional Laws.⁴⁷ Till date, the provision relating to the republican form of government is an unamendable provision in the French Constitution, even though the current constitution in France has been replaced twice since the stipulation was first made, the two Constitutions being the Constitution of the Fourth Republic in 1946 and the Constitution of the Fifth Republic in 1958 (hereinafter “1958 Constitution”).

Although still used as an unamendable provision, but different from Germany and Turkey which the author has described earlier, the French constitutional interpreting body the *Conseil Constitutionnelle* (Constitutional Council),⁴⁸ does not make a prohibition to amend the republican form of government that existed in the French 1958 Constitution as a basis to review the constitutionality of amendment.

For example, in the *Maastricht Ruling* 1992,⁴⁹ when France wanted to ratify the Maastricht Treaty on the European Union, the Constitutional Council then required amendments to the 1958 Constitution. The amendment was carried out and resulted in Article 88-3 of the French 1958 Constitution. After the amendment the Constitutional Council considers if the

⁴⁷See Charles F. A. Currier, *Constitutional Law And Organic Laws Of France* (American Academy of Political and Social Science, 1893); LA CONST. DU, 1875, Art. 2 (Law Partially Revising The Constitutional Laws. August 14, 1884). “The Republican form of the Government cannot be made of the subject of a proposed revision.”

⁴⁸Unlike the German Federal Constitutional Court and the Turkish Constitutional Court, naturally the Constitutional Council is a political body, built to support the task of parliament in formulating the law. At the beginning of its formation, the Constitutional Council was only given the authority to review the law before it was enacted by the parliament (*ex ante* control). But, since 1970 the Constitutional Council seems to entered slowly into the family of European Constitutional Courts. Now through amendments made in 2008, its authority has increased with the granting of its authority to review the constitutionality of laws that have been enacted, like many other Constitutional Courts. See Pasquale Pasquino, *New Constitutional Adjudication in France: the Reform of the Referral to the French Constitutional Council in Light of the Italian Model*, 3 INDIAN J. CONST. L. 105, (2009).

⁴⁹ Constitutional Council [CC] decision No. 92-312DC, Sept. 2, 1992, Rec. 76.

ratification of the Maastricht Treaty is no longer in conflict with the 1958 Constitution.⁵⁰ But some members of the French Parliament still considered the ratification of the Maastricht Treaty unconstitutional despite amendment. In response, the Constitutional Council argued:⁵¹

“Subject to the provisions governing the periods in which the Constitution cannot be revised (Article 7 and 16 and the fourth paragraph of Article 89) and to compliance with the fifth paragraph of Article 89 (The Republican form of government shall not be the object of an amendment), the constituent authority is sovereign; it has the power to repeal, amend or amplify constitutional provisions in such manner as it sees fit”

After issuing the opinion, the Constitution Council also affirmed that its jurisdiction had been limited by Article 61 of the French Constitution, that it was only entitled to review organic laws as well as ordinary actions of the parliament in respect of the constitution. Thus, it could not extend that authority by reviewing other legislations that are enacted by the parliament or through a referendum.⁵²

This limiting interpretation of authority was further reinforced, in 2003, after the Constitutional Council was asked to review the new bill made by Parliament on the implementation of decentralization amending several constitutional provisions or known as *2003 Ruling*.⁵³ The applicants assume if the Constitutional Council under Article 61 of the 1958 Constitution has jurisdiction to review it.⁵⁴ It turned out that the Constitutional Council

⁵⁰ LA CONSTITUTION DU, Art. 88-3. “Subject to reciprocity and in accordance with the terms of the Treaty on European Union signed on 7 February 1992, the right to vote and stand as a candidate in municipal elections shall be granted only to citizens of the Union residing in France. Such citizens shall neither hold the office of Mayor or Deputy Mayor nor participate in the designation of Senate electors or in the election of Senators. An Institutional Act passed in identical terms by the two Houses shall determine the manner of implementation of this article.”

⁵¹ *Supra* note 53, at 35.

⁵² Denis Baranger, *The Language of Eternity: Judicial Review of the Amending Power in France (Or the Absence Thereof)*, 44 ISR. L. REV. 389, 395-396 (2011).

⁵³ CC decision No. 2003-469DC, Mar. 26, 2003, Rec. 293.

⁵⁴ 1958 CONST. Art. 61, about the jurisdiction of Constitutional Council to review the constitutionality of law.

had a different view and insisted that Article 61 of the 1958 Constitution gave them no authority to review the constitutionality of the amendment.⁵⁵

What the Constitutional Council has to say in both cases, indicates that it has greatly limited their authority, by narrowly interpreting the text of the Constitution that they have no authority to examine the constitutionality of the amendment, even France's 1958 Constitution has the unamendable provision in it. Although interpreting the text of the constitution narrowly, and declaring that it is not authorized to review the constitutionality of the amendment, it does not mean that the Constitutional Council is not involved the amendment process. In practice, the Constitutional Council is heavily involved, even though it is not through the authority to review its constitutionality.⁵⁶

One of the ways in which the Constitutional Council exercises to protect the unamendable provision of the 1958 Constitution is through its authority to review the constitutionality of the "organic law" (before their promulgation) by issuing interpretations which give guidelines for the future use of amending power.⁵⁷ In both decisions the Constitutional Council argued that "the amending power that, while it was at liberty to amend the constitution, even implicitly, it was also bound by the limitations set by Articles 7, 16 and 89 of the Constitution".⁵⁸ Such an example would of course prove if the Constitutional Council imposes limitations on the amending powers to protect the unamendable provision in Article 89 of the 1958 Constitution, even if the means of limiting their amendment does not go through judicial activism as shown by the German Federal Constitutional Court.

Of course what is done by the French Constitutional Council is very different from the Constitutional Court of Germany and Turkey, but as stated by Janelidze what is done by the Constitutional Council is a natural thing, because the Constitutional Council is a political organ that runs more administrative functions rather than constitutional. What is an

⁵⁵ Denis Baranger, *supra*. note 56, at 396.

⁵⁶ *Id.* at 410.

⁵⁷ See Decision No. 99-410DC, Mar. 15, 1999, Rec. 51, and Decision No. 2003-478DC, July 30, 2003, Rec. 406.

⁵⁸ *Id.* at 413.

administrative function is that it works more to correct the tasks of Parliament, not as a constitutional court that serves to preserve the constitutional values and principles.⁵⁹

ANALYSIS: COULD IT BE USED IN INDONESIA?

Until now the Indonesian Constitutional Court has never applied the unconstitutional constitutional amendment doctrine. This is reasonable, considering the last amendment made against the 1945 Constitution in 1999-2002, the period before the establishment of the Constitutional Court and the absence of a prohibition to amend the form of the Unitary State of the Republic of Indonesia.⁶⁰ However, if we look at the examples in some of the countries described above, the use of unconstitutional constitutional amendment doctrine to protect the unamendable provision in the constitution becomes possible in Indonesia, because even though the 1945 Constitution does not authorize the Indonesian Constitutional Court to examine the constitutionality of the amendment, in fact based on such instances as in Germany and Turkey it is possible even without such authority of the constitution, based only on the existence of an unamendable provision in its constitution.

There is the different example of France which also has an unamendable provision in the constitution but does not implement the doctrine, but it is understandable because the French constitutional interpreting body that is the Constitutional Council is a political organ that when originally established, was not intended to act as a guardian of the constitution. Unlike in Germany and Turkey, where the Constitutional Court is a judicial organ, and its existence was originally intended to act as a guardian of the constitution. However, it should be remembered, that although the Constitutional Councils do not use the doctrine of unconstitutional constitutional amendment, they still protect the unamendable provision contained in their constitution.

Moreover, according to Aharon Barak currently, in a democratic society, it has become a duty for the courts to play a role in protecting the constitution and democracy. Protecting

⁵⁹ See Janelidze, *supra* note 19, at 18.

⁶⁰ Constitutional Court was formed during the third amendment of the 1945 Constitution, the third amendment process was held between September 2000 to November 2001. Unamendable provision of the Unitary State of the Republic of Indonesia was formed during the fourth amendment, which held in 2002. See INDRAYANA, *supra* note 8.

the Constitution is not only a protection against the contradiction of statutes against it, but also against amendments that are contrary to the basic foundations or fundamental principles of the constitution.⁶¹ By making a provision in the constitution unamendable, it certainly shows that if the provisions prohibited to be amended by the author are deemed to have such an essential position to the constitution,⁶² then it is natural that the position is considered fundamental.⁶³

In Indonesia itself, as in Germany and Turkey, the intention of the establishment of a Constitutional Court is to act as a guardian of the constitution and democracy, and for democracy to be upheld in accordance with the desired constitution.⁶⁴ It can also be said that the form of the Unitary State of the Republic of Indonesia as an unamendable provision has a fundamental position for the 1945 Constitution. This is because, for most Indonesians the 1945 Constitution is a symbol of the struggle for independence from colonialism, while the Unitary State of the Republic of Indonesia is considered as one of the main elements of the 1945 Constitution⁶⁵. Hence, changing it is considered as not only changing the 1945 Constitution, but also making it something different.⁶⁶ Such a view is reflected in the opinion of former MPR member I Dewa Gde Palguna, while formulating that the form of the

⁶¹ Aharon Barak, *Unconstitutional Constitutional Amendments*, 44 ISR. L. REV. 321, 336 (2011).

⁶² Jose Luis Marti, *Two Different Ideas of Constitutional Identity: Identity of the Constitution v. Identity of the People*, in NATIONAL CONSTITUTIONAL IDENTITY AND EUROPEAN INTEGRATION 17-36 (Alejandro Saiz Arnaiz & Carina Alcoberro eds., 2013).

⁶³ Fundamental has the same meaning as the essential. In the field of law both terminology is often used interchangeably to explain the same thing. For example, the terms “fundamental term” and “essential term” in contract law are used to explain the same thing. See BLACK’S LAW DICTIONARY 1481 (Bryan A. Garner ed., 1999).

⁶⁴ Hamdan Zoelva, *Negara Hukum dan Demokrasi: Peran Mahkamah Konstitusi dalam Menegakkan Hukum dan Demokrasi [Rule of Law and Democracy: The Role of Constitutional Court to Defend the Law and Democracy]*, in NEGARA HUKUM YANG BERKEADILAN [A Just Rule Of Law] (Susi Dwi Harijanti ed., 2011); See also Susi Dwi Harijanti & Tim Lindsey, *Indonesia: General elections test the amended Constitution and the new Constitutional Court*, 4 INT’L. J. CONST. L. 138, (2005).

⁶⁵ Andrew Ellis, *The Indonesian Constitutional Transition: Conservatism or Fundamental Change*, 6 SING. J. INT’L. & COMP. L. 116, 117 (2002). According to Andrew Ellis the amendment is intended not only to create more democratic system, but also to protect the major element of the Constitution, which become the symbol of the Indonesian struggle for independence, it’s three major element are Preamble, the Unitary State of the Republic of Indonesia, and the Presidential System.

⁶⁶ *Id.* at 152.

Unitary State of the Republic of Indonesia shall be used as an unamendable provision during the amendment period that took place in 1999-2002:⁶⁷

“..that there is one thing in the constitution that if those things change, in fact the constitution has lost its fundamentals idea.. For example, if the principle or the form of a unitary state changed, actually our Constitution has changed from its fundamental principles. If the form of a republic turns into a monarchy for example, it is not only in a constitutional but legally international manner, it is also a state succession... That is why, we have the idea that for matters concerning substances which may be said to be a kind of “equanom” condition for the 1945 Constitution, it should be stated explicitly as mentioned in the German Constitution and the French Constitution that they should not be subject on constitutional change. We must dare to express firmly as objects, not objects of change or in norms that cannot be changed”

What Palguna said, illustrates how fundamental the form of the Unitary State of the Republic of Indonesia is for the 1945 Constitution. This is the reason why it should be protected as an unamendable provision. Its fundamental position can also be observed in the Constitutional Court decision number 100/PUU-XI/2013 or better known as the “*Four Pillar of Nation and State Decision*”, in its decision the Constitutional Court affirmed if the form of the Unitary State of the Republic of Indonesia as an unamendable provision is the “*Cita Negara*” (*Staatsideeor State Ideals*),⁶⁸ namely a concept of the state that became the basis when forming and implementing the constitution.⁶⁹

So, because of that fundamental position, it can certainly be a justification for the Constitutional Court as the guardian of the 1945 Constitution, to use unconstitutional amendment doctrine to protect the form of the Unitary State of the Republic of Indonesia as an unamendable provision, if in the future there are amendments that seek to

⁶⁷ Sekretariat Jenderal MPR RI [Secretary General of People’s Consultative Assembly of Republic Indonesia], Annual Report Number 38, Committee Ad Hoc I, Working body of MPR about the analysis of Fourth Amendment of the 1945 Constitution, August 6th, 2002, 396-397 (2002).

⁶⁸ See Indonesian Constitutional Court Decision No. 100/PUU-XI/2013 (Indon.). This ruling could be the only decision, where the Constitutional Court gives interpretation to the form of the Unitary State of the Republic of Indonesia.

⁶⁹ The term “*cita negara*” was first used by Soepomo, one of the founding fathers of the Indonesian state, when formulating the 1945 Constitution. See Marsilam Simanjuntak, *Pandangan Negara Integralistik* [An Integralistic State view] 2-4 (1994).

change the provision. Though the Court has a justification for using the unconstitutional constitutional amendment doctrine, this doctrine cannot be used sparingly, because the doctrine has also been criticized by various academics, the main criticism against the doctrine relating to the problem of democratic legitimacy.⁷⁰ A significant question remains as to how a court not directly elected by the people can overturn the people's decision to amend the constitution, made by their representatives. Thus, this doctrine, when used, may create a sense of judicial supremacy that will be vulnerable to abuse, because it allows the courts to have the last word, when interpreting the constitution, and that their interpretations determine the application of the constitution for everyone.⁷¹

On the other hand, refusing to use the unconstitutional constitutional amendment doctrine on the basis of the lack of democratic legitimacy of the court, can also lead to other forms of abuse, as it makes the power to amend the constitution unlimited. Whereas the principle of constitutionalism requires that any power under a constitution including amending power be limited⁷² and the existence of an unamendable provision in the constitution is intended to limit it, without the unconstitutional constitutional amendment doctrine this provision is clearly unenforceable. For these reasons, I am of the belief that the Constitutional Court must use the unconstitutional constitutional amendment doctrine, especially as a tool of last resort,⁷³ if there are amendments that seek to change an unamendable provision of the Unitary State of the Republic of Indonesia because this is the only manner in which the provision can have legal backing (or, "teeth"), in order to be enforced.⁷⁴

⁷⁰ Roznai, *supra* note 31, at 200.

⁷¹ The use of the unconstitutional constitutional amendment doctrine will abolish the limits of the concept of judicial supremacy, which regards the court have the last word to determine the interpretation of the constitutional provisions, so that its interpretation is binding to everyone. Because according to Robert C. Post, the limits of the concept of judicial supremacy are through the mechanism of constitutional amendment. Through the amendment mechanism, if the people feel that the court has misinterpreted the constitutional provisions, the people can overrule the judicial interpretation by way of amendment. *See* Robert Post and Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV 1027, 1030 (2004).

⁷² *See* Dante Gatmaytan, *Can Constitutionalism Constrain Constitutional Change?*, 3 NORTHWESTERN INTERDISCIPLINARY LAW REVIEW 22, (2010).

⁷³ Rivka Weill, *On the Nexus of Eternity Clauses, Proportional Representation, and Banned Political Parties*, 16 ELECT. LAW J. 237, 243 (2017).

⁷⁴ Barak, *supra* note 64, at 333.

To prevent the abuse that can arise while using the unconstitutional constitutional amendment doctrine, YanivRoznai and SerkanYolcu in their criticism of the *Headscarf decision* in Turkey; formulating a special strategy for constitutional courts when using the doctrine; argue that a constitutional court when reviewing the constitutionality of an amendment to an unamendable provision must limit itself by not invalidating the amendment, if the amendment has no major effect or simply limits the principles of the provision, but by leaving the legal principle behind the provision, same as it was before the amendment. An example of this is the case of the *Headscarf decision*. The neutrality of the state in terms of religion according to Roznai and Yolcu remains undisturbed by the use of a headscarf by students in a higher educational institution, since it is done by individuals and not by the state.⁷⁵ Turkish Constitutional Court, according to them can only invalidate amendments in extraordinary and exceptional circumstances, for example if the amendment really changed the essence of the unamendable provision relating to secular character, so as to make it completely different, such as establishing a religion as a state religion.⁷⁶

The explanation given by Roznai and Yolcu explain, is in fact exemplified by the German Federal Constitutional Court in the five cases cited above. When the German Federal Constitutional Court used the doctrine of unconstitutional constitutional amendments, the Court did not invalidate any amendment made to the Basic Law at all. It can be said that the Court took the “middle road” by using the doctrine as a reminder, that the amending power possessed by the German parliament still has a limitation in Basic Law, which is expressed in the form of the unamendable provision. This approach can work to prevent the abuse that can arise from the doctrine, while not creating tension between the Courts and elected branches of government which have the power to amend the constitution.⁷⁷

Another argument justifying the use of unconstitutional constitutional amendment doctrine in Indonesia can be found in the opinion of Richard Albert, which states that “The doctrine is most important in countries where the constitution may be easily amended...whose

⁷⁵ Roznai, *supra* note 31, at 204.

⁷⁶ *Id.* at 205.

⁷⁷ Andrew Friedman, *Dead Hand Constitutionalism: The Danger of Eternity Clauses in New Democracies*, IV MEX. L. REV.77, 88-89 (2011).

constitution is in most cases amendable by a simple legislative majority”.⁷⁸ This argument by Albert was given as an answer to the criticism of the doctrine with respect to lack of democratic legitimacy of the courts when reviewing the constitutionality of the amendment. He argued that in a country that has a simple legislative majority amendment mechanism, it is not impossible to amend the provisions of the Constitution against the will of the majority of the people.⁷⁹

In the two countries discussed earlier, Germany and Turkey which also have unamendable provision in their constitution, amendments can also be made only by simple legislative majority, the German Basic Law, for example, requires acceptance of an amendment if approved by two thirds of the members of both legislative bodies, the *Bundestag* and the *Bundesrat*.⁸⁰ Similarly, the Turkish Constitution of 1982, though requires a referendum by the people if the amendment proposal is accepted by only three-fifths of the members of the Grand National Assembly of Turkey (GNAT), the referendum cannot take place if the amendment proposal has already been approved by two-thirds of the GNAT members.⁸¹

Reflecting from the experience of the Constitutional Court in both countries which used the doctrine of unconstitutional constitutional amendment to prevent the existence of amendments that change the unamendable provision, it can be concluded that the use of the doctrine by the Indonesian Constitutional Court is warranted as the amendment mechanism in Article 37 of the 1945 Constitution requires only a simple legislative majority in the MPR to accept an amendment proposal (50 percent + 1 of the members of MPR).⁸² Hence, as discussed this may provide an easier mechanism for the MPR to amend the substance of the unamendable provision of the Unitary State of the Republic of Indonesia, thus making the application of the doctrine necessary.

⁷⁸Richard Albert, *How A Court Becomes Supreme: Defending the Constitution from Unconstitutional Amendments*, 77 MD. L. REV. (forthcoming 2017) (Manuscript at 12), <https://ssrn.com/abstract=2975832>.

⁷⁹ *Id* at 13.

⁸⁰ G.G. CONSTI., Art. 79 (2), “Any such statute requires the consent of two thirds of the members of the House of Representatives [*Bundestag*] and two thirds of the votes of the Senate [*Bundesrat*].”

⁸¹ T.C. Ana CONSTI., Art. 175, Constitution of the Republic of Turkey 1982.

⁸²See Art. 37 (1), (2), (3), and (4), 1945 Constitution.

CONCLUSION

On considering the above jurisprudence, it seems highly likely that the Indonesian Constitutional Court would resort to the unconstitutional constitutional amendment doctrine to remedy a situation where an amendment violates the unamendable provision. As seen from an analysis of the two countries that become the source of comparison in this paper i.e. Germany and Turkey, the existence of unamendable provision in the constitution, is sufficient to provide legitimacy to the use of the unconstitutional constitutional amendment doctrine by the constitutional tribunals in both countries, to protect the unamendable provisions in the constitution.

Another country whose jurisprudence is used for comparative analysis in this paper and which has the unamendable provision in its constitution, but has time and again refused to use this doctrine, is France. However, the reluctance to use the doctrine is more due to the Constitutional Council as the constitutional tribunal in France is a political organ that was not originally established with an intention to act as a guardian of the constitution, unlike the Constitutional Courts in Indonesia, Germany, and Turkey which are judicial organs, and whose existence was originally intended to be as a guardian of the constitution.

The doctrine of unconstitutional amendment, however, has a weakness, with respect to the lack of democratic legitimacy in the decision of the courts while examining the constitutionality of amendments made by the representatives of the people. Nevertheless, I suggest that the Constitutional Court must place reliance on the unconstitutional constitutional amendment doctrine, whenever there is an amendment whose substance violates the unamendable provision of the constitution, as the unamendable provision is intended to limit the amending power of the legislature, and only by using the unconstitutional constitutional amendment doctrine, can such limitation be enforced.