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Paradigm Transformation of the Indonesian Constitution Amendment in the Era of the COVID-19 Pandemic: Reflection on the Fourth Amendment to the Fifth Amendment

Novendri M. Nggilu[1*] Mohamad Rivaldi Moha[2] Dian Ekawaty Ismail[3]

[1,2,3] *Faculty of Law (State University of Gorontalo), Gorontalo, Indonesia*
[*]*Corresponding author. Email: novendrilawfaculty@ung.ac.id*

ABSTRACT
The issue of constitutional amendments in the past decade has become increasingly prominent, as one aspect that is quite important to contemplate is paradigm of constitutional change. The fourth constitutional amendment paradigm in 1999-2002 became an important part to evaluate, especially in treading the constitutional path to the fifth amendment in the era of the Covid-19 pandemic. Key aspects in the paradigm transformation include the need for maximum community involvement in constitutional amendments carried out as a logical consequence of constitutional democracy. The establishment of the Constitutional Commission since the beginning of the process of changing into a reasonably strategic aspect, as well as work mechanisms that are regulated and carried out responsibly, will far more ensure the success of constitutional reform. In addition, a major paradigm is also to make the academic text as a formal aspect that is inseparable from the amendment process, so that academic authenticity is determinant compared to political authenticity.

Keywords: *Constitution, Constitutional Amandemen Paradigm, Constitutional Diologue, Democratic, Constitutional Making, Covid-19 Pandemic.*

1. INTRODUCTION

The issue of an amendment to the constitution is actually not a matter that has recently surfaced, but the idea was constitutional even rolled in the Indonesia People's Consultative Assembly (hereinafter abbreviated as MPR) in 2007, where the Regional Representative Council (Hereinafter abbreviated DPD) had proposed a fifth amendment to the Indonesian Constitution, although in the end the DPD proposal did not meet the requirements for the number of proposers as determined by Article 37 paragraph (1).[1][2] The failure of the proposal did not inhibit the DPD, the constitutional endeavors continued to undertake, as the DPD even compiled two manuscripts, which were the Academic Manuscript of the Fifth Amendment of the 1945 Constitution of the Republic of Indonesia and the Manuscript of the Fifth Amendment of the 1945 Constitution of the Republic of Indonesia,[3] even the manuscript was discussed in several academic forums, one of which was held by the DPD in collaboration with Gadjah Mada University.[4] Not only that the DPD is an integral part of the MPR, which is pushing for a fifth amendment to the 1945 Constitution of the Republic of Indonesia, but even among educational institutions, it attemps to encourage an amendment, one of which is conducted by the Faculty of Law of the Islamic University of Indonesia.[3]

The idea of the fifth amendment to the Indonesian Constitution with an effort to revive the State Policy as part of the authority of the People's Consultative Assembly in Article 3 of the 1945 Constitution. Normatively it is stated in MPR Decree Number 8/MPR/2019 concerning the Recommendation for the 2019-2024 MPR Term of Office. [5]

In order to put more focus of the discussion in this paper, it is necessary to formulate the problem, which are: *first*, what is the paradigm of change that influence

the fourth constitutional amendment occurred in 1999-2002? *Second*, transformation of the constitutional amendment paradigm as required in the forthcoming fifth amendment in the era of the COVID-19 pandemic?

2. METHOD

This type of research is normative by using historical approach, especially relating to constitutional amendments occurred in 1999-2002. The next one was using the conceptual approach, specifically the concept of democratic constitution formation, and the concept of constitutional dialogue that is relevant to aspects of constitutional amendment, as well as the comparative approach. Legal material in this paper is primet legal material that has the authority, in this regard, the constitution and other laws related to the study of this paper. In addition, the legal material used secondary legal material both journal articles (international and national), books, and papers. All legal materials were then analyzed descriptively.

3. RESULT AND DISCUSSION

I. PARADIGM OF THE FOURTH CONSTITUTIONAL AMENDMENT OF 1999-2002.

In the state constitution, it is common to place the provisions regarding amendments in specific articles, at least emphasize two aspects, which are the institutional authority to amend the constitution and requirements and restrictions of the constitutional amendment itself.[6] Richart Albert even stated that no part of the constitution is more important than the rules regarding constitutional amendments, as this provision will allow parts of other constitutional texts to be changed.[7] Constitutionally, the authority to amend and enact the 1945 Constitution, which constitutes the Indonesian Constitution rests with the MPR institution (Indonesia Constitution Article 3 paragraph (1)), but it is very possible for elements of the state, both the people, educational institutions, including the president to propose the constitutional amendments, definitely through the MPR with all the provision requirements regulated in Article 37 of the 1945 Constitution.

The collapse of the Soeharto regime through the 1998 reform movement due to economic recession, and then led to the regime's transition to BJ. Habibie, brought down the “wall of sacralization” of constitutional amendment that lasted for 32 (thirty two) years under Suharto's regime. B.J Habibie, who became president at the transition of the regime from the New Order to the Reform Order, then took a strategic step by conducting discussions on constitutional amendments. Habibie through the Council of Legal Experts chaired by Romli Atmasasmita invited the MPR delegation to discuss the constitutional changes.[8] The spirit reflected in Habibie's move to open up a space for constitutional discussion on constitutional amendments was in fact unable to be optimally rendered by the MPR in the constitutional amendment democratically.

The constitutional amendments that rolled out in 1999-2002 were influenced by many dynamics in the community as divided into two major groups, which are the groups of people who considered that the constitutional amendments were incredibly unreasonable and implied the formation of a new constitution, and the groups assessed that the constitutional amendments needs to be proceed with a variety of notes related to the amendment process, including the dynamics occurred internally in the MPR, especially related to the discussion about the DPD and its authority.[3]

However, Ellydar Chaidir about the paradigm of change, one of major subjects is the paradigm of popular sovereignty with the principle of democracy, which is not merely representative but also participatory.[9] The paradigm if reflected in the constitutional amendment process is certainly still beyond expectation. The constitutional amendment process carried out by the MPR appears to be very dominant, resistant, and limited in opening up spaces for public participation in the constitutional amendment.

Since the beginning of the constitutional amendment rolled in, implying that the MPR did not want its authority to change the constitution to be distributed functionally to the constitutional commission,[10] because if the formation of constitutional commission was based on comparison of the success of constitutional amendments in other countries such as South Africa, the Philippines, and Thailand, where the constitutional commission prepared the draft constitution,[3] it is not the case by

the MPR, that the formation of a constitutional commission was only formed in 2003, where the constitutional amendment process was completed in 2002, even so the constitutional commission that had lost its momentum continued to have a comprehensive study on the results of fourth amendment carried out by the MPR, which in the end, the results of such comprehensive study that formulated recommendations for revising the constitutional amendment by the MPR was rejected by the MPR,[11] reasoning that the formed constitutional commission had beyond its duties and authority, and the MPR conclusively and confidently stated that the results of the constitutional amendments by the MPR were very adequate. The MPR's rejection of the results of comprehensive study conducted by the constitutional commission reflected the MPR's resistance to the correction of its work in the constitutional amendment.

Not only is dominance and resistance reflected in the attitude that influenced the constitutional amendment process in 1999-2002, restrictions in opening spaces for public participation were also reflected in the fourth constitutional amendment by the MPR. By comparative approach with South Africa of which Chryl Saunders addressed as the same country as Indonesia to have the constitutional amendment at a regime transition,[12] public participation was so massive in influencing the constitutional amendment process in South Africa, 2 million entries of 24 million people were involved in the amendment process carried out by the South African Constitutional Assembly, constitutional dialogue rooms were widely opened with the use of mass media and electronics, 37 television programs broadcasted constitutional debates in the South African amendment, radio talkshows in eight languages, 160,000 biweekly journals, internet and hot lines telephone in five languages, even sectoral meetings were held with 200 organizations representing a number of groups.[3] The massive dialogue spaces of the constitutional amendment by van Crombrugge were intended to achieve two dual objectives; on the one hand, for the sake of constitutional education and democracy for citizens with easily understandable language and one side to ask public opinion as well as to capture the people aspirations enshrined through constitutional texts.[13] These conditions differ greatly than Indonesia, at least during the amendment process, the MPR only received 127 of the total population of approximately 200 million people, and discussion spaces through socialization and seminars were conducted in hotels, in a few large cities.[3]

II. TRANSFORMING THE CHANGE PARADIGM TOWARDS THE FIFTH AMENDMENT IN THE ERA OF THE COVID-19 PANDEMIC

Muktie Fadjar gave a view on the importance of the paradigm of change in constitutional amendments. amendment or constitutional amendment must be based on the paradigm of change so that the change is directed in line with the developing needs in society.[14] The paradigm includes important values and fundamental principles or the spirit of constitutional change. These values and principles can be used to generate critical reviews of the old constitution and at the same time become the basis for constitutional changes or the drafting of the new constitution. In other words, this paradigm is the “legal politics” of constitutional change. [15] The process of implementing the fifth amendment also must consider the current issue of the country which is the COVID-19 pandemic. Especially in the aspect of public participation and the process of discussing the amendment itself. One of the solutions in realizing the fifth amendment in the era of the COVID-19 pandemic is technology utilization in every process of the amendment.

The paradigm of change reflected in the constitutional amendment process in 1999-2002 as outlined in the previous section, certainly needs to be evaluated. There are four paradigm transformations that can be done.

First, paradigm of popular participation in the amendment process. Public participation in constitutional amendments is actually a logical consequence in a state that embraces constitutional democracy, even Saunder in his writings on constitutional formation in the 21st century stated that constitutional democracy is no longer merely building democratic governance, but the process of constitutional formation must be made in democratic process,[12] in which public participation is one of the features in the formation of democratic constitution.[16]

Public participation that is still very limited in the fourth amendment process in 1999-2002 must be increased and maximized in the fifth amendment later, as this public participation included in constitutional amendments is an important part and diametrically intersect with the constitutional promise that provides assurance for the freedom to express thoughts orally or in writing (Article 28), free to express thoughts in accordance with their conscience (Article 28E paragraphs (2) and (3)), convey information using the types of available channels (Article 28F), but moreover, public participation in constitutional amendments is also to conduct constitutional education that also intersects constitutionally with constitutional texts specifically Article 28C (regarding the right to education, including constitutional education), and Article 28F on the right to obtain information for personal development and social environment. This juridical space for public participation has actually been observed in several laws including Law Number 12 of 2011 on the Formation of Laws and Regulations that specifically places public/community participation in a special chapter (Chapter XI), which basically states that the community has the right to give input verbally/in writing in the formulation of legislation, both through public hearing meetings, work visits, outreach, and seminars/workshops, and discussions. Placement of public/community participation in a special chapter reflects the importance of public participation in the formation of laws to regional regulations, especially in constitutional amendments, in which constitutional texts have fundamental rights interests of hundreds of millions of Indonesian citizens enshrined in the constitutional document. In the era of the COVID-19 pandemic, public participation can be maximized without the mass gatherings in every process, which can be held virtually using video conference platforms. As we know that, usually the public hearing meetings, work visits, outreach, seminars/workshops, and discussions can potentially increase the mass gathering, so those processes need to be held virtually and the utilization of technology is needed.

Aside from being a constitutional education, and fulfilling the constitutional promise of the right to freedom of expression and opinion, maximum public participation is also intended to legitimize the products of the constitutional amendments,[17] the more maximum and greater public participation in constitutional amendment, the greater legitimacy of the constitutional product is, and will strengthen the emotional side of the community with the amended constitutional product, in which the community‟s sense of ownership of the amended constitution will be even greater, as the constitution does not only involve them in the amendment process, but also the fundamental interests of the community are successfully enshrined in the constitutional texts.

Second, paradigm of Constitutional Dialogue through the Constitutional Commission The dominance of constitutional amendments carried out by the MPR in 1999-2002 needs to be improved. Position and actions of domination and hegemony in the formation of policies including constitutional amendments need to be suppressed and avoided, specifically for constitutional amendments, as it is necessary to open up the space for constitutional dialogues in the amendment process. Anne Meuwese and Marnix Snel considered that constitutional dialogue becomes important, as in its stages it forms two-way communication between two or more actors to balance the dominance of certain actors.[18]

The formation of constitutional commission or other designation is important, as leaving the constitutional amendments dominated by the MPR will be very vulnerable to the covering of short-term pragmatic political interests,[19] which would otherwise obscure the essence of the substance to be enshrined in the constitution.[3] The formation of constitutional commission in the fourth amendment process in fact has lost its momentum, as the constitutional commission should have been formed at the commencement of the amendment process, in which the constitutional commission is a state auxiliary bodie functionally that will do the work of drafting the constitution. In the fifth amendment later, the formation of constitutional commission must be formed at the beginning of amendment process, with the composition of constitutional commission must be chosen by experts, statesmen, and nonpartisan. The establishment of constitutional commission in carrying out the works of drafting the constitution does not mean reducing the constitutional authority held by the MPR as stipulated in Article 3 paragraph (1),[10] but rather it is such a great help for the work of the MPR by the presence of constitutional commission that will draft the constitution, socialize, and solicit the

people‟s input, inscribe the sense of mysticism in the community of which interests are to be aggregated and enshrined as constitutional texts. Submitting the functional works of drafting the constitution to the constitutional commission far more ensures the success of constitutional amendments.[11]

Third, academic Study Paradigm. Jimly Asshiddiqe gave a severe critique of the constitutional amendments carried out by the MPR, according to him, the manuscript of the 1945 amendment was compiled and formulated without going through the profound conceptual debate, besides, the situation and political dynamics that influenced the amendment process were also strongly influenced by the involving political interests, hence it ultimately leads to choices concerning truths that are often forced to be ruled out by choices relating to political authenticity.[19] This sense of academic exclusion was then observed by the Constitutional Commission, in which results of a comprehensive study conducted by the Constitutional Commission stated that the results of constitutional amendments by the MPR contained contradictions, both theoretically, conceptually, as well as constitutional practices, and there were inconsistencies in both juridical and theoretical substance.[3] The condition observed by the Constitutional Commission by Ni'matul Huda was assessed by the absence of terms of reference or academic texts in the constitutional amendment.[11]

If drawing the historical line, the DPD's action in submitting the proposal for the fifth constitutional amendment needs to be appreciated, as apart from the DPD's proposal “lost” politically in the MPR, the DPD succeeded in expressing and giving constitutional lessons where the DPD formulated an Academic Script as a patron of constitutionalism values, which form the basis of the proposed constitutional text. The fifth amendment to the constitution in the future needs to be preceded by an academic study in which the philosophical, sociological, juridical, and political foundations of the fifth amendments are well documented, as well as containing the material content of the constitutional amendments. If it refers to contemporary Indonesian legal politics, which according to Law Number 12 of 2011 has been amended by Law Number 15 of 2019 on Formation of Laws and Regulations, regulates *expressively verbis* regarding the formal requirements for the requirement of academic texts in the formation of laws and regional regulations. However, the law does not explicitly mention the formal requirements for the study of academic texts in the constitutional amendments, but the legal politics today indicates a high urgency value, as the laws and regional regulations solely have formal requirements for academic texts in their formation, even more constitution that has a higher degree of hierarchy than the laws, let alone regional regulation.

Fourth, paradigm of Change with the involvement of the Constitutional Court. As a state institution that was born through the matrix of constitutional reform, the Constitutional Court (hereinafter abbreviated as MK) has four authorities and one obligation as stipulated in Article 24C of the 1945 Constitution, one of which reflects the existence of the Constitutional Court's function as the guardian of the constitution, in which function places the Constitutional Court as an institution ensuring that constitutional enforcement is carried out responsibly in the state life.[20] In carrying out its duties all this time, definitely the Constitutional Court often deals with various constitutional issues that intersect with aspects of constitutionalism, especially in terms of interpretation of the constitution. With this condition, the Constitutional Court (MK) is regarded as an institution that knows what aspects need to be enshrined in the constitution as strengthening the values of Indonesian Constitutionalism and universal constitutionalism. The Constitutional Court is also the one who understands and knows well of which decisions need to be repositioned from the text of the Constitutional Court's decision into constitutional text.

In addition to the above considerations, the involvement of the Constitutional Court in the fifth amendment becomes quite important due to crystallization of the principle of *checks and balances* in the constitutional amendments, the more actors involved in the constitutional amendment, it will definitely eliminate the dominance and hegemony of certain actors and constitutional dialogue will be conducted more maximal in the process of the constitutional amendment to bring forth the aspired noble constitution. The involvement of the Constitutional Court was not solely based on the balance of legal politics in the amendment process of which authority was in the MPR,[19] but also as an effort to safeguard constitutional values required to be upheld in the future by the Constitutional Court,

because after all, the Constitutional Court would later uphold the constitution through its decisions, so it is important to involve the Constitutional Court in the fifth amendment process. Even if using a comparative approach, the involvement of the Constitutional Court in the constitutional amendment process in other countries is not a taboo, even in countries such as South Africa, the Constitutional Court is placed as an institution that certifies the constitutional draft drawn up by the constitutional commission.

4. CONCLUSION

The constitutional amendment paradigm is quite decisive from the series of constitutional amendment processes, especially momentum of the fifth amendment that is now increasingly echoed, thus it is important to ponder. The fourth amendment constitution paradigm with all the pros and cons must be reflected, so that transformation of the fifth amendment paradigm occurs. Important aspects in such paradigm transformation include the need for maximum community involvement in constitutional amendments carried out as a logical consequence of constitutional democracy. The establishment of the Constitutional Commission since the beginning of the amendment process becomes a strategic aspect, with work mechanisms that are regulated and carried out responsibly, as it will far more ensure the success of constitutional reform. In addition, an important paradigm is also to make the academic text as a formal aspect that is inseparable from the amendment process, so that academic authenticity becomes a determinant compared to political authenticity, and finally involving the MK in the fifth amendment is also significant, as the MK is an institution who oversee and uphold constitutional values, so they are absolutely very aware of constitutionalism aspects that need to be repositioned into constitutional texts, and ultimately constitutional documents that are brought forth through constitutional amendments, will be fully and responsibly enforced by the Constitutional Court in every exercise of its forthcoming authority and functions.

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