Constitutional Principles in Sate Administration and Government

Prof. Dr. Arief Hidayat

Good morning and warm greetings to all.

- The Honourable Chairman of the Conference of European Constitutional Courts and President of the Constitutional Court of Georgi, **Zaza Tavadze**;
- The Honourable President of Georgia;
- The Honourable Prime Minister of Georgia;
- The Honourable Chairman of Parliament;
- The Honourable Chief Justices and Justices of the European Constitutional Courts;
- The European Court of Human Rights and Venice Commission of the Council of Europe;
- Esteemed Participants of the Congress,
- Ladies and Gentlemen,

First, as the President of the Association of Asian Constitutional Courts and Equivalent Institutions and Chief Justice of Constitutional Court of the Republic of Indonesia, I wish to express my thanks and my highest appreciation to the President of the Constitutional Court of Georgia and President of the Conference of European Constitutional Courts, **Zaza Tavadze** for inviting me to be present here for the **Seventeenth Congress of the Conference of European Constitutional Courts**.

Allow me to take this glorious opportunity to express my views on the issues under the third sub-theme of this Congress. **First**, the principle of the constitutional supremacy;

secondly, the hierarchy of legislation within the constitution; **third**, constitutional provisions not subject to amendment; and **fourth**, judicial review of constitutional amendments.

Naturally, my views on these four issues are closely related to my experience as Chief Justice of the Constitutional Court of the Republic of Indonesia and the understanding I have gained as a Professor of Constitutional Law. Therefore, I will also share some best practices from the Indonesian constitutional system in connection with these important issues.

Honourable President of the Conference of European Constitutional Courts,

Honourable Chief Justices and Constitutional Justices,

Esteemed participants of the Congress,

Ladies and gentlemen,

Regarding the **first** issue, the principle of the constitutional supremacy, I am of the opinion that the constitution represents the highest law in a given state, often referred to as the supreme law of the land. This means that there may be no norms considered higher than those found within the Constitution. In accordance with the agreement made amongst the citizens of the state, the constitution must be placed at the very apex of the legal hierarchy. The implication therefore is that no laws nor regulations nor any decree or action from a public official may contradict the norms found within the constitution. If any such law, regulation or decree is in fact found to be contrary to the constitution, then it must be determined to have no legal force and must be revoked. This hierarchical theory of legal norms is consistent with Hans Kelsen's *Stufentheorie*, which was later developed by Hans Nawiasky in his book, *Allgemeine Rechtlehre*. We call such revocation of inferior

normsby a judicial institution, such as the Constitutional Court, Judicial or Constitutional Review.

However, this theory of legal hierarchy does in fact leave room for a norm higher than the constitution, referred to as *staatsfundamentalnorm*, the fundamental norm of the state. S*taatsfundamentalnorm* is considered a pre-supposed norm, one that was established by the citizens of the state prior to the establishment of the constitution, in fact giving rise to the conception of the constitution or *staatsverfassung*.

Usually, such fundamental norms are recorded in the preamble to the constitution, for example, the Preamble to Indonesia's Constitution refers to the *Pancasila* or Five Principles as the fundamental ideology of the state, namely Faith or Godliness, Humanity, Unity, Democracy and Social Justice. These five principles represent the fundamental ideals embodied in the articles of the constitution as well as the foundation and source of all laws of the state. As such, the Constitutional Court in its activities refers not only to the Constitution when reviewing the constitutionality of the law but also to the five principles of the *Pancasila*.

With respect to the **second** issue, the hierarchy of regulations within the Constitution, I believe that any such hierarchy can be established only based on agreement amongst the authors of the constitution. This means that, if there is such an agreement, then a hierarchy of norms within the constitution is entirely possible and can be constitutionally justified.

There are, however, strengths and weaknesses to this view. On the one hand, such a hierarchy within the constitution can create a very strong position. At the same time, it can lead to difficulties should the hierarchy need to be altered at any point. For this reason, the process for amending the constitution is much more difficult compared with other laws or legal systems.

As an example, Indonesia's legislative hierarchy is regulated by law, not by the constitution; the consideration here being that this arrangement makes it easier should there be a need to alter or improve said hierarchy. Given that Indonesia is a republic with a presidential government and a decentralised, unitary state, the legislation from the central to the regional levels has plenty of room for growth and development at all times. If the aforementioned hierarchy were enshrined in the constitution, it would be significantly more difficult for the legislators to adapt to the changes in law and society.

Nevertheless, placing the hierarchy as content within the constitution is an interesting notion. For this reason, the constitution's status as the supreme law should be stated within the constitution itself in order that its supremacy be attributive, not just delegative.

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Ladies and gentlemen,

Next, I would like to discuss the **third** issue, unamendable constitutional provisions. Many countries have such provisions. In general, unamendable constitutional provisions tend to be related to the forms and systems of government, the political structure and state administration, the state's fundamental ideologies, basic rights, and integration of the state. For example, in Indonesia's constitution, Article 37 Paragraph (5) states, "Provisions relating to the form of the unitary state of the Republic of Indonesia may not be amended." Here, then, are two provisions that cannot be amended, first that the state be a unitary state and second that the form of government be a republic.

The need for this unamendable constitutional provision is predicated on the country's history. In 1949, under pressure from other countries, Indonesia became a united state,

following which there were several separatist movements across the country. Any recurrence of such events is of course undesirable, hence the inclusion of the aforementioned unamendable provision. Furthermore, though it is not enshrined in the Constitution, there is an unwritten agreement, made before the Constitution was amended in 1999 to 2002 that the preamble not be amended.

These unamendable constitutional provisions are the focus of debate amongst experts in many parts of the world. Those who agree with the practice claim that unamendable constitutional provisions serve to strengthen the constitutional system and structure of a state. On the other hand, there are those who reject the idea of unamendable constitutional provisions, claiming instead that they are contrary to the theory and principles of republicanism and democracy. However, there is in fact a way for unamendable constitutional provisions to be amended, referred to as the double amendment procedure. Here, the first step is to amend the provision that contains the prohibition, after which the previously unamendable provision can then itself be amended.

Finally, the **fourth** issue I wish to explore is related to judicial review of constitutional amendments and the revocation of amendments. One reason for revoking a constitutional amendment is that the amendment is in contradiction to the basic doctrine developed by the courts. That is to say that if a constitutional amendment is found to be at odds with the basic doctrine, then the judiciary may revoke it.

Ideally, the authority of the court to review and revoke amendments should be granted directly by the constitution as a constitutional authority. If the court is not granted such constitutional authority, there is no possibility of amending the constitution through judicial review. As such, the court should not seek to obtain this crucial authority without it being granted by the constitution.

However, if such authority is granted, I am of the opinion that consideration should first be paid to the precise object of the judicial review of the constitutional amendment, that is to say, whether the object of the judicial review is the procedure through which the constitution was amended or the substance of the amendment. If it is related to incorrect procedure or procedure not in accordance with the provisions of the constitution or the applicable regulations, then the amendment may be revoked. In other words, if the amendment procedure implemented is found to be undemocratic and not in accordance with the applicable legal procedures, then there is a strong basis for judicial review and revocation.

On the other hand, if it relates to the substance and the provisions contained in the amendment, having been made through the appropriate procedures, there should be no judicial review by the court. Therefore, one of the main duties and obligations of the Constitutional Justice is to comply with and enforce the provisions of the Constitution. Indeed, it is an oath taken by the Constitutional Court Justice to uphold and defend the constitution, not to override its contents.

In the context of the constitutional and legal system in Indonesia, the Indonesian Constitution does not grant authority to the Constitutional Court or the Supreme Court for the conduct of judicial review of constitutional amendments, the reason being that granting such authority could potentially undermine order and weaken the separation of powers, which is still being strengthened and perfected in Indonesia. Furthermore, Indonesia’s experience with constitutional amendment is still minimal, having seen to date only four amendments in a single undertaking—between 1999 and 2002—since the Indonesian Constitution was ratified on 18 August, 1945. Thus, granting full authority to the People's Consultative Assembly to amend the Indonesian Constitution without the Constitutional

Court possessing the authority to revoke those amendments is ultimately the best choice for Indonesia today.

Honourable President of the Conference of European Constitutional Courts,

Honourable Chief Justices and Constitutional Justices,

Esteemed participants of the Congress,

Ladies and gentlemen,

Before I finish, I would also like to take this opportunity to invite the President of the Conference of the European Constitutional Courts and all representatives of the member states to be present at the Congress of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC), which will be held in Solo, Indonesia, on 9–11 August 2017. Furthermore, I wish to express on this glorious occasion my hopes that the cooperation between the Association of Asian Constitutional Courts and other Equivalent Institutions (AACC) and the Conference of European Constitutional Courts can be continually strengthened in the future and that we can all learn from one another's best practices.

Thank you all for your attention.

PRESIDENT OF THE ASSOCIATION OF ASIAN CONSTITUTIONAL COURTS AND EQUIVALENT INSTITUTIONS /

KETUA MAHKAMAH KONSTITUSI REPUBLIK INDONESIA

PROF. DR. ARIEF HIDAYAT