



Public Participation in Constitutional Amendments with Deliberation Requirements in the Unamendability Framework: A Comparative Study

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ABSTRACT

From time to time, it is considered that Constitutional Amendments are lack of public participation and contains political aspects. Therefore, many nations regulate certain provisions to ensure that the Constitutional Amendments are merely for public order and welfare. One of the provision is the temporal unamendability. In the shape of deliberation requirements, which is essentially the involvement of the public in submitting constitutional amendments within a certain time limit. Indonesian Law doesn't recognize the concept of deliberation requirements, therefore, the authors will analyze Sweden and South Korean Law, two countries that are also using civil law system and have regulated deliberation requirements in submitting constitutional amendments. This paper will discuss two problems: 1) the legal provisions for constitutional amendments in Indonesia, Sweden, and South Korea, and 2) the guarantee model for public participation in constitutional amendments using the deliberation requirements model. This paper uses legal research method, with a conceptual, statutory, and comparative approach. The results show that Sweden and South Korean Law have involved both the public and the Representative Body to determine whether constitutional amendment will be performed, meanwhile Indonesia hasn't involve the public to vote for a constitutional amendments. Therefore, to guarantee public participation in constitutional amendments, the authors provide a model which include the public participation through vote or referendum to decide a constitutional amendments and a period of time to file for constitutional amendment.

Keywords: Constitutional Amendments; Deliberation; Public Participations; Time; Unamendability

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INTRODUCTION

Amendments to the 1945 UUD NRI are allowed.¹ Currently, the procedure for amendments to the 1945 UUD NRI is regulated in Chapter XVI, Article 37 of the 1945 UUD NRI. In essence, amendments can be made by submitting proposals for changes to

¹ Xavier Nugraha, Risdiana Izzaty, Alya Anira. 2020. "Constitutional Review di Indonesia Pasca Putusan Mahkamah Konstitusi Nomor 48/PUU-IX/2011: Dari Negative Legislator Menjadi Positive Legislator" *Jurnal Rechtsidee* Vol 15, No.1 <https://doi.org/10.21107/ri.v15i1.5183.g4588>

the articles of the 1945 UUD NRI in the MPR session with a minimum quorum $\frac{1}{3}$ of the number of MPR members, submitted in a written and clear manner regarding the part that wanted to be changed and the reasons, then discussed in the MPR session which was attended by at least $\frac{2}{3}$ of the total members, then the decision on the amendment was approved by at least 50% + 1 MPR member. In addition, the form of the Unitary State of the Republic of Indonesia cannot be changed. This constitutional provision was followed up with MPR Regulation No. 1 of 2019 concerning the Rules of the MPR RI. Indonesia has now made four amendments to the Constitution; the first amendment was made at the MPR General Session 14-21 October 1999, the second amendment was at the MPR Annual Session 7-18 August 2000, the third amendment was at the MPR Annual Session 1-9 November 2001, and fourth amendment at the MPR Annual Session 1-11 August 2002.²

Related to the provisions of constitutional amendments, the concept of unamendability is increasingly recognized in various world constitutions.³ The concept of unamendability itself can be interpreted as a form of limitation on constitutional subjects, both explicit and implicit, which cannot be amended.⁴ If categorized, according to Richard Albert and Yaniv Roznai, there are four types of unamendability provisions, namely procedural unamendability, substantive unamendability, temporal unamendability, and emergency unamendability.⁵ Procedural unamendability applies to certain requirements and provisions needed for the amendment process, such as provisions for a majority or quorum, election or referendum mechanism; that if it cannot be fulfilled, the amendment cannot be done.⁶ Substantive unamendability means that there is a prohibition to amend certain principles, institutions, or rules in the Constitution. Temporal unamendability requires a time limitation during the period of formal amendment process. Lastly, emergency unamendability stipulated a situation when amendment is not allowed in times of crisis.⁷

² Iswara N Raditya. 2020. "Amandemen UUD 1945 Dilakukan 4 Kali, Sejarah, & Perubahan Pasal" *Tirto* di akses pada: <https://tirto.id/amandemen-uud-1945-dilakukan-4-kali-sejarah-perubahan-pasal-f7Cw>

³ Lech Garlicki and Yaniv Roznai. 2019. "Introduction: Constitutional Unamendability in Europe" *European Journal of Law Reform* 21:3 <https://doi.org/10.5553/EJLR/138723702019021003001>

⁴ Yaniv Roznai, "Unconstitutional Constitutional Amendments - The Limits of Amendment Powers". *Oxford University Press*.

⁵ Albert, Richard. 2014. The Structure of Constitutional Amendment Rules. 49 *Wake Forest Law Review* 913 Boston College Law School Legal Studies Research Paper No. 326, Available at SSRN: <https://ssrn.com/abstract=2461507>

⁶ Abdelaal, Mohamed. 2016. Entrenchment Illusion: The Curious Case of Egypt's Constitutional Entrenchment Clause. *Chicago-Kent Journal of International and Comparative Law*, Vol. 16, No. 2, 2016, Indiana University Robert H. McKinney School of Law Research Paper No. 2016-26, Available at SSRN: <https://ssrn.com/abstract=2782744>

⁷ Richard Albert and Yaniv Roznai. 2021. Emergency Unamendability: Limitations on Constitutional Amendment in Extreme Conditions'. *Maryland Law Review* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3847420>

From these types of amendments, this paper will further analyze the temporal unamendability, which is associated as a part of procedural unamendability.⁸ Further explanation about temporal unamendability will be discussed on Discussion part of this writing.

If Indonesia wants to amend the Constitution, one of the inputs for the unamendability provisions that can be regulated is temporal unamendability in the form of these deliberation requirements. This is done so that unilateral claims from politicians and state officials regarding public support for the urgency of a constitutional amendment can be measured with certainty in a certain time frame, but still provide sufficient discussion space for the public to discuss the urgency of the amendment with concrete evidence directly. So, related to the issue of the current amendment to the 1945 UUD NRI, public participation can be guaranteed and accommodated constitutionally. The deliberation requirements model in the context of unamendability exists in various countries, such as Italy, South Korea, Costa Rica, Australia, Denmark, Norway, Sweden,⁹ Chile, and Luxembourg.¹⁰ The author chooses to use a comparison in South Korea and Sweden because the involvement of the public (citizens) in the formal constitutional amendment process, which is limited by timeframe, is much more visible than in other countries; and these 2 countries have different deliberation requirements models: South Korea with a public announcement system and Sweden with a general election system.¹¹

Therefore, two problem formulations will be discussed further in this paper, namely: 1) What are the legal provisions regarding the amendments to the 1945 UUD NRI, the Swedish Constitution, and the South Korean Constitution? and 2) Is the public participation guarantee can be included in the amendments to the Indonesian Constitution, compared to the deliberation requirements model in the temporal unamendability framework in Sweden and South Korea?

To ensure the originality of the article, the authors will elaborate few similar articles and their differences from the current research conducted by authors. First, an article published by Jurnal Konstitusi, titled "The Pulse of Fifth Amendment of the Constitution Through the Involvement of Constitutional Court as the Principle of the Guardian of the Constitution" written by Ahmad and Novendri M. Nggilu, mainly discussed the involvement of the Constitutional Court in amending the Constitution. Meanwhile, this paper is discussing the involvement of the citizens in amending the Constitution through the deliberation requirements. Second, an article published by Adalah Buletin Hukum & Keadilan, titled "Public Participation in Constitution Amendment" written by Siti Nurhalimah, mainly discussed the involvement of the Constitutional Court to examine the constitution amendment to ensure that the amendment was made for the nation's

⁸ Richard Albert and Bertil Emrah Oder. 2018. "The Forms of Unamendability". *Ius Gentium: Comparative Perspectives on Law and Justice* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3181732>.

⁹ *ibid.*

¹⁰ Albert Ricard, *Op.cit.*

¹¹ *Ibid.*

interest, not political interest. Meanwhile, this paper is discussing the involvement of the citizens in amending the Constitution through the deliberation requirements.

METHOD

This paper uses the legal research method, which is doctrinal research. As argued by Ani Purwanti, legal doctrinal research is research that focuses on legal rules, principles, concepts, and legal doctrines.¹² The approach used in this article, namely conceptual, statute, and comparative approaches. Conceptual approach is a type of approach in legal research that answers the issues from legal views and doctrines.¹³ Statute approach is a type of approach in legal research that uses legal sources including legislation, as the main source for the research related to the legal issues.¹⁴ Comparative approach is a type of approach in legal research that compares legal systems, legal sources, or legal events of each country.¹⁵ This method is used to provide a systematic exposition of the rules governing the issue, which are legal provisions related to constitution amendments in Indonesia, Sweden, and South Korea.

DISCUSSION

Provisions regarding Constitutional Amendments in Indonesia, Sweden, and South Korea

As part of the development of a constitution, the legal concept of constitutional amendments is widely known in various world constitutions. Black's Law Dictionary defines an amendment in the context of legislation as a proposed modification or alteration of a provision in a statute.¹⁶ In addition, Yulistyowati defines amendment as a process of changing existing provisions in regulations, either by adding, subtracting, or removing certain regulations.¹⁷ Meanwhile, in the context of constitutional amendments, Sri Soemantri explained three meanings of constitutional amendments, namely making different sounds, adding something new, and the existence of provisions in the Constitution that were implemented not in accordance with what was stated therein.¹⁸ Therefore, constitutional amendments are basically a procedure to change the Constitution's provisions.

The concept of temporal unamendability is closely related to the formal amendment procedure of the Constitution, where the formal amendment procedure is limited by certain provisions. These limitations are called procedural unamendability, as described

¹² Ani Purwati. 2020. "Metode Penelitian Hukum: Teori dan Praktek", *Jakad Media Publishing*, Surabaya. 11.

¹³ Johnny Ibrahim.2005. "Teori dan Metode Penelitian Hukum Normatif", Bayumedia, Malang. 249.

¹⁴ Muhaimin, *Op. Cit.*

¹⁵ Johnny Ibrahim, *Op.Cit.* 172.

¹⁶ Henry Campbell Black. 1968. "Amendment Black's Law Dictionary". *West Publishing Co.* Minnesota. 106.

¹⁷ Efi Yulistyowati, Endah Pujiastuti and Tri Mulyani. 2018. 'Penerapan Konsep Trias Politica Dalam Sistem Pemerintahan Republik Indonesia: Studi Komparatif Atas Undang-Undang Dasar Tahun 1945 Sebelum Dan Sesudah Amandemen'. *Jurnal Dinamika Sosial Budaya*. [331].

¹⁸ Sri Soemantri Martosoewigno. 2002. "UUD 1945 Kedudukan Dan Aspek-Aspek Perubahannya". *UNPAD Press*.

in the definition in the previous paragraph.¹⁹ In particular, temporal unamendability or limitations is a formal amendment specification that limits a formal amendment's period or time limit for implementing the amendment phase.²⁰ There are two general types of temporal unamendability: 1) deliberation requirements (provisions regarding a certain period of time given to constitutional actors to evaluate proposals or submissions for amendments) and 2) safe harbors (prohibition of constitutional amendments for a certain period of time).²¹

Especially in the deliberation requirements, there are three variations of implementation, namely the deliberation ceiling, deliberation floor, and intervening election, which distinguishes between the limitation of the minimum (floor) or maximum (ceiling) time period or adjusted to the election time (election).²² If analyzed further, the existence of deliberation requirements in the temporal unamendability framework provides a space for discussion for the public, either directly or through their representatives, but is given a time limit so that the constitutional amendment process does not drag on.

Provisions regarding Constitutional Amendments in Indonesia

During the existence of the Indonesian state, the Indonesian Constitution, namely the 1945 UUD NRI, underwent several amendments.²³ As explained in the previous section, the 1945 UUD NRI has been amended four times. This amendment cannot be separated from the influence of the reform movement at the end of President Soeharto's rule in 1998.²⁴ Starting from 1999, the MPR as the institution authorized to amend the Constitution, began to make the first amendment to the 1945 UUD NRI. In the next three years, the MPR passed another three amendments to the Constitution.²⁵ At that time, the amendment of the Constitution was seen as a process of political engineering to create a new reality for the people of Indonesia.²⁶ There are four changes presented in the four amendments to the 1945 UUD NRI, namely the existence of a clear separation between legislative, judicial, and executive powers, as well as guarantees for the

¹⁹ Ibid.

²⁰ Albert, Richard, *The Structure of Constitutional Amendment Rules* (March 1, 2014). 49 *Wake Forest Law Review* 913 (2014), Boston College Law School Legal Studies Research Paper No. 326, Available at SSRN: <https://ssrn.com/abstract=2461507>

²¹ Albert, Richard, *Temporal Limitations in Constitutional Amendment* (March 21, 2016). 21 *Review of Constitutional Studies* 37 (2016), Boston College Law School Legal Studies Research Paper No. 390, Available at SSRN: <https://ssrn.com/abstract=2749288>

²² *ibid.*[42-43].

²³ Alfianus Danny Jema, Harly Stanly Muaja and Marthin L Lombonan. 2020. "Analisa Hukum Terhadap Mekanisme Amandemen Konstitusi (Perubahan Undang-Undang Dasar) Berdasarkan Sistem Ketatanegaraan Yang Berlaku Di Indonesia". Vol. 8 No. 4. *Lex Administratum*

²⁴ Abrianto, Bagus O., Farid Ibrahim, and Xavier Nugraha. "Reformulating The Concept of State Principles Based on Ideological and Technocratic Strategic as A Sustainable Development Direction." *LAW REFORM* 16, no. 1 (2020): 112-126. Accessed December 20, 2022. <https://doi.org/10.14710/lr.v16i1.30309>

²⁵ Denny Indrayana. 2007. "Amandemen UUD 1945: Antara Mitos Dan Pembongkaran" *Mizan*. Jakarta

²⁶ Purwo Santoso. 2007. "Amandemen Konstitusi Untuk Mengelola Kebhinnekaan Indonesia". *Jurnal Ilmu Sosial dan Ilmu Politik* Vol 10, No.3 2007. <https://doi.org/10.22146/jsp.11013>

protection of human rights that are increasingly firm and clear. This change was brought about through an open debate in the MPR which was driven by the euphoria of the transitional period of Government.²⁷

The procedure for constitutional amendments in Indonesia is currently regulated in Article 37 paragraphs (1) to (4) of the 1945 UUD NRI. As stipulated, The submission of proposals for constitutional amendments must be submitted to at least $\frac{1}{3}$ of the MPR members by explaining which Articles of the 1945 UUD NRI are proposed to be amended, the reasons for the changes, then the content of the proposed amendments to the articles concerned. Submission of this amendment proposal can be realized in the form of a statement or petition from members of the MPR.²⁸ If the requirements for the number of proposers are met, then the session of the MPR discussing the amendments must be attended by at least $\frac{2}{3}$ of the MPR members, and the decision to approve the amendment is approved by at least 50% + 1 of the total members of the MPR.

The existence of this constitutional amendment provision is a logical consequence of the basic agreement prior to the 1999 constitutional amendment, namely the addendum.²⁹ In addition, the procedure for constitutional amendments in Indonesia is further regulated in Articles 24 to 32 of Law Number 13 of 2019 concerning the third amendment of MPR, DPR, DPD, and DPRD (Law MD3), as well as Articles 104 to Article 112 of MPR RI Regulation Number 1 of 2014 concerning the Order of the People's Consultative Assembly of the Republic of Indonesia (MPR Regulation Number 1 of 2014). The provisions regulated in more detail in these laws and regulations essentially emphasize the existence of an ad-hoc committee assigned to carry out the review of proposed changes to the Constitution.

In addition to regulating the amendment procedure, Article 37 of the 1945 UUD NRI, particularly in paragraph (5) stipulates that there is no change in the form of the Unitary State of the Republic of Indonesia.³⁰ This provision is reaffirmed in Article 24 paragraph (2) of the MD3 Law and Article 104 paragraph (2) of the MPR Regulation Number 1 of 2014, namely the prohibition of proposals for changes to the form of a unitary state and adding provisions that no changes are allowed to the contents of the Preamble of the 1945 UUD NRI. Prohibition to amend the provisions stated above is also known as unamendability or unamendable provision. The provisions for unamendability in Indonesia are in the form of the state and the system of Government, namely regarding a unitary state with a system of Government in the form of a republic. This was motivated by the history of the Indonesian state administration, which had changed the form of the state and the government system after its independence in 1945.³¹ This provision was intended as a preventive measure to prevent the existence of powers

²⁷ Indrayana. *Loc. Cit.*

²⁸ *ibid.*

²⁹ Jema, Muaja and Lombonan. *Loc. cit.*

³⁰ Aldi, Jihan Anjanja, Elma Putri Tanbun, and Xavier Nugraha. 2019. "Tinjauan Yuridis Kewenangan Dewan Kehormatan Penyelenggara Pemilu (Dkpp) Dalam Menciptakan Pemilu Yang Demokratis Di Indonesia". *Jurnal Hukum De'rechtsstaat* 5 (2):137-3. <https://doi.org/10.30997/jhd.v5i2.1941>.

³¹ Luthfi Widagdo Eddyono. 2016. "The Unamendable Articles of the 1945 Constitution". Vol 2 No. 2. *Constitutional Review*. DOI: <https://doi.org/10.31078/consrev225>

capable of changing the Indonesian state in subsequent amendments, although Roznai criticized that the amendments could not determine unamendability to itself.³²

Furthermore, although the 1945 UUD NRI does not affirm the unamendability of the Preamble to the 1945 UUD NRI, in fact the Preamble to the 1945 UUD NRI is included in the unamendable provision. If you look at the contents of Article 37 of the 1945 UUD NRI, the changes or amendments that are allowed are the 'articles of the Constitution', namely the body of the 1945 UUD NRI, and do not include the Preamble of the 1945 UUD NRI. The preamble of the 1945 UUD NRI, is no other known as Pancasila.³³ Therefore, the provisions for unamendability of the Preamble of the 1945 UUD NRI were later reaffirmed in the MD3 Law and MPR Regulation Number 1 of 2014 as described previously.

Provisions regarding Constitutional Amendments in Sweden

Sweden also allows and regulates constitutional amendments. Uniquely, the Swedish Constitution consists of four documents. First, the 1974 Instrument of Government which regulates the basic provisions that are closest to the constitutional model in other countries. Second, the 1810 Act of Succession which regulates the order of transition of the throne of the royal monarchy. Third, the 1949 Freedom of the Press Act regulates general principles of state documents and the right to produce and distribute print media. Fourth, the 1991 Fundamental Law on Freedom of Expression which regulates basic rights to media other than print media.

In addition to these four documents as the Swedish Constitution, there is also the Riksdag Act which contains provisions regarding the Riksdag or Parliament, which although its position is not as fundamental law as the four previous documents, but its position is higher than ordinary laws.³⁴

From an international perspective, the Swedish Constitution is a fairly easy constitution to change or amend. This is considering that several Swedish Constitutional documents, namely the Freedom of the Press Act and the Fundamental Law on Freedom of Expression, contain comprehensive provisions on criminal law, civil law, and procedural law, so they often require changes to adapt to the dynamics of society.³⁵ At least, there have been more than 200 amendments to the Swedish Constitution since 1974, mostly to accommodate technical provisions and constitutional and political needs.³⁶ However,

³² Yaniv Roznai. 2019. "Constitutional Amendability and Unamendability in South-East Asia". *Journal of Comparative Law*. [190].

³³ Luthfi Widagdo Eddyono. 2016. 'Quo Vadis Pancasila Sebagai Norma Konstitusi Yang Tidak Dapat Diubah'. 16 *Jurnal Konstitusi*. <https://doi.org/10.31078/jk1637>

³⁴ Ministry of Justice Sweden, 'The Constitution of Sweden'. 2013. <<https://www.government.se/49b75a/contentassets/7b69df55e58147638f19bfdfb0984f97/the-constitution-of-sweden>>.

³⁵ Joakim Nergelius 'The Constitution of Sweden and European Influences: The Changing Balance Between Democratic and Judicial Power' in Anneli Albi and Samo Bardutzky. 2019. *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law*. <https://doi.org/10.1007/978-94-6265-273-6>

³⁶ Tuomas Ojanen. 2019. 'Constitutional Unamendability in the Nordic Countries'. 21 *European Journal of Law Reform*.

the Instrument of Government document, which is the main Swedish constitutional document, is rarely amended. For example, the document was amended only when Sweden joined the European Union on January 1 1995, to accommodate provisions on human rights guarantees, and on January 1 2011, to accommodate traditional popular sovereignty with new elements such as judicial review and the vertical and horizontal separation of powers.³⁷

Provisions for amendments to the Swedish Constitution, namely amendments to basic rights and fundamental laws, are regulated in Articles 14 to 17 of the Instrument of Government document. In essence, the procedure for amendments to the Swedish Constitution begins with the Riksdag, at least nine months before the election, and is approved by a majority of members of Parliament in the same two decisions, before and after the election.³⁸ In 1980, a referendum could be used to determine constitutional amendments, as provided in the Instrument of Government. This referendum is intended to involve the people in submitting constitutional amendments, and the results are only binding if the majority of voters choose not to support the proposal for submitting the constitutional amendment. To date, the Riksdag has never used the provisions of a referendum to submit a proposal for this amendment.³⁹

The issue of unamendability in the Swedish Constitution is not explicitly regulated, in fact it tends to be silent about limiting the power to amend. However, Chapter I Instrument of Government emphasizes that the fundamental principles must be maintained are people's sovereignty, democracy, the rule of law, and separation of powers. This can be seen, for example, in Article 6 of the Instrument of Government in terms of transferring power decisions to the European Union, fundamental principles must be maintained. Then, the fundamental principle that the King and Parliament should rule the state should not be abolished is also reiterated in the Swedish Constitution. In addition, the fundamental principles of freedom of expression and the media of the press are also strictly regulated in the Swedish Constitution.⁴⁰

Provisions regarding Constitutional Amendments in South Korea

Later, South Korea, through the Constitution of the Republic of Korea (대한민국) has also gone through several amendments. The last time it was amended was in 1988, before that, the Constitution of the Republic of Korea was amended in 1952, 1954, June 1960, November 1960, 1962, 1969, and 1972.⁴¹ The need for constitutional amendments to accommodate various coup regimes and a republican form of

³⁷ Nergelius. *Loc.cit.*

³⁸ *ibid.*

³⁹ The Riksdag Information Service. 2022. 'The Constitution'. Accessed: [https://www.riksdagen.se/en/how-the-riksdag-works/democracy/the-constitution/#:~:text=To make an amendment to,limit people%27s freedoms and rights.>](https://www.riksdagen.se/en/how-the-riksdag-works/democracy/the-constitution/#:~:text=To%20make%20an%20amendment%20to%20limit%20people%27s%20freedoms%20and%20rights.>).

⁴⁰ Ojanen. *Loc. Cit.*

⁴¹ Daekyu Yoon. 1988. 'Constitutional Amendment in Korea'. 16 Korean Journal of Comparative Law.[1-13].

government system that was often changing at that time.⁴² Until now, the urge to amend the South Korean Constitution has always appeared in the community, especially in 2017 and 2018, to propose an additional two presidential term, the granting of additional powers to the Prime Minister in international relations, and the Candlelight Movement event that took place in 2016 which aim was to push the impeachment of President Park Geun Hye by the public.⁴³

If you look at the provisions of the constitutional amendment procedure in South Korea, there are provisions in Articles 128 to 130 of the Constitution of the Republic of Korea which regulates the model for submitting constitutional amendments. In essence, the proposal for submitting a constitutional amendment must be submitted by a majority of members of Parliament or by the President, must be submitted to the public for 20 days, then Parliament approves the proposal through a voting procedure of at least 2/3 of the total members of Parliament. When the conditions for approval are reached at the parliamentary level, then a maximum of thirty days later the results of the amendments must obtain approval from at least more than half of the voters (community) who meet the requirements to become voters in parliamentary elections. After that, the President must immediately ratify the new constitutional amendments. In addition, the Constitution of the Republic of Korea does not explicitly regulate the unamendability clause other than the limitation on the submission of amendments aimed at extending the term of office of the incumbent President.

Analysis on the Provisions regarding Constitutional Amendment in Indonesia, Sweden, and South Korea

From the explanation above, we can conclude that the Indonesian, Sweden, and South Korean Constitutions have the same provision, which is the possibility to amend their Constitution with particular limitations. The comparison between those three countries can be seen in the table below:

Table 1. The Comparison of the Provisions regarding Constitutional Amendments in Indonesia, Sweden, and South Korea

Country	Constitutional Amendment Provisions	Unamendability Provisions
Indonesia	<ol style="list-style-type: none"> 1. Submission of the amendment proposal 2. MPR session to discuss the approval or rejection of the amendments 	<ol style="list-style-type: none"> 1. The unitary state with a system of republic government 2. Preamble of the 1945 UUD NRI
Sweden	<ol style="list-style-type: none"> 1. Submission of the amendment proposal to Riksdad 	<ol style="list-style-type: none"> 1. The principles of the people's sovereignty, democracy, rule of law, and separation of powers

⁴² Yun, Jeong-In, What Matters in Comparative Constitutional Amendment?: Some Reflections from a Normative Perspective (August 31, 2020). Yonsei Law Journal Vol. 11 No. 1, 2020, Available at SSRN: <https://ssrn.com/abstract=3739602>

⁴³ Erik Mobernd. 2020. 'Has the Time Come to Amend South Korea's Constitution?' *The Diplomat*. <<https://thediplomat.com/2020/07/has-the-time-come-to-amend-south-koreas-constitution/>>.

	2. Referendum	2. The state should be ruled by the King and Parliament should not be abolished is also reiterated in the Swedish Constitution.
	3. Riksdag meeting to discuss the approval or rejection of the amendments	3. The fundamental principles of freedom of expression and the media of the press
South Korea	1. Submission of the amendment proposal to the President	The term of office of the incumbent President
	2. Publication of the amendment proposal	
	3. Approval from the Parliament	
	4. Approval from the community	
	5. Ratification of the Constitutional Amendment by the President	

Guaranteed Public Participation in Constitutional Amendments according to the Temporal Unamendability Framework on Deliberation Requirements

Public participation in constitutional amendments at this time is a form of embodiment of democracy.⁴⁴ In realizing this concept, there are several world constitutions that emphasize the mechanism for direct public involvement, representation through Parliament, or a combination of the two things. With the stipulation of this provision, it can be implicitly said *that amendments to the Constitution cannot be made if the public does not participate*. Therefore, when reviewing the concept of unamendability that has been described previously, the limitation of this concept is not only on what norms cannot be changed in the Constitution, but also restrictions on when the Constitution cannot be changed or whether there is a time period for the constitutional amendment process. This is what Richard Albert calls temporal unamendability.⁴⁵

Albert then divides temporal unamendability into three models, which are safe harbors, deliberations and intervening election. The safe harbors model places more emphasis on when the Constitution cannot be amended, which is then divided into states of emergency, the period of transfer or transfer of power, the period after the previous amendment proposal failed, the period after the amendment proposal was successfully approved, and the post-amendment period and the adoption of a new constitution period. The second model of temporal unamendability is deliberations, which emphasize the existence of a minimum or maximum period of time needed to consider and approve constitutional amendments. Meanwhile the third model, intervening election is similar to the deliberations model but is added with intervention election criteria to approve the amendment proposal.⁴⁶ Of these three temporal unamendability

⁴⁴ Bayu Aryanto. 2020. "Demokrasi Deliberatif Dalam Konsep Amandemen Konstitusi Indonesia". *Mulawarman Law Review* 5 (2):96-113. <https://doi.org/10.30872/mulrev.v5i2.366>.

⁴⁵ Albert. *Loc.cit.*

⁴⁶ *ibid.*

models, there is an emphasis on time as an indicator limiting constitutional amendments' occurrence.

The deliberation requirements model in the temporal unamendability framework is interesting to being further explored, because it exists to ensure public approval in constitutional amendments, by providing a system between constitutional actors and the public, both reaching a valid consensus to amend the Constitution. There are two types of deliberation requirements distinguished, based on the timeframe for the approval process for constitutional amendments, namely: 1) deliberation floors, which means the minimum period, and 2) deliberation ceilings, which means the maximum period.⁴⁷ Therefore, there are important elements that indicate the deliberation requirements, namely the limitation of the time period for submitting constitutional amendments and the obligation of public participation in the submission of constitutional amendments. The embodiment of these two elements is technically different in each Constitution following the legal system in the country.

Further, there are various countries in the world that include deliberation requirements in their constitutions, which are regulated in the constitutions of Italy, South Korea, Costa Rica, Australia, Denmark, Norway, Sweden, Canada, and the United States. As described in the background, the author draws comparisons between Sweden and South Korea to compare with Indonesia on the grounds of a clearer time limit provision with additional variations in the election in Sweden and the involvement of the President in submitting to the public in South Korea.

Deliberation Requirement in Sweden

Sweden is a country that adheres to a civil law system with little influence from the common law system due to the enactment of European Union law.⁴⁸ In the context of constitutional law, Sweden is unique, considering its Constitution is actually a unity of four basic laws, namely the Instrument of Government, the Act of Succession, the Freedom of the Press Act, and the Fundamental Law on Freedom of Expression.⁴⁹ In connection with the deliberation requirements in its Constitution, Sweden regulates the Sweden Instrument of Government Chapter 8 Article 16, which regulates the existence of a constitutional amendment model that combines a time period with the design of a representative institution, in which the representative body is prohibited from submitting and ratifying formal amendments without a referendum to approve or disapprove of the proposed amendment.⁵⁰ The representative body is allowed to file a proposal to amend fundamental law by at least one-tenth of the members and at least one-third of the members vote in favour of the proposal. The proposal itself must be put forward within fifteen days from the date on which the Riksdag adopted the proposal to

⁴⁷ *ibid.*

⁴⁸ Helena Lindbäck and others. 2021. 'Doing Business in Sweden: Overview'. *Thomson Reuters Practical Law*. <[tps://uk.practicallaw.thomsonreuters.com/6-500-6169?transitionType=Default&contextData=\(sc.Default\)>](https://uk.practicallaw.thomsonreuters.com/6-500-6169?transitionType=Default&contextData=(sc.Default)>).

⁴⁹ The Riksdag Administration Information Department, 2016. *The Constitution of Sweden: The Fundamental Laws and the Riksdag Act*.

⁵⁰ Albert. *Loc.cit.*

be held in abeyance. After the proposal has been put forward, then a referendum must be held. The proposal is rejected if a majority of those taking part in the referendum vote against it, and if the number of those voting against exceeds half the number of those who registered a valid vote in the election. In other cases the proposal goes forward to the Riksdag for final consideration. The Riksdag, or Swedish people's representative body (Parliament) is authorized to amend the Constitution, but with public approval through a referendum, as a form of guarantee that the proposed amendments have public support and the support of a parliamentary majority, so that this strict procedure can reflect public opinion with certain within a certain period of time.⁵¹ Given the provisions of this article, the requirements for submitting a constitutional amendment are through a referendum, there is an intervening election, submitted by at least $\frac{1}{3}$ of the members of the Riksdag, and submitted within 15 days.

Deliberation Requirement in South Korea

South Korea is a country with a civil law system.⁵² In the context of constitutional law, the highest basic law applicable in South Korea is the Constitution of the Republic of Korea.⁵³ Regarding the implementation of deliberation requirements, Chapter X Article 129 of the Constitution of the Republic of Korea includes a provision that throws the deliberation forum to the public, not the legislature, by requiring the President to give the public at least 20 days to evaluate the amendment. The following is the English translation of Chapter X Article 129 of the Constitution of the Republic of Korea:⁵⁴

Proposed amendments to the Constitution shall be put before the public by the President for twenty days or more.

Although the authority to submit proposals for constitutional amendments remains with the National Assembly (representative institution or Parliament) or the President, the public is then still involved in public announcements, which in practice are interpreted as national referendums, to show the support of at least half of the voters (citizens) as well as the support from $\frac{2}{3}$ members of Parliament.⁵⁵

Analysis on the Public Participation in Constitutional Amendments according to the Temporal Unamendability Framework on Deliberation Requirements

Referring to the two countries, in essence, the object of comparison taken in the deliberation requirements model can be seen from the participation of public support in the time period determined by the Constitution for the need for amendments. Thus, while Sweden's Constitution clearly mandates an 'election' as technical public

⁵¹ The Riksdag Administration Information Department. *Loc.cit.*

⁵² Kyunghoon Lee and others. 2021. 'Legal Systems in South Korea: Overview'. *Thomson Reuters Practical Law*. Accessed: <[https://uk.practicallaw.thomsonreuters.com/w-031-9598?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-031-9598?transitionType=Default&contextData=(sc.Default)&firstPage=true)>.

⁵³ No Name. 2018. 'Constitutional History of Republic of Korea'. *Constitution net*. <<https://constitutionnet.org/country/republic-korea>>.

⁵⁴ Albert. *Loc. Cit.*

⁵⁵ Office for Government Policy Coordination Prime Minister's Secretariat of Republic of Korea. *Loc.cit.*

participation, South Korea does not explicitly ask for a referendum or an election, as long as the point is made public. This is not regulated in the 1945 UUD NRI, considering that the only provision for unamendability is only reflected in substantive unamendability, as described in the previous section. The comparison between those three countries can be seen in the table below:

Table 2. The Comparison of the Public Participation in Constitutional Amendments according to the Temporal Unamendability Framework on Deliberation Requirements in Indonesia, Sweden, and South Korea.

Country	The Public Participation Existence	The Public Participation Provisions
Indonesia	Does not exist	Does not exist
Sweden	Exist explicitly	Public participation through an election to amend the Constitution
South Korea	Exist implicitly	The publication of the constitutional amendment proposal

Compared with Indonesia, the meaning of the unamendability provisions is limited to norms that explicitly state things that cannot be changed in the Constitution, so they cannot be interpreted widely, and the absence of detailed procedural barriers to amending the Constitution.⁵⁶ Due to the limitations of the unamendability provisions, there is indeed room for more flexibility, namely the procedure for constitutional amendments, especially regarding time restrictions and public involvement in the approval. Although the amendments to the 1945 UUD NRI have so far occurred quickly and in accordance with the political conditions that prompted the amendment, the most significant deficiency is in the working procedures of the MPR, which should be able to attract more public involvement for the submission of constitutional amendments.⁵⁷ This is what Indonesia needs to learn if it is to amend its Constitution again, so that there are no unilateral claims regarding 'public's support' and it takes too long to amend the Constitution.

Therefore, several key contextual considerations need to be considered in designing a constitution that can involve the people, including the constitutional amendment process, including: 1) strong basis for the constitutional amendment, such as reasons for peace, independence, or reform; 2) which stakeholders can be involved in the participation process and who should not be involved, as well as the communication process; 3) taking into account the applicable legal provisions and other agreements; 4) state security conditions; 5) who is the 'public' that can participate; 6) study the comparison of the constitutions of other countries; 7) the level of public trust in state institutions; 8) the condition of the relationship between political parties and branches

⁵⁶ Eddyono. *Op. cit.*

⁵⁷ Hoque, Ridwanul, Deconstructing Public Participation and Deliberation in Constitutional Amendment in Bangladesh (June 30, 2021). *Australian Journal of Asian Law*, 2021, Vol 21 No 2, Article 2: 7-25, Available at SSRN: <https://ssrn.com/abstract=3876801>

of power; and 9) the existence of qualified resources and expertise, including solid civic education.⁵⁸

Based on the theoretical study of the consideration and comparison of the deliberation requirements, there are important things that need to be regulated by Indonesia if there will be a constitutional amendment in the future.. First, there should be provisions for real public participation in the submission of constitutional amendments. Compared to an Article which titled “Public Participation in Constitution Amendment” written by Siti Nurhalimah, which suggest to give authority to the MPR to judicial review Constitution Amendment, this article is suggesting the involvement directly from the people through referendum.⁵⁹ Currently, the MPR is considered as the representative of the people, but seeing the dynamic development of democracy, nowadays the people are also demanding their involvement in changing the Constitution. The way to involve the community can be actualized like Sweden in the form of a referendum, or at least there is an obligation for the Government or the MPR to show the points of the amendments to the Constitution that will be amended. Second, there should be a period of time to file for constitutional amendments, so that it does not take too fast or too long.

And last but not least, the provisions of this constitutional amendment must still be regulated in the Constitution to ensure that the Constitution is not easily changed according to the ruling government regime and maintains the essence of temporal unamendability that still allows democracy. Thus, the 1945 UUD NRI can still hold its dignity as the Indonesian Constitution.

CONCLUSION

Based on this analysis, it can be concluded that there are provisions regarding constitutional amendments in various countries, such as Indonesia, Sweden, and South Korea. There are differences in the unamendability provisions of the 1945 UUD NRI, the Swedish Constitution (especially on the Instrument of Government), and the Constitution of the Republic of Korea (South Korea). The 1945 UUD NRI only stipulates substantive unamendability of the form and basis of the state, as well as provisions for the approval of the proposed amendment by the MPR. The Swedish Constitution allows for amendments, as long as there is a referendum accompanied by the Riksdag parliamentary elections, meanwhile the South Korean Constitution obliges the President to present the proposed amendments to the public.

The guarantee of public participation in constitutional amendments is seen in Sweden and South Korea, while Indonesia is not strictly regulated. The guarantee of public participation in Sweden and South Korea is included in the deliberation requirements model, which is included in the temporal unamendability framework, which provides a time limit for submitting constitutional amendments by involving the public. Therefore,

⁵⁸ Erin C Houlihan and Sumit Bisarya. 2021. Practical Considerations for Public Participation in Constitution-Building: What, When, How, and Why?. 24 *International IDEA Policy Paper 10* <<https://www.idea.int/sites/default/files/publications/practical-considerations-public-participation-in-constitution-building.pdf>>. [10-11].

⁵⁹ Zachary Elkins, Tom Ginsburg and Justin Blount. 2008. ‘The Citizen as Founder: Public Participation in Constitutional Approval’. 81 *Temple Law Review*.

the author suggests that Indonesia regulate the deliberation requirements to accommodate the public in submitting constitutional amendments, by comparing Sweden and South Korea.

REFERENCES

- Abdelaal, Mohamed. 2016. Entrenchment Illusion: The Curious Case of Egypt's Constitutional Entrenchment Clause. *Chicago-Kent Journal of International and Comparative Law*, Vol. 16, No. 2, 2016, Indiana University Robert H. McKinney School of Law Research Paper No. 2016-26, Available at SSRN: <https://ssrn.com/abstract=2782744>
- Abrianto, Bagus O., Farid Ibrahim, and Xavier Nugraha. "Reformulating The Concept of State Principles Based on Ideological and Technocratic Strategic as A Sustainable Development Direction." *LAW REFORM* 16, no. 1 (2020): 112-126. Accessed December 20, 2022. <https://doi.org/10.14710/lr.v16i1.30309>
- Albert, Richard, Temporal Limitations in Constitutional Amendment (March 21, 2016). 21 *Review of Constitutional Studies* 37 (2016), Boston College Law School Legal Studies Research Paper No. 390, Available at SSRN: <https://ssrn.com/abstract=2749288>
- Albert, Richard, The Structure of Constitutional Amendment Rules (March 1, 2014). 49 *Wake Forest Law Review* 913 (2014), Boston College Law School Legal Studies Research Paper No. 326, Available at SSRN: <https://ssrn.com/abstract=2461507>
- Albert, Richard. 2014. The Structure of Constitutional Amendment Rules. 49 *Wake Forest Law Review* 913 Boston College Law School Legal Studies Research Paper No. 326, Available at SSRN: <https://ssrn.com/abstract=2461507>
- Aldi, Jihan Anjanita, Elma Putri Tanbun, and Xavier Nugraha. 2019. "Tinjauan Yuridis Kewenangan Dewan Kehormatan Penyelenggara Pemilu (Dkpp) Dalam Menciptakan Pemilu Yang Demokratis Di Indonesia". *Jurnal Hukum De'rechtsstaat* 5 (2):137-3. <https://doi.org/10.30997/jhd.v5i2.1941>
- Alfianus Danny Jema, Harly Stanly Muaja and Marthin L Lombonan. 2020. "Analisa Hukum Terhadap Mekanisme Amandemen Konstitusi (Perubahan Undang-Undang Dasar) Berdasarkan Sistem Ketatanegaraan Yang Berlaku Di Indonesia". Vol. 8 No. 4. *Lex Administratum*
- Ani Purwati.2020. "Metode Penelitian Hukum: Teori dan Praktek". *Jakad Media Publishing. Surabaya.*
- Bayu Aryanto. 2020. "Demokrasi Deliberatif Dalam Konsep Amandemen Konstitusi Indonesia". *Mulawarman Law Review* 5 (2):96-113. <https://doi.org/10.30872/mulrev.v5i2.366>
- Daekyu Yoon. 1988. 'Constitutional Amendment in Korea'. 16 *Korean Journal of Comparative Law*
- Denny Indrayana. 2007. "Amandemen UUD 1945: Antara Mitos Dan Pembongkaran" *Mizan*. Jakarta.
- Efi Yulistiyowati, Endah Pujiastuti and Tri Mulyani. 2018. 'Penerapan Konsep Trias Politica Dalam Sistem Pemerintahan Republik Indonesia: Studi Komparatif Atas Undang-Undang Dasar Tahun 1945 Sebelum Dan Sesudah Amandemen'. *Jurnal Dinamika Sosial Budaya*.

- Erik Mobrand. 2020. 'Has the Time Come to Amend South Korea's Constitution?' *The Diplomat*. <<https://thediplomat.com/2020/07/has-the-time-come-to-amend-south-koreas-constitution/>>.
- Erin C Houlihan and Sumit Bisarya. 2021. Practical Considerations for Public Participation in Constitution-Building: What, When, How, and Why?'. *24 International IDEA Policy Paper 10* <https://www.idea.int/sites/default/files/publications/practical-considerations-public-participation-in-constitution-building.pdf>
- Helena Lindbäck and others. 2021. 'Doing Business in Sweden: Overview'. *Thomson Reuters Practical Law*. <[tps://uk.practicallaw.thomsonreuters.com/6-500-6169?transitionType=Default&contextData=\(sc.Default\)](tps://uk.practicallaw.thomsonreuters.com/6-500-6169?transitionType=Default&contextData=(sc.Default))>.
- Henry Campbell Black. 1968. "Amendment Black's Law Dictionary". *West Publishing Co. Minnesota*.
- Hoque, Ridwanul. 2021. "Deconstructing Public Participation and Deliberation in Constitutional Amendment in Bangladesh". *Australian Journal of Asian Law*.
- Iswara N Raditya. 2020. "Amandemen UUD 1945 Dilakukan 4 Kali, Sejarah, & Perubahan Pasal" *Tirto* di akses pada : <https://tirto.id/amandemen-uud-1945-dilakukan-4-kali-sejarah-perubahan-pasal-f7Cw>
- Joakim Nergelius 'The Constitution of Sweden and European Influences: The Changing Balance Between Democratic and Judicial Power' in Anneli Albi and Samo Bardutzky. 2019. *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law*. <https://doi.org/10.1007/978-94-6265-273-6>
- Johnny Ibrahim. 2005. "Teori dan Metode Pnelitian Hukum Normatif". Banyumedia. Malang.
- Kyunghoon Lee and others. 2021. 'Legal Systems in South Korea: Overview'. *Thomson Reuters Practical Law*. Accesed: <[https://uk.practicallaw.thomsonreuters.com/w-031-9598?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-031-9598?transitionType=Default&contextData=(sc.Default)&firstPage=true)>.
- Lech Garlicki and Yaniv Roznai. 2019. "Introduction: Constitutional Unamendability in Europe" *European Journal of Law Reform* 21:3 <https://doi.org/10.5553/EJLR/138723702019021003001>
- Luthfi Widagdo Eddyono. 2016. 'Quo Vadis Pancasila Sebagai Norma Konstitusi Yang Tidak Dapat Diubah'. 16 *Jurnal Konstitusi*. <https://doi.org/10.31078/jk1637>
- Luthfi Widagdo Eddyono. 2016. "The Unamendable Articles of the 1945 Constitution". Vol 2 No. 2. *Constitutional Review*. <https://doi.org/10.31078/consrev225>
- Ministry of Justice Sweden, 'The Constitution of Sweden'. 2013. <<https://www.government.se/49b75a/contentassets/7b69df55e58147638f19bfd0984f97/the-constitution-of-sweden>>
- No Name. 2018. 'Constitutional History of Republic of Korea'. *Constitution net*. <<https://constitutionnet.org/country/republic-korea>>
- Purwo Santoso. 2007. "Amandemen Konstitusi Untuk Mengelola Kebhinnekaan Indonesia". *Jurnal Ilmu Sosial dan Ilmu Politik* Vol 10, No.3 2007. <https://doi.org/10.22146/jsp.11013>
- Richard Albert and Yaniv Roznai. 2021. Emergency Unamendability: Limitations on Constitutional Amendment in Extreme Conditions'. *Maryland Law Review* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3847420>

- Sri Soemantri Martosoewignjo. 2002. "UUD 1945 Kedudukan Dan Aspek-Aspek Perubahannya". *UNPAD Press*. Bandung.
- The Riksdag Administration Information Department, 2016. *The Constitution of Sweden: The Fundamental Laws and the Riksdag Act*
- The Riksdag Information Service. 2022. 'The Constitution'. Accessed: <https://www.riksdagen.se/en/how-the-riksdag-works/democracy/the-constitution/#:~:text=To make an amendment to,limit people%27s freedoms and rights.>>.
- Tuomas Ojanen. 2019. 'Constitutional Unamendability in the Nordic Countries'. *21 European Journal of Law Reform*.
- Xavier Nugraha, Risdiana Izzaty, Alya Anira. 2020. "Constitutional Review di Indonesia Pasca Putusan Mahkamah Konstitusi Nomor 48/PUU-IX/2011: Dari Negative Legislator Menjadi Positive Legislator" *Jurnal Rechtsidee* Vol 15, No.1 <https://doi.org/10.21107/ri.v15i1.5183.g4588>
- Yaniv Roznai, "Unconstitutional Constitutional Amendments - The Limits of Amendment Powers". *Oxford University Press*.
- Yaniv Roznai. 2019. "Constitutional Amendability and Unamendability in South-East Asia". *Journal of Comparative Law*
- Yun, Jeong-In, What Matters in Comparative Constitutional Amendment?: Some Reflections from a Normative Perspective (August 31, 2020). *Yonsei Law Journal* Vol. 11 No. 1, 2020, Available at SSRN: <https://ssrn.com/abstract=3739602>
- Zachary Elkins, Tom Ginsburg and Justin Blount. 2008. 'The Citizen as Founder: Public Participation in Constitutional Approval'. *81 Temple Law Review*