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Rethinking Indonesian Constitutional Amendments: The Prospects and Perils of Judicial Review

Novendri M. Nggilu [a,b]✉, Indra Perwira [a], Ali Abdurahman [a], Mohamad Rivaldi Moha [b], Adelia Rachmaniar [c]

[a] Faculty of Law, Universitas Padjadjaran, Bandung, Indonesia
[b] Faculty of Law, Universitas Negeri Gorontalo, Indonesia
[c] Faculty of Law, Tilburg University, Tilburg, The Netherlands

✉ Corresponding email: *novendrilawfaculty@ung.ac.id*

Abstract

This article aims to evaluate the constitutional design of Indonesia's regulatory review system, which is administered by two institutions with judicial power. It also looks into the various obstacles that will arise when judicial review of constitutional amendments is put into practice in Indonesia. Statutory approaches are used in this article. The outcome demonstrates that the Indonesian constitution contains unchangeable provisions and that there is experience with both formal and informal, unusual constitutional amendments. These factors require the establishment of a judicial review mechanism to supervise constitutional amendments carried out in accordance with custom and as stipulated in the constitution, as well as to maintain and preserve the basic identity and structure of the constitution in order to prevent pragmatic constitutional amendments from damaging, eliminating, or undermining it.

Challenges that the Constitutional Court will confront in its role as a judicial implementing actor in reviewing constitutional amendments when they are implemented in Indonesia in the future include resistance that will arise from the People's Consultative Assembly, intervention, and intimidation by other branches of power towards the Constitutional Court, as well as defiance of the decisions of the Constitutional Court, especially regarding the unconstitutionality of constitutional amendments.

KEYWORDS *Judicial Review, Constitution, Constitutional Amendments, Basic Structure of the Constitution, Constitutional Identity*

Introduction

Discussions regarding judicial reviews of constitutional amendments developed in the mid-19th century,[1] and then were spread to countries such as Colombia, South Africa, [2] and Taiwan [3]. The judicial review is always linked to the basic constitutional structure doctrine, which holds that the wording of constitutional laws is not a singular entity but rather originated from a fundamental idea known that Pierre Guilemon refers to as the Supra Constitutional.[4]

The Supreme Court of India was the first to specifically address the doctrine of the "*Basic Structure*" of the Constitution in its decision in the *Kesavananda Bharati v. State of Kerala* case. The Supreme Court of India increased its authority to carry out a judicial review of constitutional

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1 Yaniv Roznai, "Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers" (2014).

2 Michael Mohallem, "Immutable Clauses and Judicial Review in India, Brazil and South Africa: Expanding Constitutional Courts' Authority," *The International Journal of Human Rights* 15 (June 1, 2011): 765–86, https://doi.org/10.1080/13642987.2011.572703.

3 David S Law and Hsiang-Yang Hsieh, "Judicial Review of Constitutional Amendments: Taiwan," in *Constitutionalism in Context*, ed. David S Law, Comparative Constitutional Law and Policy (Cambridge: Cambridge University Press, 2022), 185–215, https://doi.org/doi: 10.1017/9781108699068.010.

4 Suzie Navot and Yaniv Roznai, "From Supra-Constitutional Principles to the Misuse of Constituent Power in Israel," *European Journal of Law Reform* 21 (May 1, 2019): 403–23, https://doi.org/10.5553/EJLR/138723702019021003012.

amendments with this decision.[5] The Supreme Court ruled that the 24th Amendment to the Indian Constitution, which restricts property rights for people of India, violates basic rights, which are a cornerstone of the constitution.[6] Even in the second case, they rolled over to the Supreme Court when the constitutional amendments targeted articles on constitutional amendments and limited the authority of the Supreme Court of India, which was unable to conduct a judicial review during a state of emergency. The Supreme Court ruled them to be unconstitutional.[7] The Indian Supreme Court attempts to identify the basic features of the Indian Constitution during its formulation, encompassing constitutional supremacy, the rule of law, the division of powers, and fundamental rights.[8]

Meanwhile, in the Colombian case, Alvaro Uribe amended the constitutional provisions governing the periodization of terms of office that prohibit him from being re-elected for the following term when he was elected president for the 2002–2006 term and desired to run for office again. Uribe commanded the nation as president from 2006 to 2010 as a result of his political maneuvering.[9] When his second term of office came to a close, Uribe intended to lead for three terms, but this plan was put on hold when the Constitutional Court ruled that the revisions to the constitution that extended the presidential term were unconstitutional.[10]

In Taiwan's case, the National Assembly amended the Constitution by adding a new clause stating that the National Assembly is now selected from

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5 Pan Mohamad Faiz, *Amandemen Konstitusi: Komparasi Negara Kesatuan Dan Negara Federal* (Jakarta: Rajawali Pers, 2019).

6 Andreas Buss, "Dual Legal Systems and the Basic Structure Doctrine or Constitutions: The Case of India," *Canadian Journal of Law and Society* 19 (August 1, 2014): 23–49, https://doi.org/10.1017/S0829320100008127.

7 Kawser Ahmed, "Revisiting Judicial Review of Constitutional Amendments in Bangladesh: Article 7B, the Asaduzzaman Case, and the Fall of the Basic Structure Doctrine," *Israel Law Review* 56 (January 16, 2023): 1–25, https://doi.org/10.1017/S0021223721000297.

8 Faiz, *Amandemen Konstitusi: Komparasi Negara Kesatuan Dan Negara Federal.*

9 Mario Alberto Cajas-Sarria, "Judicial Review of Constitutional Amendments in Colombia: A Political and Historical Perspective, 1955–2016," *The Theory and Practice of Legislation* 5, no. 3 (September 2, 2017): 245–75, https://doi.org/10.1080/20508840.2017.1407397; Novendri M Nggilu et al., "Abusive Constitutional Court: Dysplasia and the Destructive Power of Constitutional Court Decisions," *Estudios Constitucionales* 22, no. 2 (2024).

10 Novendri Momahad Nggilu, Indra Perwira, and Ali Abdurahman, "Constitutionality Review of Indonesian Constitutional Amendments: History and Future," *Russian Law Journal* 11 (March 31, 2023), https://doi.org/10.52783/rlj.v11i2.517.

different political parties according to the ratio of votes received in legislative elections rather than being an elected body. Following concerns from a number of parties, the Supreme Court of Justice ruled that the Amendment was unconstitutional on the grounds that it violated the basic principles of the Constitution. The underlying norms or principles of the Constitution, which include a democratic republic, people's sovereignty, the protection of fundamental rights, and a system of checks and balances, were then clarified in depth by the Supreme Court Justices' Council.[11]

Assume we look at the different cases of the three nations reviewing their constitutional amendments. The goal of the review of the constitutional amendments is to maintain the untainted principles that are both implicitly and expressly declared as normative standards in the text of the Constitution. The knowledge that the Constitution is a document full of interests that always surround it makes protecting these fundamental ideals crucial. Constitutional amendments testing is a formal attempt to make sure that the amended Constitution resists giving way to pragmatic interests. This can harm not only the fundamental principles of the Constitution but also have long-term derivative effects for the interests of the people as the highest sovereign (constituent power). The incident in Venezuela, where constitutional changes were made to increase President Hugo Chavez's power, is another event that needs to be learned as it demonstrates how the amended Constitution is susceptible to and loses to political interests that are so strong or determinant,[12] which demonstrates the instinctive politics of the power of populism to expand and increase power to the point where no other power can be greater or equal to it. Other events may be observed in the case of Hungary, which made changes to the Constitution at the initiative of Prime Minister Viktor Orban and abolished the judiciary's independence.[13] This demonstrates that Hungary is among the nations going through a constitutional crisis, in which the judiciary, which ought to be an institution that checks and balances the

[11] Roznai, "Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers."

[12] International Crisis Group. *Imagining a Resolution of Venezuela's Crisis*. Brussels: Latin America Report No. 79, 2020, p. 24

[13] Robert Sata and Ireneusz Karolewski, "Caesarean Politics in Hungary and Poland," *East Europian Politics* 36, no. 2 (January 26, 2020): 206–25, https://doi.org/10.4324/9781003271840-4.

authority of the president, has been weakened by subverting the Constitution in order to paralyze the judiciary's power.[14]

The appeal of constitutional amendments in the Indonesian context is that they are subject to ongoing, intense, and critical examination and discussion. In addition to the 1945 Constitution of the Republic of Indonesia, often known as the Indonesian Constitution, which has the highest degree in the hierarchy of laws and regulations, there are other images of contentious constitutional amendments in Indonesia, which have controversial values. The Presidential Decree of July 5, 1959, which included a mention of the 1950 Provisional Basic Law (UUDS) and its replacement with the 1945 Constitution (formed on August 18, 1945, which Sukarno referred to as an emergency constitution), was the first controversial event associated with the transition of the Constitution.[15] The Constituent Assembly was temporarily tasked with drafting a new constitution following the 1955 general election, which made the transition to the Constitution a topic of considerable discussion. Nevertheless, the President issued the Presidential Decree, which marked the transition from the Provisional Constitution to the 1945 Constitution, even though he was constitutionally unable to develop, amend, or transition the Constitution. The president's action was unconstitutional; even Bagir Manan[16] claimed that because the president had assumed the Council's authority, the president's decision to issue the Decree amounted to a coup d'état. In this case, the transitional Constitution is one of the elements that made up the Constitution. Secondly, prior to the 1999–2002 Constitutional Reform, the Constitution had been amended by decree issued by the People's Consultative Assembly (TAP MPR) or by distribution of a Law.[17] Among the government actions that diametrically changed the Constitution are:

1) Decree of the Provisional People's Consultative Assembly of the Republic of Indonesia Number III/MPR/1963 of 1963 on the Appointment of the Great Leader of the Indonesian Revolution, Bung Karno, as Lifetime President of the Republic of Indonesia. This People's Consultative

[14] Novendri M. Nggilu et al., "Constitutional Crisis: Intensifying Disobedience to the Decisions of the Indonesian Constitutional Court," *Revista Chilena de Derecho* 50, no. 2 (October 23, 2023): 115–32, https://doi.org/10.7764/R.502.5.

[15] Novendri M. Nggilu, *Hukum Dan Teori Konstitusi (Perubahan Konstitusi Yang Partisipatif Dan Populis)* (Yogyakarta: UII Press, 2014).

[16] Susi Dwi Harjanti, and Bagir Manan. *Memahami Konstitusi, Makna Dan Aktualisasi.* (Jakarta: Rajawali Pers, 2015).

[17] Usman Rasyid et al., "Reformulation of the Authority of Judicial Commission: Safeguarding the Future of Indonesian Judicial Power," *Jambura Law Review* 5, no. 2 (July 31, 2023): 386–413, https://doi.org/10.33756/jlr.v5i2.24239.

Assembly Decree (TAP MPR) was issued with the following considerations: *first*, the Indonesian Revolution had yet to be completed, and with People's Consultative Assembly Decree (TAP MPR) No. I/MPRS/1960, President Soekarno was designated as the Great Leader of the Indonesian Revolution; *second*, President Soekarno was appointed Mandatar of the MPRS with full power; *third*, President Soekarno, the leader of the revolution, succeeded in achieving victories that were enjoyed at that time; and *fourth*, personally, Bung Karno was considered as the embodiment of the combination of revolutionary leaders and state leaders, as well as being the unifier of all extreme people's forces.[18] This People's Consultative Assembly Decree (TAP MPRS) has denied the spirit of the constitutional formulation, especially regarding the limitation of presidential powers as an essential principle in the Indonesian constitution.[19]

2) Decree of the People's Consultative Assembly Decree (TAP MPR) Number IV/MPR/1983 on Referendums and Law Number 5 of 1985 on Referendums. According to Ali Safaat, the birth of the People's Consultative Assembly Decree (TAP MPR) and this law was the culmination of the accreditation of the constitution, which made it far from being amended.[20] The TAP MPR states explicitly that a referendum is a constitutional choice that is intended so that Article 37 of the 1945 Constitution (amendment provisions) is not easily used to amend the 1945 Constitution,[21] and the People's Consultative Assembly is determined to maintain the 1945 Constitution does not wish or will not make changes to it, and at the same time will carry it out purely and consistently.[22] Meanwhile, to make constitutional amendments a constitutional path that is very difficult to take, provisions regarding the conditions for amending the 1945 Constitution can be implemented if

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[18] *See* the considering Section of the Provisional People's Consultative Assembly Decree Number III/MPR/1963 of 1963 concerning the Appointment of the Great Leader of the Indonesian Revolution Bung Karno as Lifetime President of the Republic of Indonesia.

[19] Riri Nazriyah, "Status Hukum Ketetapan Majelis Permusyawaratan Rakyat/Sementara Setelah Perubahan Undang-Undang Dasar 1945.," *Jurnal Hukum* 12, no. 28 (2005): 26–45.

[20] Muchamad Ali Safa'at, *Sejarah Konstitusi Indonesia.* (Malang: Universitas Brawijaya, 2015).

[21] *See* the Considering Section of People's Consultative Assembly Decree No. IV/MPR/1983 concerning Referendum

[22] Article 1 People's Consultative Assembly Decree No. IV/MPR/1983 concerning Referendum.

there are at least 90 percent of the registered opinion givers exercise their rights and at least 90 percent of the opinion givers exercising their rights. Said they agreed to the People's Consultative Assembly's wish to amend the 1945 Constitution.[23] The two legal products governing the provisions regarding the referendum were also a form of constitutional change, which violated the provisions of Article 37 of the 1945 Constitution.

Aside from the events previously described, attempts to modify the Constitution are concerning when considering the present circumstances since they aim to amend provisions that represent the basic principles of the Constitution that frequently emerge at the conclusion of the terms of the two presidents who are presently in office. The issue of constitutional amendments to the provisions of Article 7 of the 1945 Constitution of the Republic of Indonesia, which explicitly states that the term of office for the president and vice president is five years and that they can be re-elected in the same position for only one term of office, is the target of the issue of constitutional amendments, which rolled out at the end of the second term of office both under President Susilo Bambang Yudhoyono and President Joko Widodo. Fortunately, the issues that seemed to have been patterned did not arise in the same way as those that did in the State of Colombia when Alvaro Uribe, acting in his pragmatic interests, proposed an amendment to the Constitution to allow him to serve a third term as president. Despite this, the Colombian Constitutional Court ultimately ruled that the amendment was unconstitutional.[24]

The topic of this article is important for serious discussion because of the empirical facts mentioned above, particularly in the Indonesian context. It must be acknowledged that discussions about the judicial review of constitutional amendments, including those pertaining to the doctrine of the basic structure of the Constitution or the identity of the Indonesian Constitution, are still extremely rare to discuss, even among Indonesian academics.[25] Suppose you

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[23] Article 18 of Law No. 5 of 1985 concerning Referendums.

[24] Vicente Benítez-Rojas, "Beyond Invalidation: Unorthodox Forms of Judicial Review of Constitutional Amendments and Constitution-Amending Case Law in Colombia," *Revista de Investigações Constitucionais* 9 (October 3, 2022): 269–300, https://doi.org/10.5380/rinc.v9i2.86742.

[25] One of the Indonesian constitutional experts who is aware of the lack of discussion on the topic of the basic structure of the constitution or identification of the constitution in Indonesia, including the possibility of testing the constitutionality of constitutional amendments is Jimly Asshiddiqie as written in his book. *See* Jimly Asshiddiqie, *Pancasila: Identitas Konstitusi Berbangsa Dan Bernegara* (Jakarta: Raja Grafindo Persada, 2020).

trace the discussion on this topic. In that case, you will find a few scientific articles that describe and discuss this topic, including an article written by Luthfi Widagdo Eddyyono that limits his description of the provisions of the unamendable article constitution as reflected in Article 37, paragraph (5) of the Constitution of the Republic of Indonesia 1945[26]. This article covers parts of the Constitution that can't be amended, although also covers in depth the doctrinal elements of its basic identity or structure, such as the judicial review process for constitutional amendments. The following article, published by Mohamad Ibrahim, focuses on how he describes using many countries—most notably India—to restrict the power of constitutional amendments. With his argumentation structure, Mohamad Ibrahim suggested in the report that the Constitutional Court consider any future constitutional amendments before they are put into effect. The opportunities and difficulties that will arise when Indonesia implements a judicial review mechanism for constitutional amendments are not covered in Mohamad Ibrahim's article, despite the fact that it also touches on the organization that, in his opinion, is most appropriate to handle the task of reviewing the constitutionality of future amendments to the country's constitution.

The research approach used is the statute approach[27] based on the following considerations: 1) To view the constitutional design of the regulatory review system in Indonesia, divided into two institutions holding judicial power in Indonesia. Also, through this approach, it can be constructively analyzed to which institution the authority to review constitutional amendments is given. 2) To identify the basic structure and identity of the Indonesian Constitution, which will become the touchstone for judicial review of future amendments to the Indonesian Constitution. Examining and analyzing many of the challenges that Indonesia will have while implementing a judicial review of constitutional amendments is the goal of a different strategy that is also employed in the case approach[28]. The last approach is comparative[29] in nature and looks at how other nations handle the judicial review of constitutional amendments; however,

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[26] Luthfi Widagdo Eddyono, "The Unamendable Articles of the 1945 Constitution." *Constitutional Review* 2, no. 2 (2016): 252-269.

[27] Jonaedi Efendi, and Johnny Ibrahim, *Metode Penelitian Hukum Normatif dan Empiris,* (Depok: Pranandamedia, 2016), p. 121

[28] Irwansyah. *Penelitian Hukum: Pilihan Metode & Praktik Penulisan Artikel.* (Yogyakarta: Mirra Buana Media, 2020). p. 31.

[29] Johnny Ibrahim, *Teori dan Metodologi Penelitian Hukum Normatif.* (Malang: Bayumedia Publishing, 2012). p. 299.

experience and practice in other nations can be very helpful in honing the analysis and fortifying the arguments made in this article.

The sources of legal material in writing this article were obtained through literature studies, both from primary legal materials[30] or legal materials with authoritative values, including the Constitution, other laws and regulations, and court decisions, especially the Constitutional Court Decisions. Other legal materials that are also used are secondary materials[31] which include journal articles that describe the Constitution, constitutional amendments, and the basic structure or identity doctrine of the Constitution, including pieces that explain the judicial review of constitutional amendments, as well as various books relevant to the topic of this article.

The collected legal material is then analyzed and presented from a perspective[32] that describes and clarifies the significance of judicial review of constitutional amendments as an endeavor to safeguard and preserve the values, basic principles, and identity of the Indonesian Constitution, which must not be altered, destroyed, or eliminated through pragmatic constitutional amendments. It also outlines the touchstones that will be employed and the difficulties encountered when a judicial review of constitutional amendments is put into practice in Indonesia.

The Constitution and the Necessity of Constitutional Amendments

Suppose the Constitution's meaning is put forward by experts who emphasize the social contract.[33] In that case, it is unquestionably not wrong because, if you go back in time to the French Revolution and beyond, J.J. Rousseau's thoughts, as reflected in his book Du Contract Social, greatly influenced the thinking and practice of constitutions across the centuries, if not even now. However, it is necessary to put forward a view on the Constitution, which is also interesting to observe. Cheryl Saunders, for example, interprets the Constitution as something far beyond the notion of the Constitution as a

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30 Nurul Qomar, and Farah Syah Rezah, *Metode Penelitian Hukum Doktrinal dan Non Doktrinal.* (Makassar: Social Politic Genius, 2020). p. 32.

31 Qomar and Rezah.

32 Irwansyah. *Penelitian Hukum: Pilihan Metode & Praktik Penulisan Artikel.*

33 One of these views was expressed by K.C. Wheare who interprets the constitution as a resultant in the political, social, and cultural fields. *See also* Novendri Nggilu et al., "Indonesian Constitutional Amendment In 4.0 Era: Main Challenges and Future Prospect."

social contract. Cheryl Saunder believes that a constitution is more than a social contract. It is instead an expression of the general will of a nation. It reflects its history, fears, concerns, aspirations, and the country's soul.[34] Muna Ndulo takes the same perspective, suggesting that the Constitution is a national autobiography that represents the diversity of its society, contains unfulfilled dreams, and that its form must ensure that the goals of the Constitution can be achieved.[35]

A different view interprets the Constitution as a collection of rules that define the characteristics of something, in this case, a state entity. Thomas Paine emphasized that the Constitution was made for the people to form a government, not the other way around; the government determined it for the people.[36] In this sense, the Constitution is always considered to precede and supersede the government and all decisions and other regulations. Called precedes the order of time, its superior nature, and binding authority.[37] In this sense, the Constitution is interpreted as a constitutive condition for forming a state, meaning that the existence of a constitution will mark a sovereign state.

The Constitution is not just a formal document of a state that contains important features, both regarding the form of the state and government, the relationship between state power and state institutions established through the Constitution[38], and the guarantees given by the state to its citizens, but also contains things that are a reflection of the history of the struggle for the formation of a country, as well as what the founders of the country thought

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[34] Cheryl Saunders, "Woman and Constitutional Making", In: Bagir Manan, Susi Dwi Harijanti, *Memahami Konstitusi, Makna dan Aktualisasi,* (Jakarta: Rajawali Pers, 2015). p. ix.

[35] Saunders.

[36] Jimly Asshiddiqie, *Pokok-Pokok Hukum Tata Negara Indonesia Pasca Reformasi,* (Jakarta Barat: Bhuana Ilmu Populer, 2007), p. 9

[37] King Faisal Sulaiman, *Teori Dan Hukum Konstitusi:* (Bandung: Nusa Media, 2020).

[38] The arrangement of state power relations carried out by state institutions also implies a limitation of power which is one of the characteristics of the constitution. *see more* in Fajlurrahman Jurdi and Ahmad Yani, "Legitimacy of Non-Formal Constitutional Reforms and Restrictions on Constitutionalism: Legitimasi Perubahan Konstitusi Non-Formal Dan Pembatasannya Dalam Paham Konstitusionalisme," *Jurnal Konstitusi* 20 (June 1, 2023): 238–56, https://doi.org/10.31078/jk2024. See also Danko Tarabar and Andrew Young, "What Constitutes a Constitutional Amendment Culture?," *European Journal of Political Economy* 66 (September 1, 2020): 101953, https://doi.org/10.1016/j.ejpoleco.2020.101953.

about the goals to be realized for the generations after them[39]. The Constitution takes pictures of history and what is to be discovered in the future.

As a rule, the Constitution also requires change, especially concerning adjustments to the very dynamic development of society. The need for a touch of amendment to the Constitution should have been passed just like *Kodrat*[40], even more philosophically and religiously, Deny Indrayana[41] stated that modifications to the body are *sunatullah*[42]. Although the form can be changed, such modifications must be done cautiously[43] rather than arbitrarily, since the form is a fundamental law that has to protect its basic principles to prevent them from being undermined and destroyed.

Amendments to the constitution are only sometimes carried out through a formal amendment process. They may also occur due to the interpretation of judges.[44] It must be admitted that amendments to the constitution through non-formal procedures often have a more significant effect than formal amendment procedures, which is why George Jellinek called the issue of legal amendments something less attractive than amendments beyon standard procedures.[45] Apart from that, proper constitutional amendments are still significant[46] because they are related to the identity and basic structure of the constitution, mainly when associated with the latest developments regarding the theory of amendment limitations, which increasingly make the study of constitutional amendments have its magical power, especially for researchers in the field of the constitution.

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[39] Dainius Žalimas, "The Doctrine of Supra-Constitutionality and Lithuanian Constitutional Identity," *Journal of the University of Latvia. Law* 15 (November 16, 2022): 5–17, https://doi.org/10.22364/jull.15.01.

[40] Hasnul Melayu et al., "Syariat Islam Dan Budaya Hukum Masyarakat di Aceh," *Media Syari'ah: Wahana Kajian Hukum Islam Dan Pranata Sosial* 23 (June 30, 2021): 55, https://doi.org/10.22373/jms.v23i1.9073.

[41] Nggilu, *Hukum Dan Teori Konstitusi (Perubahan Konstitusi Yang Partisipatif Dan Populis)*.

[42] Eka Putra Wirman, "Hukum Alam Dan Sunnatullah: Upaya Rekonstruksi Pemahaman Teologis di Indonesia," *Ilmu Ushuluddin* 1, no. 4 (2012): 347–62.

[43] Ahmad Ahmad, Fence M. Wantu, and Novendri M. Nggilu, *Hukum Konstitusi, Problematika Konstitusi Indonesia Sesudah Perubahan UUD 1945*, 2012.

[44] Tom Ginsburg and James Melton, "Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty," *SSRN Electronic Journal* 13 (January 1, 2014), https://doi.org/10.2139/ssrn.2432520.

[45] Arthur Jacobson and Bernard Schlink, "Weimar: A Jurisprudence of Crisis," January 8, 2001.

[46] Yaniv Roznai, "Theory of Substantive Unamendability. Unconstitutional Constitutional Amendments: The Limits of Amendment Powers," *Jus Politicum* 18 (December 1, 2017): 1–60, https://doi.org/10.1017/S1574019617000360.

Formal amendments to the constitution are one of the essentials in the constitution, which is why formal amendments to the constitution are usually one part of the material content of a country's constitution.[47] The regulation contains how it can be amended by the authorized institution, including determining which things cannot be amended through formal amendment procedures. Yaniv Roznai calls these irreversible provisions a trend in developing world constitutions as they are found in many constitutions. Fifty-three percent (76 out of 143) of the world's constitutions (formed between 1989 and 2013) contain unchangeable provisions.[48]

If related to the Indonesian context, the constitutional amendments that occurred in 1999–2002 were a series of state reform processes that came out of the impasse of the authoritarian regime that President Soeharto preserved for 32 years.[49] In that regime, the constitution was positioned as a sacred document that could not be touched by formal constitutional amendments, even if it had material defects and was out of date, requiring substantial improvement.[50] The success of constitutional reform is inseparable from public pressure, including from students, especially reformers.[51] The amendment to the Constitution is a necessity as such changes are very significant. As can be viewed from the constitution before the amendment, there were 71 points, which changed to 199 points after being amended.[52] However, it must be admitted that there are still deficiencies that must be perfected through the fifth amendment.[53]

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[47] Ahmad Ahmad and Novendri Nggilu, "Denyut Nadi Amandemen Kelima UUD 1945 Melalui Pelibatan Mahkamah Konstitusi Sebagai Prinsip the Guardian of the Constitution," *Jurnal Konstitusi* 16 (January 28, 2020): 785, https://doi.org/10.31078/jk1646.

[48] Roznai, "Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers."

[49] Novendri M. Nggilu, Ahmad Ahmad, Fence M. Wantu, *Hukum Konstitusi: Menyongsong Fajar Perubahan Konstitusi Indonesia Melalui Pelibatan Mahkamah Konstitusi,* (Yogyakarta: UII Press, 2020), p. 28.

[50] Material defects caused by the 1945 Constitution is an emergency constitution that was formed when Indonesia's political and security conditions were not yet stable after successfully getting out of captivity.

[51] Cheryl Saunders, "Constitution Making in the 21st Century," *International Review of Law* 1 (April 16, 2013): 1–10, https://doi.org/10.5339/irl.2012.4.

[52] Luthfi Eddyono, "The Unamendable Articles of the 1945 Constitution," *Constitutional Review* 2 (February 6, 2017): 252, https://doi.org/10.31078/consrev225.

[53] Ahmad and Nggilu, "Denyut Nadi Amandemen Kelima UUD 1945 Melalui Pelibatan Mahkamah Konstitusi Sebagai Prinsip the Guardian of the Constitution." *See also* Ni'matul Huda, "Pelibatan Mahkamah Konstitusi Dalam Perubahan (Ulang) Uud 1945 Yang Partisipatif Melalui Komisi Konstitusi," *Yustisia Jurnal Hukum* 2 (May 1, 2013),

The necessity of a constitutional amendment is a momentum to improve the state system, like in Indonesia, and a means of conflict reconciliation. For example, since its independence in Sudan,[54] there has been a civil war over national identity, which ended with the Peace Agreement between the Government of Sudan and the Sudan People's Liberation Movement. The Peace Agreement is then protected by the Sudanese Constitution[55] which prohibits amendments affecting peace agreements without the consent of both parties (Article 224).

Even though the experience of amendments to the constitution in several countries provides a necessity, it must also be anticipated that constitutional amendments will damage the essential elements of the constitution itself, just as the basic constitutional structure doctrine means that every constitution must have basic principles that must be protected and preserved, so that when amendments to the constitution destroys the principles, foundations, or basic structure, then it requires the annulment of clauses that destroy the basic principles of the constitution.

Unconstitutional Amendments to the Constitution

The representation of an unconstitutional constitutional amendment can be mapped into two categories: first, an amendment that is unconstitutional when the process and mechanism for the amendment are not following what is determined by the constitution itself (testing the constitutionality of a constitutional amendment in the formal sense); and second, an amendment that is unconstitutional when there are provisions that cannot be changed either explicitly or implicitly and are forced to be amended by the parliament (testing constitutionality in the material sense). In the first case, an example of a country that expressly stated that constitutional amendments were possible to be

https://doi.org/10.20961/yustisia.v2i2.10176. and Mustajib Mustajib and Ach Fadlail, "Amandemen Ke-5 Undang-Undang Dasar Nri 1945: Peluang Dan Tantangan," *HUKMY: Jurnal Hukum* 2 (April 14, 2022): 54–69, https://doi.org/10.35316/hukmy.2022.v2i1.54-69..

[54] Richard D. Law Schwartz, *Francis A Nation in Turbulent Search of Itsel in: , Society, and Democracy: Comparative Perspective,* (New York, 2006).

[55] T Dagne, "Sudan: The Crisis in Darfur and Status of the North-South Peace Agreement," in *Politics and Economics of Africa*, 2011, 43–87.

formally examined was the State of Austria,[56] while in the second case, one of the countries that expressly said that provisions could not be changed was Indonesia.[57]

The amendment process is one way of reconciling the tension between stability and flexibility. The norms in the Constitution formulate two things: most of the norms are designed flexibly, meaning they can be changed. At the same time, there are minority norms with very difficult or irreversible changes.[58] The motive for the existence of unchangeable provisions is based on two things: first, this aspect is the identity and essence of the Constitution, which must be maintained from generation to generation; second, it is something that is intended to prevent the existence of majority power, which has the potential to be abused, especially when it is related to the experience that the country has passed on.

As previously mentioned, unconstitutional constitutional amendments are associated with a measuring instrument, namely the basic structure or identity of the Constitution. Yaniv Roznai classifies the immutable components of conditions as follows:[59]

1) Form of state and system of government. In this context, several countries that protect the form of the state and the system of government cannot be changed, Indonesia,[60] Thailand,[61] dan Germany.[62]

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[56] Jimly Asshiddiqie, and Ahmad Syahrizal, *Peradilan Konstitusi Di Sepuluh Negara,* (Jakarta Timur: Sinar Grafika, 2012).

[57] The provisions that cannot be changed are contained in Article 37 paragraph (5) of the 1945 Constitution of the Republic of Indonesia, which states that the form of the Unitary State of the Republic of Indonesia cannot be changed.

[58] Roznai, "Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers."

[59] Roznai.

[60] Luthfi Eddyono, *The Unamendable Articles of the 1945 Constitution.*

[61] Yaniv Roznai, "Theory of Substantive Unamendability. Unconstitutional Constitutional Amendments: The Limits of Amendment Powers."

[62] Monika Polzin, "The Basic-Structure Doctrine and Its German and French Origins: A Tale of Migration, Integration, Invention and Forgetting," *Indian Law Review* 5 (January 4, 2021): 1–17, https://doi.org/10.1080/24730580.2020.1866882.

2) Political structure. In this context, several countries that protect the bicameral system, regional autonomy, separation of powers, and independence of the judiciary are Bahrain,[63] Kazahkstan,[64] Portugal.[65]
3) State ideology, also often referred to as constitutional identity. The countries that expressly prohibit amendments to the state ideology are Ecuador, which protects the 'Roman Catholic Apostolic,'[66] Turkey, which covers the state ideology, which is secular and social.[67] In addition, according to the author's understanding, if it is related to the Indonesian context, Pancasila as the state ideology also falls into this qualification.[68]
4) Fundamental rights. Some countries expressly state that the basic rights of citizens is unchangeable and must be protected and preserved. These fundamental rights relating to human dignity, equality and equity, freedom of the press, and workers and trade union rights. Some examples of countries that explicitly protect basic rights from constitutional amendments are Germany, Mexico, and Portugal.[69]
5) State integrity includes national unity, territorial integrity, sovereignty, and independence. Some countries that serve as examples of making this aspect irreversible are Azerbaijan, Cameron, and Ivory Coast.[70]

There are two noteworthy points to make in the context of Indonesia: *first,* as was noted in the background section, the events of the 5 July 1959

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[63] Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions Making, Breaking, and Changing Constitutions*, 2019, https://doi.org/10.1093/oso/9780190640484.001.0001.

[64] INDEX, *Eternity Clauses In Democratic Constitutionalism* (New York: Oxford Academic, 2021).

[65] Lech Garlicki and Yaniv Roznai, "Introduction: Constitutional Unamendability in Europe," *European Journal of Law Reform* 21 (May 1, 2019): 217–25, https://doi.org/10.5553/EJLR/138723702019021003001.

[66] Yaniv Roznai, "Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea," *American Journal of Comparative Law* 61 (July 1, 2013): 657–719, https://doi.org/10.5131/AJCL.2012.0027.

[67] Yaniv Roznai and Serkan Yolcu, "An Unconstitutional Constitutional Amendment — The Turkish Perspective: A Comment on the Turkish Constitutional Court's Headscarf Decision," *International Journal of Constitutional Law* 10 (April 28, 2012), https://doi.org/10.1093/icon/mos007.

[68] Abdurahman, "Constitutionality Review of Indonesian Constitutional Amendments: History and Future."

[69] Roznai, "Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea."

[70] Roznai.

Presidential Decree provided the necessary experience; and second, the president may assume control of the amendment power in Parliament, which is a topic of debate and may take the form of unconstitutional constitutional amendments. Not only that, but the Indonesian Constitution was also amended by issuing an MPR Decree, which straddled provisions in the Constitution.

The TAP MPR on Referendum, issued by Parliament in 1983, clearly straddled the provisions of Article 37 of the 1945 Constitution. *Second*, suppose one looks at the material content of the 1945 Constitution of the Republic of Indonesia due to a series of constitutional reforms. In that case, it has shown that there are provisions for limiting constitutional amendments. At least two main matters regarding limitations on constitutional amendments will be found, namely the formal limitations reflected[71] in Article 3 paragraph 1, which expressly states that the authority to amend the Constitution lies in the only institution, namely the People's Consultative Assembly, and Article 37 paragraphs (1), (2), (3), and paragraph (4), which essentially contain quorum provisions in terms of constitutional amendments. The following limitation is the material limitation, as reflected in Article 37, paragraph (5), which states that the form of the Unitary State of the Republic of Indonesia cannot be changed.[72] The provision of Article 37 paragraph (5) is a subsidiary norm of the provisions of Article 1 paragraph (1), which state that the State of Indonesia is a Unitary State in the form of a republic; this provision is an unchangeable primary norm based on Article 37 paragraph (5). The Indonesian Constitution has unchangeable provisions, but it lacks provisions or even a mechanism to follow when the Parliament forces amendments to unchangeable provisions. If the provisions that have been materially protected are later reversed, there are no consequences.

In addition to the provisions explicitly stated to be unchangeable, another important thing is the existence of a constitutional identity, which is also a measure of whether a constitutional amendment is considered constitutional. Constitutional identity is related to collective values that unite the nation as a psychological and sociological phenomenon,[73] or an aspiration expressed through the commitments and agreements of a government in the past,

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[71] Abdurahman, "Constitutionality Review of Indonesian Constitutional Amendments: History and Future."

[72] Eddyono, "The Unamendable Articles of the 1945 Constitution." *Also see* Mohammad Ibrahim, "Pembatasan Kekuasaan Amendemen Konstitusi: Teori, Praktik Di Beberapa Negara dan Relevansinya di Indonesia," *Jurnal Konstitusi* 17 (November 10, 2020): 558, https://doi.org/10.31078/jk1735.

[73] Bijana Kostadinov, "Constitutional Identity," *Iustinianus Primus Law* 13 (2012): 4.

primarily when the formulation of a constitution was formed.[74] If associated with the Indonesian Constitution, there is also a constitutional identity, namely Pancasila, contained in the Preamble to the Constitution of the Republic of Indonesia as the state ideology.[75] Pancasila, as the State Ideology of Indonesia, includes five essential principles, including: 1) The principle of Divinity believes in the existence of belief in God Almighty; 2) The Principle of Humanity contains the meaning of acknowledging the principle of just and civilized humanity; 3) The Principle of Nationality means spirit and a vital shared will to become a single, diverse nation; 4) The Principle of Democracy implies the existence of a collective will to be independent while at the same time ensuring the freedom of each individual in deliberation-representation; 5) The Principle of Social Justice implies the agreement on becoming a just-prosperous, socially just society for all Indonesians.[76]

Its presence in the Preamble to the Constitution was a consideration for parliament; in this case, the People's Consultative Assembly (MPRI), when amending the 1999–2002 constitution, agreed that the Preamble would not be the object of the amendment.[77] The existence of restrictions on constitutional amendments both formally and materially in the Indonesian Constitution indicates a basic structure and identity that must be preserved and protected from constitutional amendments, which can damage the primary system and uniqueness of the Indonesian Constitution.

Prospects & Comparative Analysis of Amendments to the Constitution Iin Indonesia

A. Prospects for Reviewing Amendments to the Constitution in Indonesia

One way to protect the basic structure and identity of the Indonesian Constitution is through a judicial review mechanism for constitutional amendments. Mainly when it is associated with the membership structure of the People's Consultative Assembly of which composition consists of 575

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[74] Gary Jacobsohn, "Constitutional Identity," *The Review of Politics* 68 (June 1, 2006): 361–97, https://doi.org/10.1017/S0034670506000192.

[75] Roznai, "Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers."

[76] Asshiddiqie, *Pancasila: Identitas Konstitusi Berbangsa Dan Bernegara.*

[77] Luthfi Eddyono, "Quo Vadis Pancasila Sebagai Norma Konstitusi Yang Tidak Dapat Diubah," *Jurnal Konstitusi* 16 (October 8, 2019): 585, https://doi.org/10.31078/jk1637.

members of the People's Representative Council (DPR) and 136 members of the Regional Representatives Council (DPD). The membership composition of the People's Consultative Assembly indicates that the majority of its membership is filled by Members of the People's Representative Council, who, in the process of forming a law, have a poor performance index. The Indonesian Parliamentary Center stated in its report that the DPR's legislative performance index had a score of 36.2, which means the performance with poor qualifications.[78] Not surprisingly, DPR legislative products often become the object of judicial review of laws against the Constitution at the Constitutional Court.[79] Data released by the Constitutional Court regarding the recapitulation of cases reviewing laws against the Constitution from 2003 to 2023 totaled 1,704, with 1,671 points that had been decided.[80]

The data above represents that the applicants or the public assess the legislative products of the DPR as having problems of overlapping, disharmony, multiple interpretations, conflict, and even ideological defects, and demanding to be more participatory, aspirational, and accountable.[81] This pattern of poor performance from the DPR can also come about when the MPR of which majority is filled by members of the DPR, amends the Constitution. It is a concern that constitutional amendments will only be carried out based on pragmatic interests, which could damage the basic structure and identity of the Constitution significantly when it is associated with the reading of the issues that have developed so far regarding the plan to amend the Indonesian Constitution by the MPR focusing on two crucial points, namely extending the periodization of the presidential term to three periods,[82] and the return of the MPR's authority in establishing the Outline of State Policy[83] which was

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[78] Muhammad Arbain, Muhammad Ichsan, and Maulana, *Indeks Legislasi DPR RI Tahun Sidang 2020-2021.* (Jakarta*:* Indonesian Parliamentary Center, 2022).

[79] Wijaya Ahmad and Nasran Nasran, "Comparison of Judicial Review: A Critical Approach to the Model in Several Countries," *Jurnal Legalitas* 14, no. 2 (2021).

[80] Mahkamah Konstitusi Republik Indonesia, "Rekapitulasi Putusan Pengujian Undang-Undang Terhadap Undang-Undang Dasar Negara Republik Indonesia Tahun 1945."

[81] I Gusti Ayu Ketut Rachmi Handayani, Lego Karjoko, and Abdul Jaelani, "Model Pelaksanaan Putusan Mahkamah Konstitusi Yang Eksekutabilitas Dalam Pengujian Peraturan Perundang-Undangan Di Indonesia," *BESTUUR* 7 (July 7, 2020): 36, https://doi.org/10.20961/bestuur.v7i1.42700.

[82] Kristina Kristina, "Masa Jabatan Presiden Menurut UUD 1945, Bisakah Diperpanjang? *Detik,* January 11, 2020. https://www.detik.com/edu/detikpedia/d-5893641/masa-jabatan-presiden-menurut-uud-1945-bisakah-diperpanjang

[83] Zainal Arifin Mochtar, "Amandemen UUD, GBHN Dan Jabatan Presiden," *Article Online Kompas,* March 17, 2021.

previously regulated in Article 3 of the Constitution and became the entry point for requests for accountability from the president which could lead to political impeachment of the president.

The Fifth Amendment discourse is one of the momentums for redesigning the regulatory review system in Indonesia. If the current constitutional design provides two mechanisms for reviewing regulations, namely *first*, studying a law against a constitution, which is the domain of the Constitutional Court's authority,[84] and *second*, a mechanism for reviewing statutory regulations under a law against a law, which is the authority of the Supreme Court.[85] It is also necessary to design a review mechanism for constitutional amendments when they are deemed to have damaged or undermined the basic structure or identity of the Constitution.[86] It must be acknowledged that the current issue of amending the Constitution has not yet reached the judicial aspect of reviewing constitutional amendments; the problem is still limited to strengthen the DPD,[87] reinforce the presidential system,[88] fortify regional autonomy,[89] support the judicial commission,[90] the expansion of the Constitutional Court's Authority in the Context of constitutional complaint,[91] expanding the authority

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https://www.kompas.id/baca/opini/2021/03/17/amendemen-uud-gbhndan-jabatan-presiden

84 Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia

85 Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia

86 Novendri Nggilu et al., "Judicial Review of Constitutional Amendments: Comparison Between India, Germany, Colombia, and the Relevancy with Indonesia," *Lex Scientia Law Review* 8, no. 1 (September 22, 2024), https://doi.org/10.15294/lslr.v8i1.1901.

87 Adventus Toding, "DPD Dalam Struktur Parlemen Indonesia: Wacana Pemusnahan Versus Penguatan," *Jurnal Konstitusi* 14 (November 2, 2017): 295, https://doi.org/10.31078/jk1423.

88 Yusa, I. Gede, and Bagus Hermanto. "Gagasan Rancangan Undang-Undang Lembaga Kepresidenan: Cerminan Penegasan Ddan Penguatan Sistem Presidensiil Indonesia." *Jurnal Legislasi Indonesia* 14, no. 3 (2017): 313-324. https://doi.org/10.54629/jli.v14i3.119.

89 Ahmad and Nggilu, "Denyut Nadi Amandemen Kelima UUD 1945 Melalui Pelibatan Mahkamah Konstitusi Sebagai Prinsip the Guardian of the Constitution."

90 Zaki Priambudi, Bima Rico Pambudi, and Natasha Intania Sabila, "Reformulasi Kewenangan, Kelembagaan, dan Kepegawaian Penghubung". *Negara Hukum: Membangun Hukum untuk Keadilan dan Kesejahteraan* 13, no. 1 (2022): 1–19.

91 Nilwan Wize Ananda Zen, Untung Dwi Hananto, and Amalia Diamantina, "Jaminan Hak-Hak Konstitusional Warga Negara (The Protector of Citizen's Constitutional Right) Dengan Implementasi Constitutional Complaint Melalui Mahkamah Konstitusi di Negara Kesatuan Republik Indonesia (Studi Pelaksanaan Constitutional Complaint di Kor," *Diponegoro Law Review* 5, no. 2 (2016): 1–24.

of the Constitutional Court in matters of constitutional complaints,[92] setting up constitutional commissions in amendments to the Constitution, returning the authority of the MPR in terms of drawing up and establishing the outline of state policy, and periodizing the presidential term.

The public should be made aware of the limited issue of constitutional amendments that has not yet reached the conversation about the significance of a judicial mechanism for reviewing constitutional amendments. This will not only help the public understand the role of this mechanism, but will also enable them to monitor this issue when the MPR implements the 1945 fifth amendment to the State Constitution of the Republic of Indonesia. Monitoring of this issue by the public is also a form of embodiment of an essential feature of constitutional democracy, namely public participation in the formulation and formation of state law policies,[93] which the Constitutional Court formulated as the concept of meaningful participation[94] and preserved in Decision No. 91/PUU-XVIII/2020. In addition to providing legitimacy to the constitutional amendments produced by parliament, public participation in constitutional amendments serves to reflect democratic constitutional amendments and ultimately result in a democratic constitution.[95]

Suppose one looks at the judicial activism of the Constitutional Court in exercising its authority to review laws against the Constitution. In that case, one will find the use of the fundamental structure doctrine or constitutional identity in its decisions. However, it must be admitted that this doctrine is not yet well-known in Indonesia. Nonetheless, the Constitutional Court has made a breakthrough in internalizing this doctrine, particularly the use of Pancasila,

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[92] Idul Rishan, *Amandemen Konstitusi & Koalisi Partai,* https://law.uii.ac.id/blog/2019/08/20/amandemen-konstitusi-koalisi-partai/. *See also* Ahmad and Nggilu, "Denyut Nadi Amandemen Kelima UUD 1945 Melalui Pelibatan Mahkamah Konstitusi Sebagai Prinsip the Guardian of the Constitution."

[93] Amancik Amancik et al., "Choices of Law for Democratic Regional Head Election Dispute Resolution Institutions in Indonesia," *Jambura Law Review* 6, no. 2 (July 22, 2024): 304–38, https://doi.org/10.33756/jlr.v6i2.24792; Ana Fauzia and Fitria Esfandiari, "Political Party Deliberation: Mechanism for Safeguarding Constituent Rights against Vacancies in House of Representatives Affected by Political Party Dissolution," *Jambura Law Review* 6, no. 2 (July 28, 2024): 452–281, https://doi.org/10.33756/jlr.v6i2.24110.

[94] Helmi Chandra SY and Shelvin Putri Irawan, "Perluasan Makna Partisipasi Masyarakat Dalam Pembentukan Undang-Undang Pasca Putusan Mahkamah Konstitusi," *Jurnal Konstitusi* 19, no. 4 (2022): 766–93, https://doi.org/10.31078/jk1942.

[95] Ronald Crombrugge, "Belgium and Democratic Constitution-Making: Prospects for the Future?" 46 (January 1, 2017): 13–36, https://doi.org/10.5553/NJLP/221307132017046001003.

which is the Identity of the Indonesian Constitution, as a touchstone for testing laws. Yance Arizona[96] identified 14 Constitutional Court Decisions[97] that made Pancasila values an essential and decisive part of the decision. The research conducted by Ahmad Basarah stated that there was a Constitutional Court Decision that expressly made Pancasila the touchstone. The use of *Pancasila* as a touchstone or benchmark.[98] for testing laws against the Constitution indicates that the Constitutional Court has positioned itself as the guardian of the Constitution and established itself as the guardian of ideology[99], the constitutional identity and holds the task of upholding the constitutional values of the 1945 Constitution of the Republic of Indonesia.[100]

The use of Pancasila as a touchstone that the Constitutional Court has used in the case of reviewing laws against the Constitution should also be used when the mechanism for judicial review of constitutional amendments is implemented in Indonesia because Pancasila is not only positioned as a state ideology but a consequence of Pancasila. Also, a constitutional identity means placing Pancasila as the source of all sources of law, as emphasized in the law on the formation of rules and regulations in Indonesia,[101] and because of that, Pancasila can become a touchstone or benchmark for testing the constitutionality of laws, including constitutional amendments.

With the empirical practice that has been carried out by the Constitutional Court which uses constitutional identity as a benchmark or touchstone in reviewing laws against the constitution, and if it is related to the constitutional

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[96] Yance Arizona, Endra Wijaya, Tanisius Sebastian, *Pancasila Dalam Putusan Mahkamah Konstitusi* (Jakarta: Epistema Institut, 2004).

[97] Constitutional Court Decision No. 012/PUU-I/2003; No. 31/PUU-V/2007; No. 47-81/PHPU.A/VII/2009; No. 10-17-23/PUU-VII/2009; No. 115/PUU-VII/2009; No. 140/PUU-VII/2009; No. 55/PUU-VIII/2010; No. 19/PUU-IX/2011; No. 27/PUU-IX/2011; No. 58/PUU-IX/2011, No. 37/PUU-IX/2011; No. 35/PUU-X/2012; No. 84/PUU-X/2012; and No. 100/PUU-X/2012.

[98] Ahmad Basarah, "Eksistensi Pancasila Sebagai Tolok Ukur Dalam Pengujian Undang-Undang Terhadap Undang-Undang Negara Republik Indonesia 1945 Di Mahkamah Konstitusi: Kajian Perspektif Filsafat Hukum Dan Ketatanegaraan". *Dissertation.* (Semarang: Diponegoro University, 2016).

[99] Arief Hidayat, *Negara Hukum Berwatak Pancasila*, presented for "Peningkatan Pemahaman Hak Konstitusional Warga negara Bagi Asosiasi Dosen Pancasila dan Kewarganegaraan (ADPK) & Asosiasi Profesi Pendidikan Pancasila dan Kewarganegaraan Indonesia (AP3KnI), Bogor, August 21, 2017.

[100] Usman Rasyid et al., "Reformulation of the Authority of Judicial Commission: Safeguarding the Future of Indonesian Judicial Power," *Jambura Law Review* 5, no. 2 (July 31, 2023): 386–413, https://doi.org/10.33756/jlr.v5i2.24239.

[101] Article 2 of Law Number 12 of 2011 concerning Formation of Legislation.

design of the Constitutional Court which is attached to other powers which include deciding disputes over the authority of state institutions that its authority is granted by the constitution; decide on the dissolution of political parties; decide disputes about general election results;[102] as well as being obliged to give a decision on the opinion of the House of Representatives regarding alleged violations by the President and/or Vice President (impeachment)[103], all of which authority reflects the functions of the Constitutional Court which includes 1) the guardian of constitution; 2) control of democracy; 3) the soul and the highest interpreter constitution; 4) the protector of citizen's constitutional rights; and 5) the protector of human rights, the proper institution to conduct judicial review activities on constitutional amendments is the Constitutional Court.

B. Constitutional Amendments in Various Countries

Although it is not yet common in Indonesia, numerous other nations throughout the world have made extensive use of the process of amending their constitutions. The following nations can be used as comparison: Germany, Türkiye, and Colombia. For instance, the Turkish Constitution gives the Constitutional Court the authority to review constitutional amendments in procedural aspects.[104] Even in developing the constitution, the reviewing practice also assesses the substance of constitutional amendments. For example, in 2008, the Turkish Constitutional Court overturned a constitutional amendment that removed the ban on headscarves in universities as it was considered to be contrary to the basic principles of the secular Turkish Constitution.[105] The design of the Turkish constitution regarding the authority to review constitutional amendments from a procedural aspect can also be found in the Colombian constitution. The design of the Colombian

[102] Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia

[103] Article 24C paragraph (2) of the 1945 Constitution of the Republic of Indonesia

[104] "Turkey 1982 (Rev. 2017) Constitution - Constitute," accessed May 23, 2024, https://www.constituteproject.org/constitution/Turkey_2017.

[105] Y. Roznai and S. Yolcu, "An Unconstitutional Constitutional Amendment--The Turkish Perspective: A Comment on the Turkish Constitutional Court's Headscarf Decision," *International Journal of Constitutional Law* 10, no. 1 (January 1, 2012): 175–207, https://doi.org/10.1093/icon/mos007; See also Michael Hein, "Do Constitutional Entrenchment Clauses Matter? Constitutional Review of Constitutional Amendments in Europe," *International Journal of Constitutional Law* 18, no. 1 (May 21, 2020): 78–110, https://doi.org/10.1093/icon/moaa002.

Constitution recognizes the existence of this mechanism and its authority is given to the Constitutional Court. Article 241 of the Colombian Constitution states explicitly that the Constitutional Court has the authority to decide on procedural tests of the unconstitutionality of constitutional amendments.[106] It started with case C-531/2003 which questioned the call for a referendum made by the Colombian Congress. The petitioners questioned that the call for a referendum contained norms that were detrimental to the rights of citizens (especially workers and pensioners).[107] Even though this decision rejects the claim of unconstitutionality of constitutional amendments, it has been noted as part of the practice of reviewing constitutional amendments in Colombia, as well as marking the presence of a new doctrine known as the substitution doctrine, where in the consideration of the Constitutional Court it is stated that the authority of congress to make amendments is limited to activities to change or add provisions to the constitution, rather than to change the basic structure or identity of the constitution which is the identity and basic characteristics of the constitution.[108]

In contrast to the practice in Turkey and Colombia, the German Constitution does not explicitly state the authority to review constitutional amendments as in the Turkish and Colombian Constitutional Courts. The authority of the German Constitutional Court is only to test the constitutionality of federal laws.[109] In its development, when the Federal Constitutional Court receives cases on the review of constitutional amendments, it assesses the constitutionality of these amendments based on the perspective that the Basic Law, the Constitution of Germany, is a form of

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[106] "Colombia 1991 (Rev. 2015) Constitution - Constitute," accessed February 21, 2024, https://www.constituteproject.org/constitution/Colombia_2015.

[107] *See also* The Decision of the Constitutional Court of Colombia, C-551/2003, "C-551-03 Corte Constitucional de Colombia," accessed May 23, 2024, https://www.corteconstitucional.gov.co/relatoria/2003/C-551-03.htm#_ftnref100.

[108] Gonzalo Andres Ramirez-Cleves, "The Unconstitutionality of Constitutional Amendments in Colombia: The Tension Between Majoritarian Democracy and Constitutional Democracy," in *Democratizing Constitutional Law: Perspectives on Legal Theory and the Legitimacy of Constitutionalism*, ed. Thomas Bustamante and Bernardo Gonçalves Fernandes, Law and Philosophy Library (Cham: Springer International Publishing, 2016), 213–29, https://doi.org/10.1007/978-3-319-28371-5_10.

[109] Article 93 of the Basic Law for the Federal Republic of Germany stipulates that the Federal Constitutional Court holds the authority to examine the constitutionality of federal legislation. Additionally, it is empowered to resolve jurisdictional disputes between state institutions, and to evaluate the actions of these institutions as well as judicial decisions in individual cases. "Basic Law for the Federal Republic of Germany," accessed November 30, 2023, https://www.gesetze-im-internet.de/englisch_gg/.

federal legislation. Consequently, the activity of reviewing constitutional amendments is in accordance with the qualifications set forth in Article 93 of the German Constitution.[110] In addition, the Basic Structure of the German Constitution, which includes the respect for human dignity,[111] the federal state form, and democratic and social principles,[112] must be protected and preserved. Consequently, any constitutional amendments that violate this basic structure can be annulled by the Federal Constitutional Court.

The practice of reviewing constitutional amendments in Germany can be observed in several cases, including the Klass Case in 1970,[113] Land Reform I and II in 1945 and 1949,[114] the Asylum Case in 1993, [115]and the Acoustic Housing Surveillance Case.[116]

Challenges of Reviewing Constitutional Amendments in Indonesia

Of course, there is the problem of not realizing the judicial review mechanism for constitutional amendments in Indonesia can be applied, as this is a doctrine that is not yet well-known in Indonesia and has an impact on both expanding the authority of an institution—in this case, the Constitutional Court—and related to the implementation of parliamentary authority in amending the constitution, which can be controlled by another institution—the Constitutional Court. These challenges consist of:

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[110] *Kemal Gözler, Judicial Review of Constitutional Amendments: A Comparative Study* (Turkit: Ekin Press), 22, accessed February 20, 2024, http://www.anayasa.gen.tr/jrca.htm.

[111] Article 1 (1), Basic Law for the Federal Republic of Germany

[112] Article 20a (4), Basic Law for the Federal Republic of Germany

[113] "Bundesverfassungsgericht - Suche Nach Entscheidungen," accessed May 23, 2024, https://www.bundesverfassungsgericht.de/SiteGlobals/Forms/Suche/EN/Entscheidungensuche_Formular.html?language_=en; See Also Gábor Halmai, "Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?," *Constellations* 19, no. 2 (June 2012): 182–203, https://doi.org/10.1111/j.1467-8675.2012.00688.x.

[114] *Kemal Gözler, Judicial Review of Constitutional Amendments: A Comparative Study* (Turkit: Ekin Press), accessed February 20, 2024, http://www.anayasa.gen.tr/jrca.htm; See Also Elene Janelidze, "Judicial Review of Constitutional Amendments in Georgia, France and Germany – The Quest for Eternity" (Hungary, Central European University, n.d.). 22

[115] *Kemal Gözler, Judicial Review of Constitutional Amendments*, 63.

[116] Jutta Stender-Vorwachs, "The Decision of the *Bundesverfassungsgericht* of March 3, 2004 Concerning Acoustic Surveillance of Housing Space," *German Law Journal* 5, no. 11 (November 1, 2004): 1337–48, https://doi.org/10.1017/S2071832200013262.

A. Resistance of the People's Consultative Assembly

Expanding the authority of the Constitutional Court as stipulated in Article 24C of the 1945 Constitution of the Republic of Indonesia is one method to provide a possibility for the exercise of the powers of judicial review of constitutional amendments. By "testing the results of amendments to the constitution, as well as testing the law against the constitution," changes to the redaction of the norms are "testing the authority of the Constitutional Court in the context of judicial review, limited to examining laws against the Constitution." Therefore, it must be acknowledged that the People's Consultative Assembly's power to amend the Constitution is the only way it could change the provisions of Article 24C. The resistance to the expansion of the powers of the Constitutional Court will, of course, be carried out by the People's Consultative Assembly as it will affect the amendments that they not only control but can also annul by the Constitutional Court. In addition, it must also be realized that the nature and pattern of actual power are not just to maintain control but also to expand its capacity. It becomes challenging for the People's Consultative Assembly, with its sole authority to amend the Constitution, to hand over the authority to control the constitutional amendments to the Constitutional Court through the authority of judicial review of constitutional amendments.

Suppose you look closely at the issue of amendments to the Constitution. In that case, it is viewed that the main target of the People's Consultative Assembly when amendments to the Constitution are carried out is to restore the authority it once had in terms of establishing the outlines of state policy as stipulated in the Constitution before the constitutional reforms that occurred in 1999–2002. This is regarded when the term of office for the membership of the People's Consultative Assembly ends, and one of the recommendations is to amend the Constitution to revive the outlines of state policy.[117] One of the challenges that arise in the future in aggregating issues of judicial review of constitutional amendments such that the MPR can accommodate them is the limited concentration of MPR issues.

[117] Pontas.ID., "MPR Periode 2014-2019 Sudah Jalankan Rekomendasi.," n.d.

B. Intervention and Intimidation of the Constitutional Court

One symptom that has emerged recently is the decline of democracy, as in Poland and Hungary,[118] Sri Lanka, [119]and Indonesia.[120] An assessment of the decline of democracy emphasizes three key aspects: a democratic electoral system, the right to speak and associate, and legal integrity. In the context of legal innocence, one of the focuses is the existence of the Constitutional Court, which is used as a target to be weakened as this institution plays quite an essential and strategic role in maintaining democracy, protecting its independence, and the independence of other institutions, and upholding human rights. The experience in Indonesia provides an example of how vital the role of the Constitutional Court is in maintaining the stability of Indonesian democracy. Mietzner even said that Indonesian democracy, until 2014, was the most stable democracy in Southeast Asia.[121]

The Constitutional Court is an institution that may be subject to intervention from political forces or other branches of power because of its strategic role and authority. The primary crown jewels of the judiciary, especially the Constitutional Court, are its independence and impartiality. Recent events in Indonesia indicate that the power branch of People's Representative Council is attempting to overthrow the crown of Constitutional Court's throne. This circumstance may be described by two significant events: First, the dismissal of Judge Aswanto, who was previously recruited through the People's Representative Council. Commission III's assessment of Aswanto's performance in the House of Representatives led to his release. This assessment is based on how many laws passed by the House of Representatives—among

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[118] Tímea Drinóczi and Agnieszka Bień-Kacała, "Democracy and Human Rights in Illiberal Constitutionalism," *German Law Journal*, February 19, 2021, 221–50, https://doi.org/10.1017/9781839701399.012.

[119] Dian A. H. Shah, "Political Change and the Decline and Survival of Constitutional Democracy in Malaysia and Indonesia," *Constitutional Studies* 8, no. 1 (2021): 133–56.

[120] Abdurrachman Satrio, "Constitutional Retrogression in Indonesia Under President Joko Widodo's Government: What Can the Constitutional Court Do?," *Constitutional Review* 4, no. 2 (2018): 271–300, https://doi.org/10.31078/consrev425.

[121] Marcus Mietzner, "Political Conflict Resolution and Democratic Consolidation in Indonesia: The Role of the Constitutional Court," *Journal of East Asian Studies* 10 (December 1, 2010): 397–424, https://doi.org/10.1017/S1598240800003672. See also Abdurrachman Satrio, "A Battle Between Two Populists: The 2019 Presidential Election and the Resurgence of Indonesia's Authoritarian Constitutional Tradition," *Australian Journal of Asian Law* 19, no. 2 (2019): 1–21.

them Aswanto—were annulled by the Constitutional Court. It was decided that Aswanto could not defend the DPR's interests, which had produced the law.[122] *Second,* intervention and intimidation were openly conveyed by a combination of eight factions[123] ahead of the Constitutional Court's decision to review the election law case to determine whether to continue using an open or closed proportional system. Representative of the Gerakan Indonesia Raya (Gerindra) faction, Habiburohman firmly stated that if the Constitutional Court decides to review the general election law from an open proportional system to a closed balanced design, the House of Representatives will use its authority to revise the Constitutional Court Law and will amputate the authority of the Constitutional Court.[124] They will also use their budgeting authority by cutting the budget allocation for the Constitutional Court.[125] The House of Representatives has publicly indicated its intentions to take action over the drafting of laws and the application of its constitutional powers to unconstitutional concerns, even if it ultimately refrained from abusing its authority to amputate the powers and budget of the Constitutional Court. The two significant incidents mentioned above highlight the challenges that the Constitutional Court would have, particularly in carrying out its judicial duties in the future, such as the judicial review of constitutional amendments. There's a chance to encounter the similar challenges again.

C. Defiance to the Decision of the Constitutional Court

Defiance to the decisions of the Constitutional Court is practiced not only by the branches of executive and legislative power, but also by other branches of judicial power, including the Supreme Court and the judiciary under it, as well as independent branches of power like the General Elections Commission. This phenomenon of defiance of the Constitutional Court's decisions has been extensively discussed in Indonesia. The form of defiance to the Constitutional Court's decision can be viewed in the non-follow-up of the decision by other branches of power. Defiance to the first Constitutional Court decision was

[122] Mochtar, "Amandemen UUD, GBHN dan Jabatan Presiden."

[123] Partai Gerakan Indonesia Raya Faction, Partai Golongan Karya Faction, Partai Nasional Demokrat Faction Partai Keadilan Sejahtera Faction, Partai Persatuan Pembangunan Faction, Partai Kebangkitan Bangsa Faction, Partai Amanat Nasional Faction, and Partai Demokrat Faction.

[124] Mochtar, "Amandemen UUD, GBHN dan Jabatan Presiden."

[125] Mochtar.

evident from 24 decisions not followed up by the legislators[126] in this case, the House of Representatives [127] and the President.[128]

The Supreme Court's Circular Letter to all courts within its jurisdiction demonstrates the Constitutional Court's defiance of the Constitutional Court's decision. It states that the Court has the power to review statutory regulations under the law for violations of the law, even though the law supporting the review is still subject to testing in the Constitutional Court.[129] Another defiance was the Constitutional Court Decision, which stated that political party officials were not allowed to become candidates for members of the Regional Representatives Council,[130] which the General Election Commission followed up and regulated in the form of General Election Commission Regulations.[131] Still, then the General Election Commission Chairperson Regulation was annulled by the Supreme Court.[132] In addition to harming legal certainty for the community and creating a situation of constitutional justice delay—a delay in justice of which basis is the values of the Indonesian Constitution—this condition also increasingly indicates the rivalry between the Supreme Court and the Constitutional Court.[133]

Apart from that, defiance of the Constitutional Court Ruling was also carried out by an independent branch of power, in this case, the General Elections Commission. The commission, which was constitutionally given the

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[126] Tri Sulistyowati, M Nasef, and Ali Rido, "Constitutional Compliance Atas Putusan Pengujian Undang-Undang Di Mahkamah Konstitusi 0leh Adressat Putusan Constitutional Compliance on the Constitutional Review Verdict in the Constitutional Court by the Adressat," *Jurnal Konstitusi* 17 (January 1, 2020): 700–728, https://doi.org/10.31078/jk1741.

[127] The People's Representative Council has the authority to form laws, as stated in Article 20 Paragraph (1) of the 1945 Constitution.

[128] The President has the authority to submit draft laws to the House of Representatives of the Republic of Indonesia, as stated in Article 5 Paragraph (1) of the 1945 Constitution.

[129] Tri Sulistiyono, Faridhotun Ridho, and Pratama Herry Herlambang, "Peran Pengadilan Dalam Proses Eksekusi Putusan Yang Berkekuatan Hukum Tetap Di Pengadilan Tata Usaha Negara Semarang," *Indonesian State Law Review* 3, no. 1 (2020): 39–45.

[130] Supreme Court Decision Nomor 30/PUU-XVI/2018

[131] General Election Commission Regulation Number 26 of 2018 concerning the Second Amendment to the General Election Chairperson Regulation Number 14 of 2014 concerning the Nomination of Individual Election Contestants for Members of the Regional Representative Council.

[132] Supreme Court Decision Number 65/P/HUK/2018.

[133] Novendri Nggilu, "Menggagas Sanksi Atas Tindakan Constitution Disobedience Terhadap Putusan Mahkamah Konstitusi," *Jurnal Konstitusi* 16 (March 25, 2019): 43–60, https://doi.org/10.31078/jk1613.

authority to hold general elections, issued General Election Commission Regulation (PKPU) Number 10 of 2023 on the Nomination of Members of the People's Legislative Assembly, Provincial and Regency/City Regional People's Representative Councils, and General Election Commission Regulation (PKPU) Number 11 of 2023 on the nomination of individual participants in the general election for members of the Regional Representatives Council, which provides space for ex-convicts to run for office as members of the legislature without having to wait for five years after serving imprisonment/prison as stipulated by the Constitutional Court in Decision Number 87 /PUU-XX/2022 and Decision Number 12/PUU-XXI/2023. The former commissioner of the Corruption Eradication Commission, Bambang Wijayanto, called the General Election Commission's counter-constitutional action that created a new norm in PKPU that contradicted the Constitutional Court's decision.[134]

In addition to being a problem of which resolution has been widely discussed, one of the challenges the Constitutional Court will encounter in the future is strengthening disobedience to the decisions of the Constitutional Court when it comes to its judicial review of constitutional amendments. The People's Consultative Assembly may choose to disregard the decision of the Constitutional Court, which may declare that either the procedure of amending the Constitution or its contents are unconstitutional, by failing to make any corrections to the unconstitutional outcome of the amendment.

Apart from the challenges mentioned above, there is a need for a judicial review mechanism for constitutional amendments immediately because, in addition to carefully reviewing the provisions of the Indonesian Constitution that must be protected and preserved and are unchangeable as well as historical precedents involving unchangeable constitutional amendments, as previously mentioned, a judicial review mechanism for constitutional amendments is necessary. In order to address the challenges mentioned above, the public needs to get involved in two ways: first, by supporting the People's Consultative Assembly's mechanism through a constitutional amendment that will be implemented later on by placing this authority to the Constitutional Court; second, by getting involved in helping to ensure compliance with the decision of the Constitutional Court that the product of a constitutional amendment made by parliament is unconstitutional. In addition to being an essential feature of the constitutional democracy era, public involvement is significant since the people are the owners of constituent power.

[134] Mochtar, "Amandemen UUD, GBHN dan Jabatan Presiden."

Conclusion

The Preamble to the 1945 Constitution of the Republic of Indonesia, which contains Pancasila as the state ideology, or Article 37 paragraph 5 explicitly reflect provisions that are unchangeable. These provisions serve as a reminder of the identity and basic structure of the Indonesian Constitution, which must be protected and preserved. One of the attempts to correct constitutional amendment actions carried out by the People's Consultative Assembly that have the potential to change, eliminate, or damage the fundamental identity and structure of the Indonesian Constitution is the need for a judicial review mechanism. Potential challenges that the Constitutional Court may face when this mechanism is put into place in Indonesia include the need for public participation on the part of the Constitutional Court, which is the implementing actor, in order to oversee decisions made by the Constitutional Court regarding the judicial review of constitutional amendments. These decisions will be followed by other branches of power, particularly the People's Consultative Assembly, and to ensure that the Constitutional Court maintains its judicial crown of impartiality and independence and does not take any actions that undermines the prestige and honor of the Constitutional Court.

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At his best, man is the noblest of all animals; separated from law and justice he is the worst.

Aristotle

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