

CONSTITUTIONALITY REVIEW OF INDONESIAN CONSTITUTIONAL AMENDMENTS: HISTORY AND FUTURE

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Abstract - This article intends to describe the constitutional basis for the importance of mechanism for reviewing the constitutionality of constitutional amendments in Indonesia. This is based on: first, the existence of provisions both implicitly and explicitly regarding the limitations of constitutional amendments in the Indonesian Constitution, both contained in the Preamble which includes Pancasila as a philosophic grondslag, the ideals of the state which is also a constitutional imagination, as well as in the body norms of the Indonesian Constitution as contained in Article 37 paragraph (5). Second, the history of amendments to the Indonesian constitution, which has gone through incidents of distorted constitutional amendments which were marked by the dissolution of the Constitutional Assembly as well as transition to the Indonesian Constitution by the President, which is not actually within his authority. The channel for reviewing the constitutionality of amendments to the Indonesian constitution in the future is required by adding this authority to the Constitutional Court, so that the Constitutional Court does not merely serve as a guardian of the constitution *an sich*, but also becomes a guardian of constitutional identity and the basic structure of the constitution so that it is not removed and damaged by pragmatic and distorted constitutional amendments.

Keywords: Basic Structure; Constitutional Identity; Constitutional Amendment; Constitutional Review; Unamendable Provision

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INTRODUCTION

In reviewing theory, a review activity against norms can be viewed from 3 aspects, who is conducting the review, what object is being reviewed, and when the review is being conducted. In terms of who conducts the review (*subject*), it can be carried out by judicial institutions (judicial review), review by legislative institutions (*legislative review/political review*¹) and review by executive institutions (*executive review*).² Whereas in terms of its object, a norm is reviewed in a regulatory nature (*regeling*) if the characteristics of the norm are abstract and general in nature, then the review is carried out by the state constitutional court, while for concrete and individual norms in the form of a stipulation, the

¹ The term of *political review* is used by Natabaya in explaining the review carried out by the legislature, see H A S Natabaya (2006) *Sistem Peraturan Perundang-undangan Indonesia*, Jakarta: Sekretariat Jendral dan Kepaniteraan Mahkamah Konstitusi, P. 187

² Muchammad Ali Safa'at (*et.al*) (2011) *Hukum Acara Mahkamah Konstitusi*, Jakarta: Sekretariat Jendral Mahkamah Konstitusi Republik Indonesia, p. 82.

review is carried out by the state administrative court,³ while for norms or rules in the form of court decisions or verdicts, the review is carried out in stages up to the level of cassation and judicial review.⁴ While review in term of when the review was carried out, there are two known mechanisms, which are review of regulations that have been ratified which is often known as a *judicial review*, as well as review carried out on a regulation that has not been ratified or is called a *judicial preview*.⁵

In the Constitution of the Republic of Indonesia, the design of the review system through the judiciary is known by two mechanisms, which are the review of laws and regulations under the law against laws which are the authority of the Supreme Court,⁶ review of laws against the constitution which is the authority of the Constitutional Court.⁷

The essence of reviewing laws against the constitution is part of implementing a constitutional system with the paradigm of *the supreme law of the land* which requires that all laws and regulations under it must comply and cannot conflict with the provisions of the constitution,⁸ even if there is a conflict between the laws and the constitution, it is necessary to straighten one of them through the mechanism of review of the institution for constitutional justic. While reviewing the regulations under the law against the law is intended to maintain harmony, suitability, conformity and balance between the laws and regulations under the law against the law.⁹ Even though there is a bifurcation mechanism for reviewing regulations in Indonesia, which is review carried out by the Constitutional Court, as well as the Supreme Court, viewed from the essence of the review implementation, both are intended as a means for petitioners¹⁰ who feel disadvantaged by the existed laws regulations which are the object of review.¹¹

Viewed from the development of contemporary constitutions, the dialectics regarding the review of law and regulation by the judiciary is no longer only related to the two matters described above, which is the review of law and regulations under the law against the law, or reviewing laws against the constitution, but has led to issues related to reviewing the constitutionality of constitutional amendments. Vincent Samar in his research attempted to answer the big question, which is "*can the constitutional amendment be unconstitutional?*".¹² This big question certainly cannot be separated from the practice of formal constitutional changes which are usually carried out by parliament, which is very dependent on parliamentary political psychology to the point of being unconstitutional. Deny Indrayana¹³ is one of those who has depicted how political psychology will greatly affect the quality of the results of these changes.

Mahfud MD in his dissertation uses the term political configuration to show the factors that influence the formation of a legal product. In his research, Mahfud stated that there was a fairly strict line between the political configuration that applies at the time of the formation of legal products with the

³ Benny K Harman (2013) *Mempertimbangkan Mahkamah Konstitusi, Sejarah Pemikiran Pengujian UU terhadap UUD*, Jakarta: Kepustakaan Populer Gramedia, p. 28.

⁴ Jimly Asshiddiqie (2010) *Perihal Undang-Undang*, Jakarta: Rajawali Pers, p. 7-8.

⁵ Jimly Asshiddiqie (2005) *Model-Model Pengujian Konstitusionalitas di Berbagai Negara*, Jakarta: Konstitusi Press, p. 7

⁶ Article 24A paragraph (1) Undang-Undang Dasar Negara Republik Indonesia Tahun 1945

⁷ Article 24C paragraph (1) Undang-Undang Dasar Negara Republik Indonesia Tahun 1945

⁸ Tanto Lailam (2018) "Penataan Kelembagaan Pengujian Norma Hukum di Indonesia," *Jurnal Konstitusi* 15 (1), p. 206

⁹ *Idem*, p. 208

¹⁰ The petitioners in the norm review case by the Supreme Court and the Constitutional Court have almost the same criteria, as the similarities in terms of the applicants include: 1) individual Indonesian citizens; 2) customary law community units as long as they are still living and in accordance with community development and the principles of the Unitary State of the Republic of Indonesia regulated in the law; public legal entity or private legal entity. Meanwhile, the petitioners' criteria, which is state institutions, only apply in trials conducted by the Constitutional Court, see Article 31A paragraph (2) of Law Number 3 of 2009 concerning the Second Amendment to Law Number 14 of 1985 on the Supreme Court, as well as Article 51 paragraph (1) of Law Number 24 of 2003 on the Constitutional Court.

¹¹ Both review in the Supreme Court and the Constitutional Court, it was carried out on the basis of losses borne by the petitioners by the enactment of laws and regulations or the law. See Article 31A paragraph (2) of Law Number 3 of 2009 on the Second Amendment to Law Number 14 of 1985 on the Supreme Court, and Article 51 paragraph (1) of Law Number 24 of 2003 on the Constitutional Court.

¹² Vincent J. Samar (2008) "Can a Constitutional Amendment be Unconstitutional?" *Oklahoma Law Review* 33 (3), p. 668. The idea of reviewing the results of the amendment was then decomposed in more depth by Yaniv Roznai (2014) *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers*. Thesis on Departement of Law, the London School of Economic for Degree of Doctoral of Philosophy, p. 13.

¹³ Deny Indrayana (2007) *Amandemen UUD 1945: Antara Mitos dan Pembongkaran*, Bandung: Mizan Pustaka, p. 157.

characteristics of the resulting legal products. In the event of the authoritarian political configuration,¹⁴ it is most likely that the resulting legal products have repressive or orthodox characters.¹⁵ While democratic political configuration,¹⁶ it is most likely to produce progressive legal products.¹⁷ As the formulating of national law in the form of the Constitution, the People's Consultative Assembly (MPR) has a significant role¹⁸ for the success of changes in the constitution. The People's Consultative Assembly as a political superstructure has the task of processing various interest aggregations from existing interest groups, which include economic, political, social, cultural, etc. in the formulation of the Constitution.¹⁹ In the event that the political configuration when the constitutional change is carried out in democratic, the results of the constitutional change are *the people constitution*, which is a people's constitution in which guarantee for human rights and constitutional rights are one of the main features in the constitution, while in the event that political configuration when the constitutional change is authoritarian, elitist and dominative, the results of the constitutional change deviate the values of constitutionalism.

Review of the constitutional amendment is one of the intended efforts to maintain the constitution that contains the values of constitutionalism, or maintain the purity of the constitutional value that it is not damaged and obscured through a pragmatic and haphazard constitutional amendment. This review is also a corrective form of constitutional amendment carried out in a deviant manner both deviating from the formal aspects and also material aspects. In addition, review of the results of the constitutional review is also a form of manifestation of the check and balances system, in which parliament as an institution has the authority to make amendment to the constitution, balanced with the authority to review the constitutional amendment to the judicial institution.²⁰

Review of constitutional amendment always deals with 2 (two) measuring instruments, which as basic structure and identity of the constitution. In the doctrine of basic structure of the constitution, the important features include the supremacy of the constitution, the rule of law, the separation of power, guarantees of human rights.²¹ If the constitutional amendment straddle these important features, then the constitutional amendment is potentially unconstitutional so it is very possible to be reviewed. While the second measuring instrument is the constitutional identity which is a collective value that unites the nation and the state,²² which is occasionally normalized in the *unamendable provisions*.²³

In the case of the constitutional identity, Garry Jeffrey Jacobsohn explained that the constitutional identity that specifically could not be separated from the aspirations expressed through the commitment and agreement of a nation in the past,²⁴ especially when the formulation of a constitution was formed. Whereas in terms of basic structures doctrine, based on universal teachings, related to basic features that should be contained in the constitution.

¹⁴ Indicators of authoritarian political configurations include 1) weak political parties and parliament, under executive control; 2) Interventionist executive institution (Government); 3) The press is stunted, threatened with censorship and banning. Moh. Mahfud MD (2011) *Politik Hukum di Indonesia*, Jakarta: Rajawali Pers, p. 7

¹⁵ Indicators of orthodox legal product characteristics include: 1) The making is centralistic and dominative; 2) the charge is positivistic-instrumentalistic; 3) Details of the contents is *open interpretative*. *Ibid*.

¹⁶ Indicators of democratic political configuration include: 1) strong political parties and parliament, determining the direction or state policy; 2) Neutral Executive Institution; 3) The press is independent, without censorship and banning. *Ibid*.

¹⁷ Indicators of responsive legal product character include: 1) pembuatannya partisipatif; 2) muatannya aspiratif; 3) rincian isinya limitatif. *Ibid*.

¹⁸ Imam Syaukani, A. Ahsin Thohari (2004) *Dasar-Dasar Politik Hukum*, Jakarta: Raja Grafindo Persada, p. 119

¹⁹ This aspect of interest is one part of political infrastructure, which also has a role in national law politics. *Idem*, p. 121.

²⁰ Pan Mohamad Faiz (2020) "Menguji Konstitusionalitas Amandemen Konstitusi," <https://panmohamadfaiz.com/2020/11/04/menguji-konstitusionalitas-amandemen-konstitusi/#more-2365>, [08/11/2022]

²¹ Andreas Buss (2014) "Dual Legal System and The Basic Structur Doctrine or Constitutions: The Case of India," *Canadian Journal of Law and Society*, 19 (2), p. 23-49. Besides Buss, another writer who also describes the basic structure but with another term of "Constitutional Replacement Doctrine" is Carlos Bernal, See Carlos Bernal (2013) "Unconstitutional Constitutional Amendment in the Case Study of Colombia: An Analysis of The Justification and Meaning of The Constitutional Replacement Doctrin," *International Journal of Constitutional Law*, 11 (2), p. 339-357.

²² Bijana Kostadinov (2012) "Constitutional Identity", *Iustinianus Primus Law Review*, 3 (4), p. 1-20

²³ Yaniv Roznai (2017) "Towards a Theory of Constitutional Unamendability: On the Nature and Scope of The Constituional Amendment Powers." *Jus Politicum*, 18, p. 5-37

²⁴ Garry Jeffrey Jacobsohn (2006) "Constitutional Identity", *The Review of Politics*, 68, p. 361

Global practices regarding reviewing the results of constitutional amendments have occurred in India,²⁵ Colombia,²⁶ Germany²⁷ and other countries. While in other countries, concentration to the study of the constitutional identity and basic structures relating to the review when the constitutional amendment is legally issued starting to develop, such as in the United States,²⁸ Poland,²⁹ and Africa,³⁰ even in the Yaniv Roznai dissertation which also describes the basic structure, define the regulation of the provisions on restrictions of the constitutional amendment or also referred to as Unamendable Provision which is classified into two of which regulation is an explicit³¹ and implicit arrangement.³²

In the event that it is specified in the context of the Indonesian constitution, it has its prospects and urgency, not only because of the Indonesian constitution that reflects the regulation on the restriction of constitutional amendment both explicit and implicit, but also a long history of deviant constitutional amendments also becomes an empirical foothold on the importance of efforts to protect the constitution from damage both procedurally and substantively by the deviant and pragmatic interests by parliament. It is the reason that three important parts will be described in this article, *first*, regarding the provisions on restriction of constitutional amendments both implicitly and explicitly which also reflect aspects of the constitutional identity and basic structures, *second*, historical records of deviant constitutional amendments, and *third*, Indonesia. The future of reviewing the constitutionality of the Indonesian constitutional amendment.

1. Research Method

The approaches used in this study are legislation approaches, case approaches, historical approaches, and conceptual approaches. The source of legal material is obtained from literature studies, and is analyzed prescriptive.

2. Constitutional Identity: Explicit and Implicit Restriction Indonesian Constitutional Amendment

The Indonesian constitution which is hierarchically occupies the highest degree is the *resultante* in the political, social, cultural contexts,³³ as well as the state autobiography that reflects the diversity of its people, and contains the beliefs of the state's ideals to be manifested.³⁴ As prevalence of constitutional content material, in addition to containing state power, human rights, the Indonesian constitution also contains the identity of the state³⁵ which is often referred to as the identity of the constitution.

The structure of the Indonesian constitution is divided into two important parts, which are the Preamble and the Body. The Preamble comprises the statement of Indonesian independence, containing the ideology of the nation, as well as the ideals of the state to be manifested in the future, while the part of the Body contains basic norms which are further elaboration of the provisions in the Preamble.

If it is associated with the view of Yaniv Roznai regarding the existence of Unamendable Provision regulation both implicitly and explicitly, it will be found in the 1945 Constitution which is an Indonesian constitution provisions on restrictions on the constitutional amendment, both implicit and explicit.

a. Implicitly restricted constitutional amendments

²⁵ James Kariuki Nthenya (2022) "The Applicability of the Basic Structure Doctrine in Kenya", SSRN, 11 (October) 2022, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4132245, [09/11/2022]. Gabor Halmai (2012) "Unconstitutional Constitutional Amendments: Constitutional Court as Guardians of the Constitution?," *Constellations*, 19 (2), p. 186

²⁶ Mario Alberto Cajas-Saria (2016) "Judicial Review of Constitutional Amendment in Colombia: a Political and Historical Perspective, 1955-2016", *The Theory and Practice of Legislation*, 5 (3), p. 261.

²⁷ Mohamad Ibrahim (2020) "Pembatasan Kekuasaan Amandemen Konstitusi: Teori, Praktek di Beberapa Negara dan Relevansinya di Indonesia", *Jurnal Konstitusi*, 17 (3), p. 569

²⁸ OR Bassok (2015) "Interpretative Theories as Roadmaps to Constitutional Identity: The Case of The United State", *Global Constitutionalism*, 4 (3), p. 289-327

²⁹ R Daniel Kelemen and Laurent Pech (2019) "The Uses and Abuse of Constitutional Pluralism: Undermining the Rule of Law in the Name Constitutional Identity in Hungary and Poland", *Cambridge Yearbook of European Legal Studies*, 21, p. 59-74.

³⁰ Jan Erk (2022) "Aspirational and Representative Constitutional Identity in Africa", *Global Constitutionalism*, p. 1-20

³¹ Yaniv Roznai (2004) "Unconstitutional Constitutional Amendment: A Study of the Nature and Limits of Constitutional Amendment Powers", *Department of Law of the London School*, p. 22

³² *Ibid.*, p. 48

³³ Fence M. Wantu, et.al (2021) "Indonesian Constitutional Interpretation: Constitutional Court Versus The People's Consultative Assembly." *Journal of Legal, Ethical and Regulatory Issues*, 24 (6), p. 1-7

³⁴ Bagir Manan and Susi Dwi Harjanti (2015) *Memahami Konstitusi: Makna dan Aktualisasi*, Jakarta: Rajawali Press, p. ix.

³⁵ Fence M. Wantu, et.,al (2020) "Indonesian Constitutional Amendment in 4.0 Era: Main Chalanges and Future Prospect." *Journal of Legal, Ethical and Regulatory Issues*, 23 (Special Issue), p. 1-6



The implicit provision for the restriction of constitutional amendments is the Preamble of the 1945 Constitution, which is based on the agreement of the People's Consultative Assembly (MPR) in which one of the 5 basic agreements during the constitutional amendment in 1999-2002 was not to change the Preamble. This agreement certainly has its constitutional reasoning, as the Preamble of the Indonesian Constitution reflects the heroic spirit of independence, contains Pancasila as the nation's ideology of which formulation is based on values that have long lived in society, including since the monarchy era,³⁶ and the Preamble also contains the state's aspirations to be manifested. It is the reason that the Preamble of the Indonesian Constitution is agreed upon as an unamendable provision. Therefore, the Preamble of the Constitution cannot be changed as it contains the genetic code of the identity of the Indonesian Constitution.

b. Explicitly restricted constitutional amendments

Provisions on explicit restriction of the constitutional amendment are contained in the Body of the Indonesian constitution. This can be viewed in Article 37 paragraph (5) of the 1945 Constitution which states that “*specifically regarding the form of the Unitary State of the Republic of Indonesia cannot be subject to amendment*”.³⁷ The provisions are the affirmation of Article 1 paragraph (1) of the 1945 Constitution which states that “the Indonesian state is a unitary state in the form of a republic”. In addition, the restriction of the constitutional amendment is also reflected in Article 3 paragraph (1) which states that “*The People's Consultative Assembly has the authority to change and establish the Constitution*”, as well as the provisions of Article 37 paragraph (1), (3), and (4) which contain the provisions of the quorum at the time of proposal, discussion and decisions to carry out the constitutional amendment. This provision is a formal restriction of the constitutional amendment, as when compared to the Austrian constitution, this kind of provision becomes a test of the constitutionality review of the constitutional amendment.³⁸

3. History of Constitutional Amendment: Record about deviant practices

Long History of the Indonesian Constitution Amendments have shown that there has been a constitutional amendment that is not in accordance with the provisions of the Indonesian Constitution. Awareness of the existence of an emergency constitution, which is the Constitution stipulated on August 18, 1945 in the midst of unstable political and security situations as well as the transitional constitution from the Japanese colonial regime to the Independence Regime, then on November 9, 1956 the Constitutional Assembly (Indonesia: konstituante) was formed based on the results of the election General in 1955 began to carry out the task of regulating a new constitution that was more comprehensive and thorough.³⁹ In the course of the time of the formation of the new constitution, President Soekarno issued the Presidential Decree on July 5, 1959 which stated the dissolution of the Constitutional Assembly formed by the results of the general election, as well as declaring the re-enactment of the 1945 Constitution from the Provisional Constitution (UUDS-1950). The issuance of the Presidential Decree was based on the consideration that the Constitutional Assembly which was considered unable to complete its duties in the formation of a new constitution, despite the study of Adnan Buyung Nasution, it was stated that the task of the Constitutional Assembly had reached 95%.⁴⁰

The constitutional transition from the 1950 Constitution to the 1945 Constitution is a form of deviation in the constitutional amendment. The abnormal constitutional transition differs from the procedural provisions of the formation or amendment of the constitution in Indonesia, as the power to draft or amend the constitution is vested in the Constitutional Assembly, not the President, under the 1950 Constitution. The historic event must be marked with a red flag so that it does not reoccur, which is why it is critical to consider the constitutionality testing mechanism of the constitutional amendment

³⁶ Uswatun Hasanah and Aan Budianto (2020) “Pemikiran Soekarno dalam Perumusan Pancasila,” *Jurnal Candi*, 20 (2), p. 31-54.

³⁷ Luthfi Widagdo Eddyono (2016) “The Unamendable Articles of The 1945 Constitution. *Constitutional Review*,” 2 (2), p. 252-269

³⁸ Jimly Asshiddiqie and Ahmad Syahrizal (2012) *Peradilan Konstitusi di Sepuluh Negara*, Jakarta Timur: Sinar Grafika, p. 26

³⁹ Novendri M Nggilu (2014) *Hukum dan Teori Konstitusi (Perubahan Konstitusi yang Partisipatif dan Populis)*, Yogyakarta: UII Press, p. 81

⁴⁰ Adnan Buyung Nasution (1995) *Aspirasi Pemerintahan Konstitusional di Indonesia: Study Social-Legal atas Konstituante 1956-1959*, Jakarta: Grafiti, p. 317-320

not only materially, but also formally, when there is an event of constitutional amendments carried out by non-constitutional institutions.

Key lessons in the 1999-2002 constitutional amendment can also be a formal test of the testing of the constitutional amendment, where at the time of the constitutional amendment, the channel of public engagement in the constitutional amendment carried out by the People's Consultative Assembly was very minimal, the constitutional amendment was extremely monopolistic, whereas in the era of constitutional democracy, public participation is one of its defining characteristics and is essential for the legitimacy of the results of constitutional amendments.⁴¹ During the 1999-2002 constitutional amendment process, the People's Consultative Assembly only received 127 inputs from the total Indonesian people at that time of 200 million people, as well as the limited discussion space through socialization and workshop. The condition was far different when compared to the success of the Amendment to the South African in the same constitutional reform era that Indonesia went through at that time, in which the space of public participation was widely opened, and eventually produced 2 million compared to 24 million inputs in the number of South African people, besides discussions and constitutional debates was held in 37 television programs, radio talk with 8 topics, 160,000 journals, sectoral meetings held with around 200 organizations representing the number of groups.⁴²

In the practice of formal review of the constitutionality of the law in the Indonesian Constitutional Court, the meaningful aspect of participation becomes an important measure of the process of forming a law. In case of the context of merely reviewing the constitutionality of the law that meaningful participation becomes an important measurement tool, then meaningful participation must also be the main measurement tool in the context of formal review of the constitutional amendment.

In addition to the above considerations, it is also important to figure out political signs in Indonesia, which is approaching the transition of power, especially at the end of the second period of the President's term of office, the issue of the extension of the President's term of office to three periods is a seasonal issue that must be interpreted and anticipated seriously. After the reform, both at the end of the second period of President Susilo Bambang Yudhoyono⁴³ and President Joko Widodo,⁴⁴ the issue of constitutional amendment was always strengthened by targeting the provisions regarding the term of office of the President, which was only 2 periods to be extended to 3 periods.

In the context of the extension of the period of the president's term of office through the constitutional amendment channel, Indonesia needs to learn at the incident in Colombia, when the second period of the President Alvaro Uribe's term of office will end at that time, the constitutional amendment was carried out for the sake of amending the clause on the restriction of the presidential period which was only 2 to 3 periods. In such case, the Colombian Constitutional Court⁴⁵ stated that the amendment to the constitution carried out at that time was unconstitutional as it damaged the built constitutional system.⁴⁶

Although the issue of the Indonesian constitutional amendment by targeting the extension of the period of the President's term of office for such three periods has never been manifested, it seems to have become a patterned issue, so it must be anticipated in the future, one of which is through mechanism for reviewing the constitutionality of constitutional amendment.

In addition to experience in Colombia, experience in India should also be one of the important lessons in the need for reviewing mechanisms when the constitutional amendment is carried out in a deviant manner while undergoing the identity of the constitutional identity and basic structure of the

⁴¹ R.V Crombrugge (2017) "Belgium and Democratic Constitution-Making: Prospect for the Future." *Netherlands Journal of Legal Philosophy*, 46 (1), p. 13-36

⁴² Denny Indrayana (2007) *Amandemen undang-Undang Dasar 1945, Antara Mitos dan Pembongkaran*, Bandung: Mizan Pustaka, p. 43

⁴³ When SBY was tempted by the President's extended term of office, <https://rihlah.republika.co.id/posts/61308/kala-sby-digoda-perpanjangan-jabatan-presiden>.

⁴⁴ Wacana Amandemen UUD 1945, MK Ingatkan Parlemen Agar Sensitif dan Peka. 2021. <https://nasional.tempo.co/read/1501643/wacana-amandemen-uud-1945-mk-ingatkan-parlemen-agar-sensitif-dan-peka/full&view=ok>, [28/4/2022].

⁴⁵ On February 26, 2010, 7 of 9 judges stated that the constitutional amendment was declared unconstitutional. Mario Alberto Cajas-Saria (2017) "Judicial Review of Constitutional Amendment in Colombia: a Political and Historical Perspective, 1955-2016," *The Theory and Practice of Legislation*, 5 (3), p. 261.

⁴⁶ Yaniv Roznai, *op,cit.*, p. 684

constitution. In the case of *Kesavananda Bharati v. State of Kerala* (1973), at that time, Indira Gandhi wanted to strengthen the position of the sovereignty of the Indian parliament, in which 24th amendment, the Indian Parliament in exercising the power of his constituents could amend it by adding, changing or revoking every constitutional provision, including those related to the protection of fundamental rights. In its decision, the Indian Supreme Court judge was divided into two, 7 judges argued that the amendment power did not include the power to amend the basic structure or framework of the constitution, while 6 other judges argued that the contents of the Indian constitution had the same degree so that all of them could be amended. In the decision, every law included in this case is the amendment to the constitution which limits fundamental rights declared null and void.⁴⁷ In 1975, the authority of the Indian Supreme Court to review the constitutional amendment was restricted by Indian Prime Minister Indira Gandhi⁴⁸ through the 38th constitutional amendment with consideration of the constitutional amendment carried out in the country state in an emergency that could not be reviewed by the Indian Supreme Court. The outcome of the constitutional amendment was then rolled into the Indian Supreme Court with a decision that the Indian Supreme Court had the authority to declare the unconstitutional constitutional amendment if it was contrary to the basic structure of the constitution.⁴⁹

4. The future of reviewing constitutional amendments in Indonesia

The existence of provisions on restriction of constitutional amendments both implicitly and explicitly becomes one of the constitutional footholds on the importance of reviewing the constitutionality of the Indonesian constitutional amendment. Implicit and explicit provisions regarding the restriction of the constitutional amendment become a milestone when the constitutionality review of the constitutional amendment will be carried out.

In fact, the existence of Pancasila as *Philosophie Grondslag*⁵⁰ in the practice of reviewing constitutionality of the law has been used as a milestone by the Constitutional Court, Pancasila which contains 5 philosophical values including values of divine, human, unity, deliberations and representatives, and the value of social justice becomes the constitutional identity which is at the same time as a genetic code of the Indonesian constitution is a rational reason to be used as a milestone in reviewing constitutionality of the constitutional amendment.

In the event that Indonesian law politics in the future develops a reviewing system by adding a reviewing mechanism, which is reviewing constitutionality of the constitutional amendment, the constitutional path that needs to be carried out is to conduct the Indonesian constitutional amendment by adding a means of reviewing the constitutionality of the constitutional amendment into the authority of the Constitutional Court. The addition of this authority to the Constitutional Court is based on the consideration that the prevalence in the practice of reviewing constitutionality of the constitutional amendment in various countries that have constitutional courts, then that institution has such authority, it is another case with countries that have no constitutional courts, where there is only a Supreme Court as the *Supreme of Court*, the authority is attached to the Supreme Court.

In the context of the Indonesian Constitutional Court, in case of the authority is attached to the Constitutional Court, the Indonesian Constitutional Court does not merely oversee the constitution in *an sich*, but also oversee the identity of the constitution and basic structure of the constitution that has the potential to be eliminated or damaged by the pragmatic and deviant constitutional amendments.

⁴⁷ James Kariuki Nthenya, *op.cit.*

⁴⁸ Indira Gandhi is a prime minister by controlling 2/3 seats in parliament so that it easily passes the 38th amendment which restricts the authority of reviewing the constitutionality of the constitutional amendment by the Supreme Court of India.

⁴⁹ Gabor Halmai, *op.cit.*, p. 18

⁵⁰ Novendri M Nggilu, Lisnawaty W Badu, Suwitno Y Imran (2021) "Legal Protection Bonda and Bulango Language: In Reality and Prospect." *Jambura Law Review*, 3 (1), p. 19-36

CONCLUSION


The existed limitations on constitutional amendments both implicitly and explicitly is the main consideration that the Indonesian Constitution needs to be maintained so that it is not amended in a pragmatic and deviant manner. Pragmatic and deviant constitutional amendments will have a fatal impact on the loss and destruction of constitutional identity which is the genetic code of the Indonesian constitution, especially if the constitutional identity is related to Pancasila as the *philosophy of gronslag*. Historical experience regarding the constitutional transition by a president who constitutionally has no authority to do so, is one of the important lessons to be anticipated in the future, by setting up a channel for testing the constitutionality of constitutional amendments to the Indonesian Constitutional Court by placing provisions limiting constitutional amendments both implicitly and explicitly as contained in the Preamble and the Body of the 1945 Constitution which is the Indonesian Constitution.

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