

GUARDIAN OF THE CONSTITUTION: REVIEWING THE ROLE OF THE CONSTITUTIONAL COURT

^{1*} Muhammad Mutawalli Mukhlis, ² Ahmad Masum, ³ Maskun, ² Yusuf Ibrahim Arowosaiye,
³ Eka Merdekawati Djafar

¹ Sekolah Tinggi Agama Islam Negeri Majene, Kabupaten Majene, Indonesia

² Universiti Islam Sultan Sharif Ali, Brunei Darussalam

³ Universitas Hasanuddin, Kota Makassar, Indonesia

*Corresponding author: mutawallimuhammad22@gmail.com

Abstract

The Constitutional Court of Indonesia is entrusted with safeguarding constitutional supremacy within Indonesia's constitutional order, yet it does not possess the authority to review amendments to the 1945 Constitution. This institutional limitation creates a structural gap because constitutional amendments, despite their far reaching consequences, remain beyond judicial scrutiny. This study examines the constitutional feasibility of granting the Court authority to conduct procedural and substantive review of constitutional amendments. Using doctrinal legal research supported by comparative constitutional analysis, the article draws on Hans Kelsen's theory of the hierarchy of norms and the Basic Structure Doctrine as developed in India and Germany to construct an evaluative framework suitable for the Indonesian context. The analysis demonstrates that the absence of judicial oversight over constitutional amendments weakens constitutional supremacy and increases the risk of democratic erosion through formally valid political processes. The article proposes a structured model of limited amendment review grounded in Indonesia's constitutional identity, particularly the foundational principles embodied in Pancasila and the commitment to the rule of law. By articulating a contextually grounded doctrinal framework, this study contributes to contemporary debates on unconstitutional constitutional amendments and offers a normative pathway for strengthening constitutional guardianship in Indonesia.

Keywords: *Constitutional Amendment Review; Constitutional Supremacy; Constitutional Identity; Judicial Review.*

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1. Introduction

The Constitutional Court is an independent institution that exercises judicial power and operates separately from the executive branch (the government) and the legislative branch (the people's representatives).¹ In the Indonesian constitutional system, the Court has become one of the main pillars in maintaining the principles of the rule of law and constitutional supremacy.² Since its establishment following the amendment to the 1945 Constitution, the Constitutional Court has been expected not only to interpret constitutional norms progressively but also to

¹ Muhammad Mutawalli, Harlida Abdul Wahab, and Zainal Amin Ayub, "Constitutional Complaint: A Comparative Study of The Authority of The Constitutional Courts of The Republic of Indonesia and Croatia," *Russian Law Journal* 11, no. 3S (2023): 132–42.

² Adi Putra, "Peran Mahkamah Konstitusi Dalam Menjaga Keseimbangan Kekuasaan Di Sistem Pemerintahan Indonesia," *Majalah Ilmiah Warta Dharmawangsa* 18, no. 4 (2024): 1451–62, <https://doi.org/https://doi.org/10.46576/wdw.v18i4.5690>.

ensure that state practices do not deviate from the fundamental principles enshrined in the Constitution.³ One concrete manifestation of this role is its authority to review laws against the 1945 Constitution, which serves as an essential mechanism for controlling national legislation and preserving constitutional supremacy.⁴ However, despite this central role, the Constitutional Court's authority remains limited when confronted with constitutional amendments themselves.

The urgency of granting the Constitutional Court the authority to review amendments to the 1945 Constitution can be understood from several foundational perspectives. Theoretically, modern constitutionalism emphasizes that even the process of constitutional amendment must be subject to legal and institutional safeguards to prevent deviations from fundamental principles such as separation of powers, human rights, and democracy. From a legal perspective, Hans Kelsen's theory of the hierarchy of norms places the Constitution at the apex of the legal order, thereby necessitating a review mechanism to preserve its supremacy, even against formally adopted amendments. Philosophically, the Constitution represents the embodiment of the nation's foundational values and social contract; therefore, its amendment must not undermine the constitutional identity of the state⁵. Comparatively, several jurisdictions—including Germany and India—have developed doctrines such as the Eternity Clause and the Basic Structure Doctrine that authorize judicial bodies to review constitutional amendments in order to protect core constitutional principles.

Despite the extensive development of these doctrines in comparative constitutional scholarship, their systematic application within the Indonesian constitutional framework remains under-theorized. This study therefore seeks to bridge this gap by analyzing the normative and institutional feasibility of constitutional amendment review within the authority of the Constitutional Court. These two theoretical foundations—Kelsen's hierarchical conception of legal norms and the Basic Structure Doctrine—serve as the analytical framework through which this study examines the constitutional feasibility of extending the Court's authority.

However, within the framework of constitutional authority, one crucial area remains beyond the jurisdiction of the Constitutional Court: the review of amendments to the 1945 Constitution itself. This institutional limitation raises a fundamental constitutional question: if the Court is regarded as the Guardian of the Constitution, to what extent can it effectively safeguard constitutional supremacy when confronted with constitutional-level norms produced by political institutions? Amendments to the Constitution, even when adopted through the formal procedures of the People's Consultative Assembly (MPR), may reflect majoritarian political interests that risk undermining foundational constitutional principles, both substantively and procedurally⁶.

Scholarly evaluations of Indonesia's post-reform constitutional practice have increasingly highlighted concerns regarding amendments adopted without an objective judicial review mechanism. Several constitutional revisions enacted after the reformasi period have been criticized for lacking systematic coherence and for generating normative ambiguities within the Indonesian legal system. The absence of a constitutional review mechanism for such amendments therefore creates a structural vulnerability, allowing constitutional norms with long-term institutional consequences to be adopted without adequate scrutiny.⁷ This vulnerability

³ Geofani Milthree Saragih, Ade Sathya Sanathana Ishwara, and Rengga Kusuma Putra, "Evaluasi Penerapan Nilai-Nilai Pancasila Dan Penegakan Hak Asasi Manusia Dalam Sistem Peradilan Indonesia Melalui Pendekatan Konstitusional," *Reformasi Hukum* 28, no. 3 (2024): 202–217, <https://doi.org/doi.org/10.46257/jrh.v28i3.1082>.

⁴ S Hanafi, "Kewenangan Mahkamah Konstitusi Dalam Menafsir Undang-Undang Dasar Negara Republik Indonesia Tahun 1945," *Jurnal Penelitian Hukum Dan Pendidikan* 16, no. 1 (2017): 357–60, <https://jurnal.iain-bone.ac.id/index.php/ekspose/article/download/92/42>.

⁵ Yaniv Roznai, "Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea," *The American Journal of Comparative Law* 61, no. 3 (2013): 657–719, <http://www.jstor.org/stable/43668170>.

⁶ Ahmad and Novendri M. Nggilu, "Denyut Nadi Amandemen Kelima UUD 1945 Melalui Pelibatan Mahkamah Konstitusi Sebagai Prinsip the Guardian of the Constitution," *Jurnal Konstitusi* 16, no. 4 (2019): 785–808, <https://doi.org/https://doi.org/10.31078/jk1646>.

⁷ Andriyansyah and T Lesmana, "Penguujian Terhadap Kebijakan Hukum Terbuka," *Civilia: Jurnal Kajian Hukum Dan Pendidikan Kewarganegaraan* 2, no. 1 (2023),

becomes particularly significant when examined in light of Article 37 of the 1945 Constitution, which regulates the formal amendment procedure without providing for substantive judicial oversight.

Although Article 37 of the 1945 Constitution establishes formal procedural requirements for constitutional amendments, it does not provide an institutional mechanism to verify compliance with those requirements.⁸ In the absence of judicial oversight, procedural deviations or strategic manipulations within the amendment process may occur without effective constitutional control. This institutional gap strengthens the argument that the Constitutional Court should play a role in supervising the amendment process to ensure adherence to constitutional procedures and safeguard the integrity of constitutional reform.

Furthermore, the Constitutional Court's authority is also constrained in reviewing legislation that falls within the domain of open legal policy. The Court is limited to assessing the constitutionality of legal norms and generally refrains from intervening in policy choices that lie within the discretion of the legislature. This doctrinal limitation illustrates that even in the context of ordinary legislation, the Court exercises a restrained form of judicial review.⁹ Consequently, the absence of authority to review constitutional amendments reflects an even more pronounced institutional limitation in safeguarding constitutional supremacy against politically driven normative acts.

Despite the growing body of scholarship addressing the authority of the Constitutional Court in Indonesia, limited attention has been devoted to the constitutional feasibility of granting the Court the power to review amendments to the 1945 Constitution. Existing studies primarily emphasize the normative desirability of involving the Court in the amendment process, yet they seldom provide a systematic analysis of the constitutional basis, structural implications, and comparative doctrinal models that could justify such authority within Indonesia's existing constitutional framework. This gap raises a fundamental question: can the expansion of the Constitutional Court's jurisdiction to include constitutional amendment review be constitutionally justified without undermining the principles of constitutionalism and separation of powers?

Building upon prior scholarship, including the work of Ahmad and Nggilu,¹⁰ this study moves beyond normative advocacy by proposing a structured hybrid model that integrates the Basic Structure Doctrine with Indonesia's hierarchical system of legal norms. Rather than merely arguing for institutional inclusion, this article develops a doctrinal framework that enables both substantive and procedural review of constitutional amendments while maintaining constitutional coherence. In doing so, it contributes to contemporary debates on constitutional guardianship in emerging democracies by offering a theoretically grounded and context-sensitive model for strengthening constitutional supremacy in Indonesia.

2. Method

This study adopts a doctrinal legal research design, focusing on the systematic analysis of constitutional norms, judicial interpretations, and constitutional doctrines relating to the authority of the Constitutional Court in Indonesia.¹¹ Doctrinal research is appropriate for examining the internal coherence of legal norms and evaluating their consistency within the hierarchical structure of constitutional law. The analysis is conducted through interpretative constitutional

<http://jurnal.anfa.co.id/index.php/civilia/article/view/206%0Ahttp://jurnal.anfa.co.id/index.php/civilia/article/download/206/202>.

⁸ Jamaludin Ghafur et al., "Peran Mahkamah Konstitusi Dalam Mewujudkan Amandemen UUD 1945 Yang Berkualitas," *Syntax Literate: Jurnal Ilmiah Indonesia* 9, no. 2 (2024), <https://doi.org/https://doi.org/10.36418/syntax-literate.v9i2.15255>.

⁹ Rona Dwi Arifa, Firmansyah Putra, and Muhammad Eriton, "Pengujian Terhadap Kebijakan Hukum Terbuka," *Limbago: Journal of Constitutional Law* 4, no. 2 (2024): 260–72, <https://doi.org/https://doi.org/10.22437/limbago.v4i2.35984>.

¹⁰ Ahmad and Nggilu, "Denyut Nadi Amandemen Kelima UUD 1945 Melalui Pelibatan Mahkamah Konstitusi Sebagai Prinsip the Guardian of the Constitution."

¹¹ Terry Hutchinson, *Doctrinal Research Researching the Jury*, 2nd ed. (United Kingdom: Routledge, 2017).

reasoning, employing structural and teleological approaches to assess the absence of judicial oversight over constitutional amendments and its implications for constitutional supremacy.¹² The theoretical frameworks outlined in the introduction—particularly the hierarchy of norms and the Basic Structure Doctrine—are utilized as analytical tools to evaluate the constitutional feasibility of extending the Court’s authority.

The study relies on primary legal materials, including the 1945 Constitution, relevant Constitutional Court decisions, and statutory regulations governing constitutional amendment procedures. Secondary materials consist of scholarly publications and comparative constitutional jurisprudence from selected jurisdictions, namely India, Germany, South Korea, and South Africa. These jurisdictions were selected due to their developed models of constitutional review and their varying approaches to amendment control, allowing for a structured comparative analysis. Legal materials were examined through qualitative doctrinal analysis, linking constitutional texts, judicial reasoning, and comparative doctrines to construct a coherent normative argument. This study is limited to a doctrinal and constitutional analysis and does not assess the political feasibility of constitutional reform.

3. Results and Discussion

Before evaluating the specific limitations of the Constitutional Court’s authority, it is important to first explore the theoretical, legal, and philosophical justifications for such authority. From a theoretical standpoint, the concept of constitutionalism implies that all exercises of state power must be both procedurally and substantively accountable to higher legal principles. Hans Kelsen’s theory places the Constitution at the apex of the legal hierarchy, implying that even constitutional amendments should be subject to judicial review to preserve constitutional supremacy. From a philosophical perspective, the Constitution is not merely a legal document but a manifestation of the nation’s foundational identity; altering it without adequate scrutiny endangers the social contract and the values enshrined within. Legally, the absence of a testing mechanism for amendments may permit deviations from core democratic values under the guise of legality, thereby eroding the checks and balances that underpin constitutional democracy. Therefore, expanding the authority of the Constitutional Court is not merely a procedural necessity but a normative imperative to safeguard the nation’s democratic and constitutional integrity.

3.1. Criticism of the Limited Authority of the Constitutional Court

The limitation of the Constitutional Court’s authority to review constitutional amendments must be examined through the lens of constitutional theory and the doctrine of legal norms. Hans Kelsen’s theory of the hierarchy of norms posits that the Constitution stands at the apex of the legal system and must therefore be subject to judicial protection to maintain its supremacy. Additionally, the doctrine of constitutionalism insists that state power is constrained not only by procedures but also by substantive principles, such as democracy, the rule of law, and human rights. These principles serve as an immutable core that should not be endangered even by constitutional amendments. Without the Constitutional Court’s involvement, these core tenets lack an institutional safeguard, creating a structural vulnerability within the constitutional framework.

3.1.1. Absence of Authority to Test Amendments to the Constitution

The Indonesian Constitutional Court, as an institution designed to be the guardian of the Constitution, faces a fundamental paradox within the framework of its authority.¹³ Despite being mandated to test laws against the 1945 Constitution, the Court does not have the competence to assess the material validity of changes to the Constitution itself. This limitation raises serious questions about who has the authority to ensure that constitutional changes remain in line with

¹² Mark Van Hoecke, *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Oxford: Hart, 2011).

¹³ Geofani Milthree Saragih, Mirza Nasution, and Eka N A M Sihombing, “Makna Filosofis Putusan Mahkamah Konstitusi Dalam Constitutional Review Dan Urgensi Judicial Activism,” *Jurnal Masalah-Masalah Hukum* 53, No. 3 (2024): 335–44.

the basic principles of Indonesian constitutionalism.

Theoretically, modern constitutionalism requires that constitutional amendments not only comply with formal procedures, but also adhere to the principle of substantive limits on constitutional amendments, namely that there are core elements of the constitution that cannot be changed arbitrarily, such as the principles of the rule of law, democracy, and human rights. When the Constitutional Court does not have the authority to test constitutional amendments, there is no judicial oversight mechanism for potential violations of these substantive principles.

Doctrinally, many countries have developed the doctrine of unconstitutional constitutional amendments, such as in India, Germany, and Colombia, reflecting a growing global consensus on limiting abusive amendments.¹⁴ This doctrine allows constitutional courts to declare an amendment invalid if it is contrary to the basic principles of the constitution. In India, for example, the Supreme Court in the *Kesavananda Bharati v. State of Kerala* (1973) decision held that Parliament cannot alter the “basic structure” of the constitution. A similar doctrine has also been adopted by the Colombian Constitutional Court, which applies substantive limits to constitutional reforms, particularly those that threaten democracy and the separation of powers.

In the Indonesian context, the absence of such a mechanism opens up room for political manipulation by the parliamentary majority.¹⁵ In a constitutional system that upholds the principle of constitutional supremacy, amendments to the Constitution should not only be subject to formal procedures, but also pass substantive value testing so as not to damage the basic structure of the state.¹⁶ If amendments to the constitution can be made without a judicial oversight mechanism, then the Constitution risks losing its character as the highest legal norm and turning into a flexible tool of power for dominant groups in legislative institutions.¹⁷

The absence of this authority risks facilitating authoritarian regression through formal constitutional channels. In the long term, it enables the dominant political faction to entrench its power without judicial restraint, undermining both the spirit and structure of democratic constitutionalism. For instance, without an institutional mechanism to review constitutional changes, fundamental rights and checks and balances could be incrementally eroded under the guise of legitimate constitutional reform. Such outcomes would not only delegitimize the Constitution but also severely weaken public trust in democratic governance.

Furthermore, the inability of the Constitutional Court to review constitutional amendments weakens its function as the guardian of the principles of democracy, human rights and the division of powers weak.¹⁸ Without an independent testing institution, the potential for weakening constitutional democracy through legal channels becomes increasingly real. Therefore, it is necessary to promote a new constitutional arrangement that grants the Constitutional Court the authority constitutionality of amendments to the 1945 Constitution.¹⁹ As basis for reflection and mapping future institutional reforms, the following flowchart illustrates the current process of mending the 1945 Constitution and highlights the crucial points at which substantive oversight is absent.

¹⁴ Rehan Abeyratne and Ngoc Son Bui, *The Law and Politics of Unconstitutional Constitutional Amendments in Asia*, 1st ed. (Routledge, 2022).

¹⁵ Ayu Raianny and Arif Wibowo, “Rekonstruksi Kewenangan MK Dalam Proses Amandemen UUD NKRI 1945 Untuk Meneguhkan Supremasi Hukum,” *REUSAM: Jurnal Ilmu Hukum* 11, no. 1 (2023): 65, <https://doi.org/10.29103/reusam.v11i1.10541>.

¹⁶ M Ilyas, “SISTEM PERUBAHAN UNDANG-UNDANG DASAR NEGARA REPUBLIK INDONESIA TAHUN 1945: SUATU KAJIAN DALAM TEORI PERUBAHAN KONSTITUSI,” *Jurnal Media Hukum* 9, no. 1 (2022).

¹⁷ Miftah Faried Hadinatha, “Peran Mahkamah Konstitusi Mencegah Gejala Autocratic Legalism Di Indonesia,” *Jurnal Konstitusi* 19, no. 4 (2022), <https://doi.org/https://doi.org/10.31078/jk1941>.

¹⁸ Saldi Isra, “Peran Mahkamah Konstitusi Dalam Penguatan Hak Asasi Manusia Di Indonesia,” *Jurnal Konstitusi* 11, no. 3 (2016): 409, <https://doi.org/10.31078/jk1131>.

¹⁹ Muhammad Mutawalli Mukhlis, “Regional Government Autonomy in Indonesia: The Ambiguity of the Federalism of Republic Model,” *Malaysian J. Syariah & L.* 13 (2025): 35.

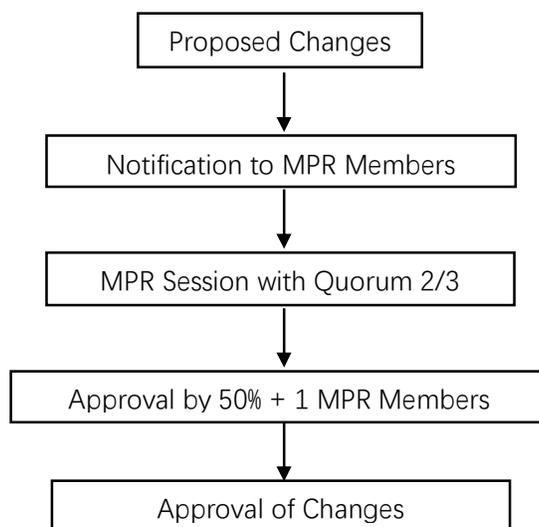


Figure 1. The Process of Amendment to the 1945 Constitution Based on Current Provisions

Source: Hukum Online.com²⁰

The flowchart above illustrates the current process for amending the 1945 Constitution, which is primarily carried out through formal stages by the People's Consultative Assembly (MPR). However, what is absent from this procedural scheme is the involvement of a judicial institution that can evaluate both the procedural and substantive constitutional validity of the proposed amendments. This omission opens a critical vulnerability: the process can be exploited by dominant political forces to enact changes that undermine democratic principles, human rights protections, or the separation of powers.

In the Indonesian constitutional context, the identification of an “unchangeable structure” or functional equivalent of an eternity clause must be grounded in the foundational principles expressly articulated in the Pancasila and the Preamble of the 1945 Constitution. These texts contain normative commitments that embody Indonesia’s constitutional identity, and several constitutional scholars argue that they implicitly function as substantive limits to constitutional amendments. The Preamble affirms four core state objectives: the protection of all Indonesians, the promotion of welfare and education, and participation in world order,²¹ which, together with Pancasila’s ideological pillars, form the philosophical “grundnorm” of the Indonesian constitutional order. These include²²: (1) belief in God; (2) humanitarianism; (3) national unity; (4) democracy through deliberation; and (5) social justice. These principles are not merely political aspirations but constitute the *state’s constitutional identity*, placing them in a category that should be protected from amendment, through a supermajority vote²³. This constitutional identity is reinforced by Article 1(1) and Article 1(3), which entrench Indonesia as a *unitary state* and as a *state based on the rule of law*, provisions widely interpreted as structural constants. A doctrinal framework that draws on these immutable principles would therefore provide a normative basis for an Indonesian version of a “basic structure” or “eternity clause,” thereby aligning Indonesian

²⁰ Fitriani Ahlan Sjarif, “Prosedur Perubahan UUD 1945 Dan Dasar Hukumnya,” Hukum Online.com, 2023, <https://www.hukumonline.com/klinik/a/prosedur-perubahan-uud-1945-dan-dasar-hukumnya-1t618a54773ee93/>.

²¹ Yuniwati, “Politik Hukum Dalam Kesejahteraan Rakyat,” *Justicia Sains* 2, no. 2 (2017): 131–40.

²² F Firman Nurwahyu, “Pancasila And The Constitution Of The Republic Of Indonesia 1945 In The Constitution Of Indonesia,” in *Proceeding International Conference on Law, Economy, Social and Sharia*, vol. 1, 2022, 547–71.

²³ Ika Kurniawati, “Keberadaan Klausul Yang Tidak Dapat Diubah (Unamendable Provisions) Sebagai Identitas Konstitusi,” *Lex Renaissance* 7, no. 2 (2022): 226–242, <https://doi.org/https://doi.org/10.20885/JLR.vol7.iss2.art2>.

constitutionalism with global trends while remaining firmly rooted in its indigenous legal-political tradition.

In other words, the absence of a constitutional review mechanism increases the risk of material and formal constitutional violations, creating latent potential for political conflict. Therefore, to safeguard the integrity of Indonesia's constitutional democracy, it is essential to grant the Constitutional Court the authority to review and, if necessary, correct amendments that deviate from the fundamental structure and values enshrined in the 1945 Constitution.

3.1.2. Incoherence with the Principles of the Rule of Law and Constitutionalism

The amendment to the 1945 Constitution is fundamental because it transforms the principle of people's sovereignty from being exercised solely by the MPR to being implemented in accordance with the Constitution. This change establishes an equal status among all state institutions under the 1945 Constitution, enabling them to exercise people's sovereignty within the limits of their respective authorities in accordance with the law.²⁴ However, there are limitations to the Constitutional Court's authority in reviewing amendments to the 1945 Constitution, particularly regarding more fundamental aspects: inconsistencies with the principles of the rule of law and the spirit of constitutionalism.²⁵ From the perspective of modern legal philosophy, a state governed by the rule of law not only requires that all government actions comply with legal norms but also imposes limits on state power through fundamental constitutional principles that are permanent and cannot be arbitrarily altered,²⁶ including constraints on constitutional amendments^{27,28}.

The implementation of popular sovereignty in accordance with the constitution gave rise to the concept of constitutional democracy.²⁹ There are norms that shape the identity of a country, such as the principles of democracy, separation of powers, protection of human rights, and popular sovereignty, which must be maintained intact even in the process of changing the constitution.³⁰ If these principles can be altered without a review mechanism, the risks losing its primary function as an instrument for constraining state power and protecting citizens.

In this context, the Constitutional Court should not only be positioned as an interpreter of laws in relation to the constitution, but also as a protector against possible distortions in changes to the constitution itself. The absence of the Constitutional Court's authority to review the substance of constitutional amendments creates an asymmetry in the Indonesian legal system: rigorous in reviewing ordinary laws, but lax when it comes to altering the highest legal norms.³¹

This is clearly contrary to the principle of checks and balances which is the foundation of constitutional democracy. In a well-functioning system, legislative power, while granted the authority to amend the Constitution, should remain subject to judicial oversight to ensure that

²⁴ Muhammad Mutawalli Mukhlis et al., "Heavy Parliamentary v. Heavy Executive: Ambiguity of Power in Indonesian Constitutional Practices," *Jurnal Media Hukum* 1945, no. 2 (2024): 186–205, <https://doi.org/https://doi.org/10.18196/jmh.v31i2.21703>.

²⁵ Andriyansyah and Lesmana, "Penguujian Terhadap Kebijakan Hukum Terbuka."

²⁶ S. S Martosoewignjo, "FUNGSI KONSTITUSI DALAM PEMBATAAN KEKUASAAN," *Jurnal Hukum* 3, no. 6 (2016): 1–6, <https://doi.org/https://doi.org/10.20885/iustum.vol3.iss6.art1>.

²⁷ Robert Alexy and Julian Rivers, *A Theory of Constitutional Rights* (Oxford: New York Oxford University Press, 2010).

²⁸ Brian Z. Tamanaha, *On the Rule of Law History, Politics, Theory* (Cambridge University Press, 2012), <https://doi.org/https://doi.org/10.1017/CBO9780511812378>.

²⁹ Muhammad Mutawalli Mukhlis et al., "Democratization or Extra-Constitutionalism: Ideas for Limiting the Term of Office for Chairmen of Political Parties in Indonesia," *Jambura Law Review* 6, no. 2 (2024): 367–402.

³⁰ Yamani Akhhmad Zaki Rafina, "Peran Konstitusi Dalam Demokrasi Dan Hak Asasi Manusia Di Indonesia," *CAUSA: Jurnal Hukum Dan Kewarganegaraan* 2, no. 11 (2024): 1–12, <https://doi.org/10.3783/causa.v1i1.571>.

³¹ M. Fadly Hasibuan and Iza Rumesten, "REORIENTASI KEWENANGAN JUDICIAL REVIEW DI MAHKAMAH KONSTITUSI BERDASARKAN PRINSIP SUPREMASI KONSTITUSI," *Ekspose: Jurnal Penelitian Hukum Dan Pendidikan* 22, no. 2 (2023): 42–55, <https://doi.org/10.30863/ekspose.v22i2.2713>.

fundamental state principles are not violated.³² The absence of such a mechanism shows a weakness in Indonesia's constitutional design that has the potential to be exploited for short-term political interests.

Moreover, from a theoretical perspective, the principle of the rule of law (*rechtsstaat*) adopted in Indonesia should ensure that no authority is absolute, including in the process of amending the Constitution.³³ If no institution has the authority to review the substance of constitutional amendments, the amendment process may allow for absolutism in the amendment mechanism, which is actually contrary to the basic idea of a state based on law and the principles of modern democracy.³⁴

Therefore, the limited authority of the Constitutional Court to assess the results of the amendment to the Constitution is a serious weak point and has direct implications for the credibility of the Indonesian constitutional system. Constitutional reform that empowers the Constitutional Court to review amendments, both procedurally and substantively, is urgently needed to close the gap for abuse of power and ensure that the Constitution remains a complete normative foundation and is not easily intervened by short-term political interests.³⁵

The author finds that the MK's lack of authority to review constitutional amendments constitute a systemic weakness that is both procedural and substantive, stemming from the absence of ideological boundaries maintained by the judicial institution. This reinforces the urgency to formulate substantive constitutional parameters as adopted in the Indian and German legal systems.

3.2. Comparison With Other Countries' Legal Systems

In the discussion on expanding the Constitutional Court's authority to review constitutional amendments, it is important to look at the practices that have been carried out by other countries with established constitutional traditions. Although not all legal systems explicitly provide such authority, several countries have developed judicial doctrines and mechanisms to restrain constitutional changes that are considered to deviate from fundamental principles. This comparative study is not intended to be adopted in its entirety, but rather to identify normative and institutional insights that can be adapted to the Indonesian constitutional context.

3.2.1. Germany: Federal Constitutional Court

Germany's experience in upholding the basic principles of the Constitution demonstrates that limitations on the power to amend³⁶ are an integral part of constitutional protection. Through the Grundgesetz (Basic Law) of 1949, Germany implemented what is known as the *Ewigkeitsklausel* or eternity clause in Article 79 paragraph (3), which states that basic principles such as human rights, the democratic system, the rule of law, and federalism cannot be changed even through the amendment process.³⁷ The Federal Constitutional Court (*Bundesverfassungsgericht*) has the authority to assess whether a constitutional amendment

³² Sunarto, "Page Header Toggle Navigation About The Author Sunarto Sunarto Fakultas Ilmu Sosial Universitas Negeri Semarang Indonesia Article Tools Print This Article Indexing Metadata How to Cite Item Email This Article (Login Required) Email the Author (Login Requi," *Masalah-Masalah Hukum* 45, no. 2 (2016): 157–63, <https://doi.org/http://dx.doi.org/10.14710/mmh.45.2.2016.157-163>.

³³ Zahermann Armandz Muabezi, "Negara Berdasarkan Hukum (Rechtsstaats) Bukan Kekuasaan (Machtsstaat)," *Jurnal Hukum Dan Peradilan* 6, no. 3 (2017): 421–46, <https://doi.org/10.25216/jhp.6.3.2017.421-446>.

³⁴ Ahmad and Nggilu, "Denyut Nadi Amandemen Kelima UUD 1945 Melalui Pelibatan Mahkamah Konstitusi Sebagai Prinsip the Guardian of the Constitution."

³⁵ Susanto Polamolo, "Reformasi Konstitusi Indonesia: Fenomena Transisi Kekuasaan," *Supremasi Hukum* 2, no. 1 (2013): 98–124.

³⁶ Donald P. Kommers and Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany: Third Edition, Revised and Expanded*, 3rd ed. (Duke University Press, 2012), <https://doi.org/https://doi.org/10.2307/j.ctv125jqj0>.

³⁷ Ulrich K. Preuss, "The Implications of 'Eternity Clauses': The German Experience," *Israel Law Review* 44, no. 3 (2011): 429–448, <https://doi.org/doi:10.1017/S0021223700018124>.

violates this eternal clause.³⁸

This authority has been exercised in several landmark decisions, including the Lissabon-Urteil (2009), in which the Court evaluated the extent to which the European Union treaties could be accepted without eroding the fundamental principles of the state.³⁹ In its decision, the Court emphasized that democratic sovereignty and the principle of the rule of law are non-negotiable parts of the constitutional identity. This German approach shows how the role of constitutional courts can be expanded to become guardians of the constitutional identity in the face of complex political and legal dynamics.

3.2.2. India: Supreme Court and the Basic Structure Doctrine

India is another example of a democratic country that limits the power of constitutional amendment through a judicial approach. Although the Indian Constitution does not explicitly restrict amendments, the Supreme Court of India since 1973 developed the basic structure doctrine through the landmark decision of *Kesavananda Bharati v. State of Kerala*. In this decision, the Court held that while parliament has the power to amend the constitution under Article 368, the power is not absolute.⁴⁰ Parliament is prohibited from changing the basic structure of the constitution, such as the supremacy of the constitution, separation of powers, popular sovereignty, and judicial independence.⁴¹

This ruling had a profound impact on India's constitutional landscape, as the Supreme Court has since actively monitored the contents of amendments made by parliament. Some amendments have even been declared invalid because they were deemed to be contrary to the basic structure of the constitution. Thus, the judiciary in India acts as the last bastion to maintain constitutional integrity from excessive political intervention.⁴²

This doctrine continues to be applied today and serves as a reference in constitutional reviews tests of policies and amendments, reflecting the ongoing balance between legislative sovereignty and constitutional supremacy. This approach is highly relevant to Indonesia which has a history of constitutional authoritarianism, suggesting that a similar judicial mechanism could serve to restrict substantially unconstitutional amendments.

3.2.3. South Korea and South Africa

Beyond the more progressive models of India and Germany, South Korea and South Africa have adopted a more selective approach, yet still demonstrate a recognition of the importance of judicial review of constitutional amendments. The Constitutional Court of South Korea is not explicitly authorized to review constitutional amendments in principle. However, in practice, the Court can still assess the procedural aspects of an amendment if it violates the constitutionally prescribed process.⁴³ Although limited in scope, this approach indicates that procedural oversight of constitutional amendment forms part of the constitutional oversight mechanism.

Meanwhile, South Africa has a more structured approach. The South African Constitution enshrines foundational provisions that embody core values including human dignity, equality, and the supremacy of the constitution.⁴⁴ The South African Constitutional Court is empowered to

³⁸ Hamdy Mubarak and Yogo Pamungkas, "UNDANG-UNDANG TERHADAP UNDANG- DI INDONESIA DAN JERMAN," *JURNAL REFORMASI HUKUM TRISAKTI* 6, no. 4 (2024): 1444–56.

³⁹ Michael Ray, "Lisbon Treaty," *Britannica*, 2009, <https://www.britannica.com/event/Lisbon-Treaty>.

⁴⁰ Kesavananda Bharati Sripadagalvaru, "Article 368 in Constitution of India" (1973).

⁴¹ Kemal Gözler, *Judicial Review of Constitutional Amendments: A Comparative Study* (Ekin Press, 2008).

⁴² Abhishek Singhvi, "How Basic Structure Doctrine Became One of the Strongest Safeguards for Indian Democracy," *The Indian Express*, 2024, <https://indianexpress.com/article/opinion/columns/the-most-powerful-safeguard-9124526/>.

⁴³ Yunita Nurwulantari and Anna Erliyana, "Menimbang Model Pengujian Keputusan Pejabat Publik Oleh Mahkamah Konstitusi Republik Indonesia (Studi Perbandingan Indonesia Dan Korea Selatan)," *Jurnal Konstitusi* 18, no. 1 (2021): 168–94, <https://doi.org/10.31078/jk1818>.

⁴⁴ Hedwig Adiarto Mau and Tinton Ditisrama, *Teori Dan Hukum Konstitusi.*, Jakarta : PT Raja Grafindo Persada. (Jakarta: PT Raja Grafindo Persada., 2008).

assess whether an amendment to the constitution is in accordance with these fundamental values, particularly if the amendment process bypasses certain procedural thresholds such as a public referendum or the support of two-thirds of parliament.⁴⁵

This hybrid approach demonstrates that judicial review of constitutional amendments needs not be absolute or comprehensive, but can instead be focused on critical aspects, both procedural and substantive. This opens up space for legal systems like Indonesia to develop a contextual, progressive model of supervision that still respects the principles of democracy and the supremacy of the constitution.

Drawing on these comparative models, Indonesia could benefit substantially by incorporating constitutional safeguards similar to India's Basic Structure or Germany's Eternity Clause. Implementing such a doctrine would not merely be a normative adjustment, but a substantive transformation in ensuring that the Constitution remains resistant to short-term political manipulation.

For example, adopting a constitutional review model based on India's approach would allow Indonesia's Constitutional Court to protect fundamental democratic values—such as separation of powers and human rights—by invalidating amendments that threaten those principles, even if procedurally correct. Similarly, enacting a version of Germany's eternity clause could embed unchangeable principles like constitutional supremacy and judicial independence into the Indonesian framework.

If Indonesia adopts this model:

- a. It would strengthen checks and balances by preventing parliamentary majorities override core constitutional values.
- b. It would enhance democratic resilience by guarding against authoritarian regression masked by formal amendment procedures.
- c. It would increase public trust by demonstrating robust safeguards that protect the spirit of reformasi.

Thus, Indonesia does not merely imitate foreign doctrines, but contextualizes them to create a hybrid model that aligns with its own constitutional tradition while learning from international best practices.

3.3. Recommendations for Strengthening the Role of the Constitutional Court

3.3.1. Urgency of Limited Amendment to Article 24C

One of the key steps in strengthening the role of the Constitutional Court is to propose a limited amendment to Article 24C of the 1945 Constitution. To formally grant the Constitutional Court the authority to review constitutional amendments, a limited constitutional amendment to Article 24C of the 1945 Constitution must be initiated. This article currently outlines the Court's jurisdiction to review laws but does not mention constitutional amendments. The proposed revision would explicitly expand the Court's jurisdiction to include procedural and substantive review of constitutional amendments. This change must follow the amendment process outlined in Article 37 of the 1945 Constitution, which involves proposals by the People's Consultative Assembly (MPR), discussion and approval by at least two-thirds of MPR members, and final ratification.

Furthermore, the amendment can be accompanied by an implementing law or revised Constitutional Court Law (UU MK), which would detail the procedural aspects of how the Court will conduct the review, such as who can file petitions, timelines for review, and what principles will be used to assess whether a constitutional amendment violates basic principles.

This two-layered approach, constitutional amendment and implementing legislation, ensures legal certainty and avoids potential constitutional conflicts in the future. So far, the article only regulates the authority of the Constitutional Court in testing laws against the Constitution, without providing a legal basis for testing changes to the constitution itself. This creates a normative vacuum that has the potential to weaken the principle of constitutional supremacy,

⁴⁵ Arie Elcaputera, "Desain Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 Berdasarkan Sistem Ketatanegaraan Indonesia" (UNIVERSITAS JAMBI, 2024).

especially when constitutional amendments are carried out politically without a judicial correction mechanism.⁴⁶

In this context, limited amendments need to be directed to open up space for the Constitutional Court to be able to test the validity of an amendment, both from a procedural and substantial aspect. Procedural testing includes the aspect of whether the process of changing the Constitution is carried out in accordance with the procedures stipulated in Article 37 of the 1945 Constitution, such as the qualifications of the proposer, stages of discussion, and quorum and approval requirements. On the other hand, substantive testing will provide protection for the basic principles of the constitution that must not be violated, even though the changes are procedurally valid.

By regulating this test explicitly in the constitution, the Constitutional Court will not be considered to have exceeded its authority, but rather will carry out a guarding function so that the constitution is not deviated from by dominant political power. This will emphasize the role of the Constitutional Court not only as a protector of the Constitution from ordinary legislation, but also from the possibility of more fundamental constitutional damage.

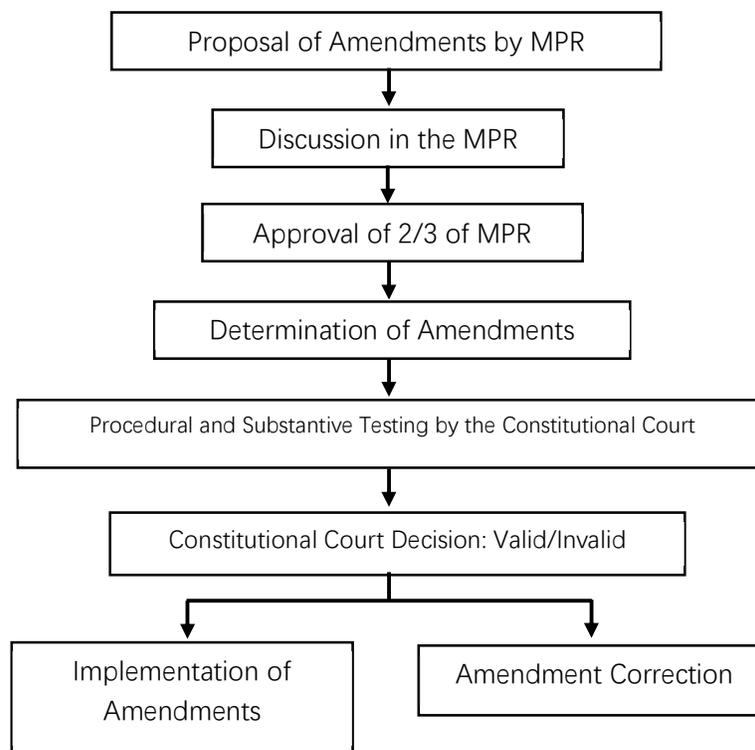


Figure 2. Flowchart of Constitutional Amendments with Testing by the Constitutional Court

Source: detikEdu⁴⁷

The flowchart above illustrates a proposed reform model that integrates the Constitutional Court into the constitutional amendment process. Under this model, amendments proposed by the MPR would not automatically acquire legal force upon approval. Instead, they must first undergo procedural and substantive testing by the Constitutional Court. This mechanism serves as a judicial safeguard to prevent constitutional damage resulting from amendments that conflict

⁴⁶ Muhammad Mutawalli Mukhlis et al., "Democratic State Governance: The Urgency of Implementing Conventions in Constitutional Practices in Indonesia," *Fenomena* 23, no. 1 (2024): 1–14.

⁴⁷ Kristina, "Pasal 37 UUD 1945, Begini 5 Aturan Perubahan Undang-Undang Dasar," detikEdu, 2021, https://www.detik.com/edu/detikpedia/d-5842641/pasal-37-uud-1945-begini-5-aturan-perubahan-undang-undang-dasar#:~:text=* detikTravel. * detikEdu.

with foundational principles such as democratic governance, human rights, and the rule of law. This proposal aims to balance legislative authority with judicial oversight, thereby reducing the potential for political abuse, enhancing constitutional integrity, and reinforcing the system of checks and balances in Indonesia's democratic system.

Strengthening the role of the Constitutional Court is not only limited to testing laws, but also needs to be directed to ensure that changes to the constitution do not conflict with the basic values that form the identity of the Indonesian constitution. In this context, the Constitutional Court can function as a guardian of the integrity of the constitution through a mechanism for testing constitutional amendments, both procedurally and substantively.

By adopting a comparative approach from countries such as India and Germany, there is an urgency to formulate constitutional limitations that cannot be removed or changed through ordinary political processes. Principles such as the rule of law, democracy, separation of powers, and protection of human rights are pillars that should not be set aside by political forces, even through formal amendments. Therefore, the mechanism for testing by the Constitutional Court is an important instrument to ensure that constitutional changes do not violate the spirit and identity of the 1945 Constitution.⁴⁸

Furthermore, it is necessary to design a more open and participatory amendment procedure. Constitutional amendments should not only be the domain of technocrats and political elites in the MPR, but should involve extensive public testing and judicial control space before the changes gain legal force. In this scheme, the Constitutional Court has a strategic position to review the formal and substantive validity of constitutional changes, before they are definitively enforced.

With this approach, the Constitutional Court is positioned not merely as an adjudicator of constitutional disputes, but also as an institution that guarantees the continuity of the basic principles of the state. This role is crucial in preventing the abuse of power, particularly when amendments are pursued for short-term political interests that risk damaging the long-term constitutional order.⁴⁹

3.3.2. Recommendations for Implementing Other Countries' Models

The experience of several countries with strong constitutional traditions can be an important reference in formulating the new role of the Constitutional Court in Indonesia. One of the most relevant examples is Germany, where Article 79 Paragraph (3) of the Grundgesetz provides that amendments of the constitution's fundamental principles; such as the federal system, democracy, and protection of human rights, are prohibited. This clause is known as the eternity clause, and is the last safeguard against the possibility of abuse of the amendment procedure by the political majority in parliament.

In addition to Germany, India provides a significant precedent through the Basic Structure Doctrine. In *Kesavananda Bharati v. State of Kerala* (1973), the Supreme Court of India held that parliament may not alter the basic structure of the constitution, even though it has the authority to amend it. The basic structure encompasses the supremacy of the constitution, state sovereignty, the democratic system, and protection of fundamental rights. This doctrine effectively constrains legislative power and reinforces the role of the court as a guardian of constitutional values.

Other relevant models include South Korea and South Africa. Both countries adopt a hybrid approach, in which constitutional courts can conduct limited judicial review of constitutional changes if they conflict with fundamental principles such as human rights and the principle of justice. Although not as strict as the German or Indian models, this approach shows that the judicial role in overseeing constitutional amendments is a legitimate practice in modern democracies.

⁴⁸ Muhammad Mutawalli Mukhlis et al., "Periodization of General Elections: Ideas and Refinements in Indonesia," *Substantive Justice International Journal of Law* 6, no. 2 (2023): 118–137, <https://doi.org/https://doi.org/10.56087/substantivejustice.v6i2.245>.

⁴⁹ Mutawalli, Wahab, and Ayub, "Constitutional Complaint: A Comparative Study of The Authority of The Constitutional Courts of The Republic of Indonesia and Croatia."

Drawing lessons from these countries, Indonesia can adopt a similar principle⁵⁰, either as a norm prohibiting changes to basic principles (*clausula petrea*) or the adoption of the Basic Structure Doctrine. Such a measure would strengthen the position of the Constitutional Court in ensuring that any constitutional changes remain within the corridor of the rule of law and constitutionalism.

3.3.3. Increasing the Legitimacy and Independence of the Constitutional Court

Different from previous studies that focused more on the need for normative change alone, this study emphasizes the need to combine the reformulation of the Constitutional Court's authority with the application of the 'basic structure' doctrine as a substantive parameter, as well as strengthening the procedural aspect through the supervision of the Constitutional Court. This combined approach presents a hybrid and contextual amendment testing model that is unique to Indonesia.

Strengthening the authority of the Constitutional Court must be accompanied by increasing the legitimacy and independence of its institution. Granting the authority to test amendments to the Constitution, although normatively important, will not be effective if it is not accompanied by institutional strengthening of the Court itself. In this case, transparency in the process of appointing judges, accountability in the decision-making process, and professionalism in carrying out duties are absolute prerequisites.⁵¹

The first step is to reform the selection system for constitutional judges to prevent domination by political interests. A more transparent, competency-based selection mechanism that incorporates public participation will enhance public trust in the independence of judges. In addition, a strong ethical oversight system needs to be built to maintain integrity and avoid conflicts of interest in the constitutional review process.

Legitimacy can further be enhanced in the Court's proceedings, including providing space for public, academic, and civil society participation in cases that have broad constitutional impacts. By incorporating multi-disciplinary views and expanding deliberative space, the Constitutional Court will be better able to produce decisions that are not only legally valid, but also socially and politically legitimate.

Granting the Constitutional Court the authority to review constitutional amendments should be viewed as part of a broader agenda of constitutional reform. The goal is not to make the Constitutional Court a superbody institution, but rather to restore the role of the constitution as the highest basic norm that is not subject to momentary majority calculations. Within this framework, the Constitutional Court becomes an institution that maintains the balance between power and law, between political will and the fundamental principles of the state.

4. Conclusion

This study confirms that the Indonesia's current constitutional framework contains a critical gap in oversight: the Constitutional Court's lack of authority to review amendments to the 1945 Constitution. The findings underscores that this gap poses significant risks for the erosion of democratic values, human rights, and the separation of powers, especially when constitutional amendments are made based on political interests without judicial review.

The results indicates that comparative models, such as the *basic structure doctrine* in India and the *eternity clause* in Germany, offer feasible mechanisms to safeguard constitutional integrity. These models validate the idea that constitutional amendments must be subject to both procedural and substantive review to ensure they do not violate inviolable principles.

Therefore, this paper proposes a hybrid model for Indonesia in which the Constitutional Court is empowered to conduct limited procedural and substantive review of constitutional

⁵⁰ Albert H. Y. Chen and Andrew Harding, *Constitutional Courts in Asia a Comparative Perspective* (United Kingdom: Cambridge University Press, 2018), <https://doi.org/https://doi.org/10.1017/9781108163903>.

⁵¹ Muhammad Mutawalli Mukhlis et al., "Regional Government According to the 1945 Constitution: Ideas Refinements and Law Reform," *Journal of Law and Legal Reform* 5, no. 2 (2024): 485–530, <https://doi.org/https://doi.org/10.15294/jllr.vol5i1.3125>.

amendments. Such a mechanism is necessary not only to safeguard the supremacy of the Constitution but also to prevent authoritarian backsliding disguised as formal legality.

The research further underscores that institutional reform must accompany the expansion of the Constitutional Court's authority. Strengthening the Court's transparency, professionalism, and legitimacy of the Constitutional Court is essential for its effectiveness as a guardian of constitutionalism. Without such reforms, newly granted powers may be vulnerable to political co-optation or public distrust.

In conclusion, granting the Constitutional Court limited authority to review constitutional amendments, supported by procedural safeguards and doctrinal clarity, is a necessary step in the evolution in Indonesia's constitutional democracy. This measure will close the current existing normative gap, strengthen the system of checks and balances, and safeguard the foundational principles of the Indonesian state.

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