

Concept of Unconstitutionally Constitutional Amendment by the Constitutional Court to Deter Autocratic Legalism

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Received: 28-03-2024; Accepted: 15-06-2024; Published: 30-06-2024;

Abstrak

Sejak tahun 2019 hingga saat ini, Indonesia diyakini akan mengalami gejala legalisme otokratis yang ditunjukkan dengan 3 (tiga) tanda, antara lain pertama, partai kooptasi yang berkuasa di parlemen; kedua, menggunakan hukum untuk melegitimasi keinginan akan kekuasaan sepihak; Ketiga, mengganggu independensi peradilan. Legalisme otokratis ini disebabkan oleh penyelenggaraan negara yang mengancam hak konstitusional warga negara. Dalam keadaan seperti ini, satu-satunya lembaga tinggi negara yang dapat dijadikan harapan untuk membendung dampak tersebut adalah Mahkamah Konstitusi. Tulisan ini menganalisis “Penerapan Inkonstitusional Amandemen Konstitusi yang dilakukan Mahkamah Konstitusi untuk Menangkal Legalisme Otokratis” dengan menggunakan metode yuridis normatif melalui pendekatan komparatif. Hasil penelitian ini adalah untuk mengkaji kemungkinan dimasukkannya doktrin Amandemen Konstitusional yang Inkonstitusional ke dalam kewenangan Mahkamah Konstitusi.

Kata Kunci: Legalisme Otokratis; Konstitusionalisme; Mahkamah Konstitusi.

Abstract

Since 2019 until now, Indonesia is believed to be experiencing symptoms of autocratic legalism as indicated by 3 (three) signs, including first, the ruling co-optation party in parliament; secondly, using law to legitimize the desire for unilateral power; Third, disrupting the independence of the judiciary. This autocratic legalism is caused by the administration of the state which threatens the constitutional rights of citizens. In such circumstances, the only high state institution that can be used as a hope to stem these consequences is the

Constitutional Court. This paper analyzes "Unconstitutional Implementation of Constitutional Amendments by the Constitutional Court to Counteract Autocratic Legalism" using a normative juridical method through a comparative approach. The result of this research is to examine the possibility of the inclusion of the Unconstitutionally Constitutional Amendment doctrine within the authority of the Constitutional Court.

Keywords: *Autocratic Legalism; Constitutionalism: Constitutional Courts*

Introduction

Since the reform era, the Constitutional Court of the Republic of Indonesia (CCRI) has played an important role in protecting the constitution of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945).¹ One strategic role of the CCRI is to review laws or government regulations in lieu of laws against the 1945 Constitution of the Republic of Indonesia.² It was noted that the review of the law against the 1945 Constitution of the Republic of Indonesia since 2003 until now has occupied the highest number of cases of 1628 cases or as a percentage has a total of 46.93%, with the number of cases granted or partially granted 298 cases or as a percentage of 18.3 %.³ This amount is the highest than the other case.⁴ If we look at it, actually the number of cases that were granted or partially granted could still increase. This is because the CCRI is hindered by the principle of judicial restraint to limit the trial of cases handled, so that all cases that require justice rather than legal certainty can be granted by the CCRI, bearing in mind that the basis for

¹ Ahmad and Novendri M. Nggilu, "Denyut Nadi Amandemen Kelima UUD 1945 melalui Pelibatan Mahkamah Konstitusi sebagai Prinsi the Guardian of the Constitution" *jurnal konstitusi*, 16(4) Desember 2019: 785-808 DOI: <https://doi.org/10.31078/jk1646>

² See Article 24C Paragraph (1) The 1945 Constitution of the Republic of Indonesia. See also, Constitutional Court Decision on Case Number 138/PUU-VII/2009 concerned about Judicial Review on Government in Lieu of Law Number 4 of 2009 regarding Amendments to Law Number 30 of 2002 regarding the Corruption Eradication Commission against the 1945 Constitution of the Republic of Indonesia. See Also, Ni'matul Huda "Pengujian Peraturan Pemerintah Pengganti Undang-undang oleh Mahkamah Konstitusi" *Jurnal Konstitusi*, 7(5), Oktober 2010: 73-91 <https://jurnalkonstitusi.CCRI.id/index.php/jk/article/download/754/242>

³ Mahkamah Konstitusi Republik Indonesia, *Rekapitulasi Perkawa Pengujian Undang-undang*, 8 April 2023, <https://www.CCRI.id/index.php?page=web.RekapPUU&menu=4>, accessed date on 9 April 2023

⁴ Miftah Faried Hadinatha, "Peran Mahkamah Konstitusi Mencegah Gejala Autcratic Legalism di Indonesia" *jurnak konstitusi*, 19(4), Desember 2022: 741-765 DOI: <https://doi.org/10.31078/jk1941>

reviewing laws and the founding of the CCRI is a commitment to compliance with the constitution.⁵

The existence of restrictions given to CCRI has a problem. This is because the CCRI cannot prevent the state from violating the constitutional rights of citizens on the pretext of conformity with the law and or the constitution, which is known as autocratic legalism.⁶ Autocratic legalism is a condition where the autocratic government in its government acts to carry out its agenda, using law to legitimize its actions.⁷ This principle is also understood as forcing political interests beyond citizens' will. Following this view, the process of forming (UU) laws is fast. It is carried out without sufficient deliberation, or anything that is not in line with the citizens' wishes, which means that it can be categorized as understanding legal autocracy.⁸

If we look at Indonesia itself, it has experienced autocratic legalism with many laws being formed quickly, not even for more than a year, these laws were immediately tested by the Constitutional Court. However, when tested, CCRI could not do much. The authority of the CCRI in reviewing laws is only limited to adjustments to the norms contained in the 1945 Constitution of the Republic of Indonesia. Unfortunately, the review carried out by the CCRI does not extend to its review of the constitutional values of the Indonesian state like the authority of the Unconstitutional Constitution Amendment. As a result, there were many urgent tests to be granted, but the CCRI could not do much because the CCRI could not evaluate the value of constitutionalism or state the meaning of the constitution so

⁵ James B. Thayer "The Origin and Scope of the American Doctrine of Constitutional Law" *Harvard Law Review*, 7(3), October 1893: 129-156. <https://www.jstor.org/stable/1322284>. See also, Pan Mohamad Faiz "Dimensi Judicial Activism dalam Putusan Mahkamah Konstitusi" *jurnal konstitusi*, 13(2), October 2016: 306-430 <https://doi.org/10.31078/jk1328>.

⁶ David Held, *Models of Democracy*, second edition, policy press, 1996, page 241 and 264

⁷ Kim Lane Scheppele, "Autocratic Legalism," *Chicago Law Review* 85 (2018): 574, <https://doi.org/https://www.jstor.org/stable/10.2307/26455917>.

⁸ Zainal Arifin Mochtar and Idul Rishan, "Autocratic Legalism: The Making of Indonesian Omnibus Law", *Yustisia Jurnal Hukum*, 11, no. 1 (2022): 36–37, <https://doi.org/10.20961/yustisia.v11i1.59296>.

that the sound of the constitution was not in accordance with the needs of the Indonesian people.⁹

Seeing the CCRI's limited authority, it is necessary to underline the word Unconstitutionalluy Constitution Amendment as an authority. The term is an Act (which is primarily carried out by a judicial institution)¹⁰ to state that the procedure for amending or changing material in a constitution or the meaning of the constitution in the regulations under it is deemed to result in the removal of the basic principles of the state or the discovery of things that actually change the identity of the state.¹¹ If you quote from Yaniv Roznai's dissertation, constitutional courts such as the Constitutional Court (CCRI in Indonesia) have the right competence to decide that the meaning of changing the constitution, the material in the constitution or the procedure for changing the constitution is unconstitutional.¹²

Based on this background, the discussion regarding the Unconstitutional Constitution Amendment becomes an urgent to examine whether this authority can effectively protect the constitutional rights of citizens as a result of autocratic legalism. The study of the urgency of the Unconstitutional Constitution Amendment in Indonesia or the study of its existence has actually been reviewed in previous legal writings, which include: *First*, an article written by Miftah Faried Hadinatha entitled "The Role of the Constitutional Court in Preventing Symptoms of Autocratic Legalism in Indonesia" this paper discusses more the problems of autocratic legalism in Indonesia and how the CCRI can prevent the symptoms that are currently being experienced by Indonesia. Miftah Faried suggested one solution, one of which was to adopt the doctrine of unconstitutional constitutional amendment in deciding cases reviewing laws.¹³

⁹ Wicaksana Dramanda, "Menggagas Penerapan Judicial Restraint di Mahkamah Konstitusi" *jurnal konstitusi*, 11(4), Desember 2014: 617-631 <https://jurnalkonstitusi.CCRI.id/index.php/jk/article/view/1141>

¹⁰ Aharon Barak, "Unconstitutional Constitutional Amendements," *Israel Law Review* 44, no. 3 (2011): 323 <https://doi.org/10.1017/S0021223700018082>

¹¹ Pan Mohamad Faiz, *Amendemen Konstitusi: Komparasi Negara Kesatuan Dan Negara Federal* (Depok: Rajawali Pers, 2019), 145.

¹² Yaniv Roznai, "Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers" (The London of School of Economics and Political Science, 2014), 16.

¹³ Miftah Faried Hadinatha, *Peran Mahkamah Konstitusi Mencegah Gejala Autcratic Legalism di Indonesia*

Second, a dissertation written by a legal expert from Israel, Yaniv Roznai entitled “Unconstitutional Constitutional Amendments: The Limit of Amendment Powers.” Yaniv is of the opinion that several constitutions of countries in the world do not explicitly regulate amendment restrictions so that some basic provisions which are state principles are very risky to be changed with the aim of perpetuating power and eliminating democratic principles in a country by the holders of state power (in this case it could be an amendment to the constitution or forming the rules under it). To prevent this, as result, the judiciary must take on the role of identifying certain constitutional subjects and determining a set of basic constitutional principles that cannot be changed through the amendment process.¹⁴

The difference between previous writings and legal writings made by the author is analyzing the effectiveness of using the Unconstitutional Constitution Amendment in preventing the Autocratic Legalism phenomenon that is currently happening in Indonesia and analyzing the ideal implementation of the Unconstitutional Constitution Amendment by the CCRI.

Method

This research method used in this research is a normative method¹⁵ study use a statutory approach and a conceptual approach which examines autocratic legalism and phenomena in Indonesia within the scope of the concept of Unconstitutional Constitutional Amendments by the Constitutional Court. The data sources and legal materials used include primary, secondary and tertiary legal materials.

Findings and Discussion

Autocrate Legalism and The Phenomenon in Indonesia

Autocrate legalism is an attitude that originates from the desire of the authorities to exercise their power in a lasting manner. Kim Lane Schepele argues

¹⁴ Yaniv Roznai, *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers*

¹⁵ Reza Noor Ihsan, “Telaah Terhadap Putusan Lepas Dari Segala Tuntutan Hukum (Onslaag Van Recht Vervolging) Pada Perkara Tindak Pidana Korupsi,” *Belom Bahadat* 12, no. 1 (2022): 66–79, <https://ejournal.iahntp.ac.id/index.php/belom-bahadat>.

that symptoms of autocratic legalism can be identified from the nature of the government which always attacks government oversight institutions when carrying out governmental authority.¹⁶ In Basak Cali's view, autocratic legalism is different from authoritarianism. Authoritarianism tends to reject the law and even the constitution, while autocratic legalism agrees to the law and the constitution, but this act of approval is done as justification for the actions of its government, even though these actions are not needed and tend to be rejected by society.¹⁷

Kim Lane Schepple added that the symptom of autocratic legalism is not just how they use law as a tool to justify arbitrariness. When they are in power, a government that is autocratic legalism will use existing laws to reduce the principles of constitutionalism.¹⁸ Furthermore, according to Anna Sledzinska Simon, a government with an autocratic legalism pattern also has the character of a government that rejects liberal democracy or is called the nature of illiberal democracy.¹⁹ The government has characteristics, including: first, rejecting the basic principles of liberal constitutionalism. One of the basic rejections of the principle of constitutionalism is to abolish the checks and balances order to operate its political interests. Second, the use of legal instruments to achieve political goals is illegitimate in principle. Third, the legitimacy of parliament which often delegates the problem of forming laws to judicial institutions.²⁰ Related to the third feature, Ibnu Sina Candranegara thinks that politically legislators tend to want to defend the laws that have been passed, as a result there is a delegation of public discourse from the DPR to the Constitutional Court (MK).²¹ The results of the DPR's actions have increased the tendency for political judicialization,²² so that the

¹⁶ Kim Lane Schepple, *Autocratic Legalism*

¹⁷ Başak Çali, "Autocratic Strategies and the European Court of Human Rights," *European Convention on Human Rights Law Review* 2, no. 1 (2021): 12, <https://doi.org/10.1163/26663236-bja10015>

¹⁸ Kim Lane Schepple, 2019, "Legal Autocrats are on the Rise. They Use Constitution and Democracy to Destroy Both", diunduh 23 April 2022, <https://theprint.in/opinion/legal-autocrats-are-on-the-rise-they-use-constitution-and-democracy-to-destroy-both/332799/>.

¹⁹ Anna Sledzinska Simon, *Public Reason and Illiberal Democracy, in Constitutionalism Under Stress* (Oxford: Oxford University Press, 2020), 297–298.

²⁰ Anna Sledzinska Simon, *Public Reason and Illiberal Democracy*

²¹ Ibnu Sina Chandranegara, "Defining Judicial 2 Independence and Accountability Post Political Transition," *Constitutional Review* 5, no. 2 (2019): 294–329.

²² B Dressel and T Inoue, "Megapolitical Cases before the Constitutional Court of Indonesia since 2004: An Empirical Study," *Constitutional Review* 4, no. 2 (2004): 157–187; B

legislators create a difficult situation for the judges at the Constitutional Court to create cooperative intervention against the Constitutional Court.²³

Another variant of autocratic legalism is also referred to as Abusive Constitutionalism or quoting from the view of Susi Dwi Harijanti is an act of implementation that is in accordance with the material in the written constitution, but the value of constitutionalism tends to be abandoned by government officials. According to David Landau, the government's action in abusive constitutionalism is an act of government which results in the implementation of an undemocratic state as a result of the meaning in organic laws or changes to the constitution.²⁴

Rigid acts of government with an autocratic legalism pattern are also often understood as acts of forcing interests beyond the will and needs of citizens. This is often indicated by the rapid formation of laws accompanied by the absence of sufficient deliberations. As a result, many laws are tested by the public and these laws are not implemented in a sustainable manner.²⁵ Apart from forming laws, there is also the issue of amending the constitution with the aim of perpetuating power. One of the examples revealed by Andrea Cassani is the manipulation of tenure in certain government sectors. Andreaa Cassani further said that autocratization by the executive to manipulate their restrictions is a process to weaken restrictions on them, so that there is no contestation that affects the possibility of citizens to choose who rules again with the aim of not leaving office.²⁶

Indonesia is inseparable from the problem of autocratic legalism. Zainal Arrifin Mochtar and Idul Rishan consider that there are 3 (three) signs or symptoms that Indonesia has entered a phase of autocratic legalism, including: (1) the co-optation of the ruling party in the parliament, (2) the violations of the law and

Dressel, R Sanchez-Urribarri, and A Stroh, "The Informal Dimension of Judicial Politics: A Relational Perspective," *Annual Review of Law and Social Science* 13 (2017): 413–430;

²³ Ibnu Sina Chandranegara, *Kemerdekaan Kekuasaan Kehakiman Pasca Transisi Politik* (Jakarta: Radjawali Press, 2019). Hal. 70

²⁴ David Landau, "Abusive Constitutionalism," *U.S. Davis Law Review* 47, no. 189 (2013): 195.

²⁵ Ibnu Sina Chandranegara, "Pengadopsian Mekanisme *Fast-Track Legislation* dalam Pengusulan Rancangan Undang-Undang oleh Presiden", *Jurnal Penelitian Hukum De Jure* 21, no. 1 (2021): 123-140

²⁶ Andrea Cassani, "Autocratisation by Term Limits Manipulation in Sub-Saharan Africa," *Africa Spectrum* 55, no. 3 (2020): 230, <https://doi.org/10.1177/0002039720964218>.

constitution, (3) the undermined judicial independence.²⁷ This phenomenon is concretely shown in the constitutional events as follows:

First, weakening the Corruption Eradication Commission through Law Number 19 of 2019 concerning the Corruption Eradication Commission (UU KPK). The loss to the state as a result of the criminal act of corruption makes the state feel that corruption in the executive body of the state government needs to be crushed in an extraordinary way and an extraordinary institution that specifically handles corruption cases.²⁸ Based on this background, the community then mandated the establishment of an anti-corruption institution,²⁹ which was later determined to be realized by establishing the Corruption Eradication Commission, through Law Number 30 of 2002 concerning the Corruption Eradication Commission (UU KPK).

Initially, the presence of the KPK was formed with an independent power model, in order to ensure the professionalism of the KPK in carrying out prosecutions of corruption.³⁰ The independent form of the KPK has also been approved by the United Nations Convention Against Corruption (UNCAC) which has been ratified through Law Number 26 of 2007 concerning UNCAC Ratification.³¹ However, the independence of the KPK was reduced after the revision of the KPK Law through Law Number 19 of 2019 (UU 19 2019). This can be seen normatively in Article 3 which states that the KPK is declared as an institution that belongs to

²⁷ Zainal Arifin Mochtar and Idul Rishan, "Autocratic Legalism: The Making of Indonesian Omnibus Law", *Yustisia Jurnal Hukum*, 11, no. 1 (2022): 36–37, <https://doi.org/10.20961/yustisia.v11i1.59296>.

²⁸ Andi Hamzah. *Korupsi di Indonesia dan Pemecahannya*, Jakarta: Gramedia Pustaka Utama, 1991, hlm. 7

²⁹ Arman Tjoneng, Cristin Septina Basani, Novalia Sidabutar, "Menguji Kewenangan Dewan Pegawas Komisi Pemberantasan Korupsi dalam Pemberian Izin Pengegledahan Sebagai Tindakan Merintang Proses Penyidikan (*Obstruction of Justice*)" *Jurnal Esensi Hukum*, 2(2), Desember 2020: 48-63 <https://doi.org/10.35586/esensihukum.v2i2.35>

³⁰ Zainal Arifin Mochtar, *Lembaga Negara Independen: Dinamika Perkembangan dan Urgensi Penataannya Kembali Pasca-Amandemen Konstitusi*, (Rajagrafindo Persada: Depok, 2016).

³¹ Sasi Wahyuningrum, Hari Sutra Disemadi, and Nyoman Serikat Putra Jaya, "Independensi Komisi Pemberantasan Korupsi: Benarkah Ada?" *Refleksi Hukum: Jurnal Ilmu Hukum* 4, no. 2 (2020): 245–255. <https://doi.org/10.24246/jrh.2020.v4.i2.p239-258>

the executive branch of power.³² This article explicitly eliminates the principle of the Corruption Eradication Commission as a fourth pillar state institution, which means that the Corruption Eradication Commission is not truly declared as an independent state institution.³³

In addition to including the KPK as part of the executive state institution, reducing the independence of the KPK is also coupled with the inclusion of the KPK supervisory board which makes the KPK have to ask for permission for the purposes of investigations, wiretapping, searches, or confiscation of the assets of corruptors.³⁴ This independence also extends to the staffing context, where KPK employees must enter as ASN. If a KPK employee is an ASN, then he or she is a government employee and works and is subject to government institutions.³⁵ The loss of the KPK's independence caused the KPK's performance to experience a significant retrogression. Based on the annual report of the Indonesian Corruption Watch (ICW), Hand-Catching Operations (OTT) carried out by the KPK itself tended to decrease drastically when compared to the number of OTTs that were carried out before the revision of the KPK Law. From 2016 to 2018 the KPK has carried out 66 OTTs, while from 2019 to 2021 the OTTs carried out by the KPK have only been carried out 34 times which is down 50% from the number of OTTs carried out before the KPK Law underwent revision.³⁶ Even the prevention of acts of corruption by the KPK did not go smoothly, ICW was of the opinion that the spirit of revising the KPK Law which was brought in to prevent corruption was not in sync with the implementing regulations and was hindered by the existence of a system that was not yet integrated within the KPK itself.³⁷

³² Zainal Arifin Mochtar, "Independensi Komisi Pemberantasan Korupsi Pasca Undang-Undang Nomor 19 Tahun 2019," *Jurnal Konstitusi* 18, no. 2 (2021): 330-331. <https://doi.org/10.31078/jk1823>.

³³ Bruce Ackerman, "The New Separation of Powers", *Harvard law review*, Vol. 113, HVLR 633, January 2000, Page 72 <https://www.jstor.org/stable/pdf/1342286.pdf>

³⁴ Article 37B Paragraph (1) letter b Law Number 19 of 2019 concerning the Second Amendment to the Law Number 30 of 2002 concerning the Corruption Eradication Commission

³⁵ Article 1 Paragraph (6) Law Number 19 of 2019 concerning the Second Amendment to the Law Number 30 of 2002 concerning the Corruption Eradication Commission

³⁶ Indonesia Corruption Watch, *Laporan Pemantauan Dua Tahun Kinerja KPK 2019-2021*, Jakarta: ICW, 2022, Page 24

³⁷ Indonesia Corruption Watch, *Laporan Pemantauan Dua Tahun Kinerja KPK 2019-2021*, Page 37

Second, the issue of adding the presidential term to 3 (three) periods.

Apart from being aimed at establishing a real presidential system, this limitation was a trauma from the New Order era, which did not have a limitation of power.³⁸ Therefore, at the time of the amendment to the 1945 Constitution of the Republic of Indonesia, the presidential term of office was limited to one 5 (five) year period with a maximum of 2 (two) terms.³⁹ Saldi Isra revealed that the purpose of this restriction was for 2 (two) purposes, namely preventing someone from being in power for a very long time and encouraging the circulation of leadership and cadre formation.⁴⁰

The maximum provisions for the presidential term of office then experienced a shock when the Covid-19 pandemic hit Indonesia. This problem has forced development in Indonesia to be delayed to deal with the impact resulting from the pandemic. Even after the pandemic, the country was preoccupied with preventing the issue of an economic recession and recovering the country's economy as well as the matter of moving the National Capital to the island of Borneo.⁴¹ This was later echoed by Minister of Investment Bahlil Lahadalia and Minister of Maritime Affairs and Investment Luhut Binsar Pandjaitan to amend the constitution in a limited manner by increasing the term of office of the president.⁴²

The idea of extending the term of office of the president is essentially a polemic. If the extension of the presidential term of office is realized, then this extension has violated the nature of the presidential system to provide certainty of a more stringent term of office.⁴³ What executives do is a form of avoiding term

³⁸ The Conversation, "Mengapa Masa Jabatan Presiden Harus Dibatasi?", <https://theconversation.com/mengapa-masa-jabatan-presiden-harus-dibatasi-181579>, diakses pada 13 April 2023

³⁹ Compare Article 7 on the original script of the 1945 constitution of the Republic of Indonesia and Article 7 on the result of the amendment of the 1945 1945 constitution of the Republic of Indonesia

⁴⁰ Saldi Isra, *Sistem Pemerintahan: Pergulatan Ketatanegaraan Menuju Sistem Pemerintahan Presidensial* (Depok: Rajawali Pers, 2020), 180.

⁴¹ Tempo, 2022, "Survei LSI: Masyarakat Tolak Semua Alasan Perpanjangan Masa Jabatan Jokowi", <https://nasional.tempo.co/read/1566802/survei-lsi-masyarakat-tolak-semua-alasan-perpanjangan-masajabatan-jokowi/full&view=ok>, accessed date on 13 april 2023

⁴² Titi Anggarini, "Siasat Pemunduran Pemilu Demi Perpanjangan Masa Jabatan", <https://news.detik.com/kolom/d-5993094/siasat-pemunduran-pemilu-demi-perpanjanganmasajabatan>, accessed date on 13 April 2023

⁴³ PSHK, *Penundaan Pemilu dan Perpanjangan Masa Jabatan Presiden Bentuk Pembangkangan Konstitusi*, 4 Maret 2022, <https://pshk.or.id/publikasi/penundaan-pemilu-dan->

limit evasion to remove presidential terms limits.⁴⁴ Daniel Nowack and Julia Leininger stated that the elimination of restrictions on power is a threat to the continuation of democracy in a country.⁴⁵

Third, the position of the acting head of the region. the issue of the simultaneous general elections and regional head elections in 2016 resulted in a state of emptying the regional head's definitive term of office until 2024.⁴⁶ However, in order to continue to run the government, the state fills in temporary positions known as officials. This position is not like a definitive regional head who is directly elected by the people, but based on appointment by the central government in accordance with statutory provisions.⁴⁷ The authority possessed by officials is very limited, even to propose a different policy than the regional head being replaced, the official must obtain written approval from the Ministry of Home Affairs.⁴⁸

The concept that exists in the position of the official has problems implementing democracy. As is known, such an election mechanism is an election mechanism with an indirect democracy concept.⁴⁹ In the extreme, Gaitano Mosca and Vilfredo Pareto argue that indirect democracy does not have ideal democracy because the election of a policy is only carried out by certain elites.⁵⁰ In essence, the ideal standard of democracy, as quoted by Rasinski and Tyler, is to give access to

[perpanjangan-masa-jabatan-presiden-bentuk-pembangkangan-konstitusi/](#), diakses pada tanggal 7 April 2022

⁴⁴ Mauricio Guim and Marilyn Guirguis Mila Versteeg, Timoty Horley, Anne Meng, "The Law and Politics of Presidential Term Limit Evasion," *Columbia Law Review* 120 (2020): 175. <https://doi.org/https://www.jstor.org/stable/10.2307/26868346>.

⁴⁵ Daniel Nowack and Julia Leininger, "Protecting Democracy from Abroad: Democracy Aid against Attempts to Circumvent Presidential Term Limits," *Democratization* 29, no. 1 (2022): 154. <https://doi.org/10.1080/13510347.2021.1957840>.

⁴⁶ Kompas, "Pilkada Serentak 2024, Ini 101 Kepala Daerah yang Habis Masa Jabatan pada 2022", <https://nasional.kompas.com/read/2021/09/03/05300011/pilkada-serentak-2024-ini-101-kepala-daerah-yang-habis-masa-jabatan-pada>, accessed date on 13 April 2023

⁴⁷ See Article 201 paragraph (9), paragraph (10), and Paragraph (11) Law Number 10 of 2016 concern about stipulation of Government Regulation in Lieu Number 1 of 2014 Concerning the Election of Governors, Regents, and Mayors to Become Law

⁴⁸ Article 132A Paragraph (1) Government Regulation Number 49 of 2008 concerning the Third Amendment to Government Regulation Number 6 of 2005 concerning Election, Approval of Appointment and Dismissal of Regional Heads and Deputy Regional Heads

⁴⁹ Dadan Ramdhani, *Problematika Penunjukan Penjabat Kepala Daerah Pada Masa Transisi Pilkada Serentak Nasional Tahun 2014*, thesis, Fakultas Hukum Universitas Islam Indonesia, Page 211

⁵⁰ Gaitano Mosca and Vilfredo Pareto in SP Varma, *Teori Politik Modern*, (Depok: Rajawali Pers, 2010), page. 202-203

the public to give consideration to the political decisions of a government.⁵¹ Samuel P. Huntington and Joan Nelson have a similar statement that an indirect democratic approach should be replaced with participatory democracy, namely a democracy that opens the activities of individual citizens to influence government decisions.⁵²

With the recruitment mechanism and appointment of acting regional heads that are elitist in nature, quoting from Dadan Ramdhani, this causes the local community as the directly affected party to be unable to determine their chosen leader. As a result, the appointed leader certainly has the potential to not take sides with the community.⁵³ This also indicates a weakening of democracy such as what was stated by Haggard and Kaufmann who argued that there were 3 factors for weakening democracy, one of which was the closing of access for civil society in discussions on determining government policies.⁵⁴ The closure of this space for participation is also a reduction in the value of constitutional democracy as stipulated in Article 1 Paragraph (2) of the 1945 Constitution of the Republic of Indonesia. The result of the absence of public participation in conducting regional head elections is the loss of legitimacy of power from the appointed regional head.⁵⁵

From the available facts, the authors agree that the government has carried out the practice of autocratic legalism and the resulting impact has reduced the elements of democracy and abandoned the implementation of the constitution based on the principles of constitutionalism. The existing phenomenon shows that the functions and mechanisms of the constitutional guard body, namely the Constitutional Court, are not enough to stem the practice of autocratic legalism. The author feels that the existing system needs to be updated so that the practice of autocratic legalism can be contained in the future.

⁵¹ Kenneth A. Rasinski dan Tom R. Tyler, *Political Behavior Annual*, Vol. I, (Colorado: Westview Press, 1986), page. 110.

⁵² Samuel P. Huntington dan Joan M. Nelson, *Partisipasi Politik di Negara Berkembang*, terj. Sahat Simamora, (Jakarta: Rineka Cipta, 1994). Page 6

⁵³ Dadan Ramdhani, *Problematika Penunjukan Penjabat Kepala Daerah Pada Masa Transisi Pilkada Serentak Nasional Tahun 2014*, Page 211

⁵⁴ Stephen Haggard dan Robert R. Kaufman, "Inequality and Regime Change: Democratic Transitions and the Stability of Democratic Rule", *American Political Science Review*, 106 (3), August 2012: 495-516. doi:10.1017/s0003055412000287

⁵⁵ Andrew Heywood, *Pengantar Teori Politik*, (Yogyakarta: Pustaka Pelajar, 2018), hlm. 215.

Unconstitutionally Constitution Amendment as a Deterrent to Autocratic Legalism

Edouard Lambert in 1921 once argued that the authority for judicial review adopted from the common law legal system of the United States of America did not only penetrate the matters of reviewing laws or legislation from laws but also extended to testing the conformity of constitutional values of a constitution or the results of its amendments.⁵⁶ Seven years later, Carl Schmitt commented on Edouard Lambert's opinion that his opinion is the real thing and one day it can indeed be practiced in the future.⁵⁷

Yaniv Roznai in his dissertation argues that countries in the world have several constitutional values that are sacred, so it is written in their constitution that the values referred to cannot be changed, including: , including: First, the form and system of government; second, the political structure and government of the country; third, basic rights; fourth, state ideology and identity; Fifth, the integrity of the nation and state.⁵⁸ All of these fundamental values are written down, but there are also some values that are not written down in the constitution, but are part of constitutional values that cannot be abandoned or even deviated from.⁵⁹ Even though there are constitutional values that need to be respected and obeyed so as not to be changed, in fact in the field, deviations from the values in the constitution have indeed occurred in several countries, these cases include:

First, the constitutional amendment procedures in the United States are unconstitutional. As it should be noted, amending the constitution in the United States is actually very difficult because it requires absolute support from all the states with the aim of creating the principle of a unified understanding of the

⁵⁶ Lambert, Edouard, *Le Gouvernement des juges et la lute contre la legislation sociale aux Etats-Unis* (Marcel Giard & Cie. 1921).

⁵⁷ Carl Schmitt, *Constitutional Theory* (Duke University Press, 2008).

⁵⁸ Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendments Power* (Oxford: Oxford University Press, 2017). Page 6

⁵⁹ Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendments Power*. Page 19-21

constitution.⁶⁰ These problems are not the only points of difficulty to amend their constitution. In Bruce Ackerman's notes, there are 3 principles that must be implemented, including inviolability, results that are forever, and absolute votes.⁶¹ The founding fathers at that time imagined that there would be a fundamental attachment if all states agreed to changes to articles in the constitution. As a result, there would be no lawsuits against the constitution. This also gives rise to the immortality of the amended articles, although it cannot be guaranteed that the *quo* article will be immortal.⁶²

This is what then gives rise to the will of the state to amend the article. The first attempt was made in July 1781, exactly five months after the United States constitutional amendment committee submitted its amendment recommendations. But the amendment never happened because there was one state that used its veto to reject the draft amendment.⁶³ This then made the majority of the congress at that time realize the difficulty of making amendments so that they prepared an extraordinary convention in Philadelphia, the results of the convention resulted in an agreement to change the provisions of the amendment which originally had to get approval from all states (in this case represented by the senate) to be approved by a majority vote in the house of representatives and a majority vote in the senate for the effectiveness of the amendment.⁶⁴

Based on Richard Albert's notes, even though this provision has become an applicable law. The reality behind it is that the results of the amendment are not in accordance with the provisions of the Amendments to the United States Constitution.⁶⁵ This is because the regulations on the US Constitution have a provision that if the amendment would like to have the validity, every change

⁶⁰ Douglas G. Smith, *An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution*, 34 SAN DIEGO L. REV. 249, 299-300 n.159 (1997)

⁶¹ Bruce Ackerman, *We The People: Foundations* 174-75 (1991)

⁶² Jeffrey Goldsworthy, *Parliamentary Sovereignty* (Cambridge: Cambridge University Press:2010) Page 70.

⁶³ George D. Harmon, "The Proposed Amendments to the Articles of Confederation", *S. Atlantic Q* 24, July 1925: 298-315. <https://doi.org/10.1215/00382876-24-3-298>

⁶⁴ Sanford Levinson, "Veneration" and Constitutional Change: James Madison Confronts the Possibility of Constitutional Amendment, 21 TEX. TECH. L. REV. 2443, 2448-49 (1990).

⁶⁵ Richard Albert, "Four Unconstitutional Constitutions and their Democratic Foundations" *Cornell International Law Journal* 50 (169) 2017, 170-196

should have approval by the Congress and the legislative from all states.⁶⁶ However, all the members of Congress do not give the approval of the amendment as a result from the convention moreover that amendment doesn't get approved by all the states. As a result, the amendment was declared unconstitutional.⁶⁷

Second, material constitutionalism from the Turkiye constitution amendment in 1971. Cite Aharon Barak's notes, from 1971 until 2008 there is 5 Turkiye constitutional court decisions that declare article's from the result of the constitutional amendment that has inappropriate value with the Turkiye constitutionalism and the state fundamentals.⁶⁸ One of these decisions was the 1973 amendment, namely regarding the requirements for members of the military to become judges.⁶⁹ The provisions of these conditions were amended by stating that the military requirement to become a judge could be waived when the country was in wartime.⁷⁰ The Turkiye Constitutional Court then decided that the amendment was contrary to the character of a republic, the Turkiye Constitutional Court in its legal considerations stated that the article violated the independence of the judiciary in Article 7 of the Turkiye Constitution which is an integral component of the rule of law principle (see Article 2 of the Turkiye Constitution).⁷¹

There is a fact of constitutional irregularities in the amendments, if previously analyzed politically, then one of the contributing factors is the desire for autocratic legalism. This is because the act of amending a constitution is a political agenda, bearing in mind that the constitution is a part of law and law is the result of political crystallization.⁷² It is this agenda of political crystallization that is then used by some elements to reduce the values of constitutionalism in the constitution.⁷³ As

⁶⁶ Journals Of The Continental Congress, 544 (Sept. 27, 1787) (Gaillard Hunt ed., 1914).

⁶⁷ James Schouler (1880), *History of the United States under the Constitution (1783-1861)*, British Library, London, page 54

⁶⁸ Aharon Barak, "Unconstitutional Constitutional Amendments,"

⁶⁹ Kemal Gozler, *Judicial Review Of Constitutional Amendments: A Comparative Study*, Anayasa, (Bursa: 2008), page 23-28

⁷⁰ Turkey Constitutional Court Decision 6 Decision of Apr. 15, 1975, No. 1975/87, 13 AMKD 403 (1975),

⁷¹ Article 2 Turkish Constitutional as amended in 1973

⁷² Moh. Mahfud. MD, *Politik Hukum di Indonesia*, (Jakarta: Rajagrafindo, 2009). Page 9

⁷³ Miftah Faried Hadinata, "Peran Mahkamah Konstitusi Mencegah Gejala Autocratic Legalism di Indonesia"

a result, constitutional amendments that deviate from constitutional values or abolish constitutional values may occur in the future.

The inclusion of autocratic legalism in the context of constitutional amendments and their amendments has made Yaniv Roznai have a paradigm that the constitution requires a mechanism for reviewing constitutional amendments, known as an Unconstitutional Constitution Amendment.⁷⁴ This mechanism examines in the event that the amendment to the constitution is not in accordance with the provisions that may not be changed or is not in accordance with the values of constitutionalism, then the amendment to the article or the meaning of implementing the constitution referred to in the law is declared unconstitutional or declared as an Unconstitutional Constitution Amendment.⁷⁵ Furthermore, according to Yaniv, the state institution that has a role in assessing the constitutionality of amendments is more appropriate to be given to the judiciary or more precisely the Constitutional Court.⁷⁶

With an analysis of unconstitutional amendments, the author is of the opinion that the danger of autocratic legalism can damage the constitutional order in the constitution and its implementation. To prevent this, the author argues that one way to prevent autocratic legalism is to include the Unconstitutional Constitution Amendment function within the authority of the Constitutional Court.

The Prospect and Ideal Concept of The Implementation of Unconstitutionally Constitution Amendment in Indonesia

If you look at what was mentioned in the previous discussion, the existence of an Unconstitutional Constitution Amendment will become an urgency in Indonesia. The author considers that there are 2 (two) important issues as a form of urgency to present the Unconstitutional Constitution Amendment within the authority of the CCRI, including: First, the issue of constitutional amendments to

⁷⁴ Dietze, Gottfried, 'Unconstitutional Constitutional Norms? Constitutional Development in Postwar Germany', 42 Virginia L. Rev. (1956), 21.

⁷⁵ Richard Albert, "Four Unconstitutional Constitutions and their Democratic Foundations"

⁷⁶ Yaniv Roznai, "Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers"

the 1945 Constitution of the Republic of Indonesia; Second, the problem of organic law norms that translate the constitution but not in accordance with the values of constitutionalism and constitutional principles in Indonesia.

To accommodate preventing these developing issues, in the opinion of the writer, efforts to include the Unconstitutional Constitution Amendment doctrine can be carried out in two ways, First, efforts through a formal amendment mechanism to the 1945 Constitution of the Republic of Indonesia.⁷⁷ In the opinion of the author, the focus of the amendment to implement the Unconstitutional Constitution Amendment is on two things, the first is the confirmation that Article 1 Paragraph (1),⁷⁸ paragraph (2),⁷⁹ and paragraph (3)⁸⁰ and the preamble of the 1945 Constitution of the Republic of Indonesia is the principle of a state that cannot be changed and must be carried out with the values of constitutionalism and Pancasila and secondly is the laying down of the function of supervising restrictions on amendments to the Constitutional Court by granting the authority to review constitutional amendments and review laws that are expressly aimed at overseeing the implementation of constitutional values.

Second, through the interpretation of the law or the habitual aspect of reviewing the law.⁸¹ The author feels that this step is very likely to be carried out by the CCRI because quoting from I Dewa Gede Palguna, the function of judicial review itself can be expanded with the aim of protecting the constitution and the values of constitutionalism that a country adheres to.⁸² This practice has been applied in Indonesia in a number of decision cases, among others:

⁷⁷ K.C. Wheare, *Konstitusi-konstitusi Modern*, Penerjemah Imam Baehaqie, Cetakan ke-5, Nusa Media, Bandung, 2015, hal. 127

⁷⁸ "The State of Indonesia is a Unitary State in the form of a Republic, Article 1 Paragraph 1 of the 1945 Constitution of the Republic of Indonesia

⁷⁹ "Sovereignty is in the hands of the people and implemented according to the Constitution" Article 1 Paragraph 2 of the 1945 Constitution of the Republic of Indonesia

⁸⁰ "Indonesia is a state of law" Article 1 Paragraph 3 of the 1945 Constitution of the Republic of Indonesia

⁸¹ Jimly Asshiddiqie, *Pengantar Ilmu Hukum Tata Negara*, Cetakan ke 10, Rajawali Press, Jakarta, 2018, hal. 98

⁸² I Dewa Gede Palguna, *Pengaduan Konstitusional (Constitutional Complaint) Upaya Hukum terhadap Pelanggaran Hak-hak Konstitusional Warga Negara*, Cetakan Pertama, Sinar Grafika, Jakarta, 2013, hal. 600

First, the elaboration of the simultaneous election interpretation. Even though the amendments to the 1945 Constitution of the Republic of Indonesia have been discussed and resulted in an article regarding elections, namely the election of regional heads in Article 18 Paragraph (4) of the 1945 Constitution of the Republic of Indonesia,⁸³ and general elections in Article Paragraph 22E Paragraph (2) of the 1945 Constitution of the Republic of Indonesia.⁸⁴ However, along the way, a debate arose regarding the simultaneity of the election. There are those who are of the view that the 2 electoral regimes are the same thing so that their simultaneity remains constitutional in the administration of the state.⁸⁵ On the other hand, those who argue that historically, the articles formed were intended to separate the two regional head election regimes from general elections.⁸⁶ In addition to historical facts, in practice according to Tuti Anggraini in the Constitutional Court's decision on case Number 37/PUU-XVII/2019 the simultaneous holding of elections creates a heavy workload, and has even been the cause of many voter workers dying from exhaustion.⁸⁷ This issue was then decided by the CCRI by stating that the matter became an open law policy by the DPR, however the CCRI provided an interpretation by providing several constitutional options as follows:⁸⁸

⁸³ "Governors, Regents and Mayors respectively as heads of provincial regional governments, Regencies and cities are democratically elected" Article 18 Paragraph 4 of the 1945 Constitution of the Republic of Indonesia

⁸⁴ "General elections are held to elect members of the People's Representative Council, the Representative Council Regions, the President and vice president and the Regional People's Legislative Assembly" Article 22E Paragraph 2 of the 1945 Constitution of the Republic of Indonesia

⁸⁵ Muhammad Anwar Tanjung; Derita Prapti Rahayu; Putri Ade Tami, "Model Pemilihan Serentak di Indonesia, Kajian Putusan Mahkamah Konstitusi Nomor 55/PUU-SVII/2019" *Jurnal Yudisial* 14 (3), December 2021: 313-330 DOI: 10.29123/jy.v14i3.431

⁸⁶ Suparto, "Perbedaan Tafsir Mahkamah Konstitusi Dalam Memutus Perkara Pemilihan Umum Serentak" *Jurnal Yudisial* 10(1), 2017 March 2017: 1-16 <http://dx.doi.org/10.29123/jy.v10i1.39>

⁸⁷ Constitutional Court Decision Number 37/PUU-XVII/2019 about Judicial review Law Number 7 of 2017 concerning General Elections, Law Number 8 of 2015 concerning Amendments to Law Number 1 of 2015 concerning Stipulation of Government Regulations in Lieu of Law Number 1 of 2014 concerning Elections for Governors, Regents and Mayors to Become Law, and Law Number 10 of 2016 concerning the Second Amendment to Law Number 1 of 2015 concerning the Stipulation of Government Regulations in Lieu of Law Number 1 of 2014 concerning the Election of Governors, Regents and Mayors Become Laws against Laws The 1945 Constitution of the Republic of Indonesia

⁸⁸ Constitutional Court Decision Number 55/PUU-XVII/2019 about Judicial review Law Number 7 of 2017 concerning General Elections, Law Number 8 of 2015 concerning Amendments to Law Number 1 of 2015 concerning Stipulation of Government Regulations in Lieu of Law Number 1 of 2014 concerning Elections for Governors, Regents and Mayors to Become Law, and

- a. General elections, both the election for members of the legislature and the election for president and vice president, are held simultaneously or simultaneously throughout Indonesia;
- b. Simultaneous general elections only to elect members of the DPR, DPRD, and DPD are held throughout the territory of the Republic of Indonesia;
- c. National and local simultaneous general elections;
- d. Simultaneous general elections are in accordance with the end of the term of office for those to be elected so that they can be held simultaneously several times in the five years, including directly electing governors and regents/mayors;
- e. Simultaneous general elections, but their simultaneous implementation is regulated by law;
- f. The presidential and general elections are held separately. Then presidential elections can also be followed by elections for governors, regents, and mayors; And
- g. Elections for president and vice president are different from general elections for selecting the DPR, DPD and DPRD. Meanwhile, the election for the executive family: the president and vice president, governors, regents, mayors, and so on are elected directly by the people.

Second, the interpretation of the supervision of judges by the Judicial Commission (KY). Supervision of judges by KY in Law Number 22 of 2004 concerning the Judicial Commission (UU KY) is still causing debate after the amendment to the 1945 Constitution of the Republic of Indonesia. The presence of the provisions of Article 1 point 5⁸⁹ which states that the scope of supervised judges

Law Number 10 of 2016 concerning the Second Amendment to Law Number 1 of 2015 concerning the Stipulation of Government Regulations in Lieu of Law Number 1 of 2014 concerning the Election of Governors, Regents and Mayors Become Laws against Laws The 1945 Constitution of the Republic of Indonesia

⁸⁹ "Judges are Supreme Court Judges and judges at judicial bodies in all judicial environments under the Supreme Court as well as Constitutional Court judges as referred to in the 1945 Constitution of the Republic of Indonesia" Article 1 number 5 Law Number 22 of 2004 concerned about Judicial Commission

is as stated in Article 13 letter b of the KY Law⁹⁰ namely judges, Supreme Court Justices, and Constitutional Justices raised a polemic over the supervision of judges where the Supreme Court justices at that time raised objections to the supervision of the Supreme Court justices because the KY's supervisory authority over Supreme Court Justices was deemed to be able to interfere with the independence of the Supreme Court justices in carrying out judicial activities.⁹¹ The Constitutional Court then in its Decision on Case Number 005/PUU-IV/2006 in its legal considerations reviewed the Comprehensive Text of the discussion of the Constitution as well as the Ad Hoc Committee I amendment to the 1945 Constitution of the Republic of Indonesia which explained that the birth of the Judicial Commission at that time was intended as a form of checks and balances for the authority of the Supreme Court and as an honorary institution that functions as an honorary enforcer for supreme justices.⁹² As a result, in its decision, the CCRI carried out an *ultra petita* by severing the authority of the KY, including the oversight function of the Supreme Court justices.⁹³

From the two CCRI decisions it is clear that the interpretation carried out by the CCRI does not only evaluate the constitutionality of the articles in the law, but also extends to the constitutionality of the constitutional interpretation of the law towards the intent of changing the constitution. Based on these facts, the CCRI can implicitly declare the unconstitutionality of changes to the constitution in laws. So that the doctrine of applying the Unconstitutional Constitution Amendment in reviewing laws is not something foreign to constitutional practice in Indonesia. Therefore, in fact the implementation of the Unconstitutionally Constitution Amendment doctrine in Indonesia can be done at this time by examining the law.

⁹⁰ “uphold the honor and nobility of dignity and maintain the behavior of Judges“Article 13 letter b Law Number 22 of 2004 concerned about Judicial Comission

⁹¹ Jesi Aryanto, “Pengawasan Hakim Agung Dan Hakim Konstitusi Oleh Komisi Yudisial”, *Adil: Jurnal Hukum* 3(2), December 2012:283-312, <https://doi.org/10.33476/ajl.v3i2>

⁹² Muhammad Hasan Basri, “Implikasi Putusan Mahkamah Konstitusi Terhadap Komisi Yudisial Dalam Pengawasan Etik Hakim : Studi Kasus Putusan Mahkamah Konstitusi 005/PUU-IV/2006” *Lex Renaisan* 3(6) July 2021:520-537, <https://doi.org/10.20885/JLR.vol6.iss3.art7>

⁹³ Constitutional Court Decision Number 005/PUU-IV/2006 about Judicial review Law of the Republic of Indonesia Number 22 of 2004 concerning the Judicial Commission and Review of the Law of the Republic of Indonesia Number 4 of 2004 concerning Judicial Power over the 1945 Constitution of the Republic of Indonesia

Conclusion

From the presentation of the material above, the author has 3 (three) conclusions, including:

First, in fact, the government has carried out the practice of autocratic legalism and the resulting impact has reduced the elements of democracy and abandoned the implementation of the constitution based on the principles of constitutionalism. The existing phenomenon shows that the functions and mechanisms of the constitutional guard body, namely the Constitutional Court, are not enough to stem the practice of autocratic legalism.

Second, the existence of autocratic legalism if left unchecked can undermine the constitutional order in the constitution and its implementation. To prevent this, the author argues that one way to prevent autocratic legalism is to include the Unconstitutional Constitution Amendment function within the authority of the Constitutional Court.

Third, Indonesia can adopt the Unconstitutional Constitution Amendment doctrine in two ways. First, through amendments by clarifying what articles and principles cannot be changed and violated in the constitution and by giving this authority to the CCRI. Second, by implementing the Unconstitutional Constitution Amendment through reviewing a law that contains provisions for elaborating the constitution, this authority has in fact been implemented in a number of decisions. Therefore, actually the implementation of the Unconstitutional Constitution Amendment in Indonesia can be done at this time by examining the law.

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