



# The Annulment of Constitutional Amendments Through the Judiciary: A Comparative Study Between Kyrgyzstan and Turkey and Its Relevance in Indonesia

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**Abstract.** This study attempts to uncover an examination of the granting of authority to judicial bodies to assess the results of constitutional amendments. This is the latest trend in global constitutionalism, where some countries explicitly affirm such authority in their constitutions, while others are an expansion of authority exercised by the highest judicial institution in the country using the doctrine of *basic structure*. The practice of cancelling constitutional amendments through the judiciary is seen in several countries, including Kyrgyzstan and Turkey. In Indonesia itself, there is no case or space for testing authority. This research intends to describe how the practice of cancelling constitutional amendments through the judiciary in Kyrgyzstan and Turkey and its relevance to Indonesian constitutional practice. This research is a doctrinal legal research or normative juridical using conceptual and comparative approaches. In the discussion, this research found that in practice in Indonesia under positive law, the mechanism to assess or test the results of constitutional amendments through the judiciary is not available. Likewise, there is no jurisprudence or doctrine developed from any judicial institution, including the Constitutional Court (MK), in testing the results of constitutional amendments in Indonesia. In some countries, the cancellation of the results of constitutional amendments can be easily done because the legal basis for amending the constitution is set out in the form of legislation. However, when reflecting on Kyrgyzstan and Turkey, this practice can be found in various cases that have been handled in the judiciary of these countries.

**Keywords:** Constitutional Amendment Cancellation · Comparative Law · Judiciary

## 1 Introduction

A constitution is essentially a collection of legal principles and rules that govern an organisation. A constitution is exclusively a legal document containing rules of law, while others define it as a manifesto, a statement of ideals commonly known as the ‘*Charter of the Land*.’

A constitution is not an ordinary law. It is not enacted by the ordinary legislature, but by a more specialised and higher body [1]. The Constitution is the highest and most fundamental law because it is the source of legitimacy or the basis of authorisation. Other forms of law or legislation. In accordance with the principles of law that apply universally, in order for the rules below the basic law can be valid and enforced, the rules must not conflict with the higher law [1].

As the norm base of legislation, the philosophical value of the constitution is a very basic thing that must be contained in it. This basic value then becomes the basis for the formation of laws and regulations. This means that when the constitution itself no longer contains the nation's philosophy of life, the constitution is actually unconstitutional.

**David A. Strauss** in his book "*The Living Constitution*" states that civilisation is always changing so it is impossible for the constitution to keep up with the pace of change. Strauss further states, "*Meanwhile, the world has changed in incalculable ways, technology has changed, the international situation has changed, the economy has changed, social mores have changed and it is just not realistic to expect a cumbersome amendment process to keep up with these changes*" [2].

The content material of the constitutional amendment that is designed, needs caution and accuracy in considering it. This is because the mechanism of constitutional change must be passed by the political process first [3]. This is in line with the opinion of Graham Hassall and Cheryl Saunders who state that constitutional changes cannot be implemented quickly and carelessly without consideration [4].

Thus, the *rigidity of* a constitution is determined by the articles in the constitution itself. Constitutional performance can be seen from the extent to which the content material of the constitution exists and can be applied as well as measuring the extent to which the achievements of state administrators comply with the written rules of the constitution so that constitutional performance can be known [5].

In Indonesia, the provisions regarding the amendment of the 1945 Constitution are positivistically regulated in Chapter XVI on the Amendment of the Constitution contained in Article 37, namely: 1) Proposals to amend articles of the Constitution can be tabled in a session of the People's Consultative Assembly if submitted by at least 1/3 of the members of the People's Consultative Assembly; 2) Any proposal to amend an article of the Constitution shall be submitted in writing and shall clearly indicate the section proposed to be amended and the reasons therefor; 3) To amend an article of the Constitution, a session of the People's Consultative Assembly must be attended by at least 2/3 of the members of the People's Consultative Assembly 4) Decisions to amend articles of the Constitution are made with the approval of at least fifty per cent plus one member of all members of the People's Consultative Assembly; 5) Specifically regarding the form of the Unitary Republic of Indonesia, no changes can be made.

The formulation of the constitutional amendment article above does lay out the prerequisites that are not easy in amending the constitution in Indonesia. Practically since the last amendment in 2002 until now there has been no change to our constitution. However, recently the issue of the 5th amendment has been raised, amidst the configuration of political power in the government which is getting stronger. Not to mention that if this is forced, the results of the constitutional amendment should provide space for the community to be tested for constitutionality, if the issue of constitutional amendment

does not meet the requirements contained in the constitution. In addition, for example, the 1945 Constitution provides restrictions on constitutional amendments, where the form of a unitary state cannot be amended.

Constitutional change is seen by assessing how the constitution itself performs. In the context of Indonesia, of course, the assessment of the performance of the constitution is carried out with regard to the content material of the 1945 Constitution whose elements include the purpose of the state, state institutions and their authority, the relationship of state institutions in the Constitution, the relationship between the state and society, guarantees of human rights and citizen rights, the direction of development planning and the implementation of the state and the mechanism of constitutional change [6].

Therefore, constitutional change is always preceded by state political momentum or constitutional momentum. Therefore, a constitutional change does not emerge from an empty space. However, there is a constitutional momentum that reflects the political dynamics and relations between state institutions, state administrators and citizens, as well as the context of human rights. This means that constitutional changes can only be made for a great and extraordinary occasion (*great and extraordinary occasions*).

Under positive law in Indonesia, there is no mechanism to test the cancellation of constitutional amendments through the judiciary. Likewise, there has been no jurisprudence or doctrine developed from any judicial body, including the Constitutional Court (MK), in testing the results of constitutional amendments in Indonesia. In many countries, the cancellation of constitutional amendments can be easily done because the legal basis for amending the constitution is set out in the form of legislation [7].

The granting of authority to the constitutional court to annul constitutional amendments is the latest trend in global constitutionalism. Some countries, such as Kyrgyzstan and Turkey, explicitly include this authority in their constitutions, while others are an expansion of the authority exercised by the highest judicial institution in their country using the basic structure doctrine [7].

When compared with several countries that will be a comparative study in this research, there are formulations in the Constitutional Court in various countries that are given the authority to cancel constitutional amendments if they are contrary to basic principles. This is different from Indonesia, which since its establishment has not made many constitutional amendments so that apart from this, the limitation of constitutional amendments on constitutional changes does not provide a special channel related to whether or not a constitutional amendment can be cancelled by the judiciary. Problem formulation; 1). Can constitutional amendments be overturned through judicial review?; 2). How is the Comparison of the Cancellation of Constitutional Amendments in Kyrgyzstan and Turkey and its Relevance in Indonesia?

## 2 Results and Discusson

### 1. Testing Constitutional Amendments Through the Mechanism of Constitutionality Testing of Constitutional Amendments.

A constitution is a text, an inanimate object containing a series of sentences. However, from a philosophical point of view, a constitution is a living text. Because of its function,

the constitution must contain articles that are able to pass through various times. This is in line with the view of David A Strauss with his living constitution. But unfortunately as a man-made product, the articles of the constitution often fail to live and be able to run with the development of human civilisation. In this context, the constitution must be able to keep up with the pace of civilisation change. Therefore, a mechanism is needed that is able to make the constitution remain the highest role model in the administration of the state so that the articles in the constitution that are left behind must be repaired. The procedure for constitutional amendment is generally found in every text of the constitution, the procedure for constitutional amendment itself is contained in separate articles or chapters. Amendments made in accordance with the procedure prescribed by the constitution itself are called *verfassungsänderung*. The provisions for such amendments are always specified in the constitution itself, because although intended to last for a long time, the text of a constitution always tends to lag behind the development of society. When society changes to such an extent, there is always an objective need to amend the text of the basic law.

However, because the constitution is essentially the highest basic law and is the basis for the enactment of other lower laws and regulations, the drafters or formulators of basic laws always consider it necessary to determine the procedure for changes that are not easy. With a procedure that is not easy, it is also not easy for people to change the basic law of their country, unless it is really needed because of objective considerations and for the benefit of the whole people, and not just to fulfil the wishes or interests of a group of people in power. For this reason, the procedure for amending the basic law is usually set up in such a heavy and complicated manner that the basic law concerned becomes very rigid.

But on the contrary, there are also basic laws that require less severe procedures for change with the consideration of not making changes difficult, so that the basic law can be adjusted to the demands of changing times. Such a constitution can be said to be a flexible constitution. For example, there are basic laws whose amendment does not require a special method, but is sufficiently carried out by ordinary lawmaking institutions. Conversely, there are also Constitutions that stipulate the conditions for changes in a special way, for example in a bicameral parliamentary system, must be approved first by both chambers of parliament. Such a Constitution can be called rigid.

It must be recognised that it is not enough to determine the flexible or rigid nature of a basic law by looking at the way it is amended. It may happen that a law is said to be rigid, but in reality it can be changed without going through the procedures determined by the basic law itself (*verfassungsänderung*), but rather changed through procedures outside the provisions of the constitution (*verfassungswandlung*), such as through revolution or by constitutional convention.

For basic laws that are classified as flexible, amendment is sometimes sufficient only through the ordinary legislative process. Meanwhile, for basic laws that are known to be rigid, the amendment procedure can be carried out: a) by the legislature, but with certain restrictions; b) by the people directly through a referendum; c) by delegates of the states, particularly in the union states; or d) by constitutional custom, or by a specialised state institution established only for the purpose of the amendment.

According to K.C. Wheare, there are three ways to amend the basic law, namely (i) formal amendment, (ii) constitutional convention, and (iii) judicial interpretation. Therefore, changes in the sense of improvements to the basic law do not always have to be made by way of formal amendment, but can also be done by constitutional convention. For example, there is an article in the basic law that is officially still valid, but in practice it is no longer used in the context of organising daily state activities.

Constitutional change is always preceded by a political process, ultimately determining whether or not the constitution should be changed is a factor of the configuration of political forces in power at any given time. No matter how rigid or difficult a constitutional text is to change, if the ruling political power configuration thinks, wants, or determines that the constitution should be changed, then it will certainly be changed. Conversely, even if the constitution is very easy to change, if the political forces in power do not think it needs to be changed or do not want it to be changed, the constitution will remain unchanged. This means that the measure of flexibility or rigidity cannot be determined with certainty simply because the procedure for change is easy or not. Because, in essence, the constitution is a political product, it is the factor of political power that has the most determinant influence in determining whether the constitution should be changed or not changed [8].

Changes to the constitution that are not desired by many people must certainly pay attention to several aspects such as the recognition of popular sovereignty, the rule of law, limitation of government power, rule of law, and respect for human rights are the main components in understanding the principles of modern constitutionalism. However, in its development, the constitution can be amended or commonly referred to as constitutional amendments.

The constitution as the highest principles and rules are usually formulated in written legal documents that form and regulate the basic institutions of the state, as well as the embodiment of the practice and expression of the noble values of a nation for the content of the constitution can be identified into five groups: (1) form and system of government; (2) political structure and state government; (3) ideology and state identity; (4) basic rights; and (5) integrity of the nation and state.

Theoretically, the implicit limitation of constitutional amendment power is based on the concept of the 'Basic Structure Doctrine', the Doctrine of Basic Features, basic principles, or the constitutional replacement doctrine. Thus, in countries where the constitution does not have an unalterable provision, the judiciary must take on the role of identifying specific constitutional subjects and determining a set of basic constitutional principles that cannot be changed through the amendment process. This is because essentially all constitutions reflect political-philosophical principles that form the basic substance, essence and spirit of the constitution [9].

The amendment power also cannot change the hierarchy of constitutional values or undermine the identity of the constitution. If a constitutional amendment undermines the basic principles and identity of the constitution, then the act can no longer be called a constitutional amendment. Here, the holder of the power of amendment as an agent has violated the limits set by the people as the holder of the people's sovereign mandate. Hence the need for the power to review constitutional amendments to be part of the judicial power if the constitutional amendment process is based on the legislative process in general.

## 2. Comparison of Constitutionality Testing of Constitutional Amendments in Several Countries

### 1) Kyrgyzstan

An interesting authority of the Kyrgyz Constitutional Court is to test the constitutionality of draft laws on amendments to the constitution. In other words, before the Kyrgyz constitution is amended, the constitutionality of the amendment can be tested at the Constitutional Court. This mechanism aims to ensure compliance of the draft law with the constitution. The parties who have the right or legal standing to apply for constitutionality testing of draft laws on constitutional amendments are: 1). Parliament; 2). Parliamentary Fraction; 3). President; 4). Government; 5). Ombudsman.

In the examination of this case, the Constitutional Court will examine whether the draft constitutional amendment law complies with, among other things: 1. Basic rights and freedoms of citizens and their restrictions; 2). Principles of democratic and secular states based on the rule of law; 3). The procedure for constitutional amendment as referred to in article 114 of the Constitution of Kyrgyzstan.

### 2) Turkey

The Constitutional Court of Turkey is one of the constitutional courts that has conducted several constitutionality tests on amendments to the Turkish constitution. Prior to its amendment in 1971, the 1961 Turkish Constitution made no provision for constitutional amendment review. Article 68 of that Turkish Constitution stipulated that a person convicted of certain crimes could not be elected to public office, even if they had been pardoned. This constitutional amendment was later challenged by the Labour Party and submitted for constitutionality review to the Constitutional Court on the grounds that the constitutional amendment was unconstitutional in both procedure and substance.

In Decision No. 1970/31 dated 16 June 1970, the Turkish Constitutional Court declared itself authorised to test the constitutionality of the amendments to the 1961 constitution, both in terms of procedure and substance. In this case, the Constitutional Court ruled by a narrow margin of eight votes to seven. The Constitutional Court concluded that the constitutional amendment was not carried out in accordance with the amendment procedure stipulated in Article 155 of the 1961 Turkish Constitution. Therefore, the Turkish Constitutional Court cancelled the constitutional amendment.

Furthermore, the Turkish Constitutional Court has also tested the constitutionality of constitutional amendments as found in Decision Number: 1971/37 dated 3 April 1971. In this case, the Turkish Constitutional Court also conducted a formal procedural examination of the constitutional amendment on 17 April 1970.

The Turkish Labour Party, as the petitioner, again applied to the Constitutional Court for the annulment of a constitutional amendment and argued that the amendment, which postponed senate elections by one year and four months, was unconstitutional, both in terms of procedural form and substance. Two things can be concluded from this case.

Firstly, the Turkish Constitutional Court examined the formal provisions regarding constitutional amendments, but the court found no formal or procedural irregularities in the constitutional amendment process. Secondly, the Constitutional Court also examined the constitutionality of the constitutional amendments with respect to their substance.

In its development, the Turkish Constitutional Court reaffirmed that it is authorised to conduct a material review of constitutional amendments. In the examination process, the Turkish Constitutional Court examined the compatibility of the constitutional amendment with the republican form of the state and concluded that the constitutional amendment that postponed the election of senators for one year and four months did not affect the republican form of the state or the fundamental principles of the Turkish constitution.

### **3. The Concept of Constitutional Amendment Testing and Its Relevance in Indonesia**

The enactment of a constitution as binding basic law is based on the supreme power or principle of sovereignty adopted in a country. If the country adheres to the notion of popular sovereignty, then the source of legitimacy of the constitution is the people. If the sovereignty of the king applies, then the king determines whether a constitution is valid or not. This is what is referred to by experts as constituent power which is an authority that is outside and at the same time above the system it regulates. For this reason, in liberal democracies, it is the people who determine the validity of a constitution [1].

Jimly Ashiddiqie argues that the constitution is not an ordinary law, it is not enacted by an ordinary legislature, but by a more specialised and higher body. If the legal norms contained in it conflict with the legal norms contained in the law, then the provisions of the constitution that prevails, while the law must give way to it (it prevails and the ordinary law must give way) [1].

Testing the constitutionality of constitutional amendments uses the doctrine of basic structure which is the identity of the constitution, the doctrine of basic structure is also often taken into consideration to determine the basic features in the constitution that cannot be changed or eliminated through constitutional amendments. These basic features of the constitution are not explicitly defined, but are determined and developed by the courts.

Interestingly, when constitutional amendments have resulted in the loss of the identity of the constitution or the alteration of provisions that the constitution is supposed to alter, the amendments can be cancelled by the constitutional court, as in various countries. The cancellation of the amendments is done through the mechanism of constitutionality testing, both formally and materially. The amendment of the 1945 Constitution of the Republic of Indonesia as the embodiment of constitutional reform made a number of profound changes to the Indonesian state administration.

Constitutional change is a necessity and a good constitution is one that is often amended in accordance with the times.

The constitution is the basic law of a state. The constitution generally regulates the structure, composition, powers and basic functions of the highest organs of the state, such as the legislature, executive, judiciary and other state institutions. The constitution also regulates important matters such as the rights of citizens called constitutional rights [7].

The design of the idea of constitutionality testing of constitutional amendments in Indonesia can actually be applied, this reflects on the current political situation. The Indonesian Constitution has stipulated that Indonesia is a state of law, this is stated in

the constitution Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. As a state of law, in Indonesia, the law has a very fundamental role in the life of the nation and the state. This means that the law must display its role as the central point in all the lives of individuals and the life of the nation and state [10].

However, if the idea of testing the constitutionality of constitutional amendments in Indonesia is accepted as a mechanism of judicial review, then the next question is who has the right to test the constitutionality of constitutional amendments? Then the author's temporary hypothesis is to place the constitutionality testing of constitutional amendments into a new authority of the Indonesian Constitutional Court. This is possible considering the duties and functions of the Indonesian Constitutional Court have a juridical basis whose position in the constitutional system is regulated by the constitution.

The position and role of the constitutional court is in a strategic position in the constitutional system of the Republic of Indonesia because the constitutional court has authority that is directly related to political interests, both from the power holders in the power system in the Republic of Indonesia [11].

The Constitutional Court was formed for the purpose of guarding and maintaining that the constitution as the supreme law of the land is actually carried out or enforced in the administration of state life in accordance with the principles of modern law, because it is law that is the determining factor for the overall dynamics of social, economic and political life in a country. In interpreting the politics of law, the institution that can straighten out bad legal products such as laws is the Constitutional Court. Basically, the Constitutional Court (MK) is a counterweight to arrogance in making rules and regulations that are not in accordance with the ethics of the institution and with the 1945 Constitution as a foothold, therefore this balancing institution is very necessary. No wonder the designation for the Constitutional Court is The Guardian of the Constitution [12].

The constitution is a form of delegation of the sovereignty of the people to the state, through the constitution the people make a statement of willingness to give some of their rights to the state. Therefore, the constitution must be guarded and safeguarded. This is because all forms of deviation, both by the holders of power and the rule of law under the constitution against the constitution, are a clear form of denial of the sovereignty of the people [13].

The Constitutional Court can adopt the doctrine of unconstitutional constitutional amendments if the constitutional amendments are made to the inviolable provisions in the constitution as an embodiment of the function of the Constitutional Court as the guardian of the constitution.

The idea of establishing a specialised judicial institution, which in many countries is now known as a constitutional court, cannot be separated from the development of the idea of constitutional review. Constitutional review is defined as the authority of a judicial body to declare a law or administrative action invalid because it is contrary to the constitution [14].

According to Jimly Asshiddiqie, the reason for the establishment of the Constitutional Court is due to fundamental changes to the 1945 Constitution. The Indonesian constitutional system now adopts the principles of separation of powers and checks and



balances as a substitute for the previous system of parliamentary supremacy. Furthermore, as a consequence of these constitutional changes, there is a need for the institutionalisation of laws and judges that can control political decisions that are based solely on the principle of the rule of the majority such as the formation of laws and the dismissal of the president. And there is a need to accommodate mechanisms to decide disputes that arise that cannot be resolved through ordinary judicial channels.

In connection with the amendment to the form of a unitary state whose provisions cannot be changed, then if changes are forced by the constitutional amendment, it can be cancelled through the Constitutional Court for the Constitutional Court must use the doctrine of unconstitutional constitutional amendment as carried out by Turkey and Kyrgyzstan. The Constitutional Court as a last resort can declare unconstitutional and not binding on a constitutional amendment that changes the form of a unitary state. There are several reasons underlying its view. First, the form of the Unitary Republic of Indonesia as an unchangeable provision has a fundamental position in the 1945 Constitution. This is because the form of the Unitary Republic of Indonesia has been widely regarded as a symbol of the struggle for independence and resistance to colonialism. This view is also supported by I Dewa Gede Palguna, who was involved in formulating the unitary state form as a permanent provision in the 1945 Constitution amendment process: "if the principle or form of the unitary state changes, then our constitution has changed from its fundamental principles".

If the use of the concept of unconstitutional constitutional amendment is rejected on the basis of a lack of democratic legitimacy, then it may lead to arbitrariness because then the power to amend the constitution becomes unlimited. Departing from the perspective put forward by Richard Albert who states that the doctrine of unconstitutional constitutional amendment is very important to use in countries whose constitutions can be amended relatively easily, Satrio compares the amendment requirements in Germany and Turkey with Indonesia. Similar to Indonesia, the Turkish Constitution provides that amendments to the constitution can be made by simple majority by the Parliament (in Indonesia, the People's Consultative Assembly).

Thus, the use of the doctrine of unconstitutional constitutional amendment becomes necessary as has been practised in the German Federal Constitutional Court and the Turkish Constitutional Court. In principle, the author agrees with the reasons put forward by Satrio above. However, it should also be emphasised that Article 37 paragraph (5) of the 1945 Constitution contains an explicit unamendable provision. In addition to the unitary form of state, by using the method of systematic or logical interpretation, namely interpreting constitutional articles by connecting with other articles, it can be concluded that the Preamble of the 1945 Constitution is also included in the inviolable provision. This is because the provisions of Article 37 of the 1945 Constitution only accommodate constitutional changes made to the articles or body of the constitution. Thus, if for example the majority political power in the MPR intends to change the Preamble of the 1945 Constitution, then the proposal should not proceed. If, due to the magnitude of political power, the proposed amendment to the Preamble of the 1945 Constitution is successfully pursued, then the Constitutional Court may declare itself authorised to examine, hear and decide whether the constitutional amendment is unconstitutional.

### 3 Conclusion

This research is a doctrinal legal research or normative juridical using conceptual and comparative approaches. In the discussion, this research found that in practice in Indonesia under positive law, the mechanism to assess or test the results of constitutional amendments through the judiciary is not available. Likewise, there is no jurisprudence or doctrine developed from any judicial institution, including the Constitutional Court (MK), in testing the results of constitutional amendments in Indonesia. In some countries, the cancellation of the results of constitutional amendments can be easily done because the legal basis for amending the constitution is set out in the form of legislation. However, when reflecting on Kyrgyzstan and Turkey, this practice can be found in various cases that have been handled in the judiciary of these countries.

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