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ARTICLE

Restoring Indonesia's (Un)Constitutional Constitution: Soepomo's Authoritarian Constitution

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Abstract
The recent years saw the rise in discourse to undo the liberal-democratic amendments introduced between 1999 and 2002 and restore the Indonesian 1945 Constitution to its original 1945 version. Some Indonesian public figures believe that these amendments are not legitimate, because they are deemed to have eliminated the basic values of the original 1945 Constitution which was built on the "integralist" concept as propounded by its main architect Soepomo. According to the integralist conception, the state should be seen as a family in which the government played a role as a wise father who can bring its people to the right choice. This article seeks to prove that these amendments are legitimate although they constitute a "dismemberment" of the original 1945 Constitution. This is because the original 1945 Constitution was formed only by a handful of elites in an institution established by the Japanese occupying power in early 1945. By contrast, the *Majelis Permusyawaratan Rakyat* (People's Consultative Assembly) who was in charge of the four amendments to the 1945 Constitution had a greater democratic legitimacy compared to the drafters of the original Constitution given that they were elected through the 1999 elections. Furthermore, the original 1945 Constitution was never intended to operate beyond the Indonesian revolutionary period, which ended in 1949. It was expected that the document be significantly changed or even replaced by the People's Consultative Assembly through the amendment process.

Keywords: Constitutional amendment; constitutional dismemberment; integralist; liberal democracy

A. Introduction

After the 2019 Indonesian presidential election—which resulted in a clear victory for the incumbent Joko Widodo (popularly known as "Jokowi")—there was a rise in popular discourse to enact the fifth amendment to the 1945 Constitution.[1] The current version itself had underwent four comprehensive amendments by the *Majelis Permusyawaratan Rakyat* (People's Consultative

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[1]Giri Ahmad Taufik, *Democracy in retreat as push for fifth amendment gains momentum*, INDON. AT MELBOURNE (Aug. 27, 2019), https://indonesiaatmelbourne.unimelb.edu.au/democracy-in-retreat-as-push-for-fifth-amendment-gains-momentum/.

Assembly)[2] from 1999 to 2002 to democratize the Indonesian political system.[3] At first glance, there is nothing wrong with this idea; while the current 1945 Constitution is very democratic —as shown by its broad protection of human rights—it still bears several conceptual problems, such as the lack of restriction for the government to enact emergency legislation (Government Regulation in Lieu of Law; *Peraturan Pemerintah Pengganti Undang-Undang*)[4] and the absence of a clear relationship between Indonesia's bicameral legislative bodies.[5] On paper, the idea to enact the fifth amendment was needed to correct some of the Constitution's conceptual problems and strengthen Indonesia's democratic institution.[6]

However, it is suspected that the main purpose of the fifth amendment is to undo the liberal-democratic amendments enacted between 1999 to 2002 and to restore the pre-amended version of the 1945 Constitution [hereinafter "the original 1945 Constitution"][7] that is notorious for its authoritarian character. The original 1945 Constitution had facilitated the creation of an authoritarian regime—first with Soekarno and his Guided Democracy regime from 1957 to 1966, and then with Soeharto and his New Order regime from 1966 to 1998[8]—every time it was in force.[9] This suspicion was further fanned by many statements from public figures who claimed that the fifth amendment would revive many norms that were previously contained in the original 1945 Constitution.

For example, Hendropriyono—a retired military general who was also known as one of Jokowi's most loyal supporters—proposed that the People's Consultative Assembly's power to elect the President is reinstated.[10] The Indonesian Democratic Party of Struggle (*Partai Demokrasi Indonesia Perjuangan* or PDIP)—Jokowi's own party—also suggested the revival of the economic planning system based on the national five-year plan, better known as Broad Outlines of State Policy (*Garis-Garis Besar Haluan Negara*).[11] Conceptually, these two ideas will place the People's Consultative Assembly as the highest state institution, just as in the original 1945 Constitution, because the implementation of the Broad Outlines of State Policy is only possible if the President is elected by the People's Consultative Assembly as contained in the original 1945 Constitution. [12] Moreover, there is also an idea to allow the president to be elected for more

[2]In 1999, the People's Consultative Assembly was the highest state organ composed of the House of Representative (*Dewan Perwakilan Rakyat*) and some appointed members. They had the power to amend the 1945 Constitution. After the amendment, the position of the People's Consultative Assembly as the highest state organ has been changed, but they still have the power to amend the 1945 Constitution. The reason for the change to the People's Consultative Assembly status will be explained below.

[3]*See* Tim Lindsey, *'Indonesian Constitutional Reform: Muddling Towards Democracy'*, 6 Sing. J. Int'l & Compar. L. 245, (2006); *see also* Denny Indrayana, Indonesian Constitutional Reform 1999–2002: An Evaluation of Constitution-Making in Transition (2008).

[4]*See* Article 22(1) of the 1945 Constitution (allowing the President to enact a government regulation, which has the same status as law without requiring legislative approval in the face of "compelling exigencies").

[5]Indonesian parliament consists of two houses, the House of Representative is the lower house that has joint legislative power with the President, meanwhile the Senate (*Dewan Perwakilan Daerah*) is the upper house, that has a very weak legislative power because they can only refer laws to the House of Representative.

[6]Stefanus Hendrianto, *The 2019 Indonesian General Election: Constitutional Odds and Ends*, Int'l J. Const. L. Blog (August 13, 2019), http://www.iconnectblog.com/2019/08/the-2019-indonesian-general-election-constitutional-odds-and-ends/.

[7]Taufik, *supra* note 1.

[8]Although these two authoritarian regimes were very different (Soeharto overthrew Soekarno), both built an authoritarian political system on the basis of the original version of the 1945 Constitution.

[9]*See* Mohammad Mahfud Md, Perdebatan Hukum Tata Negara: Pasca Amandemen Konstitusi 24 (2011); *see also* Lindsey, *supra* note 3, at 245.

[10]Ardito Ramadhan, *Hendropriyono Usul Presiden Kembali Dipilih MPR,* Kompas.com (July 12, 2019), https://nasional.kompas.com/read/2019/07/12/16325421/hendropriyono-usul-presiden-kembali-dipilih-mpr.

[11]Budiarti Utami Putri, *Ngotot Amandemen, PDIP: Hanya Hidupkan GBHN, Tak Bahas Pilpres*, Temp.co (October 10, 2019). https://nasional.tempo.co/read/1257889/ngotot-amandemen-pdip-hanya-hidupkan-gbhn-tak-bahas-pilpres.

[12]Under the original version of the 1945 Constitution, the President was appointed by and subordinate and accountable to the People's Consultative Assembly. *See* Tim Lindsey, *Indonesia Devaluing Asian values, rewriting rule of law*, *in* Asian Discourse of Rule of Law 299 (Randall Peerenboom ed., 2004).

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than two five-year terms.[13] This implies that the fifth amendment's real intention is to restore the original 1945 Constitution, given that one of the main objectives of the Indonesian constitutional transition to democracy from 1999 to 2002 was to limit the presidential term of office for only two five-year terms.

Some figures who are known as long-term proponents of the idea to restore the original 1945 Constitution also support the fifth amendment. One of them is Prabowo Subianto,[14] Jokowi's former political opponent in the 2014 and 2019 presidential elections who eventually served as Jokowi's Minister of Defense. Prabowo even emphasized that the fifth amendment must be done comprehensively to all articles of the 1945 Constitution. Prabowo's statement raised the question: why should the fifth amendment be carried out comprehensively? There is currently no political or ideological crisis that requires the 1945 Constitution to be amended comprehensively and considering how vocal Prabowo is in his intention to return the 1945 Constitution to its original form, it is safe for the public to assume that the proposed fifth Amendment might have a hidden agenda lurking beneath it.[15]

The incessant discourse to restore the original 1945 Constitution by many Indonesian political figures cannot be separated from the nature of the amendments made by the People's Consultative Assembly from 1999 to 2002. The original 1945 Constitution that was promulgated on August 18 1945—one day after Indonesia declared its independence—was the brainchild of Soepomo, who ardently believed in the idea of integralism, which views the state and the people as a unity. Therefore, it is justified in this idea—according to Pranoto Iskandar—for the State "to freely maneuver without constitutional bounds in regards to maintaining public order".[16] By contrast, the amendments in 1999 to 2002 transformed the 1945 Constitution into a document that represented liberal-democratic values, which emphasized limitation of power—a direct contradiction to Soepomo's thoughts and values that underlie the original 1945 Constitution.[17]

Because of this significant change, many Indonesian public figures—usually politicians and retired military generals whose career started under Soeharto's New Order regime—claimed that the amendments in 1999 to 2002 "went too far" (*kebablasan*) because they transformed the substance of the 1945 Constitution that was based on the values of integralism to liberalism.[18] They believe that the fifth amendment is necessary because they consider the current version of the 1945 Constitution to be illegitimate.[19] There is also "scholarly" support among these views; for example, Kaelan, a conservative professor of philosophy from a prestigious national university,[20] believes

[13]Stefanus Hendrianto, *Term Limits and the Unconstitutional Constitutional Amendment Doctrine in Indonesia*, Int'l J. Const. L. Blog (Apr. 13, 2021), http://www.iconnectblog.com/2021/04/term-limits-and-the-unconstitutional-constitutional-amendment-doctrine-in-indonesia/.

[14]*See* Simon Butt, *Returning to the 1945 Constitution: what does it mean?*, New Mandala (June 18, 2014), https://www.newmandala.org/returning-to-the-1945-constitution-what-does-it-mean/; *see also* Edward Aspinall, *Oligarchic Populism: Prabowo Subianto's Challenge to Indonesian Democracy*, 99 Indon. J. 1, 19–21 (2015).

[15]*See* Preamble of the Constitution of the Greater Indonesia Movement party (*Gerakan Indonesia Raya*), Prabowo Subianto's party, which states that one of their goals is to enforce the 1945 Constitution that promulgated on 18 August 1945. http://partaigerindra.or.id/uploads/Anggaran_Dasar_Partai_Gerindra.pdf (stating that one of their goals is to enforce the 1945 Constitution that promulgated on 18 August 1945).

[16]*See* Pranoto Iskandar, *Indigenizing Constitutionalism: A Critical Reading of 'Asian Constitutionalism'*, V Indon. J. Int'l Compar. L. 3, 24 (2018).

[17]*See e.g.,* Susi Dwi Harijanti & Tim Lindsey, *Indonesian general election tests the amended Constitution and the new Constitutional Court*, 4 Int'l J. Const. L. 138, 138 (2006); *see also* Albert H.Y. Chen, *Pathways of Western liberal constitutional development in Asia: A comparative study of five major nations*, 8 Int'l J. Const. L. 849, 866 (2010).

[18]In 2018, there was a declaration from some Indonesian public figures to restore the original 1945 Constitution. They call themselves as *Gerakan Kebangkitan Indonesia* (Indonesia Revival Movement). This group views the amendments to the 1945 Constitution between 1999–2002 as illegitimate acts. *See* Taufiequrachman Ruki, Mengapa Kita Harus Kembali ke UUD 1945 (2019).

[19]*See* Giat Wahyudi, Perubahan UUD 1945 Tahun 1999 – 2002 Makar Terhadap Negara (2009).

[20]Ruki, *supra* note 18, at 105.

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that the amendments between 1999 until 2002 are illegitimate because they deviated from the goals of the original 1945 Constitution.[21]

This article intends to challenge the claim that four amendments to the 1945 Constitution were illegitimate. Although these amendments could indeed be categorized as a 'constitutional dismemberment'[22] because they fundamentally revised the original 1945 Constitution, these changes are legitimate because the members of the People's Consultative Assembly who amended the 1945 Constitution from 1999 to 2002 had a higher democratic legitimacy than the founders of the 1945 Constitution. Not only that, the original 1945 Constitution was never intended by its drafters to be a permanent Constitution. The seemingly unlimited governmental power was supposed to help Indonesia during the independence revolution from 1945 to 1949, and the document can and *should* be significantly changed or even replaced once the revolutionary period is passed. This article also argues that the fifth amendment discourse was abused to further Jokowi's government and his supporters' interests, because by restoring the original 1945 Constitution, Jokowi will be able to extend his term so that his long-term development vision can be achieved. Lastly, this article also assesses whether the act of restoring the original 1945 Constitution will justify the application of the doctrine of an unconstitutional constitution by the Indonesian Constitutional Court.

B. Constitutional Amendment and Dismemberment

A constitution is a product of the political constellation that existed at the time of its formation.[23] Considering its time-specific nature,[24] amendments are necessary to ensure the text's relevancy towards ever-changing social and political circumstances.[25] An amendment mechanism has been hailed as one major element of the constitutions, given that without this mechanism the constitution will not be able to endure for a long time.[26]

However, there are fundamental issues with the amendment mechanism; for every power, there must be limits, and amendments—including the consequential changes emerging from it—do not escape this limitation.[27] Regarding these problems, renowned jurist Carl Schmitt once argued that amendments can be made "only under the presupposition that the identity and continuity of the constitution as a whole is preserved." In other words, a change can be considered as an amendment if "it contains only the grant of authority for undertaking changes, additions, extensions, deletions, etc., in constitutional provisions that preserve the constitution itself."[28] Schmitt is of

[21]Gusti, *Pakar: UUD 1945 Hasil Amandemen Menyimpang dari Pancasila*, Universitas Gadjah Mada (Feb. 12, 2004), https://ugm.ac.id/id/berita/8687-pakar-uud-1945-hasil-amandemen-menyimpang-dari-pancasila.

[22]Richard Albert, *Constitutional Amendment and Dismemberment*, 43 Yale J. Int'l L. 1, 4 (2018) (arguing that constitutional dismemberment, "is incompatible with the existing framework of a constitution because it seeks to achieve a conflicting purpose. It seeks deliberately to disassemble one or more of a constitution's elemental parts.").

[23]*See* K.C.Wheare, Modern Constitutions 67 (1975) ("Constitutions, when they are framed and adopted, tend to reflect the dominant beliefs and interest, or some compromise between conflicting beliefs and interests, which are characteristics of the society at that time.").

[24]Tom Ginsburg, *Constitutional Endurance, in* Compar. Const. L. 112 (Tom Ginsburg & Rosalind Dixon eds., 2011); Tom Ginsburg & James Morigielton, *Does the constitutional amendment rule matter at all? Amendment culture and the challenge measuring amendment difficulty*, 13 Int'l. J. Const. L. 686, 688 (2015).

[25]There are some modes of constitutional change outside amendments, such as "judicial interpretation," "periodic replacement of the entire document," constitutional replacement, and "legislative revision." In this article, I define the amendment as the change to the text of the constitution through a procedure that specifically provided by the constitution. *See* Donald Lutz, *Toward A Theory of Constitutional Amendment*, 88 Am. Pol. Sci. Rev. 355, (1994); *see also* Jaclyn Neo & Bui Ngoc Son, *Expanding the Universe of Comparative Constitutional Amendment in Southeast Asia*, 14 J. Compar. L. 46, 47 (2019).

[26]*See* Charles Manga Fombad, *Strengthening constitutional order and upholding the rule of law in Central Africa: Reversing the descent toward symbolic constitutionalism*, 14 Afr. Hum. Rts. L. J. 412, 416 (2014) (listing the control of the amendment of the constitution as one of the core elements of constitutionalism).

[27]Dante Gatmaytan, *Can Constitutionalism Constraint Constitutional Change?,* 3 Nw. Interdisc. L. J. 22, (2010).

[28]Carl Schmitt, Constitutional Theory 150 (2008).

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the opinion that any other changes that go beyond that should be considered as a replacement and not an amendment.[29] In reality, it remains difficult to determine whether the amendment only changes some norms in the constitution or has transformed it into an entirely new document .

Some constitutions sought to regulate these issues through a prohibition to amend certain constitutional subjects that are considered pivotal for the existence of the constitution, popularly known as unamendable provisions.[30] This type of provision becomes the basis of the doctrine of an unconstitutional constitutional amendment, which enables the constitutional tribunals to declare some amendments as unconstitutional[31] if they are contrary to the unamendable provision in the constitution as exemplified in countries such as Turkey and Germany.[32] The problem is, even with the existence of an unamendable provision, there is still no clear boundary between amendment and replacement. For example, if an amendment changes almost all articles in the constitution, but does not change the provisions that are unamendable, does the constitution not transform into a different document?[33]

On the other hand, there is also a case when the court applies the unconstitutional constitutional amendment doctrine without determining any specific unamendable provisions. This has been exemplified in several countries, such as Colombia and India, where the courts in both countries determined which values constitute the basic structure of the constitution that should not be destroyed by an amendment.[34] Therefore, any effort to supplant these values must be considered as a form of replacement and not an amendment.[35] The Colombian and Indian examples illustrate that the courts can determine what constitutes an amendment or not despite the absence of an unamendable provision. However, this practice still does not provide a clear answer regarding the boundary between amendment and replacement. Under this value-based assessment, there are examples such as in the *Kesavananda Bharati* case by the Indian Supreme Court,[36] in which the majority of judges who decided to annul the amendments did not find an agreement on which norms form part of the basic structure of the Indian Constitution. Each judge drew a different list, so a constitutional amendment would be valid or invalid depending on the judges' personal preferences.[37]

[29]This because, there is a general assumption among scholars, which believed that the changes labeled as a replacement should have a greater magnitude to the text of the constitution than the changes labeled as an amendment. SCHMITT, *supra* note 28, at 150-55; *see also* David S. Law and Ryan Whalen, *Constitutional Amendment versus Constitutional Replacement: An Empirical Comparison, in* ROUTLEDGE HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW (Xenophon Contiades & Alkmene Fotiadou eds., 2020) (finding that the "amendments" tend on average to involve changes of a lesser magnitude than "replacements" as measured by proportional changes to the text of the constitution).

[30]Yaniv Roznai, *Unamendability and The Genetic Code of the Constitution*, 27 EUR. REV. PUB. L. 1, 4 (2015).

[31]*See* Michael Hein, *Do constitutional entrenchment clause matter? Constitutional review of constitutional amendments in Europe*, 18 INT'L. J. CONST. L. 78 (2020).

[32]*See* Yaniv Roznai & Serkan Yolcu, *An unconstitutional constitutional amendment–The Turkish perspective: A comment on the Turkish Constitutional Court's headscarf decision*, 10 INT'L. J. CONST. L. 175 (2012); *see also* Monika Polzin, *Constitutional identity, unconstitutional amendments and the idea of constituent power: The development of the doctrine of constitutional identity in the German constitutional law*, 14 INT'L. J. CONST. L. 411 (2016).

[33]This question arises because, if a country declared some clauses as unamendable because it was considered as the identity or important element of the constitution, then there might be the case that some unamendable provisions could express non-essential values. *See* Jose Luis Marti, *Two Different Ideas of Constitutional Identity: Identity of the Constitution v. Identity of the People, in* NAT'L CONST. IDENTITY AND EUR. INTEGRATION 23 (Alejandro Sáiz Arnáiz & Carina Alcoberro eds., 2013).

[34]Gary Jacobsohn, *An Unconstitutional Constitution? A Comparative Perspective*, 4 INT. J. CONST. L. 460 (2006); Carlos Bernal, *Unconstitutional constitutional amendments in the case study of Colombia: An analysis of the justification and meaning of the constitutional replacement doctrine*, 11 INT. J. CONST. L. 339 (2013).

[35]These can be observed in Colombia's case when the former President Alvaro Uribe in 2009 makes a constitutional amendment which extends his tenure as President for three periods, in this case, the Colombian Constitutional Court decided to annul the amendment. Based on reasons that it was contrary to the values of checks and balances, which according to the Colombian Constitutional Court is one of the essential elements of the Colombian Constitution so that the change must be considered as a form of constitutional replacement and not an amendment. *See* Bernal, *supra* note 34, at 345–346.

[36]*Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225 (India).

[37]KEMAL GOZLER, JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS: A COMPARATIVE STUDY 94–95 (2008).

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Apart from that, even though the doctrine of an unconstitutional constitutional amendment has migrated to various countries across the globe,[38] not all constitutional courts are willing to review the constitutionality of amendments.[39] In such a difficult situation, to decide whether a change to the constitution is included in the category of amendment or replacement, the following opinion of Richard Albert might help to solve the dilemma. Albert suggested a form of constitutional change that is positioned between amendment and replacement, which he called "constitutional dismemberment."[40] According to Albert, a change can only be considered as an amendment if it is either corrective or elaborative. A corrective amendment is made to a constitutional provision with the goals to improve it, so that later the provision can achieve its objectives as desired by the constitution's founder. An example of this type of amendment is the Twelfth Amendment to the United States Constitution,[41] which determines that each candidate for President and Vice President must take part in a different election.[42] Meanwhile, an elaborative amendment creates broader change than corrective. This type of amendment is not enacted to correct the imperfections of constitutional norms, but rather to elaborate the meaning of a norm in the constitution. Albert provided the example of the Nineteenth Amendment of the United States Constitution—which prohibits the denial of the right to vote on the basis of sex.[43] This amendment was carried out to further elaborate on the promise of equality in the United States Constitution.[44]

Meanwhile, Albert argues that a constitutional change is included in the dismemberment category if it changes the basic values determined by the constitution-makers. It is irrelevant whether that change is obtained through the amendment procedure—what matters is whether the changes show inconsistencies between the new norms and the goals of the constitution that have been determined by its founder.[45] According to Albert, the basic values of a constitution include: constitutional identity; fundamental rights; and the structure of the constitution.[46] A dismemberment of fundamental rights is exemplified when the norms regarding human rights in a constitution undergo significant changes, whereas the dismemberment of constitutional structure is a change that affects the allocation of powers, such as how political institutions exercise their authority or how it balances competing claims. For the dismemberment of constitutional identity, Albert sees it as a change that removes or replaces the constitution's basic values.[47] Although Albert differentiated dismemberment into three distinct forms, he also admitted that in practice, it is difficult to separate these three, because the changes to the constitutional identity can also affect changes to the structure of the constitution.[48]

[38]Yaniv Roznai, *Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Idea*, 61 AM. J. COMPAR. L. 657 (2013); Richard Albert, *How Court Becomes Supreme: Defending the Constitution from Unconstitutional Amendment*, 77 MD. L. REV. 181 (2017).

[39]Usually, the court rejection of the doctrine of the unconstitutional constitutional amendment was based on a purely formalist ground because it is very rare for the constitutional court to have authority in the constitution to review the amendment. *See* Richard Albert, Malkhaz Nakhasidze, & Tarik Olcay, *The Formalist Resistance to Unconstitutional Constitutional Amendment*, 70 HASTINGS L. J. 639 (2019).

[40]Albert, *supra* note 22.

[41]U.S. CONST. amend. XII.

[42]In its early establishment, the US Constitution required each presidential elector to cast two votes for president, the candidate with the highest votes would become the president, while the runner-up, vice president. However, these become a problem when in the 1800 presidential election the two candidates earned the same number of votes. *See* Albert, *supra* note 22, at 3.

[43]U.S. CONST. amend. XIV.

[44]Albert, *supra* note 22.

[45]*Id.* at 2–3 ("[C]onstitutional dismemberment. . . are self-conscious efforts to repudiate the essential characteristics of the constitution and to destroy its foundations.").

[46]*Id.* at 39.

[47]*Id.*

[48]*Id.*

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C. Indonesia's Constitutional Transition in 1999–2002: A New Constitution

Indonesia transitioned from an authoritarian government to a democratic one through four comprehensive amendments to the 1945 Constitution between 1999 and 2002. This option was chosen instead of the complete replacement of the 1945 Constitution due to the fact that there were still many Indonesians who held the view that the 1945 Constitution was "sacred" as a symbolic document of Indonesia's struggle for independence.[49]

The desire to maintain the 1945 Constitution cannot be separated from the context when the 1945 Constitution was amended; at that time, even though the amendments were considered as a successful transition to democracy, it was still deemed as an "insider job."[50] This is owed to the fact that the majority of the People's Consultative Assembly who amended the 1945 Constitution were previously also the members of the New Order authoritarian regime who were elected through democratic elections in 1999.[51] At that time, they were forced to amend the 1945 Constitution in response to the people's pressure to democratize the authoritarian political system that resulted in the economic crisis that hit Indonesia in 1998.[52] In that setting, it is not surprising that some members of the People's Consultative Assembly still wanted to preserve the 1945 Constitution, despite the fact that the document always gave birth to an authoritarian regime every time it was operated. [53]

Despite the decision to maintain the 1945 Constitution, Indonesia's transition can still be seen as a success because the amendments successfully democratized the constitution and adopted the principle of constitutionalism. For example, the changes established the dis of power between the executive and Indonesia's bicameral legislative bodies by giving the legislator greater control over the legislative process.[54] It also created new organs tasked with limiting governmental powers such as the new Constitutional Court, and made progressive steps in expanding human rights provisions; limiting the President's term of office, and; introducing a direct mechanism for the election of the President and Vice-President.[55]

The substance of those amendments contradicts the basic values of the original 1945 Constitution that was formulated by Soepomo. In contrast to modern constitutions that commonly have been made to limit governmental power and protect the rights of the people,[56] Soepomo's vision for this new constitution was that the government power should not be constrained. Soepomo—who was also a scholar of indigenous law—believed that the Indonesian state should be constructed by "the spirit of the Indonesian people,"[57] which views the relationship between the leaders and its people as a unity (*manunggaling kawula-gusti*). Under this conception—which he referred to as "integralism"—the government is akin to a wise parent who knows best about the interest of its "children," which corresponds to "the people."[58]

This is why the original 1945 Constitution only had a few articles on human rights, had no limits on the President's term of office, and also lacked a checks and balances mechanism, as

[49]Andrew Ellis, *The Indonesian Constitutional Transition: Conservatism or Fundamental Change*, 6 Sing. J. Int'L. & Compar. L. 116, 116–117 (2002).

[50]Donald L. Horowitz, Constitutional Change and Democracy in Indonesia 1 (2013).

[51]*Id.*; *see also* Rawin Leelapatana & Abdurrachman Satrio, *The Relationship Between a Kelsenian Constitutional Court and an Entrenched National Ideology: Lessons from Thailand and Indonesia*, 14 Vienna J. on Int'l Const. L. 497, 512 (2020).

[52]Leelapatana & Satrio, *supra* note 51, at 512.

[53]After 1957, Indonesia fell into the grip of two authoritarian rulers, first Soekarno and his Guided Democracy regime, and then Soeharto and his New Order regime.

[54]Before the amendments, the founders of the 1945 Constitution rejected Montesquieu's theory of separation of powers because they regarded that theory to be part of a liberal-democratic system that is always suspecting the governmental power. *See* Lindsey *supra* note 12, at 298; *See also* Pranoto Iskandar, *Constitutionalizing Human Rights Universality in Nonconstitutional Legal System: Decoding Indonesian Human Rights Brouhaha*, 3 Indon. J. Int'L. & Compar. L. 1, 17 (2016).

[55]Harijanti & Lindsey *supra* note 17, at 138.

[56]Charles Howard McIlwain, Constitutionalism: Ancient and Modern 2 (1966).

[57]*See* Lindsey, *supra* note 12, at 292.

[58]Iskandar, *supra* note 16, at 24.

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reflected in the absence of the judicial review system.[59] Soepomo viewed that the ideas of human rights and the limitation of power came from a Western society whose individualistic character always suspected governmental power.[60] He believed in the Eastern society such as Indonesia with its communal character, it is impossible for the government to harm its people.[61]

Based on the substances of the original 1945 Constitution, the four amendments between 1999 until 2002 cannot be considered corrective or elaborative,[62] because even though they have been enacted through procedures provided by the text of the Constitution itself, the substance still changed the values underlying the original 1945 Constitution. Although still called the "1945 Constitution," the resulting draft is more appropriately categorized as a dismemberment, because the original 1945 Constitution has been transformed into a completely different document that stands in juxtaposition to the values of the original Constitution.

This is demonstrated by how the amendments added comprehensive human rights protection to the 1945 Constitution, and some provisions are even inspired by the norms from the Universal Declaration of Human Rights (UDHR).[63] This choice contradicts the vision of the constitution-makers, especially Soepomo, who rejected the existence of individual rights because in his view Indonesia was more concerned with people's obligations towards the state rather than their rights.[64]

The amendments also altered the allocation of power in the 1945 Constitution. Before the amendment, the 1945 Constitution did not recognize the concept of separation of powers due to Soepomo's adamant belief that it does not fit Indonesian reality.[65] Instead, the framers of the Constitution adopted the concept of division of power (*pembagian kekuaasaan*) that places the People's Consultative Assembly as the supreme sovereign body that exercised popular sovereignty, while the President was assigned the duty of a *mandataris* (mandate), acting as both the head of government and the head of state. Under Article 5(1), the President also has the main legislative power, while Article 22(1) allows him or her to promulgate legislation in times of emergency.[66]

After the amendment, the President's legislative power is reduced, and his or her term of office is also limited to only two five-year terms as a response to Suharto's thirty-two years of presidency. Furthermore, the amendment no longer places the People's Consultative Assembly as the highest state institution. This change also gave birth to a new mechanism that was once rejected by Soepomo when the original 1945 Constitution was formulated; a judicial review mechanism, which is exercised by the new and powerful Constitutional Court.[67]

[59]This meant that there was no independent check on the law-making power which at that time was concentrated on the hand of the President. *See* Abdurrachman Satrio, *A Battle Between Two Populists: The 2019 Presidential Election and the Resurgence of Indonesia's Authoritarian Constitutional Tradition*, 19 AUST. J. ASIAN L. 2, 11 (2019).

[60]A.B. KUSUMA, LAHIRNYA UNDANG-UNDANG DASAR 1945 365–366 (2004).

[61]*Id.*

[62]Albert, *supra* note 22, at 3.

[63]Lindsey, *supra* note 3, at 254; *see also* Stefanus Hendrianto, *The Divergence of Wandering Court: Socio-Economic Rights in the Indonesian Constitutional Court*, 16 AUST. J. ASIAN L. 1, 3 (2016).

[64]KUSUMA, *supra* note 60, at 367.

[65]Koichi Kawamura, *The Origins of the 1945 Indonesian Constitution, in* CONSTITUTIONAL FOUNDINGS IN SOUTHEAST ASIA 58, (Kevin Y.L. Tan & Bui Ngoc Son eds., 2019) (discussing Soepomo's belief that in practice "the law-making institution was handed over government works, a court was handed over government works, and the government was given authority making laws.").

[66]*Id.* at 65.

[67]During the formulation of the 1945 Constitution, Soepomo rejected a proposal to establish a judicial review because he considered that Indonesian jurists were not ready to implement it. Besides, Soepomo took the view that the judicial review mechanism contradicts integralism, arguing that the mechanism is only necessary for a liberal democratic government that relies on the separation of powers, while Indonesia does not implement a separation of powers and had rejected the liberal democratic system. *See* KUSUMA, *supra* note 60, at 390

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D. Debate about the Legitimacy of the Amendments

As the four amendments to the 1945 Constitution are more properly categorized as dismemberment, there is a strong perception in the mind of some of the Indonesian public figures that these changes were illegitimate. This raises the question of whether dismemberment automatically renders constitutional changes illegitimate. In this section, the author argues that the changes made are still valid despite the dismemberment.

In his seminal work, Constitutional Theory (*Verfassungslehre*), Carl Schmitt argued that the sovereignty in the constitution was divided into two distinct forms; the *constituent power,* which he understood as the power of the people as the real sovereign holders; and the *constituted power,* or the authority of political institutions in the constitution. In this theory, the people—as the holder of constituent power—embody the real sovereignty when they make a fundamental political decision to form a constitution, which then constitutes the basis for political institutions—holder of constituted power—exercising their authority.[68] From that classification, Schmitt argues that the amendments by political institutions must not change the identity or fundamental values in a constitution, because such a change means a replacement to the constitution.[69] For him, the constitution may only be replaced by the people as the holders of sovereignty through extra-constitutional means such as revolution or coup.[70]

Schmitt's view has several gaps, among which is the fact that his views only conceive constitutional change through a simple distinction between amendment and replacement. This sort of perspective does not fit well with reality, because currently, many constitutions regulate mechanisms such as "total revision" or "total reform"[71] which in substance falls into the category of constitutional dismemberment.[72] There are also many constitutions in the world which directly involve the people in the constitutional amendment process, such as through a referendum or a ratification process to approve the results of the amendments.[73] Thus, it is difficult to conclude whether the constitutional changes made through the procedure of the constitution cannot embody the constituent power of the people's sovereignty.

Responding to that problem, some scholars such as Richard Albert and Yaniv Roznai argues that the limits of the constitutional amendment cannot be seen only through a traditional lens, which views extra-constitutional methods as the only means for the constituent power to be exercised. In Roznai's view, the limitation on the substance of constitutional amendments— a secondary constituent power—will be less when the number of people's participation is closer or even equal to the people's participation during the constitutional formulation—the primary constituent power.[74] Vice versa, when the people's participation in the amendment process is closer to the constituted power of the ordinary legislative process, the more it should be bound by limitation and judicial scrutiny.[75] Meanwhile, for Albert who also proposed the concept of constitutional dismemberment, a constitutional amendment that changes the identity and the basic values of

[68]*See* SCHMITT, *supra* note 28, at 125–28.

[69]*Id.* at 150.

[70]*Id.* at 142.

[71]*See e.g.,* COSTA RICAN CONST. art. 195, 196 (differentiating between partial reform and general reform of the constitution); *See also* BUNDESVERFASSUNG [BV][CONSTITUTION] Apr. 18, 1999, SR 101, art 138 (Switz.) (stipulating special procedures for doing total revision).

[72]*See* Low Hong Ping, *The Doctrine of Unconstitutional Constitutional Amendments in Malaysia: In Search of our Constitutional Identity*, 45 J. MALAY. & COMPAR. L. 53, 54–55 (2018).

[73]Yaniv Roznai, *Amendment Power, Constituent Power, and Popular Sovereignty*, *in* THE FOUNDATIONS AND TRADITIONS OF CONSTITUTIONAL AMENDMENT 35 (Richard Albert dan Alkmene Fotiadou eds., 2017).

[74]In contrast to Schmitt, Roznai divides constituent power into two categories, primary and secondary. Primary constituent power is used to describe the basic constitution-making power, meanwhile, secondary constituent power was used by Roznai to describe the constitutional amendment power. This is because Roznai considers that the amendment power can also manifest constituent power. *See* YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS 120–122 (2017).

[75]Roznai, *supra* note 73, at 37.

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the constitution—dismemberment—can be performed under the rule of mutuality, in which "a constitution can be dismembered using the same procedure that was used to ratify it."[76] This means constitutional dismemberment should be seen as valid as long as it was conducted in the same, or more, democratic threshold with the process where the original constitution was ratified by the constituent power.[77]

Based on the above views, the four amendments to the 1945 Constitution can be considered legitimate. This is because the original 1945 Constitution was formed only by a handful of Indonesian elites in an institution formed by the Japanese colonial government—called the Committee for Examination of Indonesian Independence (*Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan* or BPUPK)—when they still occupied Indonesia in early 1945. There was no public education, no submission, no draft circulated, and no referendum during the formulation process and the majority of elites who sat in the BPUPK did not represent the plurality of Indonesian society because most of them came from a Javanese origin, the biggest indigenous group in Indonesia, or held political and bureaucratic positions in the Japanese administration. There were also no political groups that at the time became the main opponents of the Japanese occupation such as the youth and the leftist.[78]

On the contrary, the People's Consultative Assembly members who amended the 1945 Constitution from 1999 to 2002 had a greater democratic pedigree than the founders of the 1945 Constitution because they were elected through the 1999 democratic elections—the first of its kind since the thirty-two year reign of Soeharto's New Order authoritarian regime.[79] The People's Consultative Assembly at that time had a greater legitimacy to change the substance of the 1945 Constitution, even to replace it with a new constitution, because they manifest greater constituent power than when the 1945 Constitution was first formed. That is why the amendments to the 1945 Constitution carried out in 1999 to 2002 are considered to be legitimate even though the substance contradicts the basic values of the original 1945 Constitution.

Other than the issue of democratic legitimacy, the original 1945 Constitution was only intended to be a provisional constitution. As admitted by Sukarno—Indonesia's first president who was also involved in the drafting process of the 1945 Constitution—the 1945 Constitution is a "*revolutionary grondwet*," which means that it is a temporary constitution intended to operate only during the revolutionary period and may be replaced with a new one once the exigent circumstances are no longer applicable.[80] The document was thus made in a very short time, and not long after, the Dutch started a war against Indonesia to restore their power. Based on this context, the drafters of the 1945 Constitution accepted Soepomo's proposal to use the integralist concept, which gave enormous power to the government because they needed to work efficiently in a situation of conflict. The fact that it contained only thirty-six articles—including two transitional provisions—reflected time constraints and temporary consensus about the different visions of the state among the drafters.[81] Therefore, it is understandable that the original 1945 Constitution always facilitates the creation of an authoritarian political system every time it

[76]Albert, *supra* note 22, at 57.

[77]*Id.* at 58.

[78]*See* David Bourchier, Illiberal Democracy in Indonesia: The Ideology of the Family State 64 (2015); *see also* Melissa Crouch, *Constitution making and public participation in Southeast Asia, in* Comparative Constitution Making (David Landau & Hanna Lerner eds., 2019).

[79]Most observers agreed that the 1999 election was very democratic. At that time, the political rights of the people had been recognized and protected, they also had the freedom to form a political party which resulted in 48 parties participating in the 1999 elections. *See* Saiful Mujani, R. William Liddle & Kuskridho Ambardi, Voting Behaviour in Indonesia Since Democratization: Critical Democrats 2 (2018).

[80]*See* Soekarno, Speech during the formulation process of the 1945 Constitution by the Preparatory Committee for Indonesian Independence (Aug. 18, 1945); Kusuma, *supra* note 60, at 479.

[81]Adriaan Bedner, *The Need for Realism: Ideals and Practice in Indonesia's Constitutional History, in* Constitutionalism and the Rule of Law: Bridging Idealism and Realism 166 (Maurice Adams, Anne Meuwese & Ernst Hirsch Ballin eds., 2017).

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was in force during peaceful time, because its main objective was not to limit or prevent any abusive practice by the government.[82]

The temporary nature of the 1945 Constitution can also be seen in the course of Indonesian history, especially from 1950 to 1959. The era—known in Indonesia as *demokrasi-liberal* (liberal-democracy) era—witnessed the then-reigning Indonesian government adopting the 1949 Federal Constitution and the 1950 Provisional Constitution.[83] The enactment of the two constitutions is the result of the Round Table Conference (*Konferensi Meja Bundar,* popularly known as the KMB) between Indonesia and the Netherlands. This conference marked the end of the conflict between the two as well as the end of the Indonesian independence revolution period.[84] Through the KMB, it was decided that Indonesia as a new country would adopt a liberal-democratic system, hence the reason why the 1945 Constitution was replaced with the 1949 Federal Constitution—which was immediately replaced again by the 1950 Provisional Constitution[85]—whose substance contained a blueprint for liberal-democratic values, with comprehensive protection of civil and political rights, especially labor rights, a fully elected parliament, and also a guarantee for an independent judiciary.[86]

Both constitutions also mandated the establishment of a permanent constitution for Indonesia which should uphold the values of human rights and democracy through a special body called the *Konstituante* (Constituent Assembly), whose members were democratically elected in 1955. This example shows that the founders of these two constitutions—some of whom were also involved in the process of formulating the 1945 Constitution, including Soepomo himself[87]—considered the original 1945 Constitution only as a temporary document that should not be the permanent basis of the Indonesian state. Unfortunately, the efforts of the *Konstituante* to create a permanent constitution failed after President Soekarno, together with the military under the pretext of an emergency due to the rise of armed rebellion in some regions, reinstated the 1945 Constitution and dissolved the *Konstituante* through a Presidential Decree on July 5, 1959, even though at that time the *Konstituante* had almost completed the new constitution. This move later proved to be an excuse for him to destroy Indonesian democracy because it marked the beginning of his authoritarian Guided Democracy regime that lasted until 1966.[88]

The turbulences of Indonesian democracy illustrate that there is still not a one-size-fits-all standard to determine whether a constitutional amendment was legitimate or not, given that the legitimacy of a constitutional amendment seems more dependent on the constitution's socio-political context.[89] Even though the substance of the amendments between 1999 until 2002 dismembered the basic values of the original 1945 Constitution, it cannot be deemed as illegitimate because the amendments manifest a greater constituent power than the process when the original 1945

[82]Iskandar, *supra* note 16, at 24.

[83]*See generally* Herbert Feith, The Decline of Constitutional Democracy in Indonesia (1962) (providing more information about *Demokrasi-Liberal*).

[84]Bedner, *supra* note 81, at 167.

[85]The 1950 Provisional Constitution is actually the same document as the 1949 Federal Constitution, the only difference is the 1950 Provisional Constitution uses the form of a unitary state.

[86]Bedner, *supra* note 81, at 167–68.

[87]Interestingly, Soepomo also involved in the drafting process of the 1949 Federal Constitution and the 1950 Provisional Constitution. However, according to Bagir Manan, his role was not as big as when formulating the 1945 Constitution. During the KMB process which later gave birth to an agreement for Indonesia to adopt a liberal-democratic system, Indonesian politics was dominated by Mohammad Hatta and Sutan Sjahrir, two independent movements figures who are known as the proponents of liberal democracy. *See* Bourchier, *supra* note 78, at 86–98.

[88]*See* Adnan Buyung Nasution, The Aspiration for Constitutional Government in Indonesia: A Socio-Legal Study of the Indonesian Konstituante (1992).

[89]This supports Jaakko Husa's opinion, which views the study of constitutional change as both legal and political phenomenon. Husa believes that the political dimension of constitutions be intertwined with the legal dimension when the constitution was changed. *See* Jaakko Husa, *Comparative Methodology and Constitutional Change, in* Routledge Handbook of Comparative Constitutional Change 2 (Xenophon Contiades & Alkmene Fotiadou eds., 2020).

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Constitution was created as well as succeeded in erasing the provisional elements in the original Constitution—the integralist concept—and also actualize its framers desire to create a permanent constitution which upholds the values of human rights and democracy.

E. Jokowi's Government Political Interest

The explanations above show that there is no convincing justification to restore the original 1945 Constitution because the allegations that the amendment between 1999 until 2002 was illegitimate has been disproven because of the amendments' democratic legitimacy and the nature of the 1945 Constitution itself.

That is why there is suspicion that the fifth amendment idea is only a political tactic to perpetuate President Jokowi's position. This presumption arose because many figures who proposed the fifth amendment were mostly his supporters, such as former general Hendropriyono and the Chairman of the People's Consultative Assembly, Bambang Soesatyo. Moreover, even though Jokowi himself said that he is not in favor of the fifth amendment,[90] many of the government officials—including the Minister of Finance, Sri Mulyani—under his reign stated that his policies would be more effective if they were implemented under an authoritarian system such as the New Order regime.[91] Jokowi's long-term development visions resemble Soeharto's development plans, which prioritized infrastructure building, and his supporters believe these visions can be achieved if Jokowi may extend his presidency beyond the term limit.[92]

This suspicion is also strengthened by the actions of his government that often revive the authoritarian tradition of the New Order regime. During the New Order era, the Soeharto regime utilized the five principles of Pancasila in the Preamble of the 1945 Constitution[93] in order to justify his authoritarian regime.[94] His regime associated Pancasila with the collectivist values of Indonesian society that had been the basis for Soepomo to form his integralist ideas, such as harmony (*rukun*) and mutual cooperation (*gotong-royong*).[95] That is why all actions deemed to be in opposition to his regime will be viewed as a threat to Pancasila and social harmony. The New Order regime also rejects the values of democracy and human rights,[96] and conducts a comprehensive indoctrination of Pancasila at all levels of society with an emphasis on the importance to prioritize the interests of the nation over the individual.[97]

Today, Jokowi's government utilizes these authoritarian ideas to suppress its political opponents. For example, in 2017, his government issued Government Regulation in Lieu of Laws No. 2 of 2017 on the Amendment of Law No. 17 of 2013 on Societal Organizations that provides the government with sweeping powers to ban any societal organization which is considered to have an ideology that contradict Pancasila.[98] Although this regulation has been used only to

[90]Antara, *Jokowi Tolak Usulan Amandemen UUD 1945*, TIRTO (Dec. 3, 2019), https://tirto.id/jokowi-tolak-usulan-amandemen-uud-1945-emGQ.

[91]R53, *Sri Mulyani Dorong Jokowi Otoriter*, PINTERPOLITIK (Dec. 2, 2019), https://www.pinterpolitik.com/sri-mulyani-dorong-jokowi-otoriter/.

[92]*See* Eve Waburton, *Jokowi and the New Developmentalism*, 52 BULL. INDON. ECON. STUD. 297, 315–16 (2016).

[93]Pancasila is viewed by many Indonesians as a national ideology, it consists of five principles: (1) the belief in the One God; (2) humanism that is just and civilized; (3) unity; (4) populism that is guided by the inner wisdom of deliberation amongst representative; and (5) social justice for all Indonesian.

[94]*See* Pranoto Iskandar, *The Pancasila Delusion*, 46 J. CONTEMP. ASIA 723, 726 (2016).

[95]David Bourchier, *Organicism in Indonesian Political Thought, in* THE OXFORD HANDBOOK OF COMPARATIVE POLITICAL THEORY 611 (Leigh K. Jenco, Megan C. Thomas, & Murad Idris eds., 2020); *see also* Leelapatana & Satrio, *supra* note 51, at 506.

[96]Bourchier, *supra* note 95.

[97]*Id.* at 612.

[98]Leelapatana & Satrio, *supra* note 51, at 507.

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ban organizations that perform intolerance and anti-democratic practices,[99] there is a possibility that this mechanism could be used in the future to also ban "democratic" organization which oppose the government because there is no certain interpretation regarding what constitute as an action that "contradicts Pancasila." Not only that, his government also formed a special body whose mandate is to indoctrinate Pancasila ideology in every element of society, similar to how Soeharto's regime saturated Indonesian society with Pancasila propaganda, popularly known as P4, to legitimize his authoritarian rule.[100]

By restoring the original 1945 Constitution through the fifth amendment, Jokowi's government will be able to fully reinstate these authoritarian constitutional traditions.[101] For this reason, the current government's attempt to carry out the fifth amendment can also be considered as what David Landau described as "abusive constitutionalism." The matter itself refers to practice that uses the mechanism of constitutional change to make a state significantly less democratic than it was before.[102] With the Jokowi government receiving support from almost all parties in the House of Representatives after its former political opponents Prabowo and his Party, Gerindra, switched sides to support him, it is likely that he will be able to implement this abusive practice if he pressed this idea to his supporters in the legislature,[103] given that the amendment mechanism in the 1945 Constitution only requires a simple majority vote, 50% + 1, in the People's Consultative Assembly.[104]

F. A Case for An Unconstitutional Constitution Doctrine?

With the possibility of the fifth amendment occurring, especially after the Chief of the People's Consultative Assembly has declared that he wants to execute this idea before his term of office ended in 2024,[105] the question that arises right now is how to prevent the People's Consultative Assembly from restoring the original 1945 Constitution. This Section argues that the only way to prevent the return of an authoritarian constitution is for the Indonesian Constitutional Court to perform the unconstitutional constitution doctrine.

The unconstitutional constitution doctrine is a variant of the unconstitutional constitutional amendment doctrine. This doctrine was once performed by the Constitutional Chamber of the Honduran Supreme Court; in 2015 they invalidated Article 374 in the Honduran 1982 Constitution[106] that made the four-year presidential term limit unamendable.[107] The court reasoned that the provision violated human rights provisions such as the right of free choice and

[99]Prasanth Parameswaran, *What the FPI Ban Does and Doesn't Tell Us About Political Islam in Indonesia*, THE DIPLOMAT (Jan. 7, 2021), https://thediplomat.com/2021/01/what-the-fpi-ban-does-and-doesnt-tell-us-about-political-islam-in-indonesia/.

[100]Jokowi's government formed the Agency to Reinvigorate Pancasila Ideology (*Badan Pembinaan Ideology Pancasila* or BPIP), a special body whose duty is to develop and foster Pancasila ideology in every element of society]. *See* Pranoto Iskandar, *An Indonesia that thinks, that's all we need*, INDON. J. INT'L. & COMPAR. L. BLOG (Dec. 17, 2018), https://www.ijil.org/blog/an-indonesia-that-thinks-that-s-all-we-ne\ed.

[101]During the New Order regime, Soeharto's government likened the Indonesian state with a traditional village or family in which all citizens were expected to take part according to their station in life. *See* BOURCHIER, *supra* note 78, at 612.

[102]David Landau, *Abusive Constitutionalism*, 43 U.C. DAVIS L. REV. 189, 195 (2013).

[103]The possibility for this idea to be materialized is also strengthened by a statistical data that shows that an amendment proposal has a higher chance of success if it was proposed by the government and cabinet. *See* Anna Fruhstorfer & Michael Hein, *Institutional interest and the politics of constitutional amendment*, 42 INT. POL. SCI. REV. 1 (2019).

[104]*See* INDONESIAN CONST., Art. 37 (4) ("[t]he resolution to amend articles of the Constitution shall be conducted by the approval of at least fifty percent plus one member of the People's Consultative Assembly.") The People's Consultative Assembly itself—as a joint session legislative body—is constituted of the member of the House of Representative and the Senate, with the House of Representative members a majority (575 people), while the members of the Senate only consisted by 132 people.

[105]Putra Ananda, *Ketua MPR Bertekad Rampungkan Amandemen UUD 1945 Sebelum Lengser*, MEDIA INDONESIA (Oct. 11, 2022), https://mediaindonesia.com/politik-dan-hukum/439134/ketua-mpr-bertekad-rampungkan-amendemen-uud-1945-sebelum-lengser.

[106]David Landau, Rosalind Dixon & Yaniv Roznai, *From an unconstitutional constitutional amendment to an unconstitutional constitution? Lesson from Honduras,* 8 GLOB. CONST. 40, 52 (2019).

[107]*See* HONDURAN CONST. art. 374 (prohibiting the amendment to Article 237 and 239 which states that the presidential term shall be four years and after that cannot be re-elected).

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freedom of speech.[108] The Honduras example falls into the category of the unconstitutional constitution doctrine because Article 374 of the Honduran 1982 Constitution is not a result of the amendment to the constitution, but rather was a part of the original 1982 Constitution itself. It was formed directly by the original constituent power, in contrast to the doctrine of the unconstitutional constitutional amendment which annuls amendments to the constitution which is a product of the constituted power.[109] That is why the use of the unconstitutional constitution doctrine in Honduras was criticized by many scholars for not having a convincing justification because the Honduran Supreme Court is considered to have exceeded the authority bestowed by the original constituent power.

The Honduras example was also criticized because it was done not to protect the values of liberal democracy but to weaken it, given that this decision erases any limits of presidential term of office under the Honduran 1982 Constitution. In fact, there is evidence that this decision was the result of manipulation from the Honduran National Party—the ruling party at that time—to maintain their power for an unlimited period.[110] By contrast, one of the justifications used by many scholars to support the application of the unconstitutional constitutional amendment doctrine is to slow down the forms of constitutional change that threaten to damage a liberal democratic order.[111]

Unlike the Honduras situation, however, there are several justifications for the Indonesian Constitutional Court to use the doctrine of an unconstitutional constitution if one day the original 1945 Constitution were to be restored. The first reason is related to the substance of the original 1945 Constitution. Scholars argue that the biggest obstacle to the implementation of an unconstitutional constitution doctrine is because the doctrine would make the constitutional court able to overturn the political decisions formed by constituent power as the real sovereign holder.[112] In the Indonesian context, this problem is not relevant; the drafters of the original 1945 Constitution did not want this authoritarian document to be operated outside the independence revolution context. Therefore, if the Indonesian Constitutional Court uses this doctrine and annuls the People's Consultative Assembly action that revived the original 1945 Constitution through the fifth amendment, they are actually upholding the vision of the constitution-makers. Apart from that, the Constitutional Court can also argue that the liberal democratic amendments between 1999 and 2002 were created by a real constituent power because the people were much more involved compared to the original 1945 Constitution. This refutes the claim of some initiators of the fifth amendment who view that the amendment from 1999 to 2002 as illegitimate because of the dismemberment.

The second reason was that the Indonesian Constitutional Court can use the argument which scholars have called *pragmatic justification*, or a justification to protect the liberal-democratic values because reviving the original 1945 Constitution means restoring the integralist conception which would grant enormous power to the President. Besides that, the justification to implement this doctrine was also strengthened by the fact that the 1945 Constitution could be amended by a "simple legislative majority." In a country that has a simple legislative majority amendment mechanism, it is not impossible to amend the provisions of the Constitution against the will of the majority of the people.[113]

[108]David Landau, *Honduras: Term Limits Drama 2.0 – how the Supreme Court declared the Constitution Unconstitutional*, CONSTITUTIONNET (May 27, 2015), https://constitutionnet.org/news/honduras-term-limits-drama-20-how-supreme-court-declared-constitution-unconstitutional.

[109]Landau, Dixon, & Roznai, *supra* note 107, at 54.

[110]In 2012, the Honduran National Party abruptly dismissed four Honduran Supreme Court justices, and then replaced them with judges who would back their agenda. *See* Brian Sheppard & David Landau, *Why Honduras's Judiciary is Its Most Dangerous Branch*, N.Y. TIMES (June 25, 2015), https://www.nytimes.com/2015/06/26/opinion/why-hondurass-judiciary-is-its-most-dangerous-branch.html.

[111]Landau, Dixon, & Roznai, *supra* note 107, at 57; *see also* Landau, *supra* note 103.

[112]Landau, Dixon, & Roznai, *supra* note 107.

[113]Albert, *supra* note 38.

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In reality, the Indonesian Constitutional Court may not use the unconstitutional constitution doctrine even though they have a strong justification to do so, because the implementation of this doctrine is related to how powerful the role of the Constitutional Court is in its political context.[114] The current conditions show that the Constitutional Court is weakening[115] as a result of various corruption scandals that greatly reduced the Court's public support.[116] Thus, it would be highly unlikely for the Court to adopt the unconstitutional constitution doctrine if the People's Consultative Assembly were to restore the original 1945 Constitution. However, there is still a possibility for the Indonesian Constitutional Court to use this doctrine, because the Constitutional Court during the leadership of its first chief justice, Jimly Asshiddiqie, had stated that the liberal democratic amendments between 1999–2002 were valid and legitimate,[117] as a response to criticisms from several Indonesian public figures which viewed the amendment as illegitimate and went too far.[118] If the current justices of the Court still hold this view, there is a chance for them to perform this doctrine.

G. Conclusion

The fifth amendment idea—which aims to restore the original 1945 Constitution—is untenable because the assumption that the current version of the 1945 Constitution is illegitimate has been disproven. Instead, I believe that to restore the 1945 Constitution to its original form would constitute an unconstitutional act, considering that the original 1945 Constitution was a temporary document not intended to operate beyond the revolutionary period. Apart from that, the amendments from 1999 until 2002 were also acts of primary constituent power because they had greater people's participation than when the 1945 Constitution was formed, thus they are legitimate even though they dismembered the 1945 Constitution.

This Article also highlights that the desire to restore the original 1945 Constitution is related to the interest of the Jokowi government to revive the authoritarian tradition that was used by Soeharto's New Order regime to maintain its power for thirty-two years. Thus, by restoring this Constitution through the fifth amendment, Jokowi's government will be able to fully restore this authoritarian tradition. Lastly, this Article also reveals that the Constitutional Court has a strong justification to use the doctrine of the unconstitutional constitution if the People's Consultative Assembly implements this idea because the application of these doctrines in this instance will not only be able to safeguard liberal-democratic values but will also be able to actualize the visions of the framers of the original 1945 Constitution.

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[114]Stephen Gardbaum, *What Makes for More or Less Powerful Constitutional Courts,* (UCLA School of Law: Public Law & Legal Theory Research Paper No. 17-37, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3050169.

[115]After the arrest of its third Chief Justice, Akil Mochtar, in 2013 on bribery charges, the Constitutional Court under Hamdan Zoelva has seemingly tried to avoid conflict with the government and the legislature. *See* Stefanus Hendrianto, *The Rise and Fall of Historic Chief Justices: Constitutional Politics and Judicial Leadership in Indonesia*, 25 Wash. Int'l. L.J. 489, 556 (2016).

[116]*See* Nardi, *Can NGO Change the Constitution? Civil Society and Indonesian Constitutional Court*, 40 Contemp. Se. Asia 247, 254 (2018).

[117]Editor, *Debat Keabsahan UUD 1945 jadi Momentum Memperluas Sosialisasi*, Hukumonline (Jan. 31, 2007), https://www.hukumonline.com/berita/baca/hol16134/debat-keabsahan-uud-1945-jadi-momentum-memperluas-sosialisasi/.

[118]Detiknews, *Tyasno: Amandemen UUD 1945 Ilegal dan Tak Sah*, DETIK (July 19, 2007), https://news.detik.com/berita/d-807192/tyasno-amandemen-uud-1945-ilegal-dan-tak-sah.

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