

# ABUSIVE CONSTITUTIONALISM: COMPARATIVE ANALYSIS

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**ABSTRACT.** This article aims to delve into the reasons behind the plan to implement further constitutional amendments two decades after the last constitutional amendments in 1999–2002. The key question is whether it is necessary to carry out further constitutional amendments with two agendas: (1) to incorporate the State Policy Guidelines (PPHN) and (2) to extend the presidential term? This study employs doctrinal-qualitative approaches to answer the aforementioned research questions. It examines relevant laws, regulations, and doctrines to understand the main factors that contribute to the plan for constitutional amendment. This paper argues that while the inclusion of the two topics above in the constitution falls within the constitutional authority of the Consultative Assembly or Working Committees, the principles of constitutionalism and democracy must be considered. This paper contends that further constitutional amendments with the above objectives could lead to abusive constitutionalism if undertaken without a clear and legitimate purpose. This is because further amendments with these two agendas could be subjectively exploited by state institutions to gain more constitutional powers. The paper recommends three approaches to prevent abusive constitutionalism: incorporating an eternal clause, applying a basic doctrine structure, and involving civil society.

**Keywords:** abusive constitutionalism; unconstitutional constitutional amendments; judicial state order; state organs

## 1. INTRODUCTION

### 1.1 BACKGROUND

A constitution contains the fundamental structure of state governance, including the basic state structure, relationships between the state and its citizens, and the protection of human rights (Bulmer, 2017). A constitution also provides a mechanism for constitutional amendments (Albert, 2018). Such provisions are essential to ensure that the constitution remains up to date. The amendment provision implies that a human-made constitution is not a perfect document (Roznai, 2017). It must be improved and refined periodically to better adapt to contemporary societal developments (Roznai, 2017). However, the good intentions of an amendment provision are often exploited for undemocratic purposes, such as the accumulation of power, the perpetuation of power, or the marginalization of other

state institutions' authority (Dixon & Landau, 2021).

To illustrate, there has been a tendency to exploit constitutional channels for undemocratic purposes in the past decade. In Russia and Turkey, for example, the presidential term has been extended through invoking constitutional mechanisms (Partlett, 2020). However, the purpose of extending the presidential term is, in fact, to perpetuate power, which contradicts the concept of constitutionalism. This proves a contradiction to the concept of constitutionalism, and the abusive use of it.

Constitutionalism, which essentially means the limitation of powers, is misused to expand the powers of state institutions. This phenomenon is termed „abusive constitutionalism” by David Landau (2013). David Landau describes this phenomenon in his article *Abusive Constitutionalism*, with examples from several Latin American countries such as Venezuela and Colombia. In these two countries, constitutional amendment mechanisms are used to extend the president's term of office, increase the authority of certain state institutions, and weaken the constitutional authority of other state institutions (Landau, 2013).

A recent book by Rosalind Dixon and David Landau titled *Abusive Constitutional Borrowing* analyzes the use of constitutional mechanisms for undemocratic purposes (Dixon & Landau, 2021). The exploitation of constitutional mechanisms occurs through constitutional amendments, constitutional rights, and judicial review. In several countries, it is also possible to witness an abusive borrowing of constitutional rights. A notable example of this is Hungary, where constitutional amendments have been made to consolidate power within the executive branch, despite the appearance of safeguarding democratic structures.

This issue has also emerged in Indonesia over the past five years. This includes proposals to give the People's Consultative Assembly (MPR) the authority to set state guidelines (PPHN), extend the President's term from two to three terms, and even extend the President's term beyond five years. While this paper acknowledges that the MPR has the constitutional power to propose these changes, it is crucial to consider the will of the people and, above all, ensure that these changes align with the principles of constitutionalism. Hence, constitutional amendments should be implemented to improve the constitution, upholding the values of constitutionalism, rather than to expand political power. Therefore, it is essential to prevent amendments that could lead to abusive constitutional practices.

## 1.2 RESEARCH QUESTIONS

Based on the description above, this study aims to address three key questions:

1. What justifies the proposal to include the State Policy Guidelines (PPHN) and (de jure or de facto) extend the presidential term, from the two to three terms in future constitutional amendments?
2. What constitutional endorsement could be qualified as the abusive constitutionalism (Indonesia, Brazil, Venezuela, Russia, France, Turkey, etc)?
3. How to recognize the attempts to extend the presidential term in future constitutional amendments?
4. What kind of constitutional reforms can be implemented to prevent abusive constitutionalism?

### 1.3 METHODOLOGY

This is a conceptual legal research with a comparative approach. This study seeks to answer the research questions above by offering two concepts that can serve as a reference to prevent abusive constitutionalism in Indonesia. These concepts draw from the experiences of other countries that have faced similar constitutional challenges in the past (Kigwiru, 2020). Therefore, this study uses a comparative approach. A comprehensive understanding of the concepts of constitutionalism and democracy will become an important foundation. This study uses Indonesia's experience with the plan to carry out further constitutional amendments as a case study and evaluates it against relevant constitutional principles such as constitutionalism and democracy. Is there a tendency for deviation?

Once gaps between constitutional doctrines and their practical application are identified, this research aims to offer solutions to prevent abusive constitutionalism. Existing literature highlights the efforts of India and various Latin American states in addressing abusive constitutionalism. India is significant because its Supreme Court ruled a constitutional amendment unconstitutional for violating the "basic structure" principle (Choudry et al., 2016). Similarly, Latin American states such as Colombia and Venezuela are indicative (Dixon & Ginsburg, 2017), as both have experienced abusive constitutionalism in the past (González-Jácome, 2015).

This work suggests an alternative approach to prevention of abusive constitutionalism: strengthening, disseminating, and sustaining the voice of civil society to offer a counter-narrative in assessing the validity of constitutional changes. This mechanism is preferable for three reasons: Firstly, civil society is already integrated into the political system. Second, no constitutional amendments are required. Third, this approach fosters a space for constructive constitutional dialogue between the government and society.

The paper is structured as follows: Part II, titled „Results and Discussion,“ is divided into several sections. Section 2.1 clarifies the concept of „abusive constitutionalism,“ which is used to evaluate whether recent developments in Indonesia align with this framework. Section 2.2 explores the proposal to include two key issues in future constitutional amendments: the reinstatement of the PPHN and the extension of the presidential term. This section addresses the motivations behind these proposals, questioning whether they represent an exercise of the MPR's constitutional authority to amend the constitution or if they aim to expand the powers of state institutions. Section 2.8 examines the potential consequences of these developments and offers strategies to prevent the rise of abusive constitutionalism in Indonesia. Finally, Part III, „Conclusion,“ summarizes the findings and offers recommendations.

## 2. RESULTS & DISCUSSION

### 2.1 DEFINITION OF ABUSIVE CONSTITUTIONALISM

This section explores the concept of abusive constitutionalism, which is essential for evaluating whether recent developments in Indonesia align with it, drawing on two articles: *Abusive Constitutionalism* by David Landau and *Abusive Constitutional Borrowing* by Rosalind Dixon and David Landau.

David Landau's 2013 article *Abusive Constitutionalism* highlights a trend in some countries, including Colombia, Hungary, and Venezuela, where constitutional changes were used to undermine democracy. Under President Álvaro Uribe Vélez, the Colombian constitution dictated that the president could hold office for a single term. This was intended to prevent the emergence of a strong leader who could hold office permanently (Bushnell, 1993). However, there was an attempt to amend the previously democratic Colombian constitution by proposing an extension to the president's term of office. In Venezuela, the constitution was amended to extend the president's term of office from a single four-year term to two six-year terms.

Meanwhile, Hungary employed both amendments and replacements to the constitution (Nart, 2021). This was done by adding more constitutional court judges so that the ruling party could fill the seats (Hungary Constitution). Additionally, the incumbent government also established a powerful National Judicial Office, enabling the ruling party to control the judiciary. Some state commissions, including the electoral commission, budget commission, and media committee, were reconstituted to grant the government with more opportunities to appoint its people. Moreover, the rule for general electoral districts was adjusted to potentially make it harder to amend the constitution in opposition to the current government.

A recent study by Rosalind Dixon and David Landau on *Abusive Constitutional Borrowing* (Dixon & Landau, 2021) expands upon David Landau's earlier work on abusive constitutional change by examining whether similar democratic constitutional features are being used for anti-democratic purposes in other countries. Their research concludes that democratic constitutional designs, doctrines, and concepts can indeed be abused for undemocratic ends. Dixon and Landau illustrate how elements of modern democratic constitutionalism like constitutional courts, rights, and the theory of constituent power can be manipulated. The erosion of democratic constitutions often depends on key institutions, such as courts, anti-corruption commissions, human rights bodies, and election commissions, which can be co-opted or undermined.

A separate study by Mila Versteeg, Timothy Horley, Anne Meng, Mauricia Guim, and Marilyn Guirguis, titled *The Law and Politics of Presidential Term Limit Evasion* (2020), reveals that about half of leaders nearing the end of their terms attempt to extend their tenure, often through strategies such as drafting new constitutions, manipulating judicial interpretations, or delaying elections. Furthermore, the study also concludes that it is public resistance, not judicial intervention, that typically prevents the extension of the president's term of office, challenging the prevailing view that courts are the primary enforcers of term limits (Versteeg et al., 2020).

These three studies offer valuable insights into the current situation in Indonesia, especially with regard to the proposal to amend the constitution to reintroduce the National Guidelines (PPHN) and extend the presidential term from two to three terms. Do the findings from these studies help us understand the motivations behind Indonesia's proposed constitutional amendments? I argue that they do, but the key question remains: What is the primary goal of the proposed changes? Is it to limit government powers, or to expand the influence of state institutions? If the latter is true, this proposed constitutional amendment could indeed be considered a case of abusive constitutionalism, as described by David Landau.

## 2.2. PROPOSAL FOR FURTHER CONSTITUTIONAL AMENDMENTS

The updated 1945 Constitution includes a special chapter on constitutional amendments, which grants the People's Consultative Assembly (MPR) the authority to amend the constitution:

Article 37 states that:

(1) A proposal to amend the articles of this statute may be included in the agenda of an MPR meeting if submitted by at least one-third of the total MPR membership.

(2) Any proposal to amend the text of the Constitution must be in (i) writing; clearly stating the articles to be amended along with the reasons for the amendment.

(3) To amend the articles of this constitution, the attendance of at least two-thirds of the total MPR membership is required at the MPR meeting.

(4) Any decision to amend the articles of this constitution requires the approval of at least fifty percent plus one member of the total MPR membership.

(5) Provisions concerning the form of the Unitary State of the Republic of Indonesia may not be amended.

Article 37 grants the MPR the authority to amend the constitution, outlining both the procedures and requirements for doing so. As the only state institution empowered by the constitution to carry out amendments, the MPR is subject to one key limitation: it cannot alter the form of the unitary state, as explicitly stated in Article 37(5). This raises an important question: what if the MPR seeks to amend the constitution in a way that expands its own powers? The following section will examine the proposal to amend the constitution in Indonesia, specifically to reintroduce the PPHN and extend the presidential term, shedding light on the potential implications of such changes.

## 2.3 EXAMINATION OF THE PROPOSAL TO REINTRODUCE THE PPHN IN FUTURE CONSTITUTIONAL AMENDMENTS

This section examines the proposal to reintroduce the PPHN in future constitutional amendments. What motivates the People's Consultative Assembly (MPR) to consider reintroducing the PPHN in future constitutional amendments? Are the arguments to include the PPHN legitimate? This section reviews the claims of MPR members and some politicians who believe it is essential to include the PPHN in the updated constitution. It appears that the MPR's claims are weak and lack a strong historical foundation.

Historically, the old 1945 Constitution granted the People's Consultative Assembly (MPR) the highest position among government institutions. The MPR represented the sovereignty of the people. The MPR elected the President and Vice President. Both the President and Vice President were accountable to the MPR. The MPR could impeach the President and Vice President. Another key task of the MPR was determining the National Development Guidelines (GBHN). The MPR referred to the GBHN when the President reported on its work. If the MPR was dissatisfied, it could impeach the President for failing to comply with MPR guidelines. The President was accountable to the MPR since the latter was the highest state institution and represented the sovereignty of the people.

While Indonesia's first Constitution, enacted in 1945, mandated the MPR to determine

the GBHN, the GBHN itself was not implemented until the 1960s. This implementation was carried out by the Presidential Decree 1/1960 on the State Guidelines (GBHN). The next GBHN was issued by the MPR through the MPR Decree 1/1960 on the Indonesian Political Manifesto, originally derived from the President's speech at the United Nations titled "To Build a New World ((Penetapan Presiden Republik Indonesia, 1960)." In 1963, the MPR issued another decree on the national guideline, based on the President's speeches "Revolusi Sosialisme Indonesia – Pimpinan Nasional" (Socialist Revolution – National Leader) and "Tahun Kemenangan" (The Year of Glory). This demonstrates that the GBHNs during the Old Order (1959 - 1966) era were originally developed by the President, even though they were formalized in MPR decrees. Thus, the content of the GBHN heavily depended on the incumbent President.

Between 1999 and 2002, the Indonesian Constitution was amended. The goal of these constitutional amendments was to limit the powers of the government and ensure the protection of human rights. With the updated constitution, the paradigm shifted from MPR sovereignty to the supremacy of the constitution. The MPR is no longer the highest state institution. It no longer has the authority to establish national policy directives or to elect the president and vice president.

According to the new constitution, constitutional norms are the highest laws of the state. It is the constitution that distributes powers to state institutions instead of the MPR. Therefore, the MPR's authority to determine the GBHN (Broad Guidelines of State Policy) has been abolished.

However, there are still some questions to be posed regarding this constitutional amendment. Why is it that now, various politicians and MPR members are proposing the reintroduction of the PPHN—the new name for the GBHN—into future constitutional amendments after two decades since the 1999–2002 amendments? There are two arguments that follow this proposition. First, the current constitution, which abolished the GBHN, does not guarantee the sustainability of national development (Forum Rektor Indonesia). Second, the GBHN is more comprehensive than the current national development plan as outlined in the SPPN Law (CNN Indonesia, 2019). Finally, what would the implications be if the GBHN were reintroduced to the current constitution?

## **2.4 DOES THE CURRENT CONSTITUTION ENSURE THE CONTINUITY OF LONG-TERM NATIONAL DEVELOPMENT?**

It is argued that transitioning from the GBHN to the SPPN Law has led to uncertainties about the continuity of national development. Under the old constitution, the MPR had the authority to determine the GBHN. However, historical evidence shows that it was the President, and not the MPR, who determined the GBHN's content in practice. The GBHN's continuity in the past stemmed from the President's prolonged tenure, which enabled the continuity of national development objectives.

When it comes to whether the MPR's authority to determine the GBHN aligns with the updated Constitution's framework, the short answer is no. Because under the updated constitution, the MPR is no longer the highest state institution. If the MPR determines the GBHN and the President is bound by it, the President is subordinate to the MPR. However,

the updated Constitution places the President and the MPR on equal footing. This means that the President is no longer accountable to the MPR.

The challenge of aligning institutional authority with the continuity of national development is also evident in other countries. For instance, in Turkey, constitutional amendments have significantly increased presidential powers while extending terms, ostensibly to allow for the sustained implementation of development policies. However, this approach has sparked debates about the risks of concentrating power in the executive and its implications for institutional checks and balances.

Similarly, in Kazakhstan, recent constitutional reforms redistributed power between the President and Parliament. While intended to democratize governance, this redistribution has raised concerns about whether frequent political changes might disrupt long-term policy objectives—a challenge that resembles the potential inconsistencies within Indonesia's updated framework.

Under the current constitution, the President and MPR members are regularly replaced through elections. If the composition of the MPR changes frequently, its aspirations may shift, potentially disrupting the GBHN's continuity.

## **2.5. IS THE GBHN MORE COMPREHENSIVE COMPARED TO THE EXISTING SPPN LAW?**

The main argument for why the GBHN is more comprehensive compared to the SPPN Law lies in the fact that the GBHN is created by the MPR, which consists of members of the DPR and the DPD, meaning that various entities with different interests are involved. Representing interests of many, the GBHN is expected to last longer. The SPPN Law, on the other hand, is issued by the President and the House of Representatives (DPR). This means that the SPPN Law follows the preferences of the incumbent president. If the president changes, the SPPN Law is also likely to change. Consequently, the SPPN Law is founded not on the will of the public, but the disposition of the president in office.

Therefore, there still remains the question of whether it is true that the GBHN will last longer, given that MPR members change along with parliamentary elections. This seems unlikely. Because whereas the SPPN Law is issued by the President and the DPR, the GBHN is created by the MPR (members of the DPR and members of the DPD), setting a more solid foundation for its creation.

## **2.6. DOES THE REINTRODUCTION OF THE GBHN FIT WITH THE CURRENT CONSTITUTIONAL FRAMEWORK?**

Under the original 1945 Constitution, the MPR (People's Consultative Assembly) consisted of the DPR (House of Representatives), regional delegates, and functional delegates, and held the position of the highest state institution. The removal of the GBHN (Guidelines of State Policy) in the reformed constitution profoundly impacted this structure, as it diminished the MPR's supremacy and redefined its position as equal to other state institutions, including the President, DPR, and DPD (Regional Representative Council). The President, who is now directly elected by the people, is no longer accountable to the MPR, making the GBHN

incompatible with the current constitutional framework.

Reinstating the GBHN as a guideline for the President would reestablish the MPR as the body to which the President must be accountable. This shift would introduce elements of parliamentarism—a system at odds with Indonesia’s strengthened presidential system. The current constitution is designed to solidify presidential authority through mechanisms such as the direct election of the President, fixed presidential term limits, the removal of the MPR’s authority to elect the President, and the elimination of the GBHN.

Given this context, the proposal to reintroduce the PPHN (Broad State Policy Guidelines) in future constitutional amendments lacks a solid legal and constitutional basis. It directly conflicts with the constitutional framework’s aim to bolster presidentialism. Additionally, this proposal has faced significant resistance from civil society organizations and NGOs, which argue that it risks resurrecting the MPR’s dominance, reminiscent of its pre-reform power under the original 1945 Constitution.

In summary, reintroducing the PPHN could pave the way for abusive constitutionalism, reflecting the MPR’s ambitions to expand its authority through constitutional mechanisms that contradict the spirit of the current framework. To prevent such measures, robust safeguards must be established. These potential mechanisms will be explored in Part IV.

## **2.7. A PROPOSAL TO EXTEND THE PRESIDENT’S TERM OF OFFICE**

Another issue to be included in future constitutional amendments is the extension of the President’s term of office from two to three terms. There are three proposals regarding the possibility of the incumbent President remaining in office for three terms: (1) A proposal to extend the President’s term of office from two to three terms. (2) A proposal to extend the second term of the President by five years. Finally, (3) a proposal to nominate the incumbent President as a candidate for Vice President in the next parliamentary elections. All three proposals aim to extend the President’s term of office (Presiden 3 Periode Diusulkan Masuk Amandemen, 2019).

It is imperative to acknowledge the underlying reasoning behind such proposals. The main argument is that extending the President’s term would prevent societal divisions, (Pengamat Politik Qodari Jelaskan Alasan Mendukung Wacana Jokowi 3 Periode) enabling more stability in the country. Is this true? Indonesia’s history tells us that only two presidential candidates were running in the 2019 presidential elections. This head-to-head competition led to societal division between those who supported Jokowi and those who supported Prabowo. Today, the rivalry between the elites has ended, as the losing presidential candidates, Prabowo Subianto and Sandiaga Uno, have joined the Jokowi administration as the Ministers of Defense and Tourism, respectively. However, there is a possibility that such an event is likely to reoccur in the future. Therefore, it is considered important to extend the President’s term of office to prevent societal division.

The debate around presidential term limits is not unique to Indonesia. For example, in Russia, constitutional amendments in 2020 reset Vladimir Putin’s previous terms, enabling him to remain in office until 2036. Proponents argued that this continuity was essential for political stability and economic development. However, critics claim that such amendments undermine the principle of power limitation and create the risk of authoritarianism.

Similarly, in France, the shift from a seven-year presidential term to a five-year term in 2000 was intended to strengthen accountability and align presidential and parliamentary elections. While this reform did not extend terms, it demonstrates how term limits and their adjustments are crucial to maintaining balance in governance.

It is worth noting that the proposal to extend the Presidential term has been put forth by politicians, not the public. It began with a statement from the Minister of Investment, followed by politicians from other political parties. Essentially, they argued that the current political order promotes investment and development, and that it should be maintained to allow Indonesia to continue growing. Therefore, they argue that it is necessary to extend the President's term of office to maintain this favorable situation.

However, is the extension of the Presidential term the sole solution to Indonesia's continued growth? Other factors, such as corruption and legal uncertainty, should also be taken into consideration by investors before they invest their capital in Indonesia. While proponents argue that stability is key, this perspective raises critical questions about the broader implications of such a constitutional amendment.

According to Article 7 of the updated 1945 Constitution, „The President and Vice President hold office for five years and can subsequently be re-elected for only one term for the same office.” Additionally, Article 8 (1) states: „If the President dies, resigns, is dismissed, or is unable to perform their duties during their term, they shall be replaced by the Vice President until the end of their term of office.”

This means that under Article 7, the incumbent President has no chance of serving three terms, as Article 7 limits the President's term of office to two terms. There are two arguments for extending the President's term of office: First, it is likely to maintain the continuity of district development. Without an extension, it is possible that the next President will adopt different policies from the current President when governing the country. This might result in the disruption of the program continuity. On the other hand, an extension of the term is likely to reduce the possibility of societal division, which was what happened in the 2019 presidential election, where people were divided over their political choices (Wasisto & Paryudi, 2021).

Such arguments, however, lack a solid foundation. They do not align with the current constitutional order, as Article 7 limits the President's term to two periods. Furthermore, this plan also contradicts the essence of the constitution, which is to limit power. In other words, it violates the principle of constitutionalism. Therefore, extending the President's term of office is likely to violate both the constitution and the principle of constitutionalism.

Ultimately, the proposal to extend the President's term of office requires a constitutional amendment. Supporters of this initiative have also suggested additional amendments to facilitate such an extension. While this recommendation is technically feasible, it risks serving as a gateway to an unconstitutional amendment by altering the fundamental structure of the constitution—specifically, the principle of limiting executive power. Such a change would undermine the core values and foundational principles that the constitution is designed to uphold.

## **2.8. THE POSSIBLE CONSEQUENCES AND SOME POSSIBLE WAYS TO PREVENT ABUSIVE CONSTITUTIONALISM IN INDONESIA**

This section will address two key topics: (1) the potential consequences of further constitutional amendments aimed at reintroducing the PPHN and extending the presidential term, and (2) strategies to prevent abusive constitutionalism. Specifically, it will propose two conceptual approaches to counter such abuse: the principle of the unconstitutional constitutional amendment and the application of the basic structure doctrine (Bhat, 2012). These two concepts are interrelated and aim to prevent the misuse of the constitutional mechanism for undemocratic purposes.

An unconstitutional constitutional amendment refers to an amendment that, while meeting the formal procedural requirements outlined in the constitution, contradicts the basic structure of the constitution (Barak, 2011). Many constitutions include ‘eternal provisions’—clauses that are explicitly protected from modification. These immutable provisions are designed to safeguard the core values and essential features of the constitution, ensuring their preservation over time.

### **\* WHAT WOULD BE THE POSSIBLE CONSEQUENCES IF THE PLAN TO IMPLEMENT FURTHER CONSTITUTIONAL AMENDMENTS, WHICH AIMS TO REINTRODUCE THE PPHN AND EXTEND THE PRESIDENTIAL TERM, IS ACTUALLY REALIZED?**

Normatively, such proposals do not align with the five fundamental agreements determined by the second founding fathers during the 1999-2002 constitutional amendments. The five basic agreements are as follows: (1) maintaining the preamble of the constitution, (2) maintaining the unitary state of Indonesia, (3) strengthening the presidential system, (4) incorporating the explanations into the constitutional text, and (5) making amendments through addenda (The Office of the Registrar and the Secretariat General). It can be said that the proposal to include the PPHN of the MPR does not align with the constitutional provisions aimed at strengthening the presidential system. The presence of the PPHN therefore reflects the introduction of the parliamentary system, as the president must follow the PPHN created by the parliament (the MPR).

This begs the question: who will determine whether the president complies with the PPHN? What will happen if the president does not comply with the PPHN? Should the MPR, as the creator of the PPHN, become an institution for which the president is accountable? If so, this would mark a shift toward a parliamentary system, undermining the presidential system and reestablishing the MPR's dominant role. Furthermore, the PPHN's framework does not guarantee continuity in the national development program, as the composition of MPR members changes every five years.

The proposal to extend the presidential term directly challenges a cornerstone of constitutional governance: the limitation of power. It also conflicts with the principles of constitutionalism. However, the plan to extend the presidential term appears less contentious than the push to reintroduce the PPHN in future constitutional amendments.

These developments hint at a trend toward abusive constitutionalism. The proposals to extend the presidential term and reintroduce the PPHN seem to originate from elites—

senior officials, ministers, and members of the DPR/MPR—rather than from the people.

Institutions such as the MPR and the DPD have actively promoted these ideas, with the latter frequently advocating for them in academic settings. There is evidence suggesting that the MPR seeks to reclaim its previous powers through constitutional amendments. While the reintroduction of the PPHN could technically be carried out by the MPR, it must align with the constitution's fundamental principles, namely the limitation of power and the protection of human rights.

If these indications hold true, such efforts must be resisted to safeguard democracy and the principle of power limitation. Yet, preventing abusive constitutionalism is particularly challenging in a political landscape where the majority of parties are closely aligned with the ruling government. This alignment weakens the checks-and-balances mechanism, limiting meaningful scrutiny, resistance, or criticism from the legislature. Consequently, government proposals risk being implemented unchallenged, regardless of whether they truly reflect societal needs or align with public expectations.

In this context, it is vital to ask: Does this policy genuinely serve the interests of society, or does it primarily reflect the ambitions of political elites?

#### **\*HOW CAN THE RISK OF ABUSIVE CONSTITUTIONALISM BE PREVENTED?**

The following section explores two potential solutions to prevent abusive constitutionalism. First, there is a need to establish clear limits on constitutional amendments, particularly for articles that embody the basic structure or fundamental principles of the constitution. This can be achieved through the adoption of an eternity clause or immutable constitutional provisions, which are designed to safeguard essential constitutional principles from modification.

The theory of immutable constitutional provisions means that certain articles of a constitution are unamendable. These restrictions are intended to preserve the constitution's core values and ensure that its fundamental nature remains intact. If such provisions were altered, the identity of the constitution itself would be compromised. Immutable provisions can take various forms, such as prohibiting changes to specific articles, requiring additional institutional oversight for constitutional amendments, or embedding non-amendable clauses into the constitution.

For instance, France's Fifth Republic Constitution enshrines immutable principles, such as the republican form of government, which cannot be altered under Article 89. This clause helps safeguard the constitution against potential abuses by preserving the foundational principles of the nation's legal framework. The updated 1945 Constitution of Indonesia declares that the unitary state of the Republic of Indonesia is unalterable. This provision serves as a safeguard against unconstitutional constitutional amendments and helps maintain the integrity of the nation's foundational principles.

Second, the basic structure doctrine provides another potential solution. This doctrine represents a judicial effort to safeguard the fundamental principles and structures of a constitution (Choudry et al., 2016). Under this approach, the judiciary is tasked with examining whether a constitutional amendment violates the basic structure of the constitution. Importantly, the judiciary's role is to assess such amendments through judicial

review mechanisms, not to propose constitutional changes. If a constitutional amendment is found to contradict the basic structure, the court has the authority to declare it invalid.

An example of this is India's Supreme Court, which, in the landmark *Kesavananda Bharati v. State of Kerala* case (1973), established the basic structure doctrine. The court ruled that certain fundamental features of the Indian Constitution, such as democracy, the rule of law, and judicial independence, cannot be amended by Parliament. This doctrine has since been used to block several attempts at constitutional changes that could undermine India's democratic framework.

Implementing an eternity clause would require a constitutional amendment, as the current constitution does not explicitly incorporate all foundational principles into such a provision. However, this approach may not be feasible at present, given the significant effort, cost, and political challenges involved in amending the constitution.

What about the adoption of an unconstitutional constitutional amendment? While this might seem like an alternative, it also requires a constitutional amendment to grant the Constitutional Court the authority to review constitutional amendments. Currently, the Indonesian Constitutional Court is only empowered to review laws against the constitution, not the constitution itself. Therefore, empowering the court to act as a safeguard against unconstitutional amendments would require significant changes to the existing legal framework.

### **\*WHAT METHOD WOULD BE MOST SUITABLE IF ETERNITY CLAUSES AND BASIC STRUCTURE DOCTRINES POSE SIGNIFICANT CHALLENGES?**

A robust and active civil society is key to prevent abusive constitutionalism. Research by Mila Versteeg highlights that civil resistance is a significant factor in preventing abusive constitutionalism (Versteeg et al., 2020). Similarly, Dominic J. Nardi's study emphasizes the importance of NGOs in shaping legal development (Nardi, 2018).

Additional studies support these findings. For instance, research conducted by PSHK concludes that a proposal to extend the presidential and vice-presidential terms is likely to trigger a new form of authoritarianism (Stop Gagasan Tiga..., n.d.). Meanwhile, a study by LAB 45 reveals that while most citizens express support for the current government, there is a notable resistance to proposals that would allow a president to serve three terms (Presiden tiga Periode, n.d.).

Together, these studies highlight the importance of an engaged civil society and public discourse in defending democratic principles and preventing abusive constitutionalism.

### **3.CONCLUSION**

This study has examined the dual nature of constitutionalism: its potential to limit state power and its susceptibility to abuse for undemocratic purposes. It identifies the risks inherent in proposed amendments to constitutions, such as incorporating the PPHN and extending the president's term, concluding that these initiatives likely aim to consolidate power rather than uphold constitutional principles.

The analysis emphasizes that constitutional amendments should enhance democratic

governance and protect fundamental rights, not serve as tools for centralizing authority. While mechanisms such as eternity clauses and the basic structure doctrine offer potential safeguards, their implementation in elaborated countries presents significant legal and political challenges. In this context, the study advocates for strengthening civil society as a practical and effective solution. An engaged civil society can act as a critical check on government actions, fostering public discourse and resisting efforts to undermine democratic principles.

Ultimately, upholding the constitutional integrity requires both institutional mechanisms and an empowered civil society. The ongoing vigilance and participation of citizens remain essential to prevent the erosion of democratic principles and to ensure the preservation of Indonesia's constitutional values.

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