

PREVENTING ABUSIVE CONSTITUTIONALISM IN INDONESIA

Andy Omara*

Universitas Gadjah Mada School of Law
andy.omara@mail.ugm.ac.id

Received: 26 February 2024 | Last Revised: 4 December 2024 | Accepted: 10 March 2025

Abstract

Through Landau's abusive constitutionalism concept, this article aims to investigate the background behind the plan to conduct further constitutional amendments after over two decades of constitutional amendments in 1999 – 2002. The central question to be addressed is whether it is necessary to pursue further constitutional amendments aimed at restoring the authority of the People's Consultative Assembly (MPR) to set State Guidelines (PPHN) and extending the President's term of office from two to three terms. This study utilizes doctrinal-qualitative approaches. It studies relevant laws, regulations, and doctrines to find out the primary factors that contribute to the MPR intention to amend the constitution. This paper argues that while amending a constitution is within the MPR's constitutional powers, doing so should consider principles of constitutionalism and democracy. A constitutional amendment should be carried for the sake of having a better constitution which uphold constitutionalism –and not the other way around. This paper, therefore, asserts that further constitutional amendment with the above-mentioned agendas potentially lead to abusive constitutionalism if doing so without any clear and legitimate purposes. In the absence of well-defined and reasonable goals, a constitutional amendment may be subjectively used or misused by state institutions to gain more constitutional powers --not to strengthen constitutionalism and democracy. This paper recommends three ways to avoid abusive constitutionalism namely: inserting eternal clause, applying basic doctrine structure, and effectuating civil society.

Keywords: abusive constitutionalism, unconstitutional constitutional amendment, basic structures.

* Andy Omara, S.H (UGM), MPub&IntLaw (UNIMELB), Ph.D (UW) is an Associate Professor of Constitutional Law at Faculty of Law Universitas Gadjah Mada, Yogyakarta, Indonesia. His primary research areas are: Judicial review, Indonesian Constitutional Law, Comparative Constitutional Law, Rule of Law and Democracy, Human Rights, Indonesian Legislation System, and Law and Politics.. E-mail: andy.omara@mail.ugm.ac.id.



I. INTRODUCTION

1.1. Background

A constitution contains the basic structure of the state administration, *inter alia*, the state fundamental structure, the relations among state institutions as well as the state and citizens, and protection of human rights.¹ A constitution also stipulates a mechanism to amend the constitution. Such provision is important to ensure that a constitution keep updated. The amendment provisions indicate that a constitution made by human is not a perfect document.² It needs improvement and refinement from time to time to better suited with current societal development.³ However, it is not uncommon that the good intention of provision concerning constitutional amendment may be used or misused for undemocratic purposes, such as accumulating power, perpetuating power or marginalizing the power of other state institutions.⁴

In the last ten years, there has been a tendency the use of constitutional channels for undemocratic purposes. In Russia and Turkey, for example, the extension of the presidential term is carried out by a constitutional mechanism.⁵ The purpose of extending the term of office of the president is actually to perpetuate power. This phenomenon shows a contradiction with the notion of constitutionalism.

Constitutionalism which essentially means limiting governmental powers is used for contradictory purposes namely to prolong the powers of the state institutions. This phenomenon is labelled by David Landau as *abusive constitutionalism*.⁶ In his article entitled *Abusive Constitutionalism*, Professor

¹ Elliot Bulmer, *What Is a Constitution? Principles and Concepts*, International IDEA Constitution-Building Primer 1, 2nd ed. (Sweden: International IDEA, 2017).

² Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers*, Oxford Constitutional Theory (Oxford, United Kingdom; New York, United States of America: Oxford University Press, 2019).

³ Roznai, *Unconstitutional Constitutional Amendments*, 2019.

⁴ Rosalind Dixon and David E. Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy*, Oxford Comparative Constitutionalism (Oxford: Oxford University Press, 2021).

⁵ William Partlett, "Russia's Unconstitutional Zeroing Amendment," *IACL-AIDC Blog*, (March 16, 2020). See also Tolga Şirin, "How Many Times Can Erdoğan Be a Presidential Candidate?," *International Journal of Constitutional Law Blog*, (August 3, 2021).

⁶ David Landau, "Abusive Constitutionalism," *UC Davis Law Review* 47, no. 1 (November 2013): 189–260.

Landau describes this phenomenon in several Latin American countries including Venezuela and Colombia.⁷ The constitutional mechanism for amending the Constitution, in these two countries, is used to extend the term of office of the president, strengthen, or increase the authority of certain state institutions or weaken the constitutional authority of other state institutions.⁸

A more recent book by Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing*,⁹ analyze the use of constitutional mechanisms for undemocratic purposes turns out to occur in a wider scope such as in constitutional changes, constitutional rights, and judicial review. Abusive constitutional borrowing also occurs in several countries.

This symptom seems also to be found in Indonesia at least in the last five years. These include the proposal to reintroducing the MPR authority to stipulate the Foundation of State Policies (PPHN); a proposal to extend the presidential term of office from 2 to 3 periods; and the proposal of prolonging the president's term of office over 5 years. This paper acknowledges that inserting the three topics above-mentioned in the updated Constitution is within the MPR's constitutional powers. However, doing so should consider the voice of the people and more importantly in line with the principle of constitutionalism. The constitutional amendment should be carried for the sake of having a good quality of constitution which uphold constitutionalism –and not to broaden the powers. It is therefore important to prevent further constitutional amendment if such amendments will likely lead to abusive constitutionalism.

1.2. Research Questions

Based on the description mentioned above, this study aims to answer three important questions, namely:

1. What is the background behind the proposal to reinstate State Policy Guideline (PPHN) and to prolong presidential term of office in the new constitution?

⁷ Landau, "Abusive Constitutionalism," 189.

⁸ Landau, "Abusive Constitutionalism," 189.

⁹ Dixon and Landau, *Abusive Constitutional Borrowing*.

2. In the context of constitutionalism, how do we interpret the intention of MPR to reintroduce the PPHN and extend president terms of office in the updated constitution?
3. What kind of constitutional engineering that might be adopted to prevent abusive constitutionalism in Indonesia?

1.3. Method

This is a conceptual legal research with comparative approach. This study seeks to answer the abovementioned research questions by introducing a concept that may be used as reference to prevent abusive constitutionalism in Indonesia coupled with two existing concepts. These two existing concepts –the basic structure doctrine and eternal clause-- are obtained through comparative study from other countries experiences that have similar problems in the past.¹⁰ This study uses Indonesia's experience on the plan to carry out further constitutional amendments as a case study and assess it against relevant constitutional principles such as constitutionalism and democracy.

This research is expected to contribute by offering a different way of avoiding abusive constitutionalism. Existing literatures analyze the experience of India and some Latin America countries in avoiding abusive constitutionalism. India is important because the Supreme Court of India through its ruling declared that an amendment to the Constitution unconstitutional if a violation of the basic structure principle is found.¹¹ Meanwhile, the experiences of Latin American countries such as Colombia¹² and Venezuela are important because both countries experienced abusive constitutionalism in the past.¹³

This paper offers a different way of preventing abusive constitutionalism i.e. by effectively increasing, spreading and maintaining the voice of civil society to

¹⁰ Vellah Kedogo Kigwiru, "Comparative Legal Research: A Brief Overview," *Afronomics Law* (January 25, 2020).

¹¹ Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta, eds., *The Oxford Handbook of the Indian Constitution* (Oxford; New York: Oxford University Press, 2016); See also Aqa Raza, "The Doctrine of 'Basic Structure' of the Indian Constitution: A Critique," (July 12, 2015), SSRN.

¹² Rosalind Dixon and Thomas B. Ginsburg, *Comparative Constitutional Law in Latin America* (Cheltenham: Edward Elgar Publishing, 2017), 261.

¹³ Jorge González-Jácome, "On Abusive Constitutionalism: Two Critical Impulses," *International Journal of Constitutional Law Blog*, (June 11, 2015).

provide counternarrative to assess the validity of such plan. This mechanism is preferable for three reasons. First, civil society is already in existence and embedded as part of the whole political system. Second, there is no need to amend the constitution. Third, this method provides a space between the government and the society to have fruitful constitutional dialogue.

The structure of the paper is as follows, Part II Result & Discussion: Section 2.1. clarifies the term abusive of constitutionalism to understand whether the symptom of abusive constitutionalism is factually happening in Indonesia lately. Section 2.2. to Section 2.7 examine the proposal to include two topics in the future constitutional amendment i.e. the reintroduction of the PPHN and prolonging the president term of office. What motivates the inclusion of these two themes in the constitutional amendment in the future? How do we understand such proposal? Should we consider this proposal as the implementation of the MPR constitutional authority to carry out constitutional amendment? or it aims to extending the powers of state institutions? Section 2.8. analyses the possible consequences and finds possible ways to prevent abusive constitutionalism happening in Indonesia. Part III Conclusion will draw conclusion and recommendations.

II. RESULT & DISCUSSION

2.1. Defining Abusive Constitutionalism

This Part clarifies the concept of abusive constitutionalism. This concept is important to indicate whether or not the recent phenomena happening in Indonesia fit with this concept. The explanation of abusive constitutionalism is referring to two articles: *abusive constitutionalism* by David Landau and *abusive constitutional borrowing* by Rosalind Dixon and David Landau. In his article *Abusive Constitutionalism* published in 2013, David Landau observed a tendency of abusive constitutionalism in some jurisdictions including Colombia, Hungary, and Venezuela. In these three countries, there was a phenomenon of utilizing constitutional amendment or constitutional replacement to weaken democracy. The replacement or amendment of a constitution was used as a tool to establish

an undemocratic order. Under President Alvaro Uribe Velez, the Colombian Constitution stipulates that the President holds office for a single term and this aimed to prevent the emergence of strong leader with a continuous hold on the office.¹⁴ There was an attempt to amend the Colombian Constitution. The amendment focused on the extension of presidential term of office.

Unlike the Colombian case, Venezuela replaced the constitution –not amended it, with the aim to prolong presidential term of office from single four-year term of office to two terms of six years each. Hungary combined the strategies by reforming and replacing of the constitution.¹⁵ This is done by adding more constitutional court justices so that the ruling party can fill the seat.¹⁶ In addition, the sitting government also established National Judicial Office with significant powers in selecting and assigning cases within the judiciary.¹⁷ Some state commissions such as electoral election, budget commission and media board are re-staffed so that it provides more opportunity for the government to fill its men. And finally, the government adjusted the rule on general election districts which potentially make more difficult for the sitting government to be altered constitutionally.

A recent study by Rosalind Dixon and David Landau on *Abusive Constitutional Borrowing*¹⁸ extends the discussion by analyzing whether the phenomenon observed by David Landau in his study on *Abusive Constitutionalism* could be seen in other countries experience which apply similar democratic constitutional features for anti-democratic purposes. Their study concludes that democratic constitutional designs, doctrines, and concept may be (mis)used for undemocratic ends. Dixon and Landau study provide examples on how modern democratic constitutionalism such as constitutional courts, constitutional rights, and constituent power theory can be misused or abused. The erosion of democratic constitutions happened

¹⁴ David Bushnell, *The Making of Modern Colombia: A Nation in Spite of Itself*, 4th print, History/Latin American Studies (Berkeley: University of California Press, 2003).

¹⁵ Irem Nart, "Abusive Constitutionalism in the Heart of the Europe: Cases of Hungary and Poland," *Journal of International Relations and Political Science Studies* 3 (2021): 27–44.

¹⁶ Article 24(4) of the Hungary Constitution (extending the number of justices from 11 to 15).

¹⁷ Article 24(4) of the Hungary Constitution (extending the number of justices from 11 to 15).

¹⁸ Dixon and Landau, *Abusive Constitutional Borrowing*, 2021.

depending on some important institutions such as the courts, independent institutions such as anti-corruption commission, human rights commission, and general election commission, and other similar institutions.

A study by Mila Versteeg, Timothy Horley, Anne Meng, Mauricia Guim and Marilyn Guirguis on *The Law and Politics of Presidential Term of Limit Evasion* finds that quantitatively efforts to prolong presidential term of office are common around fifty percent the leaders who are about to complete their final term pursued some methods to remain in office such as drafting a new constitution, utilizing court interpretation, and delaying elections.¹⁹ This study further finds that it is the popular resistance --not the court that can prevent the prolonging of presidential term of office. This finding is somehow different from existing literature on this issue that court effectively enforce term of office.

The three above-mentioned articles will be used to understand the Indonesian situation specifically concerning the proposal to conduct further constitutional amendments with very specific agendas to re-introduce the National Guideline (the PPHN) and extending presidential term of office from two terms to three terms of office. Do the abovementioned articles help us to understand the motive behind the plan to carry out further constitutional amendments? I do believe that these articles are helpful in assisting us to comprehend the Indonesian situation lately because the symptoms are somehow similar. Some important questions that need to be addressed are: what is the primary purpose of amending the current constitution? Does it aim to limit governments powers? or its goal is to broaden the powers of the state institutions? If the latter is confirmed, such constitutional amendment proposal falls under what David Landau called as “abusive constitutionalism.”

2.2. Proposal to Conduct Further Constitutional Amendment

Similar to many modern constitutions across the globe, the Indonesian constitutions since the beginning of the republic contains provisions on amendment of the constitution. Article 37 of the updated 1945 Constitution

¹⁹ Mila Versteeg, Timothy Horley, Anne Meng, Mauricio Guim, and Marilyn Guirguis, “The Law and Politics of Presidential Term Limit Evasion,” *Columbia Law Review* 120, no. 1 (2020): 173–248.

provides specific process and procedures to carry out Constitutional Amendment. It stipulates:

- (1) A proposal to amend the Articles of this Constitution may be included in the agenda of an MPR session if it is submitted by at least 1/3 of the total MPR membership.
- (2) Any proposal to amend the Articles of this Constitution shall be introduced in writing and must clearly state the articles to be amended and the reasons for the amendment.
- (3) To amend the Articles of this Constitution, the session of the MPR requires at least 2/3 of the total membership of the MPR to be present.
- (4) Any decision to amend the Articles of this Constitution shall be made with the agreement of at least fifty per cent plus one member of the total membership of the MPR.
- (5) Provisions relating to the form of the unitary state of the Republic of Indonesia may not be amended.

Article 37 authorizes the MPR a power to amend the Constitution. Article 37 also determines procedures and requirement in amending the Constitution. The MPR is the one and only state institution that is authorized by the Constitution to amend the Constitution. The only restriction for the MPR to amend the Constitution is concerning the form of unitary state as expressly mentioned in Article 37 (5). The question is how if the MPR intent to amend the existing constitution aiming to extend its constitutional powers? The following Part will explain regarding the proposal to amend the Constitution with agendas to reinstate the PPHN and to prolong presidential term of office.

2.3. Examining the Proposal to Reintroduce the PPHN In the Future Constitutional Amendments

This Part examines the proposal to reinstate the PPHN in the future constitutional amendment. What motivate the MPR to re-introduce the PPHN? Does the argument to include the PPHN have strong constitutional basis? This

Part will scrutinize the claims of the MPR members and politicians that it is important to insert the PPHN in the updated constitution. Historically, the Old 1945 Constitution granted the highest position of the People's Consultative Assembly (The MPR) among government institutions. The MPR represents people's sovereignty.²⁰ It elects President and Vice President.²¹ Both President and the vice president are responsible to the MPR.²² the MPR can impeach the president and the vice president.²³ Another important responsibility of the MPR is to determine the national development guidance (the GBHN).²⁴ The MPR is referring to the GBHN when the President report his work. If the MPR is not satisfied it is possible that the MPR impeach the President for not complying the MPR guidance.²⁵ In this setting, it is understandable that the president is responsible to the MPR as it is the highest state institution and represent people's sovereignty.

The Old Order and the New Order eras adopted the Old 1945 Constitution meaning that during these two periods, the MPR was powerful. the MPR elected the president and the vice president. The MPR may also impeach the president and vice president for violating the GBHN or the Constitution. This indicates that GBHN determines the term of office of the president.

While MPR's authority to determine GBHN has been stipulated since the introduction of the first Constitution in 1945, the GBHN itself was not introduced until the 1960s through the President Stipulation 1/1960 concerning the State Guidelines (the GBHN). The next GBHN was enacted by the MPR through MPR stipulation 1/1960 concerning Indonesian Political Manifesto. This 1960 GBHN was originally from the president speech in the UN entitled *To a Build New World*.²⁶ In 1963 the MPR issued another decree concerning National Guideline which is rooted from the speech of the president "*Revolusi Sosialisme Indonesia-Pimpinan*

²⁰ Article 1(2) of the 1945 Constitution (Old Constitution).

²¹ Article 6(2) of the 1945 Constitution (Old Constitution).

²² General Elucidation of the 1945 Constitution (Old Constitution).

²³ General Elucidation of the 1945 Constitution.

²⁴ Article 3 of the 1945 Constitution.

²⁵ General Elucidation of the 1945 Constitution.

²⁶ *Penetapan Presiden Republik Indonesia Nomor 1 Tahun 1960 tentang Garis-Garis Besar Daripada Haluan Negara* [Presidential Decree No. 1/1960 on the Broad Guidelines of State Policy].

Nasional” (Socialism Revolution-National Leaders) and “*Tahun Kemenangan*.” (the Year of Glory).²⁷ It can be said that during Old Order era, the GBHNs were originally from the President even though it was stipulated in the MPR Decree. In other world, the content of the GBHN was heavily dependent on the sitting President aspiration.

In New Order era, the GBHN was stipulated in the MPR decree. These include: the MPR Decree IV/MPR/1973; the MPR Decree II/MPR/1978; the MPR Decree II/MPR/1983; the MPR Decree II/MPR/1988; the MPR Decree II/MPR/1993; and finally, the MPR Decree II/MPR/1998. All these MPR Decrees were formulated by the sitting president and his team but they were stipulated in the MPR Decree --not the President Regulation. It is important to note that under these two eras, the President was never replaced. It means during the Old Order era the sitting President was Soekarno while in the New Order era the sitting president was Soeharto. This fact tells us that the content of the GBHN is heavily depending on the sitting President agendas. Since in both eras there was only one President each, it is understandable that the content of the GBHN was consistent since it is made by the same individual.

In 1999-2002, the Indonesian Constitution was amended. The aims of these constitutional amendments are to limit the powers of the government and to ensure the protection of human rights. The updated Constitution shifts its paradigm from the MPR sovereignty to supremacy of the constitution. The MPR is no longer the highest state institution. The MPR does not have the authority to determine the National Guideline anymore.²⁸ MPR also does not have the power to elect president and vice president.²⁹ Under the new Constitution, the norms of the Constitution are the highest law of the land. It is the Constitution that distribute the powers to states agencies --not the MPR.³⁰ Therefore, the authority of the MPR to determine the GBHN is deleted.

²⁷ *Tap MPRS No. IV/MPRS/1963 tentang Pedoman Pelaksanaan Garis-Garis Besar Haluan Negara dan Haluan Pembangunan* [MPRS Decree No. IV/MPRS/1963 on the Guidelines for Implementing the Broad Outlines of State Policy and Development Guidelines].

²⁸ Article 3 of the updated 1945 Constitution.

²⁹ Article 6A of the updated 1945 Constitution stipulates that president and vice president are directly elected by the people, not the MPR.

³⁰ Article 1(2) of the updated Constitution.

The question is why do some politicians and the MPR members submit a proposal to reintroduce the PPHN –the new name of the GBHN – to the future constitutional amendments after two decades of the constitutional amendments in 1999-2002? Some politicians and the MPR members provide two arguments. First, the current Constitution which delete the GBHN does not guarantee the sustainability of national development.³¹ Second, the GBHN is more comprehensive compared to the current national development plan as mentioned in the National Development Planning System Law (SPPN Law).³²

2.4. Does the Current Constitution Guarantee the Continuity of Long-Term National Development?

It is believed that the shift from the GBHN to the SPPN Law causes uncertainty in the continuity of national development. Under the Old Constitution, MPR had the power to determine the GBHN. However, is it true that the MPR was the one who determine the content of the GBHN in the past? History proves that it is the president --not the MPR-- who determine the content of the GBHN. The continuity of the GBHN in the past was because the President stayed in power for long period of time. Therefore, he was able to maintain the continuity of national development.

The Deletion of GBHN in the updated Constitution does not mean that Indonesia does not have Long Term National Development Planning (RPJPN). The RPJPN is now stipulated in SPPN Law. The SPPN Law is important for the government in maintaining the continuity of the development programs. There are some criticisms regarding the continuity and the sustainability of SPPN Law since it is heavily depending on the will of sitting President and the DPR. The change of president may also change the content of the SPPN Law depending on the president agendas. But this may also happen even if the GBHN is reintroduced. This is because the composition of the MPR from time to time also change which means the content of the GBHN also changes.

³¹ Excerpt from the Indonesian Rectors Forum (formulation of the convention).

³² CNN Indonesia, "Wacana Membangkitkan GBHN dan Stabilitas Semu Ala Orde Baru [The Discourse of Reviving the GBHN and the False Stability of the New Order]" (Jakarta: CNN Indonesia, August 14, 2019).

Under the Updated Constitution, does the power of the MPR to determine the GBHN fit with the current constitutional arrangement? the short answer is no, why? 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 the GBHN, it means the president is subordinate to the MPR. The fact is the current Constitution places the president and the MPR equal. Therefore, it is not proper if the President is responsible to the MPR.

In addition, even if the MPR has the power to determine the GBHN, it does not guarantee that the GBHN will remain consistent because under the current Constitution the President and the members of the MPR regularly change as a result of general election. If the composition of the members of the MPR regularly change, it means the aspirations of the MPR may also change which may impact the continuity of the GBHN.

2.5. Is the GBHN More Comprehensive Compared to the Existing SPPN Law?

The main argument why the GBHN is more comprehensive compared to the SPPN Law is because the GBHN is created by the MPR³³ that consists of the members of the DPR and the members of the DPD which means involving different entities with different interests. As a result, the formulation of the GBHN will consider very seriously many different aspects. That way it is expected that the GBHN will last longer. The SPPN Law is made by the President and the House of Representatives (The DPR). This makes the SPPN Law follow the preference of the sitting President. If the President changes the SPPN Law will likely change. As a result, the SPPN Law will not able to maintain its continuity. The question remains whether it is true that the GBHN last longer if the composition of the MPR members also change as a result of the general election? it is unlikely. The GBHN is made by the MPR (members of the DPR and members of the DPD). The SPPN Law is made by the President and the DPR. It means both the GBHN

³³ In the past, under the old 1945 Constitution, the MPR consisted of the DPR, the regional delegates, and the functional delegates.

and the SPPN Law made by multiple parties which may accommodate different interests, and not exclusively President interests.

2.6. Does the Reintroduction of the GBHN Fit with the Current Constitutional Arrangement?

The deletion of the GBHN in the Updated Constitution has significant impacts because it changes the position of the MPR as the highest institution. The position of the MPR equals to other state institutions including the President, the DPR, and the DPD. The MPR is no longer the institution where the president is responsible to. The fact that the current constitution changes the constitutional arrangement cause the GBHN does not fit with the current constitutional setting. The President is independent from the MPR in the sense that he is not elected by the MPR, he is instead elected by the popular through general election. The existence of the GBHN is no longer relevant with the current constitutional setting. If the GBHN becomes president's guideline in governing the country, the GBHN maker namely the MPR will be the institution where the President is responsible to. This practice somehow reflects the adoption parliamentarism –A system that is not adopted by the current Constitution. The Current Constitution aims to strengthen presidential system by introducing some features such direct presidential election, fix term of president term of office, abolishing the power of the MPR to regularly elects president, deleting provision concerning the GBHN.

From the abovementioned explanation, it can be said that the proposal to reintroduce the PPHN in the future constitutional amendments does not have strong legal and constitutional basis. It does not fit with the current constitutional design to strengthen presidential system. Sociologically, the plan to include the PPHN in the constitution faces significant challenges from civil societies. Many NGOs reject this idea and claim that such idea is as a form of expanding the MPR authority or at least to bring the MPR authority back so that MPR become powerful institution as it was under the Old Constitution. To conclude, the plan to reintroduce the PPHN in the future constitutional amendment, potentially becomes abusive constitutionalism as the proposal shows the eagerness of the

MPR to expand its powers through constitutional mechanism which somehow does not fit the spirit of the current constitution. It is therefore important to have a mechanism which may prevent such action in the future. Some possible mechanism will be introduced separately in Part IV.

2.7. A Proposal to Prolong President Term of Office

Another topic that was proposed to be included in the future constitutional amendment is to extend the president term of office from two periods to three periods. There are three proposals regarding the possibility of the sitting president to remain in power for three periods.³⁴ They are: (1) a proposal to extend presidential term of office from two periods to three periods. (2) A proposal to prolong the second period of the president term of office over five years. And finally (3) A proposal to nominate the sitting president to be a candidate of vice president in the next general election. All the three proposals aim to extending the president term of office.

Why are such proposals presented? The main argument delivered by some politicians was that prolonging presidential term of office will prevent division in society.³⁵ Is it true? The story can be traced from the 2019 presidential election where there were only two candidates of presidents contested in the election. This head-to-head political competition was resulted in the division of the society between those who go for Jokowi and those who go for Prabowo. For, the rivalry among elites is over because the losing President candidates, Prabowo Subianto and Sandiaga Uno, have joined Jokowi administration as Minister of Defense and Minister of Tourism. However, there is a claim that such event will likely happen in the future. Therefore, it is important to prolong president term of office so that it prevents the division of society.

It is important to note that the idea of extending president term of office is coming from politicians –not the public. It starts with the statement from Minister

³⁴ Firsty Hestyarini, "Presiden 3 Periode Diusulkan Masuk Amandemen: Jokowi Emang Mau? [Three-Term Presidency Proposed for Amendment: Does Jokowi Really Want It?]" (Jakarta: RM.id, November 22, 2019), 3.

³⁵ Tempo.co, "Pengamat Politik Qodari Jelaskan Alasan Mendukung Wacana Jokowi 3 Periode [Political Observer Qodari Explains the Reason for Supporting the Jokowi Three-Term Discourse]" (Jakarta: Tempo.co, March 16, 2021).

of Investment followed by some politicians from various political parties.³⁶ In essence, they believe that the current situation today is conducive for investment and development. This situation should be maintained so that Indonesia keep growing. Therefore, it is necessary to prolong the president term of office so that the situation remains conducive.³⁷ It is questionable whether extending president term of office will be the solution to make Indonesia keep growing. Other factors such as corruption and legal uncertainty are indeed important factors that will be carefully considered by investors prior to investing their capital to Indonesia.

Under the current Constitution, is it possible for a President to stay in powers for three periods? Article 7 of the updated 1945 Constitution stipulates, “The President and the Vice President hold office for five years, and may subsequently be reelected for the same office only one term of office.” In addition, Article 8 (1) stipulates, “If the President passes away, resigns, is discharged or is not able to conduct his/her obligations during his/her term of office, he/she shall be replaced by the Vice President up to the expiry of his/her term of office.”

It means that under Article 7, there is no chance for the sitting President to stay in power for three periods as Article 7 limits the president’s term of office into two terms. The argument for extending presidential term of office is twofold:³⁸ First, it will likely to maintain the sustainability of the country’s development. If there is no third term of office extension, it is possible that the next president will have different policies from the current president. As a result, there might be discontinuity of the program. Second, extending term of office will likely reduce the possibility of societal division. This argument is based on the 2019 Presidential Election where people are divided due to their political affiliation. Such arguments, however, does not have solid basis. Constitutionally, it does not fit with the current constitutional arrangement. First, Article 7 limits

³⁶ Fitria Chusna Farisa, “Empat Kali Wacana Presiden 3 Periode, Sikap Jokowi Dulu dan Kini [Four Times the Three-Term Discourse, Jokowi’s Past and Present Attitude]” (Jakarta: Kompas.com, August 29, 2022).

³⁷ Szalma Fatimarahma, “Usulan Jokowi 3 Periode Kembali Muncul, Ini Pengagasnya! [Proposal for Jokowi’s 3rd Term Re-Emerges, Here Are the Initiators!]” (Jakarta: Kabar24, July 1, 2022).

³⁸ Aryo Wasisto and Prayudi, “Isu Jabatan Presiden Tiga Periode dan Evaluasi Kinerja Eksekutif [The Issue of Three-Term Presidency and Evaluation of Executive Performance]” (Jakarta: Pusat Penelitian Badan Keahlian DPR RI, July 13, 2021).

president term of office into two periods. Extending president term of office into three term is contrary to Article 7. Second, Prolonging President term of office is also inconsistent with the very meaning of constitution i.e. limiting powers. In other words, it is contrary to principle of constitutionalism. Thus, extending presidential periods will likely violate both the constitution and constitutionalism.

The proposal of extending president term of office requires constitutional amendment. Therefore, those who propose this idea also recommend to carry out further constitutional amendments to open up the possibility for the President to extend his term of office. While such recommendation is possible, if it is implemented, it is likely that the amendment fall under unconstitutional constitutional amendment because it amends “the basic structure of the constitution” namely the limitation of powers. If the basic structure of a constitution is amended, the most important values of the constitution will also erode.

2.8. The Possible Consequences and Some Possible Ways to Prevent Abusive Constitutionalism in Indonesia

This Part will elaborate two themes (1) the possible consequences if further constitutional amendments aims to reintroduce the PPHN and extend presidential term of office (2) some possible ways to avoid abusive constitutionalism. It offers a conceptual solution to avoid abusive constitutionalism, namely the unconstitutional constitutional amendment coupled with the basic structure doctrine³⁹ and eternal clause. These two concepts are interrelated and expected to be effective in preventing the misuse of the constitutional mechanism for undemocratic purposes.

Unconstitutional constitutional amendment is a concept that links to a question of a constitutional amendment that has been made in accordance to formal requirements mentioned in the constitution but the purpose of such

³⁹ Iftikhar Hussain Bhat, “Doctrine of Basic Structure as a Constitutional Safeguard in India: Reflection in the Jurisprudence of Other Countries,” *International Journal of Research in Humanities and Social Sciences* 1, 27 (May 2013).

amendment is in contrary to the basic structure of the constitution.⁴⁰ Some constitutions contain eternal provisions –constitutional provisions that cannot be amended. The stipulation of unamendable constitutional provisions in a constitution aims to preserve particular features of the constitution.

What would be the possible consequences if the plan to carry out further constitutional amendments intends to reintroduce the PPHN and extend presidential term of office is in fact materialized? Normatively, such proposals do not fit with the five basic agreements of the 2nd founding fathers when amending the Constitution in 1999-2002. The five basic agreements are (1) maintaining the preamble of the Constitution (2) retaining the unitary state of Indonesia (3) strengthening presidential system (4) incorporating the elucidation into the body of the constitution and (5) conducting amendment through addenda.⁴¹ The proposal to include the PPHN of the MPR clearly does not fit with the constitutional arrangements to strengthen presidential system. The presence of the PPHN will consequently reflect the adoption of parliamentary system since the President has to follow the PPHN created by the parliament (the MPR). The question is who will determine whether the president comply with the PPHN? What if the President does not comply the PPHN? Shall the MPR as the creator of the PPHN become an institution where the President responsible to? If so, this reflects the adoption of parliamentary system and at the same time it weakens the presidential system. It is also showing that the MPR regains its highest position. The PPHN of the MPR in fact does not guarantee the continuity of the national development program because the composition of MPR members also change every five years.

With regard to the plant to extend president term of office, it is obviously inconsistent with the important function of the constitution namely limiting powers. It is also contrary to constitutionalism. Fortunately, the plan to extend

⁴⁰ Aharon Barak, "Unconstitutional Constitutional Amendments," *Israel Law Review* 44, no. 3 (July 2011): 321–41.

⁴¹ The Office of the Registrar and the Secretariat General of the Constitutional Court of the Republic of Indonesia, *Foreword: The 1945 Constitution of the Republic of Indonesia; Law of the Republic of Indonesia Concerning the Constitutional Court*.

the president term of office is not as intensive as the idea to reintroduce the PPHN in the next constitutional amendment.

The indications that are happening today potentially lead to abusive constitutionalism. It appears that the proposal to prolong presidential term of office and reinstate the PPHN in the future constitutional amendments were initiated by elites, high rank states officials, ministers and members of the DPR/MPR. The idea is not coming from below namely the society. Some state institutions including the MPR and the DPD from time to time consistently disseminates this idea to universities. There are divergent views regarding the important of reintroducing the PPHN in the future Constitution. There is an indication that the MPR intends to regain its powers through constitutional amendment. While reinstating the PPHN in the future constitutional amendment can be carried out by the MPR, it should be conducted inline with the basic structure of the constitution i.e. limiting powers and protection of human rights.

If these indications are true, it should be prevented or avoided so that democracy and the principle of limiting powers are maintained. It is indeed rather difficult to prevent abusive constitutionalism when the political constellation reflects the majority of political parties are closer to the government party. This situation potentially blunts the checks and balances mechanism. As a result, the policies that will be taken by the government do not get enough inputs, opposition and criticism from the legislature. In short, the policy plans that will be issued by the government will likely to proceed smoothly without any significant challenges from the legislature. This kind of situation is very likely not to describe the actual situation that exists in society. Is the policy really acceptable and meet the expectations of society?

How to prevent the possibility of abusive constitutionalism then? The following Part provides two possible solutions to avoid abusive constitutionalism. First, it is necessary to set the limit to amend the constitution, specifically article which contain the basic structure or foundational articles of the constitution. The adoption of eternity clause or unamendable constitutional provisions is

important to preserve certain values of the constitution from amendment. The eternity clause or unamendable constitutional provisions theory provides a method to limit constitutional amendments. Under this theory, not all articles in a constitution can be changed. There are specific articles which cannot be amended (eternity clause/ unamendable constitutional provisions). These restrictions aim to preserve important values of the constitution. That said if such provisions are amended, the very nature of the constitution will change. The unamendable constitutional provision can be in various forms including: the prohibition to amend certain provision of the constitution, the heavy and complex requirements to amend the Constitution; the involvement of more state institutions to amend a constitution; or inserting the unamendable constitutional provisions in the Constitution. Article 37 (5) of the Updated 1945 Constitution, for instance, stipulates that the Unitary State of the Republic of Indonesia cannot be amended. This provision prevents the change of the unitary arrangements. If there is an attempt to change the provision, such amendment can be regarded as unconstitutional constitutional amendment.

Second is the basic structure doctrine. This doctrine means a judicial effort to preserve the most important foundational structures of a constitution.⁴² This effort aims to protect the very nature of a constitution. The judiciary is the institution that test whether the constitutional amendment violates the basic structure of the constitution, not by an institution that has the authority to amend the Constitution. The judiciary through judicial review mechanism assess whether an amendment to the Constitution violates the basic structure of the Constitution. The Court can invalidate the results of constitutional amendment if it violates the basic structure of the Constitution.

The adoption of eternity clause needs constitutional amendment as the current constitution does not include all basic foundations in the constitution into eternity clause. For now, it is not favorable to adopt this approach because constitutional amendment takes so much efforts and costs including political

⁴² Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta, eds., *The Oxford Handbook of the Indian Constitution* (Oxford University Press, 2016), 275.

cost. What about the adoption unconstitutional constitutional amendment, is it preferable? unconstitutional constitutional amendment also needs constitutional amendment to equips the constitutional court with an authority to review the amendment of the constitution because for the time being the Indonesian constitutional court does not have such authority. The Court can review the law against the constitution –not the constitution itself.

If eternity clause and basis structure doctrines pose significant challenges, what would be the most preferable method? Active and vibrant civil society is important to prevent abusive constitutionalism. A study by Mila Versteeg shows that civil society resistance is the determining factors in preventing abusive constitutionalism.⁴³ Further, a study by Dominic J. Nardi explains NGOs play significant roles in legal development.⁴⁴ A study by PSHK finds that a proposal to extend president and vice president term of office will likely create a new authoritarianism.⁴⁵ Another study by LAB 45 shows that most people support the current government however when the question is about 3 periods for president, there is tendency that they reject the proposal of three period for a President.⁴⁶

III. CONCLUSION

This study has provided different explanation on how constitutionalism is implemented in practice. The existing literature understands constitutionalism as a concept to limit government powers. In practice, constitutionalism can be (mis)used for undemocratic purposes. This paper has attempted to answer three important questions: First, how to understand the recent proposal for further constitutional amendment with agendas to reinstate the PPHN and extend president term of office? The paper finds that the agenda to insert the PPHN and extend president term of office in the updated constitution is likely a way to

⁴³ Mila Versteeg, Timothy Horley, Anne Meng, Mauricio Guim, and Marilyn Guirguis, *The Law and Politics of Presidential Term Limit Evasion*, 173–248.

⁴⁴ Dominic J. Nardi, "Can NGOs Change the Constitution? Civil Society and the Indonesian Constitutional Court," *Contemporary Southeast Asia* 40, no. 2 (August 2018): 247–78.

⁴⁵ Pusat Studi Hukum dan Kebijakan, "Stop Gagasan Tiga Periode Masa Jabatan Presiden dan Wakil Presiden: Jangan Buka Keran Otoritarianisme Baru [Stop the Idea of Three-Term Presidency and Vice Presidency: Don't Open the Gate to a New Authoritarianism]" (Jakarta: PSHK, 2022).

⁴⁶ Tilik Data, "Presiden Tiga Periode [Three-Term President]" (Jakarta: LAB45, June 22, 2021).

accumulate powers which may lead to abusive constitutionalism. This is because factually there is no urgency to insert these two topics in the constitution. The current constitution and legislation already regulated these two issues. While constitutionally, the MPR has authority amend the constitution, such amendment should fulfill all important principles for amending the Constitution including the principles of constitutionalism. Constitutional amendment should aim to create a better constitution, uphold constitutionalism and protect of human rights ---and not to gain more power or extend the power. Constitutional amendment potentially leads to abusive constitutionalism if it does not fulfill the principles of constitutionalism and democracy.

Second, in the context of constitutionalism, the plan to insert the PPHN and extend president term of office in the updated constitution potentially leads to abusive constitutionalism. Indonesia already had similar document in place namely Law on SPPN (National Development Plan System) to substitute the PPHN. Extending president term of office potentially contradicts with the principle of limiting powers. Under the current constitution, there is no room for expending president term of office.

Third, constitutional engineering that might be adopted to prevent abusive constitutionalism are eternity clause, basic structure doctrine and vibrant civil society. Eternity clause preserves foundational values and principles of the constitution by prohibiting any amendment to particular provision of the constitution. This can be done by the constitutional drafters when amending the constitution. The constitutional drafters place important articles such as articles on President term of office and MPR powers in the eternity clauses so that these two articles are “unamendable constitutional provisions.”

Basic structure doctrine is a doctrine which stipulates that a constitution contains fundamental principles which explicitly or implicitly which cannot be violated. Violating the basic structure of a constitution means can be invalidated by the court. The court by referring to the basic structure principles may declare that such violation is unconstitutional.

While these two above-methods may be adopted by Indonesia, it contains significant challenges to materialize it since it requires constitutional amendment. This paper offers a more feasible way to prevent abusive constitutionalism i.e. empowering and maintaining the active and critical roles of civil society in providing counternarrative and critical insights to the government. Vibrant civil society so far proof to be an effective mechanism to prevent the government from amending the current Constitution which potentially lead to abusive constitutionalism.

BIBLIOGRAPHY

- Aryo Wasisto and Prayudi. “*Isu Jabatan Presiden Tiga Periode dan Evaluasi Kinerja Eksekutif* [Issue of a Three-Term Presidency and Evaluation of Executive Performance].” Pusat Penelitian Badan Keahlian DPR RI report, 13 July 2021. https://berkas.dpr.go.id/pusaka/files/info_singkat/Info%20Singkat-XIII-13-I-P3DI-Juli-2021-2063.pdf.
- Barak, Aharon. “Unconstitutional Constitutional Amendments.” *Israel Law Review* 44, no. 3 (July 2011): 321–41. <https://doi.org/10.1017/S0021223700018082>.
- Bhat, Iftikhar Hussian. “Doctrine of Basic Structure as a Constitutional Safeguard in India: Reflection in the Jurisprudence of Other Countries.” *International Journal of Research in Humanities and Social Sciences* 1, no. 27 (May 2013).
- Bulmer, Elliot. *What Is a Constitution? Principles and Concepts*. 2nd ed. International IDEA Constitution-Building Primer 1. Stockholm: International IDEA, 2017. <https://www.idea.int/sites/default/files/publications/what-is-a-constitution-primer.pdf>.
- Bushnell, David. *The Making of Modern Colombia: A Nation in Spite of Itself*. 4th print. History/Latin American Studies. Berkeley: University of California Press, 2003.

- Choudhry, Sujit, Madhav Khosla, and Pratap Bhanu Mehta, eds. *The Oxford Handbook of the Indian Constitution*. Oxford; New York: Oxford University Press, 2016.
- CNN Indonesia. “Wacana Membangkitkan GBHN dan Stabilitas Semu ala Orde Baru [Discourse on Reviving the GBHN (General Guidelines of State Policy) and Pseudo-Stability of the New Order].” 14 August 2019. <https://www.cnnindonesia.com/nasional/20190813120238-32-420843/wacana-membangkitkan-gbhn-dan-stabilitas-semu-ala-orde-baru>.
- Dixon, Rosalind, and Thomas B. Ginsburg. *Comparative Constitutional Law in Latin America*. Cheltenham, UK: Edward Elgar, 2017.
- Dixon, Rosalind, and David E. Landau. *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy*. Oxford Constitutionalism. Oxford: Oxford University Press, 2021.
- Farisa, Fitria Chusna. “Empat Kali Wacana Presiden 3 Periode, Sikap Jokowi Dulu dan Kini [Four Times the Discourse on a Three-Term Presidency, Jokowi’s Stance Then and Now].” *Kompas.com*, 29 August 2022. <https://nasional.kompas.com/read/2022/08/29/10525661/empat-kali-wacana-presiden-3-periode-sikap-jokowi-dulu-dan-kini>.
- González-Jácome, Jorge. “On Abusive Constitutionalism: Two Critical Impulses.” *International Journal of Constitutional Law Blog*, 11 June 2015. <http://www.iconnectblog.com/2015/06/on-abusive-constitutionalism-two-critical-impulses/>.
- Hestyarini, Firsty. “Presiden 3 Periode Diusulkan Masuk Amandemen: Jokowi Emang Mau? [Proposal to Include a Three-Term Presidency in an Amendment: Does Jokowi Really Want It?].” *RM.id*, 22 November 2019. <https://rm.id/baca-berita/government-action/22973/presiden-3-periode-diusulkan-masuk-amandemen-jokowi-emang-mau>.
- Indonesian Rectors Forum. The Formulation of the Convention. Accessed May 14, 2025. <http://fri.or.id/rumusan-konvensi>.

- Kigwiru, Vellore Kedogo. "Comparative Legal Research: A Brief Overview." *Afronomicslaw*, January 25, 2020. <https://www.afronomicslaw.org/2020/01/24/comparative-legal-research-a-brief-overview>.
- Landau, David. "Abusive Constitutionalism." *UC Davis Law Review* 47, no. 1 (November 2013): 189–260.
- Law of the Republic of Indonesia Concerning the Constitutional Court. Jakarta: Government of Indonesia.
- Nardi, Dominic J. "Can NGOs Change the Constitution? Civil Society and the Indonesian Constitutional Court." *Contemporary Southeast Asia* 40, no. 2 (August 2018): 247–78.
- Nart, Irem. "Abusive Constitutionalism in the Heart of Europe: Cases of Hungary and Poland." *Journal of International Relations and Political Science Studies* 3, no. 1 (December 2021): 27–44.
- Office of the Registrar and the Secretariat General of the Constitutional Court of the Republic of Indonesia. Foreword to *the 1945 Constitution of the Republic of Indonesia*. Jakarta: Constitutional Court, n.d.
- Partlett, William. "Russia's Unconstitutional Zeroing Amendment." *IACL-AIDC Blog*, 16 March 2020. <https://blog-iacl-aidc.org/2020-posts/2020/3/16/russias-unconstitutional-zeroing-amendment>.
- Penetapan Presiden Republik Indonesia Nomor 1 Tahun 1960 tentang Garis-Garis Besar Daripada Haluan Negara* [Presidential Stipulation No. 1 of 1960 on the Broad Outlines of State Policy]. Jakarta, 1960.
- Pusat Studi Hukum dan Kebijakan. "Stop Gagasan Tiga Periode Masa Jabatan Presiden dan Wakil Presiden: Jangan Buka Keran Otoritarianisme Baru [Stop the Idea of a Three-Term Tenure for President and Vice President: Don't Open the Door to New Authoritarianism]." Jakarta: PSHK, 2022. <https://pshk.or.id/publikasi/stop-gagasan-tiga-periode-masa-jabatan-presiden-dan-wakil-presiden-jangan-buka-keran-otoritarianisme-baru/>.

- Raza, Aqa. "The Doctrine of 'Basic Structure' of the Indian Constitution: A Critique." SSRN Scholarly Paper, 12 July 2015. <https://doi.org/10.2139/ssrn.2661127>.
- Rozna'i, Yaniv. *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers*. Oxford Constitutional Theory. Oxford; New York: Oxford University Press, 2019.
- Şirin, Tolga. "How Many Times Can Erdoğan Be a Presidential Candidate?" *International Journal of Constitutional Law Blog*, 3 August 2021. <http://www.icconnectblog.com/2021/08/how-many-times-can-erdogan-be-a-presidential-candidate/>.
- Szalma Fatimarahma. "Usulan Jokowi 3 Periode Kembali Muncul, Ini Penggagasnya! [Proposal for Jokowi's Third Term Reemerges, Here's the Proposer!]." *Kabar24*, 1 July 2022. <https://kabar24.bisnis.com/read/20220701/15/1549844/usulan-jokowi-3-periode-kembali-muncul-ini-penggagasnya>.
- Tap MPRS No. IV/MPRS/1963 *tentang Pedoman Pelaksanaan Garis-Garis Besar Haluan Negara dan Haluan Pembangunan* [MPR Decree No. IV/MPRS/1963 on Guidelines for Implementation of the Broad Outlines of State Policy and Development Guidelines]. Jakarta, 1963.
- Tempo.co. "Pengamat Politik Qodari Jelaskan Alasan Mendukung Wacana Jokowi 3 Periode [Political Observer Qodari Explains Reasons for Supporting the Jokowi Three-Term Discourse]." *Tempo.co*, 16 March 2021. <https://www.tempo.co/politik/pengamat-politik-qodari-jelaskan-alasan-mendukung-wacana-jokowi-3-periode-530695>.
- The Constitution of the Republic of Indonesia.
- The Fundamental Law of Hungary.
- Tilik Data. "Presiden Tiga Periode [Three-Term Presidency]." *LAB45*, 22 June 2021. <https://www.lab45.id/detail/95/presiden-tiga-periode>.

Versteeg, Mila, Timothy Horley, Anne Meng, Mauricio Guim, and Marilyn Guirguis.

“The Law and Politics of Presidential Term Limit Evasion.” *Columbia Law Review* 120, no. 1 (January 2020): 173–248.

William Partlett. “Russia’s Unconstitutional Zeroing Amendment.” *IACL-AIDC Blog*, 16 March 2020. <https://blog-iacl-aidc.org/2020-posts/2020/3/16/russias-unconstitutional-zeroing-amendment>.