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Press freedom, law and politics in Indonesia : a socio-legal study

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2 Constitutional Ideas, Freedom of Expression and Press Freedom

2.1. INTRODUCTION

The development of human rights ideas in Indonesian constitutional history has been influenced by the human rights discourse as it first emerged after the American War of Independence and during the French Revolution. These revolutions were the first to highlight political rights and civil liberties, including freedom from torture, freedom from extra-judicial punishment, freedom to unite, freedom of assembly, and freedom of expression. The American Bill of Rights of 1791, which provides the guarantee of press freedom, and the French *Déclaration des droits de l'homme et du citoyen* of 1789 became major landmarks in political thought worldwide, including in the European colonies.

The idea to embed fundamental rights and freedoms in a constitution was further stimulated by the promulgation of the Universal Declaration of Human Rights (UDHR) in 1948 and incorporating human rights provisions into a constitution is now characteristic of most modern constitutions. Since 1948, the normative framework of human rights in the UDHR has been followed and operationalised by numerous international covenants or conventions on human rights, and gradually been adopted by states – including Indonesia – as a recognition of an international legal order constructed to maintain international relations (Wiratraman 2007).

The idea of human rights is thus closely linked to the concept of constitutionalism. According to Wignyosoebroto (2002: 415-417; 2003: 19), 'constitutionalism' incorporates the pursuit of grounding rights and freedoms in a constitution, thus limiting strictly and clearly the power of the state, listing what is legitimate authority or, adversely, what is arbitrary power or misuse of power. In other words, constitutionalism is a political doctrine which claims that political authority shall be bound by institutions in order to limit the ruling power (Lane 1996: 19). The diverse approaches within constitutionalism are sometimes explained as a dichotomy between liberal approaches, which centre on rights-possessing individuals who seek equality before the law, and socialist approaches, which grant rights to the community at the expense of the individual and which allow community interests to be determined by the state (Hassall and Saunders 2002: 33).

Understanding the constitutionalism regarding freedom of expression in Indonesia, including press freedom, requires an inquiry into the constitution and constitutional debates. It concerns the extent to which freedom of

expression has been discussed in promoting rights and what guarantees the constitutional framers had in mind to make sure that freedom of expression would be effectively guaranteed.

The present chapter will focus on these constitution-making processes and their debates regarding freedom of expression and press freedom under the Indonesian Constitution. It looks at the minutes of the debates dealing with either drafting or amending the Constitution, especially in 1945, 1949, 1950, 1956-1959, and 1999-2002. At the same time, it is also necessary to pay attention to the *absence* of such debates in the period 1959-1999, as this will help to understand the jump from the *Konstitutante* (Constitutional Council) debates in 1956-1959 to the People's Consultative Assembly (MPR) sessions in 1999-2002. In the absence of (recorded) debates, the proposals on constitutional change in the period 1959-1999 will be explained by looking at why the idea of constitutional reform had failed.

2.2. FREEDOM OF EXPRESSION IN BPUPKI AND PPKI SESSIONS

Freedom of association and assembly, and freedom of expression of thought and of issuing writing and the like, shall be prescribed by statute. (Article 28, Indonesia's Constitution, 1945)

In order to understand the nature of the debate about the 1945 Constitution, it is necessary to understand the political situation at the time. During World War II, with the Japanese about to lose the war, the Dutch sought to re-establish their authority in Indonesia. Before their defeat, however, the Japanese started helping the Indonesian nationalists to prepare for self-government. On 7 September 1944, Prime Minister Kuniaki Koiso promised Indonesia independence, although no date was set.¹

About half a year later, this promise led to the establishment of the Investigating Committee for Preparing Indonesia's Independence (BPUPKI), a Japanese-organised committee, which was to support independence in Indonesia.² The first task of this committee was to prepare independence and to draft a constitution. This development contributed significantly to the revolutionary character of the transition to independence (Feith 1962: 2).

1 The promise of independence was continued by appointing Soekarno and Hatta as leaders of the nationalists, whose antagonism to the Dutch had led them to look at the Japanese as an evil, but necessary ally. The two started the process of preparing for independence in May 1945, hoping to secure it before the expected victory by the allied forces (Cribb and Brown 1995: 15).

2 *Dokuritu Zyunbi Tyoosakai* or *Badan Penyelidik Usaha Persiapan Kemerdekaan Indonesia*. The organisation was founded on 29 April 1945 by Lieutenant General Keimakici Harada, the commander of the 16th Army in Java.

The first debate on the freedom of expression as a constitutional right in Indonesia took place during one of the meetings held by the BPUPKI. The BPUPKI members were divided into several sub-committees (*Bunkakai*) and the so-called Committee of Fundamental Law (*Panitia Hukum Dasar*). The Committee of Fundamental Law had 19 members and was chaired by Ir Soekarno. It was renamed the Constitutional Committee (*Panitia Undang-Undang Dasar*), with most of its members assigned to sit on the so-called Small Committee of Constitutional Drafters (*Panitia Kecil Perancang Undang-Undang Dasar*), chaired by Prof Mr Dr Soepomo. There were two official sessions, chaired by Dr Radjiman Wedyodiningrat. The first session was held between 28 May-1 June 1945, and discussed the philosophical underpinning of the state;³ the second session was conducted between 10-17 July 1945, and dealt with the state's form, its territory, citizenship, the draft constitution, economy and finance, defence, education and teaching.

The Constitution Committee's first meeting took place on 11 July 1945 in the Tyuuoo-In building.⁴ The draft of the constitution was first debated, followed by checking its language. The concept and rules around the freedom of expression, as articulated in Article 28 of the Constitution (UUD 1945),⁵ were only touched upon briefly. In BPUPKI's second session, on 15 July 1945, Soekarno spoke of the importance of moving away from individualism and asked the members of the BPUPKI to not incorporate freedom of thought into the constitution as a 'right of the citizen'. For Soekarno, the idea of 'social justice', which was formulated in the Preamble of the Constitution, was a fundamental statement against individualism:

Your excellencies! We want social justice. For what the *Grondwet* says, that humans not only have freedom of speech, the right to vote, the right to have meetings and sessions, if there is no *sociale rechtvaardigheid*? For what purpose do we make a *Grondwet*, if the *Grondwet* can't provide for suffering and starving people? A *Grondwet* which contains "*droit de l'homme et du citoyen*" cannot prevent poor people's starvation and their consequent death. Therefore, if we really want to establish our state on the principles of kinship,⁶ help, mutual assistance,⁷ and social justice, throw away any ideas of individualism and liberalism. (Bahar et al. 1995: 259-260)

What is interesting about Soekarno's idea is that it reflects an 'indivisibility' principle. This refers to the inseparability or integration of two types of human rights, the civil and political rights on one hand, and economic, social and cultural rights on the other. Soekarno regards what he calls 'freedom of speech' as a right that is inseparable from the 'right to food or freedom from starvation'. This opinion reflects closely a human rights theory,

3 *Dasar Negara*.

4 Currently this building is the Foreign Affairs Department.

5 Undang-Undang Dasar 1945.

6 *Kekeluargaan*.

7 *Gotong royong*.

which is based on the idea that both types of rights are needed for a dignified human life, and all human rights have an equal status (Ravindran 1998; Leckie 1998). This principle was also discussed during the drafting process of the Universal Declaration of Human Rights (Morsink 1999: 290-296; Freeman 2002: 34-42).

After Soekarno had spoken before the BPUPKI session, Hatta replied as follows:

... [B]ut I worry about one thing, if there is no belief or commitment to the people in the Constitution about the right to speech and expression – the right in the Constitution that we are drafting now – we may establish a state model with which we disagree. Because in the state's law as we have it now, we see a “*kadaver discipline*” situation as we have seen in Russia and Germany, and this is my point of objection. Regarding the incorporation of the “*droits de l’homme et du citoyen*,” it is indeed unnecessary to include them here (Constitution), because they are just the requirements for protecting human rights against ruthless kings in the past. These rights are incorporated in the *grondwet-grondwet* (fundamental law) after the *Franse Revolutie* (French Revolution), just for fighting such ruthlessness. But we are founding a new state. We should consider requirements in order for our state not to turn into an authoritarian state based upon power. We want a state that rules, we awaken a new society based on mutual assistance, common endeavour, our aim to improve society. Nevertheless we should never give unlimited power to the state so that on top of that new state, a state based on power arises. Therefore, it is good to provide an article to prevent fear of using freedom of speech for citizens. (Bahar et al. 1995: 262)⁸

Hatta's statement thus underlined the importance of “freedom of speech” for making power accountable.⁹ This line of argument was consistently championed by Hatta during the BPUPKI sessions. In the end, it was due

8 “... [t]etapi satu hal yang saya kuatirkan, kalau tidak ada satu keyakinan atau satu pertanggungjawaban kepada Rakyat dalam Undang-Undang Dasar yang mengenai hak untuk mengeluarkan suara, yaitu bahwa nanti di atas Undang-Undang Dasar yang kita susun sekarang inimumungkin terjadi suatu bentukan negara yang tidak kita setuju. Sebab dalam hukum negara sebagai sekarang ini mungkin timbul suatu keadaan “*kadaver discipline*” seperti yang kita lihat di Rusia dan Jerman, inilah yang saya kuatirkan. Tentang memasukkan hukum yang disebut “*droits de l’homme et du citoyen*.” memang tidak perlu dimasukkan di sini, sebab itu semata-mata adalah syarat-syarat untuk mempertahankan hak-hak orang seseorang terhadap kezaliman raja-raja masa dahulu. Hak-hak ini dimasukkan dalam *grondwet-grondwet* sesudah *Franse Revolution* semata-mata untuk menentang kezaliman itu. Akan tetapi kita mendirikan negara yang baru. Hendaklah kita memperhatikan syarat-syarat supaya negara yang kita bikin jangan menjadi Negara Kekuasaan. Kita menghendaki negara pengurus, kita membangun masyarakat baru yang berdasar kepada gotong royong, usaha bersama, tujuan kita ialah membaharui masyarakat. Tetapi di sebelah itu janganlah kita memberikan kekuasaan yang tidak terbatas kepada negara untuk menjadikan di atas negara baru itu suatu negara kekuasaan. Sebab itu ada baiknya dalam salah satu pasal, misalnya pasal yang mengenai warga negara, disebutkan juga di sebelah hak yang sudah diberikan kepada misalnya tiap-tiap warga negara jangan takut mengeluarkan suaranya.” (1998: 286)

9 The opinion that freedom of speech and freedom of expression should be regarded as fundamental freedoms cannot be separated from Hatta's ideas during the BPUPKI sessions. Although it was hardly debated, freedom of expression was finally guaranteed by the Constitution, even if some restrictions remained in place. See also Soebadio Sastro-satomo (1995: 25), who argues that human rights articles, especially on the freedom of expression, were adopted into the Constitution because of Hatta's efforts.

to Hatta's persistence on this issue that freedom of expression was guaranteed in Indonesia's Constitution (Sastrosatomo 1995: 25). Although its form was limited due to the parliament's capability of restricting it, this could be regarded as a necessary compromise in the initial process of building the country.

Hatta advocated a similar stance on press freedom. He argued that press freedom should be guaranteed, and, therefore, that censorship and press banning (*persbreidel*) should be prohibited. Nevertheless, he accepted the imposition of certain limitations by acts of parliament – the formal voice of people's representatives in the political system. In principle, he argued, the limitation had to be bound by legislation, in order to respect other rights.

This position differed from what he had defended earlier. During a speech at an Indology Student Association meeting in Utrecht on 4 November 1930, Hatta had already discussed the need for fundamental freedoms, and how people's pressure on the colonial government had led to the annulment of Article 11 of the *Regeringsreglement* (the Netherlands-Indies Constitution), which prohibited the gathering of political organisations (Hatta 1930: 8). Limiting freedom of expression including press freedom should never be done "in a conservative way," so he argued. As he wrote in *Daulat Rakjat* (No. 8, 30-11-1931), press freedom in the Constitution of Belgium was much broader than in the Dutch Constitution (as stipulated in Article 7), because under the Dutch Constitution, press freedom could be limited by the law. If the ruler is conservative, it is likely that "what is given by the right hand is taken away by the left hand." Thus, originally, Hatta argued for a more liberal way of protecting press freedom. During the constitution-drafting process, however, he agreed to the idea of limiting press freedom through legislation on the grounds that the limitation could not contradict the essence of constitutional rights.

The idea of press freedom was also advocated by Liem Koen Hian, chief editor of *Sit Tit Po*. He argued during the BPUPKI session on 15 July 1945 that press freedom must be guaranteed by Indonesia's Constitution. According to Liem, "[i]n proposing fundamental rights (*grondrechten*), not only the right of assembly and the right to discuss, but also right to print (*drukpers*), and the *onschendbaarheid van woorden* (inviolability of words) should be guaranteed. Press freedom is needed to reduce the badness of state and society" (Adinegoro 1963: 62).

However, Liem's proposal was rejected by Soepomo, and press freedom was left out of Article 28 of the Indonesian Constitution. In the role of 'law expert', Soepomo could exert considerable influence over the BPUPKI sessions, and he disagreed with Hatta's way of regarding and incorporating into the Constitution a number of fundamental rights. Nonetheless, he proposed a compromise article to accommodate Hatta's ideas as follows:

... Mr Chairman excellency, if the guarantee of fundamental rights in the Constitution, which is based upon the principle of the family system, would not be established, it does not mean at all that people who organise themselves, can neither speak nor assemble... Absolutely not. The principle of the family system and of deliberation which have been accepted as Indonesian state foundations, automatically include people's freedoms to unite and assemble.¹⁰

.... Both the Committee chairman and myself have explained at length that the reason why the Committee did not include it [freedom of expression] in the fundamental rights (*grondrechten*), is because this idea would be contrary to the family system, our draft's systematic, but we have also explained, that because it was not included, this does not mean at all that people cannot hold meetings or gatherings and so on, because those things are in a modern state automatically regulated by law.... Hence, we propose a compromise provision, but never one against the systematics of this constitutional draft.... (Bahar et al. 1995: 276, 321)¹¹

Soepomo thus argued that to insert *grondrechten* (fundamental rights) into the Constitution would go against the underlying principle of kinship and the system designed on that basis.¹² The most fundamental opposition came from Yamin, who said:

I only ask to really consider this, because what we are talking about is people's rights. If this is unclear in our Constitution, there is a mistake of the *Grondwet*; a *Grondwettelijke fout* [Constitutional Error] would be a big sin to the people who are expecting their rights from the Republic. For instance as to what addresses citizens, it should never be considered that only citizens will have rights; residents will be protected by this Republic as well. (Bahar et al. 1995: 323)¹³

10 "[P]aduka Tuan Ketua, jikalau jaminan hak-hak dasar orang seseorang dalam Undang-Undang Dasar yang bersifat kekeluargaan itu tidak diadakan, itu sama sekali tidak berarti, bahwa rakyat berserikat, tidak boleh bersuara atau tidak boleh berkumpul, sama sekali tidak. Dasar kekeluargaan dan dasar permusyawaratan yang telah kita terima sebagai dasar-dasar Negara Indonesia, dengan sendirinya menghendaki kemerdekaan rakyat berserikat dan berkumpul." (1998: 301).

11 "[T]adi dengan panjang lebar, baik oleh Ketua Panitia, maupun oleh saya sendiri diterangkan apa sebabnya Panitia tidak memasukkan dalam hukum dasar tadi yang dinamakan *grondrechten*, ialah oleh karena pemasukan itu menentang sistematik kekeluargaan, sistematik rancangan kita, akan tetapi kami telah menerangkan juga, bahwa tidak dimasukkannya sama sekali tidaklah berarti, bahwa rakyat tidak akan mempunyai kemungkinan bersidang atau berkumpul dan lain-lain, sama sekali tidak, oleh karena hal-hal itu dalam negara yang modern dengan sendirinya sudah tentu diatur dalam Undang-Undang. ... Oleh karena itu, kami usulkan suatu aturan yang mengandung kompromis, akan tetapi tidak akan menentang sistematik rancangan anggaran dasar ini..." (1998: 346).

12 According to Sri Soemantri, "... these different thoughts should be scrutinised, whether the situation has influenced personal thought or not. It is because Professor Soepomo was involved during the Constitution (UUD 1945)-making process and the UUDS-making process. The UUD 1945 was formulated during the Japanese occupation. Soepomo, as a professor of *adat* law, has always promoted the principle of the family system which he based on elements of Hegel's theory." (*Kompas Sabtu*, 14 Agustus 2004).

13 "Saya hanya minta perhatian betul-betul, karena yang kita bicarakan ini hak rakyat. Kalau hal ini tidak terang dalam hukum dasar, maka ada kekhilafan daripada *grondwet*, *grondwettelijke fout*, kesalahan Undang-Undang Hukum Dasar, besar sekali dosanya buat rakyat yang menanti-nantikan hak daripada republik, misalnya mengenai yang tertuju kepada warga negara, jangan difikirkan bahwa hanya warga negara yang akan mendapat hak, juga penduduk akan diperlindungi oleh republik ini" (1998: 348).

Yamin thus demonstrated a view promoting universalism of human rights, i.e. not limiting or distinguishing between human rights by dividing them into particular ideological or political blocks.

Finally, Soepomo proposed what he called a 'compromise formulation', by adding an article saying that:

Citizens' freedoms to discuss and assemble, to express thought by oral or written and other forms will be prescribed by law. (Sekretariat Negara 1998: 346)

The right, thus, did not become a *subjectief recht* (subjective right), as proposed by Soetardjo but was named a liberty / freedom (*kemerdekaan*) through a vote by the members of the BPUPKI. At the next session, on 16 July 1945, Soepomo proposed to further adjust the article according to Djajadiningrat's proposal. Thus Article 28 became, "The freedoms to unite and assemble, to express thought in oral, written and other forms are prescribed by law" (Bahar et al. 1995: 360).

One day after the promulgation of independence, the Committee for Preparing Indonesia's Independence (PPKI/Panitia Persiapan Kemerdekaan Indonesia) started its sessions. The PPKI was established on 7 August 1945, and started work after the declaration of independence on 17 August 1945. At the first session of the PPKI on 18 August 1945, the BPUPKI draft of Article 28 of the Constitution was read out again by PPKI Chairman Soekarno, and it was finally and formally approved. This formulation was maintained until 1949 and would also be valid between 1959 and the second amendment of the 1945 Constitution in 2000.

The proposals and debates about the freedom of expression in the BPUPKI meetings show that it was considered as an important means to fight the abuse of power. Founding fathers Soekarno, Hatta, Yamin, Soepomo and others demonstrated that they had a thorough understanding of the concept. The different ideological perspectives in relation to liberalism and individualism which were presumed to endanger the tradition of mutual assistance, were finally resolved by the introduction of a short and simple article on freedom of expression as a fundamental freedom under the Constitution, which included freedom of the press.

For this reason, many discussions about press freedom relate to Article 28 of the 1945 Constitution. Yet, this constitutional right eventually proved insufficient to offer clear protection of press freedom. There are three reasons for this. First, the concept is very broad and open to interpretation. Second, the article had to be operationalised by legislation. Lastly, the words 'prescribed by statute' in Article 28 were later changed into specific rules, which seriously restricted the freedom of expression. This also explains Bedner's conclusion that "freedom of opinion and expression is not guaranteed by the Constitution" (2001: 177).

2.3. FREEDOM OF EXPRESSION IN THE 1949 FEDERAL CONSTITUTION AND UUDS 1950 DRAFT

In the early years of Indonesia's independence, the Dutch government still tried to claim authority and control over Indonesia. Part of its strategy was to promote a federal state form, to which end the Netherlands supported the establishment of a union of regional states such as Indonesia Timur, Pasundan, Jawa Timur and others.¹⁴ The federal principle was actually accepted by both the Netherlands and the Republic of Indonesia, in the Linggarjati Agreement, concluded in November 1946. During these discussions, both sides also agreed to promote fundamental human rights as formulated in the United Nations Charter and to respect them in both the Republic and the other states forming part of the Union (Drooglever 1997: 69).

A few months later, in 1947, the Dutch started their first military action against the Republic,¹⁵ followed by a second attack in 1948. The latter backfired, but elicited a negative response from the international community.¹⁶ As a result, the United Nations forced the Dutch government to resume negotiations with the government of the Indonesian Republic, the so-called Renville negotiations (Kahin 2003: 401; Nasution 1979). On 18 March 1948 the Dutch presented a working paper on the Constitution. Only a few days later, the Indonesian Republican Committee headed by Soepomo presented a draft of its own, which contained the principal outline of a constitution for the United States of Indonesia. This draft included the protection of human rights as referred to in the United Nations Charter (NIB XIII: 222-3; 276-9, in Drooglever 1997: 70-71).

The United Nations' Security Council Resolution of 28 January 1949 once again made clear what importance was attached to the freedom of expression. It recommended the establishment of a commission to guarantee fair and democratic general elections as well as freedom of expression (Para. 4

14 For a closer look at political developments in the early years of independence, and how the Dutch government tried to reclaim power by politically supporting the federal government, see George McTurnan Kahin (2003).

15 The Dutch government preferred to use the term *politieele acties*, instead of 'aggression'.

16 The states which supported Indonesia in condemning the Dutch military attack included Iraq, Iran, Egypt, Pakistan, Morocco, and many other Asian states, especially the states that attended the Asian Conference in New Delhi on 20 January 1949. It should be noted that India was the pioneer of Asian and African states in mobilising international support for Indonesia's independence struggle at that time (Nasution 1979: 9-63).

(e) a-b).¹⁷ This resolution became an important reference for the negotiations between Indonesia and the Netherlands about the provisional constitution for the new state. These negotiations, called the Roundtable Conference (KMB),¹⁸ took place in The Hague from 23 August to 2 November 1949. The Indonesian side was represented by the government of the Republic of Indonesia and members of the *Bijeenkomst voor Federaal Overleg* (BFO),¹⁹ led by Mr Mohammad Roem. The other participants were the Dutch government and the United Nations Commission for Indonesia.²⁰ The negotiations led to three major points of agreement: first, the establishment of the United States of Indonesia (USI; *Negara Republik Indonesia Serikat*, RIS); second, the transfer of sovereignty to the United States of Indonesia, and third, the establishment of a union between the Netherlands and the United States of Indonesia.

The draft constitution for the United States of Indonesia, henceforth referred to as the 1949 Federal Constitution, was formulated by the delegates of the Republic of Indonesia and the BFO.²¹ It had already been discussed before the official negotiations started, and once again Soepomo was its main architect.²² The draft had also been approved by the Central Indonesia National

17 UN Security Council Resolution Para. 4 (e) a-b: "The Commission, or such other United Nations agency as may be established in accordance with its recommendation under paragraph 4 (c) above, is authorized to observe on behalf of the United Nations the elections to be held throughout Indonesia and is further authorized, in respect of the territories of Java, Madura and Sumatra, to make recommendations regarding the conditions necessary (a) to ensure that the elections are free and democratic, and (b) to guarantee freedom of assembly, speech and publication at all times, provided that such guarantee is not construed so as to include the advocacy of violence or reprisals."

18 *Konferensi Meja Bundar*.

19 The Meeting for Federal Consultation, also known as the PPF delegation. The chairman of the BFO/PPH was Sultan Hamid II, who also represented the delegation from West Kalimantan/Borneo.

20 UNCI (*United Nations Commission for Indonesia*) is the organisation established by the United Nations.

21 The final document was concluded in Scheveningen and added as an appendix to the Agreement Charter (*Handvest van Overeenstemming*) between the Republic of Indonesia delegation and the BFO delegation about The Draft Planning of the United States of Indonesia Constitution, 29 October 1949 (*Het Secretariaat-Generaal van de Ronde Tafel Conferentie* 1949: 54-55). Nevertheless, the republicans and federalists had already discussed and negotiated a constitutional design during a pan-Indonesia conference in Yogyakarta.

22 According to Drooglever (1997: 79), the republican arrogance and the federalist weakness was reflected furnished by an act of Soepomo, who at the end of a long discussion on an unrelated subject flung a small note on the table with the casual remark that he supposed that the gentlemen would agree with its contents, and that they would do so without a word.

Committee (*Komite Nasional Indonesia Pusat*/KNIP).²³ It was officially adopted on 14 December 1949 and came into force on 27 December 1949.²⁴

Then, on 19 May 1950, the Republic of Indonesia and USI agreed to rebuild a Unitary State of the Republic Indonesia (NKRI, *Negara Kesatuan Republik Indonesia*), as mandated since the promulgation of independence on 17 August 1945. This was written in the so-called Agreement Charter between the Government of the United States of the Republic of Indonesia and the Government of the Republic of Indonesia, who were represented by their respective Prime Ministers, Mohammad Hatta (RIS) and A. Halim (RI).²⁵

In the session on 19-20 July 1950, after the draft of the Provisional Constitution of the Republic of Indonesia had been presented, agreement was reached and finally, the new constitutional draft (the Provisional Constitution of the Republic of Indonesia or *UUD Sementara Republik Indonesia/UUDS*) was formally enacted by Law No. 7 of 1950 (State Sheet of RIS (*Lembaran Negara*) 56/1950). From the point of view of a constitutional lawyer, enacting a constitution by using lower legislation is incorrect, but – similarly

23 The Vice-President's Proclaim (*Maklumat Wakil Presiden*) No. X of 16 October 1945 authorised the legislative power of the KNIP, whilst MPR and The People's Representative Council (or DPR) had not been established yet.

24 Two important things should be noted. First, the 1949 Federal Constitution was provisional in nature, as defined by Article 186, which stipulated: "*The Constituante (Constitution Making Council), together with the Government are asked soon to formulate the Republic of Indonesia Constitution that will change this provisional constitution.*" Second, the USI establishment was based on the 1949 Federal Constitution, which also recognised the territory of the Republic of Indonesia. Article 2 of the 1949 Federal Constitution recognised the Republic of Indonesia as a part of the USI, which territory was mentioned in the Renville agreement. From the point of view of the constitution's applicability, the UUD 1945 still existed in the Republic of Indonesia, whilst the 1949 Federal Constitution still existed in the USI. Hence, Indonesia used to have two constitutions, each of which was applicable to a different territory. The federal state in the form of the KMB could no longer exist, because power had been consolidated in the early years after independence, so that the idea of the United States of Indonesia became unpopular. Both in the Netherlands as well as in Indonesia, the result of the KMB was opposed, not only for the legal consequences, but also for political and psychological reasons. See for example Mr Moh Roem's speech, the Chairman of the Republic of Indonesia delegation in The Second Minister Conference Union Indonesia-Netherlands, S-Gravenhage, 20-29 November 1950 (*Secretariat Uni Indonesia-Belanda* 1950: 24).

25 The follow-up to this agreement was the preparation of a draft constitution and the establishment of a Joint Committee (*Panitia Bersama*). The Joint Committee was chaired by Prof Dr R. Soepomo (representing RIS) and Mr Abdul Hakim (representing RI). The result of this committee was noted in *Rentjana Konstitusi Sementara Republik Indonesia* (the Provisional Constitution Draft of the Republic of Indonesia), which was set up by the Joint Committee of the United States of the Republic of Indonesia and the Republic of Indonesia. The result was submitted to and authorised by the Working Council of the Central Indonesia National Committee (*Badan Pekerja Komite Nasional Indonesia Pusat* or KNIP, authorised on 12 August 1950 and also known as the People's Representative Council (*Dewan Perwakilan Rakyat*)) and the Senate of the United States of Indonesia (*Senat Republik Indonesia Serikat*, authorised on 14 August 1950).

to the 1949 Federal Constitution – the UUDS 1950 was provisional in nature, as clearly formulated in Article 134.²⁶

The main difference between the 1950 Constitution and the 1949 Federal Constitution concerned the form of the state. Regarding human rights there was only one change. The 1949 Federal Constitution had incorporated the Universal Declaration of Human Rights (UDHR), and thus contained a solid list of fundamental rights and freedoms. These were directly transplanted to the 1950 Constitution (Purbopranoto 1979: 28). The fundamental rights and freedom provisions in the Annex of Statute of the Indonesia-Netherlands Union were also stipulated in Part V and VI of the UUDS 1950. In addition, Article 21 of the 1950 Constitution introduced the right to strike, which neither the 1949 Federal Constitution nor the 1945 Constitution had included.²⁷ The 1950 Constitution formulated the freedom of expression as follows:

Article 19: Every person has the right to hold and express opinions.²⁸

Article 33 and 34 of the 1950 Constitution stipulate a number of limitations on rights and freedoms, and how the authorities should apply these.

Article 33: The exercise of the rights and freedoms listed in this part can only be limited by legislation in order to guarantee their recognition and respect for them and to fulfill the just requirements for peace, morality, and prosperity in a democratic society.²⁹

Article 34: No provision in this part can be interpreted so as to mean, that a ruler, a group, or an individual can derive any right from it to try something or to commit any deed denying rights or freedoms as clarified within the Constitution.³⁰

The above articles thus allowed for limiting rights and freedoms under certain considerations. This was stated by Yamin, who argued that legislation may only further regulate constitutional rights, but never narrow them down (Yamin 1956: 183). This observation is important in evaluating the degree of constitutionality of legislation, which limits the freedom of expression. It may be used to ascertain whether the law only serves the interests of the regime, or whether it genuinely protects freedom of expression. This will

26 Article 134 of the UUDS 1950 states: *“The Constituant (Constitution Making Council), together with the Government are asked soon to formulate a Republic of Indonesia Constitution that will change this provisional constitution.”* This article is similar to Article 186 of the Federal Constitution.

27 Civil rights groups, especially Indonesian labour movement groups, faced a real struggle to obtain this right. The inclusion of this right in post-WWII constitutions following civil rights groups pressure also occurred in the USSR (1946), France (1946), and Italy (1947) (Soepomo 1950: 9-10, 42).

28 This provision is similar to Article 19 of the Konstitusi RIS.

29 This article is similar to Article 32 of the Konstitusi RIS and Article 29 section 2 of the 1948 Universal Declaration of Human Rights.

30 This article is similar to Article 33 of the Konstitusi RIS and Article 30 of the 1948 Universal Declaration of Human Rights.

be further discussed in the next chapter of this thesis. Nevertheless, despite this point of concern, the scope of guarantees of rights and freedoms in the 1950 Constitution and the 1949 Federal Constitution was considerable, certainly for its time. As noted by Poerbopranoto in 1953 (1953: 92), “the 1949 Federal Constitution and 1950 Constitution are the only constitutions that adopted human rights as a United Nations Organisation decision (Universal Declaration of Human Rights, 1948) into a Constitution Charter.”

Moreover, these two constitutions provided a far more detailed and complete formulation of rights than the Constitution of 1945. Yet, although both contributed to the development of human rights in Indonesia, they paid no serious attention to press freedom as a special issue. While it might have made no difference if they would have done, this foreshadowed what was to follow and what will be discussed in further detail in the next chapters: press freedom in practice was constantly endangered. In other words, these progressive articles on human rights were hardly important in the eyes of the governments in their dealings with the press.

2.4. FREEDOM OF EXPRESSION IN THE KONSTITUANTE COUNCIL SESSIONS (1956-1959)

The Constitutional Council or *Konstituante* was officially formed on 10 November 1956 and held meetings for almost two and a half years. As mandated by Article 134 of the 1950 Constitution, the *Konstituante* together with the government, was in charge of drafting a new Constitution. It was elected at the same time as Parliament during the general elections of 1955. The majority of the parties constituting the Council fell ideologically into three groups:³¹ those based on religion,³² those based on socialism,³³ and those based on so-called ‘indigeneous nationalism’ (Cribb and Brown 1995: 52).³⁴

In his doctoral dissertation, Adnan Buyung Nasution (1992) explained how the idea of freedom of expression as debated by the *Konstituante* cannot be separated from the historical context of the early years of independence, when Indonesia had numerous steps to take in order to develop a constitutional government. One such step was to embed freedom of expression into the new constitution. As expressed by one of the *Konstituante* members:

31 Other scholars have distinguished different categories, such as Feith and Castles (1970) who divided Indonesia’s political thinking into five groups: (1) radical nationalism; (2) Javanese traditionalism; (3) Islam; (4) democratic socialism; (5) communism.

32 *Nahdlatul Ulama*, *Masyumi*, *Pergerakan Tarbiyah Islamiyah (Perti)* and *Partai Syarikat Islam Indonesia (PSII)*.

33 Indonesian Communist Party (PKI) and Indonesian Socialist Party (PSI).

34 PNI, *Partai Indonesia Raya* (PIR), and *Partai Rakyat Nasional* (PRN).

Not only to become a people free to express its opinion, free to choose any life philosophy and religion, free from arbitrariness and oppression by power, free from want, but also to become a healthy and rational people. (Koesnodiprodjo 1951, in Nasution 1992: 20-21)

In the *Konstituante* session of 12 August 1958, a Drafting Committee was established to wrap up the debate about human rights and to formulate a decision about the human rights discussed in the plenary session (Risalah, 1958/IV: 1877-1878). An important distinction made by the *Konstituante* was between 'human rights', which applied to all human beings, and 'citizen rights', which only applied to those with the Indonesian nationality. The drafting report, submitted one week later, contained 24 human rights articles, which were agreed upon, 18 citizen rights, and 13 additional rights, which were to be adopted as human rights or citizen rights, but which still had to be further considered by the Preparatory Committee. This last group included the right to freedom of expression and opinion. The report listed 14 proposals for formulating other articles, including the right to freely print and publish (*hak kebebasan cetak-mentjetak*) (Risalah, 1958/IV: 1881).³⁵

The latter proposals were never put to a vote or returned to the Preparatory Committee for a final formulation. According to Nasution (1995: 242), these rights, including press freedom, should be interpreted as general observations that were never officially formulated but ought to be recognised.

The right to freedom of expression arose again, when the *Konstituante* discussed which human rights it would adopt. The right 'to have and express opinions, either orally or in writing', was mentioned on list number 6, and held 'third category' status, which meant that it was "recognised by the *Konstituante* as a citizen right, and that its extension to become a human right to include people who were not citizens, was being considered and that there was need for a further definitive formulation" (Risalah, 1958/VI: 3161, in Nasution 1995: 245). The Constitution Preparatory Committee was asked to continue discussions on whether the 13 rights in the 'third category' should become human rights or citizen rights.

Among the 13 rights listed was the limitation on the freedom of expression discussed above, but now defined with far more caution than in the 1950 Constitution: "Establishing rights and freedoms as explained in this part can only be limited by legislation, just for guaranteeing and respecting non-derogable rights and freedoms and for fulfilling the requirements of legal justice, peace, decency, and prosperity in a democratic society." These requirements look quite reasonable, but this of course depends in the end

35 This draft was proposed by the Human Rights/Citizen Rights and Obligations Drafting Committee, signed by Kuasini Sabil (Chair) and M. Soetimboel (Vice), Bandung 16 August 1958.

on the interpretation of the article by the authorities and – ultimately – the judiciary.

The next stage was the Chairman's proposal for drafting 'rights'. 'Rights' under the Constitution Preparatory Committee were accepted by acclamation. The proposal also defines the 'third category' of rights which includes a more comprehensive article on freedom of expression, since such article also regulates derogation in the Indonesian Constitution.

Unlike the debates about the 1949 Federal Constitution and the 1950 Constitution, the *Konstituante* addressed the difference between the concepts of 'every person' (*setiap orang*) and 'citizen' (*warganegara*). During Session II, in 1958, Muhammad Tahir Abubakar, from the *Partai Sjarikat Islam Indonesia* (PSII Faction) proposed to Constitution Commission II that, "the basic material which covers human rights and citizen rights should be formulated by using the word 'every person, without the word 'citizen'," since the term 'every person' included 'citizen'.³⁶ In a later session, Soedijono Djojoprajitno from *Murba Pembela Proklamasi* (Murba party) objected to the use of the word 'person' (*orang*) in human rights provisions, because this would include foreigners. He proposed to replace all instances of the use of the word 'person' with 'citizen' (*warganegara*), except when asylum issues were concerned.³⁷ The *Konstituante* decided not to follow this suggestion, but to distinguish between two kinds of rights subjects: 'every person' (*setiap orang*) versus 'citizen' (*warganegara*). In relation to the former, every human being would be protected by the Constitution.

One other important provision related to freedom of expression was the right to submit complaints or petitions to the government. It was agreed upon by acclamation in the following wording: "(1) Everyone alone as well as together with others has the right to freely submit complaints to the government either orally or in written form; (2) Everyone alone as well as together with others has the right to submit petitions to the government either orally or in writing." (Risalah Perundingan, 1958/VI: 3281).

In summary, the debates of the *Konstituante* between 1956-1959 about freedom of expression and freedom of the press showed new and interesting ideas for rights and freedoms, which were more concrete and detailed compared to the ideas during earlier constitutional debates. The *Konstituante*

36 *Konstituante of the Republic of Indonesia Session II (1958), Session 26, Thursday, 14 August 1958, p. 1768. Thirteen basic materials which included Group II as mentioned by Constitution Commission report II No. 36/III/Red/58, 10 March 1958, which stated that "basic material that was as yet undefined as to in which group it should be included: human rights or citizen rights."*

37 *Konstituante of the Republic of Indonesia, Session II (1958), Session 29, Tuesday, 19 August 1958, p. 1849-1850.*

even tried to formulate a special article to establish the press as an important pillar for constitutional democracy. However, this is more obvious from the formulation resulting from the debates than from the debates themselves.

The work of the *Konstituante* was eventually overturned when Soekarno released the Presidential Decree of 5 July 1959 (*Dekret Presiden*). It put an end to the sessions of the *Konstituante* and proposed to return to the 1945 Constitution. Ironically, this had already been suggested by Yamin, who earlier had shown himself a supporter of a liberal constitutional model (Lev 1966: 247). Some argue that the *Konstituante* only had itself to blame for failing to finish the task on time. Regardless of whether this is true or not, Soekarno's presidential decree paved the way to a truly authoritarian state (Nasution 1995: 259).

2.5. TRANSITION TO THE NEW ORDER: THE ABSENCE OF CONSTITUTIONAL CHANGE (1959-1998)

After Soekarno's Guided Democracy and the political turbulence and mass murders of 1965-1966, Soeharto established the authoritarian New Order regime. The Temporary People's Consultative Assembly (*Majelis Permusyawaratan Rakyat Sementara*/MPRS) adopted Decree No. XX/MPR/1966 on statutory hierarchy, which legalised the 1945 Constitution and placed it at the top of this hierarchy.

The procedure to change the Constitution was laid down in MPR's Decrees I/MPR/1983 and IV/MPR/1983 and in lower legislation, especially Law No. 5 of 1985. According to constitutional law expert Sri Sumantri (1987), this system was too complicated for practical implementation. Politically, changing the 1945 Constitution was even more difficult. Soeharto interpreted the Pancasila and the Constitution as 'pure and consistent' (*murni dan konsekuen*) and anyone proposing any changes was accused of being disloyal to the Pancasila and the UUD 1945. Constitutional lawyers were later often said to have behaved as if they 'suffered from a toothache' (*sakit gigi*),³⁸ in the sense that they had failed to provide criticism and just followed the regime.

The MPR produced two decrees about freedom of expression and press freedom, IV/MPR/1978 and II/MPR/1983. These fully supported the authoritarian New Order approach as can be read from the following quote:

38 According to Professor J.E. Sahetapy, a criminal law expert from Airlangga University. Interview on 10 May 2011, Jakarta.

Building and developing a national press or media should be based on the spirit and soul of the Pancasila, so that the press can support a Pancasila society. In increasing and spreading 'enlightenment' throughout the country we need to increase the usefulness of the media such as radio, television, film, news agencies, etc. In order to increase the role of the press in development we need a healthy, free and responsible press, which can function as a disseminator of information and has the objective to achieve constructive social control, channelling people's aspiration and expanding people's communication and participation. For this purpose we need to develop a positive interaction between the press, government and society. For securing a healthy, free and responsible press the Basic Press Law should be reviewed. It needs to prepare regulatory instruments which can secure a healthy press development in the light of the implementation of Pancasila Democracy. (Lubis 1997: 264-265)

The legislation based on these decrees will be discussed in the next chapter.

2.6. DEBATES DURING THE CONSTITUTIONAL AMENDMENT PROCESS (1999-2002)

After Soeharto stepped down in 1998, the wave of *Reformasi* that swept over Indonesia included a process of amending the 1945 Constitution. In order to prevent systematic human rights violations in the future, public pressure rose to limit the power of the president and to prevent misuse of power by providing guarantees for the protection of human rights. Human rights could no longer be kept from the reformation agenda in Indonesia post-Soeharto.³⁹ This also appeared from the enactment of Law 39/1999 on Human Rights and Indonesia ratifying the major international human rights treaties.

The MPR's debates about constitutional reform centred on Article 28 of the 1945 Constitution, into which all new human rights were eventually included.⁴⁰ In the 1945 Constitution, the human rights provisions could be found in Articles 27, 28, 29 (2) and 31 (1). In the Elucidation to the Constitution two relevant categories were included: citizen rights (Articles 27, 30, 31(1)) and welfare (Articles 28, 29(1), 34).

39 During *Reformasi* the following pieces of legislation related to human rights were enacted: MPR Decree XVII/MPR/1998 on Human Rights, Presidential Decree 129/ 1998 on Indonesia's National Action Plan on Human Rights, Law 5/1998 on Ratification of the **Convention against Torture** and Other Cruel, Inhuman or Degrading Treatment or Punishment, Law 8/1998 on Consumer Protection, Law 9/1998 on Freedom of Expression in the Public Sphere, Law 29/1999 on Ratification of the International **Convention** on the Elimination of All Forms of **Racial Discrimination**, Law 39/1999 on Human Rights, Law 40/1999 on Press, and Law 26/2000 on the Human Rights Court.

40 Freedom of expression was included in Article 28E(3), but a specific provision about press freedom was never added. The main resource for the discussion is *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses dan Hasil Pembahasan, Buku VIII: Warga Negara dan Penduduk, Hak Asasi Manusia, dan Agama*, published by the Constitutional Court (2008).

The first discussion on human rights was held in the Ad Hoc Committee III Forum (Panitia Ad Hoc/PAH III) in 1999. The discussion was continued by PAH I between 1999 and 2000. It resulted in a revised draft of Article 28, which was brought before Commission A during the annual session of the MPR. The final revision was agreed upon during the MPR's annual session in 2000. During the sessions of the PAH, numerous representatives from professional organisations, human rights based NGOs and constitutional law experts provided their opinions.

For the discussion about press freedom, the PAH invited the Indonesian Journalists Association (PWI),⁴¹ the Independent Journalists Alliance (AJI),⁴² and the Indonesian Press and Broadcast Society (MPPI).⁴³ Freedom of expression was discussed several times. In the Third Session of PAH I, on 6 December 1999, Abdul Khaliq Ahmad of the Nation's Awakening Party (*Fraksi Partai Kebangkitan Bangsa*), stated:

As a nation which upholds democracy, the state should provide autonomous freedom for every citizen to create and express him or herself, also to choose his or her profession and his or her way of life. For that reason, according to the Nation's Awakening Party, don't you think that it is proper for the Constitution as a constitutional basis, a fundament, and beacon to provide specially or explicitly for human rights?

Similarly, Hamdan Zoelva of the Crescent Star Party (*Fraksi Partai Bulan Bintang*) suggested formulating special articles on human rights in addition to Articles 27 and 28, and thus to change the structure of the Constitution.

This idea was fleshed out by Tarigan from the journalist association PWI during the Eighteenth Session of PAH I in 2000. According to Tarigan, Article 28 should be amended to incorporate the freedom to express one's opinion, with specific reference to the press.

Our suggestion regards Article 28 because this article does not guarantee freedom of the press as a right. I have said that the formula of Article 28 defines that the freedom to unite and assemble, to express one's thought orally or in writing and in other forms are prescribed by law. There is no explanation of the word 'right', which becomes even clearer if we look at the Elucidation. The Elucidation to Articles 28, 29 and 34 is not talking about rights, but about representing the status of the inhabitants (*kedudukan penduduk*) [...]. These articles (Article 28, 29, and 34) are not perceived as citizen rights, but are about the status or position of the inhabitants of Indonesia. (Mahkamah Konstitusi 2008: 96-97)⁴⁴

What Tarigan referred to is the formulation of Article 28 as a right. The Elucidation to the 1945 Constitution indeed speaks only of the status of inhabitants (*kedudukan penduduk*), not about their rights, but this can virtually be

41 *Persatuan Wartawan Indonesia*.

42 *Aliansi Jurnalis Independen*.

43 *Masyarakat Pers dan Penyiar Indonesia*.

44 The Eighteenth Session of Ad Hoc Committee of 2000, page 69.

discounted as the Elucidation has never been recognised as a formal part of the Constitution. In any case, Tarigan argued that the formulation of Article 28 did not really provide strong constitutional protection for press freedom, a priority which was indeed absent during the constitution-making process in 1945.

The MPR sessions, in which human rights articles were discussed, were attended by numerous non-governmental activists, such as representatives from the Indonesian Legal Aid and Human Rights Association (PBHI)⁴⁵ and the Indonesian Legal Aid Foundation (YLBHI).⁴⁶ The PBHI, through its Chairman Hendaridi, recommended a comprehensive and explicit inclusion of citizens' fundamental rights, i.e. first, the protection of human dignity; second, the guarantee of individual freedom; third, equality before the law; fourth, freedom of religion and belief; fifth, freedom of expression; sixth, freedom to unite and assemble; seventh, the right to reside and move; eighth, the right to work and a proper salary; and ninth, property and heritage rights. Press organisations, such as the PWI, AJI and MPP, focused more specifically on press freedom as a pillar of freedom of expression. Tarman Azam from PWI proposed that Article 28 of the UUD 1945 should be maintained, but suggested to add a new paragraph saying "[p]ress freedom is guaranteed by the state based on the right to information as an Indonesian human right as regulated by MPR Decrees and Law." Didik Supriyanto from AJI went even further saying that,

Press Law 40/1999 has been more or less guaranteeing press freedom, because under Article 4 it is mentioned that: first, press freedom is guaranteed as a citizen's right; second, the national press cannot be censored, banned, or stopped from broadcasting. Moreover, the following two sub-articles mention that to guarantee press freedom, the national press has the right to seek, receive and impart ideas and information and has to be responsible for its reporting before the law, and the journalist has the right to refuse [to reveal his sources]. Nevertheless, the guarantee to press freedom, just as the freedom to unite or the freedom of speech, should be accommodated by the Constitution as a citizen's fundamental right. Article 28 of the 1945 Constitution, textually or practically cannot guarantee press freedom. (Mahkamah Konstitusi 2007: 166-167)

Didik continued saying that,

The guarantee of press freedom similar to the freedom to unite and freedom of expression as fundamental rights, should be recognised and adopted into the Constitution. Article 28 of the 1945 Constitution, neither textually nor in practice secures press freedom. Press freedom and freedom of expression are human rights which human beings are entitled to, not because the state grants these rights. Because of that, there is no privilege of the state to limit human rights, moreover this state has been established on the principle of liberty. In this regard, we could learn from the American experience in practicing the constitution.

⁴⁵ *Perhimpunan Bantuan Hukum dan Hak Asasi Manusia Indonesia.*

⁴⁶ *Yayasan Lembaga Bantuan Hukum Indonesia.*

After 180 years of application of the Constitution of the United States of America,⁴⁷ a first amendment was proposed in order to secure fundamental rights related to freedom of expression and press freedom. This amendment stated that Congress is not allowed to make legislation, which limits press freedom and freedom of expression. For that reason, it is necessary for the amendment of the 1945 Constitution to mention explicitly that the state should secure freedom of expression, freedom to unite and freedom to assemble. In addition, it should be mentioned that no regulation can limit those freedoms [...]. The rule for press freedom should be given to society, either a code of ethic assembly, journalist associations, or a society-based press organisation.⁴⁸

Lukas Luwarso from AJI added that press activities had been threatened by Penal Code articles:

We have Press Law 40/1998, which it is textually quite good. Moreover, a number of foreign observers have said that Indonesia's Press Law is the best in Asia. But the problem is that the Press Law we have and that has been fought for by Parliament and the press has not been applied or operationalised yet. For what reason? We have the Penal Code which contains 35 articles threatening the press. The articles about defamation, libel, the *haatzaai artikelen* (hatred sowing articles) can be implemented to contain press reports.

AJI's statement was supported by the MPPI, represented by Leo Batubara, who argued specifically for deleting the word 'prescribed by statute' in Article 28. This argument was founded on past experience, when press laws Law 11/1966 and Law 21/1982 were applied to suppress press freedom.⁴⁹

Despite their arguments, the critical perspectives brought forward by the journalist organisations and NGO activists were not seriously discussed in the reformulation of Article 28.

The main discussion focused on whether it was necessary to include all human rights articles of the Universal Declaration of Human Rights in the Amendment of the 1945 Constitution, whether only a limited number should be introduced, or whether the relevant articles should be left as they were. For instance, Drs H.A. Rosyad Sholeh from the Golkar Party (*Fraksi Utusan Golongan*) questioned the need for incorporating all human rights into the constitution. And if indeed so, he suggested preventing repetitive

47 The statement is incorrect, because the First Amendment was adopted in 1791, and it was four years after the passing of the Constitution. It may well be possible that his statement was misinterpreted by the subsequent team.

48 *Ibid*, page 59-60, Mahkamah Konstitusi (2008: 167-168).

49 *Ibid*, page 61-62, Mahkamah Konstitusi (2008: 169).

formulations, such as the right to express one's thought and opinion, which was mentioned several times in other legislation.⁵⁰

Several debates during the plenary session, especially those about the Second Amendment and those attended by civil society groups, were concerned with articulating a true spirit of constitutionalism, paying special attention to freedom of expression. Nevertheless, many debates were far removed from notions of constitutionalism and merely addressed technicalities, such as format, structure and other such subsidiary questions. In the end, repetition in the formulation of the human rights articles could not be prevented either, including the formulation of freedom of expression (see Article 28 and Article 28E section (3) of UUD 1945).

This result was disappointing for journalists and others supporting press freedom. The absence of a special clause addressing press freedom reflected the lack of attention and unwillingness by MPR's members to take seriously press freedom in Indonesia. Even if the MPR invited many journalist organisations and press freedom experts during the amendment process, the idea of guaranteeing press freedom in the Constitution still gained insufficient support. Perhaps these representatives were afraid of a truly liberal press after so many years of repression.

However, in several discussions between 2007-2008, the Regional Representative Council (DPD)⁵¹, which together with the national Parliament constitutes the MPR, completed a draft to amend the constitution. In this document, the DPD proposes a special article guaranteeing press freedom. It remains to be seen what will come of this suggestion.

50 The idea of limiting the number of human rights articles was proposed by the Struggle for Indonesian Democracy Party (*Partai Demokrasi Indonesia Perjuangan*). According to their spokesman Muhammad Ali human rights had already been adopted in Indonesia's legal system, especially by Law 39/1999 on Human Rights, which contains 106 articles. Therefore, he argued, human rights did not need to be unnecessarily detailed in the Constitution. Golkar Party's Dra. Siti Hartarti Murdaya also objected to the 'deconstruction' of the 1945 Constitution by inserting many human rights articles, which in her perspective started to look *jelimet* (complicated) and containing too much overlap. Because this process had been so quick, she feared that the Constitution would lose its 1945 spirit and soul of the Independence Proclamation.

51 The People's Consultative Assembly (MPR), comprises the members of the DPR and the DPD. Article 22D of Indonesian Constitution restricts the DPD to dealing with law on "regional autonomy, the relationship of central and local government, formation, expansion and merger of regions, management of natural resources and other economic resources, and Bills related to the financial balance between the centre and the regions." The DPD can propose particular laws to the DPR and must be heard on any regional laws proposed by the DPR.

2.7. CONCLUSION: CONSTITUTIONALISM AND FREEDOM OF EXPRESSION

This overview of constitutional debates shows in what way the legal concept of freedom of expression was ultimately broadened and given a clear constitutional basis. Although the 1945 Constitution still holds no explicit provision on press freedom, Article 28's clause on freedom of expression is generally deemed to also include press freedom.

As we have seen, the wish to provide a constitutional foundation for freedom of expression has been the subject of profound debate since 1945, when during the BPUPKI sessions it was considered in the context of kinship/mutual assistance and social justice versus liberalism-individualism. The BPUPKI discussions finally resulted in the elegant but ambivalent formulation of Article 28 of the Indonesian Constitution (UUD 1945), which relegates the regulation of the freedom of expression to lower levels of legislation. Even if they ended in a compromise, the debates on the freedom of expression in 1945 show that the 'founding fathers' of Indonesia were capable of thinking critically about some of the basic principles and universalism of human rights. Nevertheless, the result was disappointing from a human rights perspective, as the final draft of the 1945 Constitution only provided a very limited number of human rights articles, whereas during the debates the importance of human rights for every Indonesian citizen had been underlined. The debates show that there was a general willingness to realise and guarantee freedom of expression in order to prevent the misuse of power, and there seemed to be agreement about this point – even if the participants supported different reasons and perspectives and proposed different ways to achieve this.

The debate on freedom of expression disappeared during the drafting process of the 1949 Federal Constitution and the Provisional Constitution of the Republic of Indonesia (UUDS 1950), but reappeared during the *Konstituante* sessions as well as during the amendment process of the 1945 Constitution in the MPR in 2000.

The *Konstituante* sessions highlight how freedom or human rights could be limited or restricted by means of the so-called derogation articles. This idea reappeared in 2000 during the debates about the Second Amendment of the 1945 Constitution, but the debate in the *Konstituante* was sharper and deeper. In the end the *Konstituante* agreed that "[e]stablishing rights and freedoms as explained in this part can only be limited by legislation with the purpose of guaranteeing and respecting non-derogable rights and freedoms and fulfilling the requirements of legal justice, peace, decency, and prosperity in a democratic society." This idea was finally adopted into the Second Amendment of 2000, in Article 28J, section (2).

Furthermore, articles on the right to information and the right to complain against the state, as a requirement for obtaining freedom of expression was discussed by the *Konstituante* in a very comprehensive manner. However, these debates had few direct results due to the re-enactment of UUD 1945 by Soekarno's decree on 5 July 1959. This idea of the *Konstituante* was extremely relevant for the political context at that time, as well as for the New Order period, when access to information was extremely difficult, tightly controlled by the Soeharto regime which acted as a single authority to claim or justify information flows. In this situation, arbitrary and repressive rule could not be controlled and there was no constitutional clause to mount in public debates.

Yet, eventually, it reappeared in the 2000 Amendment. Article 28F provides a guarantee on access to information. The conceptual development of freedom of expression in the Indonesian Constitution has thus evolved progressively. The formulation of Article 28 of the 1945 Constitution was the result of the efforts by Muhammad Hatta, who as a thinker and Indonesian socialist showed perseverance and courage in highlighting the importance of freedom of expression in the new constitution. What he did not fully achieve at the time was finally realised more than half a century later, when human rights articles and freedom of expression were incorporated into the 1945 Constitution in order to prevent arbitrary and misuse of power.

However, the formulation of a specific article on press freedom failed. Press freedom's constitutional basis is freedom of expression, and to an extent freedom of information. This is not enough. The concept of press freedom is still unclear and open to misuse. This has been the failure of those members of the MPR who refused to recognise press freedom as a major pillar for constitutional democracy. Hence, the legal arena to promote and strengthen press freedom is laid down in legislation, but will be seriously endangered if law-makers do not consider the principles of the rule of law.

Furthermore, the constitutional debates in the past demonstrate how freedom or liberty to express opinions or thought in oral or written form has been debated many times and has become part of constitution-making history. Moreover, the development of conceptual and constitutional thoughts is inseparable from the context of the political dynamics. Certainly, the relevance of those debates goes beyond being historical documents, but should be a challenge to explore, position, and enlighten the constitutionalist spirit of human rights in a more democratic Indonesian constitutional law system. In this regard, press freedom still ought to be incorporated as a constitutional right, if Indonesia is serious about recognising press freedom as one of the pillars of a constitutional democracy.