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## **The essence of the 1999-2002 constitutional reform in Indonesia: remaking the Negara Hukum. A socio-legal study**

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As described in Chapter III, the 1945 Indonesian Constitution was prepared by the Investigating Commission for the Preparation of Independence (BPUPK – *Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan*), a committee formed by the Japanese military authority during the final months of the Japanese occupation of Indonesia.

The 1945 Constitution was promulgated by the Preparatory Committee of Indonesia's Independence (PPKI – *Panitia Persiapan Kemerdekaan Indonesia*) on 18 August 1945 – one day after Indonesia's proclamation of independence – with an agreement to improve the 1945 Constitution's articles as soon as possible.<sup>1</sup>

In the first four years of independence, the 1945 Constitution was a nominal constitution. Even though it was officially the state's constitution, its rules were not implemented.

Since its formulation, efforts have been made to incorporate principles into the Constitution that respect people's sovereignty, such as freedom of speech, a state based on law, and limitations on power. Mohammad Hatta and Maria Ulfah Santoso, for instance, urged adherence to human rights and democracy and strongly rejected a state with unlimited power.<sup>2</sup> Later, at the beginning of "*reformasi*", students and activists demonstrated and loudly voiced the importance of freedom of speech, the rule of law, and democracy.<sup>3</sup>

One of the reasons put forward for improving the 1945 Constitution was that it had textual and contextual problems, was insufficient to support democracy, and did not contain enough clauses to escape authoritarianism.<sup>4</sup>

Thus, during the amendment process, the public and the MPR's factions discussed how to ensure that the Constitution includes principles such as popular sovereignty, rule of law, limitation of powers, and protection of human rights. However, comprehension of the principles varied. Some understood a 'state based on law' (*negara hukum*) from a legality perspective, while others found that the law must be formed through a democratic process that respects human rights.

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1 See II.1.

2 See Sekretariat Negara Republik Indonesia, *op.cit.*, p. 263.

3 *Reformasi* is a term that refers to the 1998 reform movement in Indonesia, which demanded and finally succeeded in overthrowing authoritarian rule and replacing it with democracy.

4 *Kompas Daily*, 1 September 1999, Seminar on "*Menilai perbaikan UUD 1945, Menuju Indonesia Baru*" (*Assessing the Improvement of the UUD 1945, Toward a New Indonesia*)" at the National Resilience Institute (Lemhannas), Jakarta, 31 August 1999.

This chapter first sets out a theoretical framework for understanding the essence of a constitution, rule of law and democracy, and a constitutional democracy. Secondly, it discusses the common narratives for describing constitution-making processes, notably those concerned with the rule of law and democracy. Finally, it discusses the relationship between the principles that shape a constitutional democracy and the constitutional amendment process.

#### IV.1 THE CONSTITUTION

Oxford Dictionary defines a constitution as a body of fundamental principles or established precedents according to which a state or other organization is acknowledged to be governed. This section derives the following constitutional characteristics from academic publications that try to define what a constitution is or ought to be.

In its very idea, a constitution should reflect the views and wishes of those who are bound to it and preserve the founding norms, the nation's basic values, and the state's establishment. Thus, the Constitution often makes principles, structures, and symbols (e.g., republicanism, democracy, federalism, and separation of powers) unamendable, alongside rights and freedoms, pluralism, and national flags. It seems contrary to the idea of a constitution – which ought to reflect the views and wishes of those bound by it – that there could be enforceable limits to what the people's representatives may do. The unamendable sections reveal much about a constitution and its essential values.<sup>5</sup>

Harjono, an amendment committee member, argued that a constitution is an ideological, legal, political, economic, and social framework.<sup>6</sup> Elazar similarly argues there are three dimensions of a constitution: the frames of the government, the reflection and accommodation of socio-economic power realities, and the moral principles underlying the polity. Whereas the frames of the government are comprised of institutions and procedures, a constitution 'reflects and accommodates the aspirations and political views of the society', upheld by its representatives. The moral dimension of the

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5 See Richard Albert, *The State of the Art in Constitutional Amendments*, in Richard Albert, Xenophon Contiades, Alkmene Fotiadou (eds), *The Foundations and Traditions of Constitutional Amendments*, Hart Publishing, Oxford and Portland, Oregon, 2017, pp. 7-8.

6 Harjono, is a lecturer of Constitutional Law at Airlangga University, Surabaya and was a member of MPR from F-PDIP (*Fraksi Partai Demokrasi Indonesia Perjuangan* – Faction of Indonesian Democratic Party – Struggle) in Ad-Hoc Committee for Amendment of the 1945 Constitution, 1999 - 2002. See Majelis Permusyawaratan Rakyat Republik Indonesia, *Risalah Perubahan UUD Negara Republik Indonesia Tahun 1945, Tahun Sidang 2000, Buku Dua*, Edisi Revisi, Sekretariat Jenderal, 2010, p. 430.

constitution serves 'to limit, undergird, and direct ordinary political behaviour' within the constitutional system.<sup>7</sup>

In addition, a constitution matters because it provides a political structure that protects fundamental rights.<sup>8</sup>

Limiting government powers by distributing authority is at the heart of 'limited government'. The political structure envisioned in the constitution is so important to the values contained in this concept that this structure needs to be consistently upheld.<sup>9</sup>

Finally, in the words of Jimly Asshiddiqie, Indonesia's Constitutional Court's first chairman, the constitution is the highest and most basic law, the source of legitimacy or basis for authorizing other forms of law or regulation. Therefore, all regulations under the constitution can only be applied or enforced if they do not contradict the highest law.<sup>10</sup> However, a constitution solves nothing unless interpretation and enforcement apparatuses are in place.

#### IV.1.1 Constitution Types

There are various kinds of typologies of constitutions, which can be used for different purposes, or which suit different scholarly disciplines.<sup>11</sup> This section outlines five constitution typologies that are relevant from this study's perspective: (1) normative, nominal or semantic, (2) authoritarian or democratic, (3) written or unwritten, (4) federal or unitary, and (5) flexible or rigid.

First, there is the *normative* constitution, which controls or governs the political processes within a particular country. It is an effective or strong constitution.<sup>12</sup> Secondly, the *nominal* constitution's contents do not always correspond to domestic political realities. Its text is mainly (or only) nominal and thus not really implemented, due to lack of appropriate conditions. Third, the *semantic* constitution, or "pseudo-constitution", only serves to formalize and legalize the monopoly of power already held by some groups. It is a clear means by which dictatorial governments disguise their

7 Elazar D.J. (1985), *Constitution-making: The Pre-eminently Political Act*. In: Banting K.G., Simeon R. (eds), *The Politics of Constitutional Change in Industrial Nations*. Palgrave Macmillan, London. <https://doi.org/10.1007/978-1-349-06991-0-9>

8 Mark Tushnet, *Why Constitution Matters*, Yale University Press, 2010, pp. 1, 92, 173.

9 Martin H. Redish, *The Constitution as Political Structure*, Oxford University Press, 1995, p. 5.

10 See Jimly Asshiddiqie, *Konstitusi & Konstitusionalisme Indonesia*, Konstitusi Press, Jakarta, 2<sup>nd</sup> printing, 2006, p. 23.

11 See Dieter Grimm, *Types of Constitutions*, in Michel Rosenfeld and András Sajó, *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, Oxford, 2012, pp. 98-99.

12 David Law and Mila Versteeg, (*Sham*) *Constitutions*, California Law Review, vol. 101, 4, 2013, p. 883.

authoritarianism or totalitarianism. Instead of limiting government power in favour of individual rights, those “constitutions” are meant to reinforce or strengthen an already oppressive political system.<sup>13</sup>

Another relevant distinction is between *authoritarian* and *democratic* constitutions. A democratic constitution is a body of fundamental law that defines, limits, and distributes government power in a government system based on popular sovereignty, checks and balances, adherence to human rights, and periodical and transparent circulation of powers. This study is concerned with making a democratic constitution meant to develop into a normative constitution, i.e., an effective prescriptive document to manage the state, defining its institutions, constraining or restricting the scope of state power, and encouraging and directing societal changes to achieve shared ideals. A particular form of authoritarian constitution is the weak constitution, which promises little in terms of rights and democratic principles.<sup>14</sup>

A third relevant distinction is between *written* and *unwritten* constitutions. A written constitution embodies the most important legal rules that govern a government in a document or collection of documents. An unwritten constitution means that there is no written constitution. Although the distinction between written and unwritten constitutions seems to be relatively unimportant,<sup>15</sup> there is no constitution that is fully written or unwritten.<sup>16</sup>

The written constitution is usually subject to a stringent amendment process, which protects important values, principles, and rights from a simple majority’s damaging actions, thus limiting certain government actions. In that regard, judicial review has an essential part to play in protecting the written constitution.<sup>17</sup>

Fourthly, constitutions can be distinguished according to how government powers are distributed between the country’s national and subnational governments. Thus, constitutions are classified as ‘federal’ and ‘unitary’.

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13 See Karl Loewenstein, *Political Power and the Governmental Process*, The University of Chicago Press, second edition, 1965, pp. 147-153. Law and Versteeg bring both the nominal and the semantic constitution under the notion of sham constitution, as their major feature is that they do not deliver on their promises (*ibid.*, p. 880).

14 Law and Versteeg, *ibid.*, p. 883. Indonesia’s original 1945 Constitution would qualify as a weak constitution.

15 Arend Lijphart, *Patterns of Democracies, Government Forms and Performance in Thirty-Six Countries*, Yale University Press, 1999, p. 217.

16 C.F. Strong, *Modern Political constitutions*, 1973, pp. 57-59, in Denny Indrayana, *Indonesian Constitutional Reform 1999 – 2002, An Evaluation of Constitution-Making in Transition*, Kompas Book Publishing, Jakarta, 2008, p. 30. Whereas, it is often said that the Indonesian constitution consists of the written 1945 Constitution and the unwritten constitution, but in this dissertation, the Constitution always refers to a written constitution, because Indonesia has not yet developed an accepted and sophisticated jurisprudence of unwritten constitutional law. See also Tim Lindsey, *Indonesian Constitutional Reform: Muddling Towards Democracy*, 2002, p. 6.

17 Martin H. Redish, *op.cit.*, pp. 7, 8.

In a *federal* constitution, government power is divided between national and subnational governments, where each government is legally independent within its own sphere. The federal (or national) government exercises its powers without the control of subnational governments and vice-versa. In particular, the federal and regional legislatures both have limited powers. Neither is subordinate to the other. Both are co-ordinated.

By contrast, in a *unitary* constitution, the national legislature is the country's supreme law-making body. It may permit other legislatures to exist and exercise their powers, but it has the legal right to overrule them. They are subordinated to it.<sup>18</sup>

Finally, constitutions can be *flexible* or *rigid*. Flexible constitutions can be amended by the legislature similarly as any other law, whereas rigid constitutions require a special amendment process containing certain legal obstacles. A rigid constitution can also be classified as a *supreme* constitution, being supreme over the legislature, requiring a special amendment process as stipulated in the constitution. Hence, a supreme constitution's amendment is not within the legislature's sole competence.

While both democracy and rule of law are vital to the discussion on Indonesia's constitutional change, both are contested concepts, as the following sections discuss.

## IV.2 DEMOCRACY AND RULE OF LAW: CONSTITUTIONAL DEMOCRACY

### IV.2.1 Democracy

Deriving from classical Greek, democracy (*demokrasi* in Bahasa Indonesia) means power (*kratos*) of the people (*demos*). Historically, democracy has often arisen from struggles against despotic rule and social injustice.<sup>19</sup>

Colloquially, 'democracy' describes a government system where the supreme power is vested in the people and is exercised by them, directly or indirectly, through a representation system, usually involving periodic and free elections.<sup>20</sup>

Most political theorists consider democracy as the best form of government. Nevertheless, democracy is not an undeniable blessing.<sup>21</sup> Democracy is often claimed by regimes who implement a majoritarian system, where the legislative or executive majority applies the winner-takes-all principle.

18 K.C. Wheare, *Modern Constitutions*, Oxford University Press, Fifth impression, 1980, pp. 14-19.

19 Robin Luckham, Anne Marie Goetz and Mary Kaldor, *Democratic Institutions and Democratic Politics*, in *Can Democracy Be Designed? The Politics of Institutional Choice in Conflict-torn Societies*, Sunil Bastian and Robin Luckham (ed.), Zed Books, 2003, p. 15.

20 Merriam-Webster Dictionary.

21 Larry Diamond, *Developing Democracy, Toward Consolidation*, The John Hopkins University Press, 1999, p. 2.

While procedurally correct, it increases the chance of producing policies that are detrimental to minority groups. If 'democracy' says nothing about the content of law, it is substantively empty.

Democracy is generally claimed by authoritarian governments who, as in state socialism, declare to be enhancing people's welfare, while denying people's basic political rights. The latter have no right to choose their leader, no freedom of expression, and no free press. The ruler applies arbitrary power as a means to justify the end. This is a pseudo-democracy. In contrast, a normative or effective democracy should satisfy certain requirements, i.e., constitutional protection, an independent judiciary, free elections, freedom of opinion and association, and the existence of opposition and civic education.<sup>22</sup>

By itself, democracy is a procedurally blunt and unwieldy mechanism that does not guarantee morally good laws. It may even facilitate evil if there is no delineation of the good and just with respect to the law's content. Conversely, without proper democratic procedures, which are applied with certainty and equality, the law's content loses its legitimacy.

When democratic mechanisms are applied in a society without a democratic tradition or without efforts to build one, or when antagonistic subcultures or communities coexist, an organized cabal or subgroup can seize the reins of government power, then utilize the law to advance its particular agenda, while claiming democracy's conferred legitimacy.<sup>23</sup>

Furthermore, since a democratic legislature can change the law whenever it desires, this threatens the certainty of law, which differs from the classical and medieval understanding, where the rule of law was an enduring body of natural and customary laws.<sup>24</sup>

Therefore, democracy is not only a way, tool, or process, but should also incorporate values or norms that inspire the society, nation, and state. Democracy must have substance, namely principles that must be upheld. These include the principles of constitutionalism to limit the arbitrariness of power, including the tyranny of the majority.<sup>25</sup> Democracy is also understood as a political system where people's basic rights are embedded in the highest law, namely the constitution, which emphasizes that the majority's wishes and state power are subjugated to the constitution's fundamental principles.

Democracy never serves as an automatic remedy. It only opens opportunities to achieve the desired effects. Hence, achieving democracy depends on adopted and safeguarded rules and procedures, as well as how citizens use opportunities<sup>26</sup> and how an effective machinery enforces the fundamentals.

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22 See Sri Soemantri Martosoewignyo, *op.cit.*, pp. 42-43

23 Brian Z. Tamanaha, *On the Rule of Law, History, Politics, Theory*, Cambridge University Press, 2004, pp. 93 - 100. Cabal is "secret gang".

24 *Ibid.*, p. 101.

25 Adnan Buyung Nasution, *Demokrasi Konstitusional, Pikiran dan Gagasan*, *op. cit.*, pp. 3, 12.

26 Amartya Sen, *Development as Freedom*, Alfred A. Knopf, New York, 1999, p. 155.



## IV.2.2 Rule of law

Like democracy, the rule of law has historical roots. Aristotle (384 – 322 BC) wrote, “Law should govern,”<sup>27</sup> and that “even the guardians of the laws are obeying the laws.”<sup>28</sup> Roman statesman Cicero (136 – 43 BC) expressed that we are in bondage to the law in order that we may be free.<sup>29</sup> Lord Denning assumed that the *Magna Carta Libertatum* (1215) was the greatest constitutional document of all times – the foundation of individual freedom against the despot’s arbitrary authority.<sup>30</sup> In 1690, John Locke warned that “wherever laws end, tyranny begins.”<sup>31</sup> Thomas Paine wrote that “the law is king.”<sup>32</sup> The phrase “a government of laws, not men”, was made famous by John Adams, the second president of the United States of America.<sup>33</sup> These citations all refer to a state, a government, based on law. It is the law that governs, not a person. So, the rule of law is often contrasted with the rule by law, the latter referring to a state where a person decides and uses the law as an instrument to justify and legalize such decisions.<sup>34</sup>

While ‘the rule of law’ is an English expression that is well-known in countries with legal systems rooted in British colonialism or influenced by Britain, similar concepts exist in Germany, France, Italy, the Netherlands, Spain and in other states where law is influenced by jurisprudence. In Germany and the Netherlands, reference is made to the *Rechtsstaat*, while in France it is to *État de droit*. In Indonesia, rule of law corresponds to ‘*Negara Hukum*’, which translates to ‘law-governed state’ and is generally understood as a ‘state based on the rule of law’.

While rule of law emerged in the context of national law, contemporary references to the rule of law are also embedded in international instruments of high standing, such as the preamble of the Universal Declaration of Human Rights and the European Convention of Human Rights. With the irresistible contemporary phenomenon of globalization, a transnational legal infrastructure is developing apace. With such background, besides the advancement of the rule of law within a state, the rule of law at international levels is growing. Civil, political, and human rights are explicitly

27 Aristotle, *Politic, Liberty and Law*, Chapter XVI, art. 1287a.

28 Aristotle’s *Politics and Athenian Constitution*, ed. and trans. John Warrington (J.M. Dent, 1959), book III, s. 1287, p. 97, in Tom Bingham, *The Rule of Law*, Penguin Books, 2010, p. 3.

29 The original Latin reads: “*Legum denique idcirco omnes servi sumus, ut liberi esse possimus*”. Marco Tullio Cicero, from his oration *Pro A Cluentio*, on behalf of Aulus Cluentius, chapter 53, section 146.

30 Danny Danziger & John Gillingham, *1215: The Year of Magna Carta*, paperback edition, 2004, p. 278.

31 John Locke, *Second Treatise of Government*, chap. XVII, s. 202 (1690); Cambridge University Press, 1988, p. 400, in Tom Bingham, *op. cit.*, p. 8.

32 Lieberman, Jethro. *A Practical Companion to the Constitution*, University of California Press, 2005, p. 436

33 *The Massachusetts Constitution*, Part The First, art. XXX (1780).

34 Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme di Indonesia*, Konstitusi Press, 2<sup>nd</sup> printing, October 2006, p. 23.



set forth in multiple international and regional declarations. It is worth noting that at this level a qualitatively different kind of legal limitation on sovereigns holds government leaders personally accountable for especially egregious conduct. However, this thesis addresses the rule of law primarily at a domestic level.

With its global dissemination, 'rule of law' may have become meaningless because of its ideological abuse and general overuse.<sup>35</sup> For the former, authoritarian governments that claim to abide by the rule of law routinely use this phrase in oppressive terms.<sup>36</sup> For the latter, there is tendency to use the term as a shorthand description of any political system's positive aspects.<sup>37</sup> As noted on the cover of Tom Bingham's book, *The Rule of Law*, the 'rule of law' as the foundation of modern states and civilizations has recently become even more talismanic than that of democracy.<sup>38</sup>

Yet, rule of law is an essentially contested concept. It has served a wide variety of political agendas, from libertarianism to social welfare liberalism to soft authoritarianism, to state socialism.<sup>39</sup> Thus, as Tamanaha states, the rule of law stands in the peculiar state of being the preeminent legitimating political ideal in the world today, without agreement upon precisely what it means.<sup>40</sup> Among policy makers and practitioners who promote the rule of law abroad, there is also uncertainty about the rule of law's essence.<sup>41</sup> The 'rule of law' is an exceedingly elusive notion and its precise meaning is rarely articulated.<sup>42</sup> Proponents support the rule of law in the interests of freedom, in the preservation of order, and in the furtherance of economic development.<sup>43</sup> Everyone seems to both support it and have different interpretations about its exact meaning.

Before the concept is further unpacked, Tamanaha and others have also revealed a negative use of the 'rule of law'. They observed that despite its great contribution to human existence in its capacity to hold governments legally accountable, it also has a long history of aligning with liberalism in a conservative and anti-democratic manner. In that context, liberalism is the

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35 Judith Shklar, *Political Theory and the Rule of Law*, in A. Hutchinson and P. Monahan (eds), *The Rule of Law: Ideal or Ideology*, Carswell, Toronto, 1987, p. 1.

36 Brian Z. Tamanaha, *op.cit.* p. 3.

37 Joseph Raz, *The Rule of Law and its Virtue*, in Raz, *The Authority of Law: Essays on Law and Morality*, Oxford University Press, 1979, p. 210.

38 Tom Bingham, *The Rule of Law*, Penguin Books, 2010.

39 Randall Peerenboom, *Varieties of Rule of Law, An introduction and provisional conclusion*, in *Asian Discourses of Rule of Law. Theories and implementation of rule of law in twelve Asian countries, France and the U.S.*, Randall Peerenboom (ed.), Routledge, 2004, p. 1.

40 Brian Z. Tamanaha, *On the Rule of Law, History, Politics, Theory*, Cambridge University Press, 2004, p. 4.

41 Thomas Carothers, *Promoting the Rule of Law Abroad*, Carnegie Endowment for International Peace, Rule of Law Series, No. 34, January 2003, p. 3.

42 Brian Z. Tamanaha, *op.cit.*, p. 3.

43 *Ibid.*

dominant partner in the relationship, utilizing the rule of law to advance conservative and anti-democratic ends. Even today, aspects of this show up in liberal political and economic thought, in the relationship between the common law and legislation, in certain formulations of the rule of law, and in the realm of contemporary economic development.<sup>44</sup> This observation is confirmed in Hayek's argument that the rule of law is tightly wrapped with capitalism and liberalism. Hence, the rule of law cannot operate in the context of a socialist economy or the social welfare state.<sup>45</sup>

By contrast, Trubek and others affirm that the social welfare state does not necessarily threaten the rule of law, even relying upon it to function. The rule of law creates an area for government action not cabined by detailed legal restrictions.<sup>46</sup>

Regardless, the rule of law has specific limits in developing countries. Its aspect of formal legality (see below) is not appropriate or socially beneficial in a society with significant diversities, such as in developing countries in Asia and Africa, where communitarian cultural strains may clash with aspects of formal legality. Formal legality as 'rule-by-rules' is counterproductive in situations that require discretion, judgement, compromise or context-specific adjustments. In those circumstances, the legal rules frequently have an all-or-nothing consequence, resulting in winners and losers. In that context, communities, whether social, political, or commercial, are often better served if both sides can leave their dispute satisfied.<sup>47</sup>

An emphasis on formal legality potentially creates difficulties in such situations. As Tamanaha argues, cultures are different. Personal liberty, as much as the West takes it for granted, cannot be justified in universalist terms. In that regard, there is no standard formula for dealing with such situations other than to tread with care.<sup>48</sup> In the same vein, Asshiddiqie states that in societies with significant diversities, such as developing countries in Asia and Africa, it is unfair to enforce equal legal norms upon those who are not aware, who are in remote areas, and who are uneducated and unreachable. Without a societal basis that is aware of its rights and obligations, the law will not be obeyed, upheld, or effective.<sup>49</sup> Often that situation is similar to what Montaigne said about the incoherence of French society in

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44 Brian Z. Tamanaha, *The Dark Side of the Relationship between the Rule of Law and Liberalism*, *NYU Journal of Law and Liberty*, Vol. 33, 2008.

45 As argued by Hayek. See Brian Z. Tamanaha, *op.cit.*, p. 97.

46 See David Trubek, *Max Weber on Law and the Rise of Capitalism*, *Wisconsin Law Review* 720, 1972, in Brian Z. Tamanaha, *On the Rule of Law, History, Politics, Theory*, Cambridge University Press, 2004, pp. 97, 98.

47 *Ibid.*, p. 121.

48 *Ibid.*, pp. 138-139.

49 Jimly Asshiddiqie, *Menuju Negara Hukum Yang Demokratis (Towards A Democratic State based on the rule of law)*, Secretariat General and Registrar of the Constitutional Court, Jakarta, 2008, p. 208.

the sixteenth century, where common law was so far apart from the prevailing Roman law that it was not even written in their language.<sup>50</sup>

In spite of these critical observations and its contested nature, the rule of law has remained a powerful concept and cannot be diminished as meaningless verbiage. Despite the lengthy debates about its proper interpretation, there is actually broad consensus as to its core meaning and basic elements.

In the nineteenth century, A. V. Dicey popularized the phrase “rule of law” and emphasized its three aspects: (1) no one can be punished or made to suffer except for a breach of law proved in an ordinary court, (2) no one is above the law and everyone is equal before the law regardless of social, economic, or political status, and (3) the rule of law includes the results of judicial decisions determining the rights of private persons.<sup>51</sup> Since then many authors have further elaborated and explained the concept.

Bedner argues that despite different understandings, virtually everyone agrees on the rule of law’s twin functions. The first one is to curb arbitrary and inequitable use of state power. The second function is to protect citizens’ property and lives from infringements or assault by fellow citizens.<sup>52</sup> Hence, it is paramount for a system to respect human rights and have an independent judiciary system.

Contemporary conceptualisations of the rule of law frame it as ‘thin’ and ‘thick’, corresponding with ‘formal’ and ‘substantive’. Thin rule of law emphasizes formal legality and law-making procedures, but ignores the substance, possibly violating decency and morality. Thick rule of law provides both formal legality and the substance of the law that respects human dignity and its fundamental rights. In its broadest sense, the rule of law can be viewed as a continuum from thin to thick,<sup>53</sup> or from fewer to more numerous requirements.<sup>54</sup>

Bedner distinguishes ‘formal’, ‘substantive’, and ‘control’ elements. Formal elements assert that a state governs through general laws rather than individual decrees, that state actions are subject to law (legality), that legislation should be prospective, clear and certain (formal legality), and should be enacted by a democratically elected legislature. Substantive elements assert subordination of all law and its interpretations to fundamental principles of justice, protection of individual rights and liberties, furtherance of social and economic human rights, and protection of group rights. Control elements include an independent judiciary and other guardian institutions tasked with overseeing compliance with formal and substantive elements.

50 See Biancamaria Fontana, *The Rule of Law in Montaigne’s Essays*, in Jose Maria Paravall and Adam Przeworski (eds.), *Democracy and the Rule of Law*, Cambridge University Press, 2003, p. 306.

51 A.V. Dicey, *An Introduction to the Study of Law of the Constitution*, Mc Millan and Co, 1897.

52 Adriaan Bedner, *op. cit.*

53 Randall Peerenboom, *op.cit.*, pp. 2-4.

54 Brian Z. Tamanaha, *op.cit.*, p. 91.

The rule of law's formal elements does not bother with the law's substantive aims. They may serve various aims with equal efficiency.<sup>55</sup> Substantive elements deal with the content of the law and refer usually to the justice and morality principle. In that respect, the thickest version includes both formal and substantive elements (i.e., civil and political rights, social welfare rights, group rights), as well as the control elements.<sup>56</sup> In Roman terms, it has been characterised as a peculiar relationship between *jurisdictio* and *gubernaculum*, between justice and governance.<sup>57</sup>

A thin rule of law requires a variety of institutions and processes to satisfy the qualities of formal legality. In this sense, it includes public, prospective laws with qualities of generality, equality of application, and certainty. It also provides certainty and predictability. To that end, legal systems should have a hierarchical structure, so that particular norms conform to general ones.<sup>58</sup>

Even a legal system based on a limited thin rule of law has important virtues. At minimum it promises a degree of predictability and a limitation on arbitrariness, protecting certain individual rights and freedoms.<sup>59</sup> However, Peerenboom argues that we should not apply a thin rule of law to legal systems where the state uses law to govern but does not accept that the law binds the state and state actors. Such conditions do not fall under his definition of rule of law, as he classifies them as rule *by* law.<sup>60</sup> In that regard, Peerenboom reminds readers that thin and thick conceptions are analytical, rather than normative, tools. It is not a question of one being the right and the other the wrong way to conceive rule of law.<sup>61</sup>

It has been argued that thin or formal rule of law is morally neutral. However, Peerenboom noted that while thin and thick versions of rule of law are analytically distinct, there are no freestanding thin rule of law legal systems that exist independently of a particular economic, social, and cultural context.

The relationship between thick and thin can also be understood as concentric circles, with the smallest circle consisting of core thin elements, embedded within a thick rule of law. The thick conception is part of a broader social and political philosophy that addresses issues beyond the legal system and rule of law. However, including more comprehensive social and political philosophies into thick theories may remove the rule

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55 Ibid., p. 94.

56 Ibid., pp. 92, 112.

57 Gianlugi Pallombella, *The Rule of Law and Its Core*, in *Relocating the Rule of Law*, Gianlugi Pallombella and Neil Walker (eds.), Hart Publishing, Oxford and Portland, Oregon, 2009, p. 17.

58 Joseph Raz, *The Authority of Law*, Oxford, Clarendon Press, 1979, p. 210, in Jose Maria Maravall and Adam Przeworski, *Introduction for Democracy and The Rule of Law*, Jose Maria Maraval and Adam Przeworski (eds.), Cambridge University Press, 2010, p. 1.

59 Ibid., p. 6.

60 Randall Peerenboom, *op.cit.*, p. 2.

61 Ibid., p. 6.

of law's distinctiveness, as it gets swallowed up in normative merits or demerits of the particular social and political philosophy.<sup>62</sup> Therefore, the thickest version might lack any useful function. In such a situation, a non-democratic legal system may conform to the rule of law's requirements better than any of the older Western democracies' legal systems.<sup>63</sup> The thickest version ensures the supremacy of regular power as opposed to arbitrary power.<sup>64</sup> In democracies, using arbitrary power is considered an anathema to the rule of law. Constitutional limits on power, a key feature of democracy, require adherence to the rule of law. It is the supreme check on political power used against people's rights. Without regulating state power through a system of laws, procedures, and courts, democracy could not survive.<sup>65</sup>

Placing crucial restraints on regimes does not decrease inequity because these constraints are devoid of substantive content. Thus, tensions may exist between formal legality, with its general characteristics and applied equality, and social values and objectives, such as distributive equality and individual justice.

Purely formal legality may strengthen an authoritarian regime's grip by enhancing its efficiency and according it a patina of legitimacy. In this way, the law can institutionalize slavery without breaking the thin rule of law.<sup>66</sup> Within limits on state power lies the idea of a bill of rights. This is a difficult area since there is no universal consensus on the rights and freedoms that are fundamental. Tamanaha admits that these clusters are often abstract, lacking precise content. In that regard, the rule of law should always be subject to evaluation from the standpoint of justice and the community's good.<sup>67</sup> No single approach will satisfy everyone. Each produces its own insights and has its own drawbacks.<sup>68</sup>

It must be accepted that the outer edges of certain fundamental rights are unclear. In each society there is often much agreement on where lines are to be drawn at any time, even though standards change over time and courts also clarify them. A thick conception assumes that citizens have moral rights and duties to one another and political rights against the state as a whole. In a constitutional democracy these moral and political rights should be recognized in positive law so they may be enforced on demand. However, it should be underlined that these rights are not granted by positive law, but rather act as a background and integral aspect of positive law.

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62 Randall Peerenboom, *op.cit.*, p. 6.

63 Joseph Raz, *The Rule of Law and its Virtue*, in Randall Peerenboom, *op.cit.*, p. 6.

64 Black's Law Dictionary, Bryan A. Garner (Editor in Chief), Abridged 9<sup>th</sup> Edition, West Publishing Company, 2010, p. 1137.

65 When the rule of law is understood to mean that the government is limited by law, the heritage of this idea pre-exists liberalism, it is not inherently tied to liberal societies or to a liberal form of government. See, Brian Z. Tamanaha, *op.cit.*, p. 137.

66 Joseph Raz, *The Rule of Law and its Virtue*, p. 221, in Brian Z. Tamanaha, *op.cit.*, p. 93.

67 Brian Z. Tamanaha, *op.cit.*, pp. 115-141.

68 Randall P. Peerenboom, *op. cit.*, p. 2.

In such instances, it is the judges' responsibility to make decisions that "best fit the background moral rights of the parties" by framing and applying overarching political principles consistently to existing rules and principles. These principles go beyond the rules and can resolve apparent conflicts between them. In this regard, applying a controlling principle will usually be evident and here, a society's views on these subjects cohere at the highest level of political and moral principle, so that judges who study the issues with sufficient acuity and dedication can find a correct legal outcome in light of the dispute's contestable nature.<sup>69</sup>

People's participation is essential to make the rule of law work, as law is not self-interpreting or self-applying. The weaknesses to be avoided can be reintroduced by resorting to the rule of law. At the moment of application, rules cannot do without the injection of human reason, insight, and judgement, and can never be insulated completely from abuse at the hands of individuals acting in bad faith. To prevent the latter, the judiciary was introduced as the law's special, professional guardian, putting aside the individual judge. They are the ones who ensure that other government officials are held to the law. The separation of powers, which has established judicial independence and prestige, alongside the social presence of lawyers, have induced the extraordinary growth of a legal tradition and its extensive social penetration. Hence, the ultimate risk is that the rule of law might become the rule of judges, a matter of real concern. Centuries ago, Aristotle insisted that the judge's characteristics and orientation is one of the rule-of-law's most essential components.<sup>70</sup>

In general, states agree on the importance of rule of law elements. However, they may interpret or weigh them differently, considering stability or individual liberty. The former may result in limiting civil society, freedom of association and speech,<sup>71</sup> as was indeed the case in Indonesia under the New Order. In those days, Mochtar Kusumaatmadja already stated that law has both the function to maintain order and is an instrument to realize social change.<sup>72</sup>

In the following period of *Reformasi*, Indonesian legal scholars have looked at the rule of law as an instrument of social change. Similarly, Mohammad Mahfud MD argued that the rule of law must reconcile the principles of certainty and justice. It should also find a proper balance between law as a tool and cultural mirror of society, and between an instrument to uphold order and advance society.<sup>73</sup> Speaking broadly about law's

69 Ronald Dworkin, *Political Judges and the Rule of Law*, 64 *Proceeding of the British Academy*, 1978, pp. 259, 262, in Brian Z. Tamanaha, *op.cit.*, pp. 102-103.

70 Brian Z. Tamanaha, *op.cit.*, pp. 123-125.

71 *Ibid.*, p. 3.

72 See Mochtar Kusumaatmadja, *Fungsi dan Perkembangan Hukum Dalam Pembangunan Nasional* (Function and Development of Law in National Development), Padjadjaran, Volume III, No. 4, 1970, pp. 5-16.

73 Mohammad Mahfud MD, *Membangun Politik Hukum, Menegakkan Konstitusi* (Building the Politics of Law, Upholding the Constitution), Rajawali Pers, Jakarta, 2011, pp. 26, 28.

function in modern society, Satjipto Rahardjo said that law as an instrument of social engineering requires a conscious use to achieve desired order, societal conditions, and changes.<sup>74</sup> Therefore, modern law is not merely about recording societal behaviours, but also an instrument for policies to create new conditions and change existing ones. Thus, the legal function has shifted to become more active. This is a larger process of community development, namely the political power that becomes stronger, more monolithic in the state's hands, and interferes in the sphere of social life.<sup>75</sup> Therefore, while law should serve as the means to make changes in society, the rule of law itself is also a desired objective. Fulfilling the twin functions of the rule of law is a worthy goal indeed.

A democratic constitution as the fundamental law which contains the ultimate objectives of a nation serves in changing and shaping that nation to achieve the desired objectives. It must build from the past and reflect the future by indicating the direction of the nation's destiny. Of course, it needs to be understood that social changes driven by law occur slowly and gradually.<sup>76</sup> Nevertheless, it can be expected that those in power repeatedly espouse the virtue of being bound by law; in the course of time, this rhetoric may become a prime cultural value, a view of government and law shared by most everyone.<sup>77</sup>

Hence, rule of law provides a useful heuristic guide for legal reforms in that rule of law theoretical elements (e.g., thin or thick) can clarify and prioritize reform areas to highlight the relationship between various elements. It provides structure to what otherwise could be a chaotic, piecemeal reform process.<sup>78</sup> Therefore, I conclude in saying, with Tamanaha, that in spite of its limitations and risks, the rule of law is a major achievement deserving preservation and praise.<sup>79</sup>

#### IV.2.3 Constitutional democracy: democracy and rule of law

In the concept of 'constitutional democracy', elements of both democracy and rule of law are intertwined. Simply speaking, a constitutional democracy is "a democracy that has a constitution setting it as such."<sup>80</sup> However, democracy and the rule of law can also conflict with one another. Actually,

74 Satjipto Rahardjo, *Hukum dan Perubahan Sosial; Sebuah Tinjauan Teoretis Serta Pengalaman-Pengalaman di Indonesia* (Law and Social Changes; A Theoretical View and Experiences in Indonesia), Genta Publishing, Yogyakarta, 2009, p. 129.

75 Ibid, p. 131.

76 Satjipto Rahardjo, *op. cit.*, p. 148.

77 Brian Z. Tamanaha, *op. cit.* p. 141.

78 Randall Peerenboom, *Varieties of Rule of Law*, in Randall Peerenboom (ed.), *op. cit.*, p. 13.

79 Brian Z. Tamanaha, *op. cit.*, p. 4.

80 This quote is taken from an on-line discussion about the concept, contribution by A Knight, [https://en.wikipedia.org/wiki/Talk%3AConstitutional\\_democracy](https://en.wikipedia.org/wiki/Talk%3AConstitutional_democracy), accessed on 24 December 2020.



they are embodied in two distinct institutional systems: (1) democracy in elections and parliaments and (2) rule of law in law-making and law-enforcement by the executive and judiciary. Their main intersection is in the legislative process. Once legislation is issued through this process, law takes on a life of its own. So, the fact that legislation passes from one set of institutions to another, each operating according to its distinct norms and expectations, suggests the likelihood of more mundane tension between democracy and law.<sup>81</sup>

Institutions that use democratic procedures to determine the law's content can still produce evil laws, similar to formal legality.<sup>82</sup> As stated previously, popularly elected regimes often manipulate the law in the name of democracy, using a winner-takes-all approach. For instance, they may justify discriminatory policies against the fundamental rights of minorities as 'democratic'.<sup>83</sup>

Hans Kelsen's 1920-1950 work is still relevant to the discussion of complex relations between democracy, rule of law, and the branches of state power. Having witnessed the rise of authoritarianism, Kelsen conceptualized how law could effectively protect fundamental rights. First, a sovereign state must limit itself by law, thus becoming a rule of law state. Second, there should be a clear hierarchy of legal norms, the highest of which empowers a constitution's makers, as the basic law attributing authorities to the three branches of state power. Third, a state should enact in a constitution its fundamental values and the institutional framework to protect them, thus limiting the government's power. Kelsen asserts that the legal order is not a system of coordinated norms of equal level, but a hierarchy of different levels of legal norms, wherein the highest is a hypothetical basic norm. This basic norm is the highest reason for the validity of all legal norms, i.e., it is not given by God, nature, tradition, or ideology, but by the legal norm itself.

Further, Kelsen underlines that the catalogue of fundamental rights and freedoms in a constitution tries to prevent a statute that violates such rights and freedoms, such as freedom of conscience or equality. While legislators could enact such laws, Kelsen argued that the laws' effects could be prevented if contesting and abolishing such statutes can occur. In doing so, the higher norm, a constitutional provision, should prevail over the ordinary statute's creation and content.<sup>84</sup> In contrast, the ordinary statute does not have power to abolish or amend the constitution's higher norm.

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81 John Ferejohn and Pasquale Pasquino, *Rule of Democracy and Rule of Law*, in Jose Maria Maravall and Adam Przeworski (eds.), *op. cit.*, p. 243.

82 Brian Z. Tamanaha, *op. cit.* p. 100.

83 See Tom Ginsburg, *Judicial Review in New Democracies. Constitutional Court in Asian Cases*, Cambridge University Press, 2003, p. 2.

84 See Hans Kelsen, *Pure Theory of Law*, Translation from the Second (Revised and Enlarged) German Edition by Max Knight, University of California Press, 1967, pp. 221-224.

Consequently, when Hans Kelsen drafted Austria's constitution, he proposed establishing a constitutional court, the *Verfassungsgerichtshof*, with the power to review the laws' constitutionality.<sup>85</sup> By adopting the constitutional review principle, he intended to ensure that the statutes created in a legislative process would not violate the constitution. This constitutional court protects the democracy from its own excesses and is adopted precisely because it could be counter-majoritarian, able to protect the substantive values of democracy from procedurally legitimate elected bodies.<sup>86</sup> Thus, people's sovereignty would be subjugated to the constitution.

If all laws are determined by parliament, no other legislative institution is needed. However, because parliament is an institution that also needs to be supervised, the constitution should create a separate institution, commonly called the Constitutional Court.<sup>87</sup>

Thus, a constitutional court forms part of a broader system of institutional arrangements designed to empower and limit the government at the same time. This system forms the institutional foundation for the rule of law and for constitutional democracy. It recognizes certain institutional devices and procedures that limit government's power, such as:<sup>88</sup>

- a. Separation and sharing of powers. State power is separated and divided among the different branches of state power. Each branch has a primary responsibility for certain functions, such as legislative, executive and judicial functions. A branch may also share part of its function with another branch;
- b. Checks and balances. Certain state institutions have enough power to counterbalance the power of other institutions. Checks and balances may include a judicial institution with judicial review authority, i.e., to examine and cancel actions or laws of other institutions considered contrary to the constitution or lower legislation;
- c. Due process of law. Individual rights to life, liberty, and property are protected by the guarantee of due process of law;
- d. Leadership succession through elections. Elections ensure that positions in key state institutions – notably legislatures, but also other institutions – will be contested at periodic intervals and that the post-election transfer of authority is accomplished in a peaceful and orderly process.

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85 See Sara Lagi, *Hans Kelsen and the Austrian Constitutional Court (1918-1929)*, Coherencia vol. 9 no. 16 Medellin January/June 2012.

86 Tom Ginsburg, *Judicial Review in New Democracies. Constitutional Court in Asian Cases*, Cambridge University Press, 2003, p. 2.

87 I.D.G. Palguna, *MAHKAMAH KONSTITUSI, Dasar Pemikiran, Kewenangan, dan Perbandingan dengan Negara Lain*, Konstitusi Press, 1<sup>st</sup> printing, 2018, pp. 75 – 77.

88 Text adapted after Center for Civic Education, [www.civiced.org](http://www.civiced.org), *Part Two: Constitutional Democracy, An Outline of Indices*.

Hence, a democratic government system based on people's sovereignty should have its structures, powers, and limits of government set forth in a constitution. This form of democracy, renowned as constitutional democracy, believes that although the peoples' freely chosen representatives should govern, those elected officials must respect certain substantive limitations on their authority.<sup>89</sup> In a deliberative democracy, one of the principal purposes of a constitution is to protect not the rule of the majority but democracy's internal morality.<sup>90</sup>

### IV.3 CONSTITUTION-MAKING

To successfully create an effective democratic constitution or change an authoritarian constitution into an effective democratic one, managing the process of constitution-making is crucial. As Vivian Hart observes, how the constitution is made and what it says matters.<sup>91</sup> This process is about establishing the shared ideals or agreed values and an effective machinery to implement and enforce them. For the constitution to be 'normative' or effective, there should be a symbiotic relationship between the constitution's text and the political and social practices.<sup>92</sup>

There are three basic routes to constitution-making, namely by an expert commission appointed by a caretaker government, by a special elected body or constituent assembly with the sole mandate of constitution-making, or by a newly elected legislature with the additional duty of drafting a constitution.<sup>93</sup>

In the past, it was often conducted by hand-picked elites who worked in isolation from the public, for instance, the 1787 US Constitution and the original 1945 Indonesian Constitution.<sup>94</sup>

The constitution-making's form may also reveal the shape of future domestic political relations.<sup>95</sup> When they are framed and adopted, constitutions tend to reflect the dominant beliefs and interests, or compromises therein, which are characteristic of society at the time. The prevailing values

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89 Walter F. Murphy, *Constitutional Democracy, Creating and Maintaining a Just Political Order*. The John Hopkins University Press, Baltimore, 2007, p. 10.

90 Cass R. Sunstein, *Designing Democracy. What Constitutions Do*. Oxford University Press, 2001, p. 10.

91 Vivien Hart, *Democratic Constitution Making*, United States Institute of Peace, Special Report, July 2003.

92 Edward Schmeier, *Crafting Constitutional Democracies, The Politics of Institutional Design*, Rowman & Littlefield Publishers, 2006, p. 2.

93 Andrea Bonime-Blanc, *Constitution Making and Democratization: The Spanish Paradigm*, in *Framing the State in Time of Transition: Case Studies in Constitution Making*, Laurel E. Miller (editor with Louis Aucoin), United States Institute of Peace Press, Washington D.C., 2010, p. 424.

94 See Chapter III, *Constitution Making in Indonesian History*.

95 Andrea Bonime-Blanc, *op.cit.*, p. 422.

and norms in a society also influence the norms in a constitution.<sup>96</sup> A constitution is the result of a parallelogram of forces – political, economic, and social – which operate at the time of its adoption. Constitutions tend to embody or reflect or protect the social opinions of those who frame them.<sup>97</sup>

In Harjono's words (see IV.1), a constitution is simultaneously an ideological, legal, political, economic, and social framework. There should be sufficient common paradigmatic ground for the framework to be accepted or legitimate. Thus, whatever the constitution's formulation, if the nation's main components do not share this common ground, the Constitution's text will remain as mere words on a page.<sup>98</sup>

Webber asserts that the constitution-making narrative that conceives of a constitution as a written instrument adopted by 'the People' in a given moment of special law-making is foreign to so many constitution-making practices but remains so dominant in theory. To consider 'the People' as having one voice is more idealized than real. 'We the People' in the United States' constitutional history meant fewer than five percent of the new nation's adult population.<sup>99</sup> This romanticized constitutional narrative fails to capture the experience of constitution-making.

Making a constitution is a far more complex and contingent undertaking than the received narrative would allow. It is both a political and ideally participatory exercise for all citizens and a technical task for experts to ensure that the process can capture legitimacy and efficacy at the same time. It includes the political management of conflict that makes law and government possible.<sup>100</sup> Indeed, some sort of manageable political order is necessary to ensure a situation that protects the process of reason-giving in constitution-making.<sup>101</sup> Therefore, the making of a constitution during a crisis should also form part of attempts to prevent conflict and promote reconciliation. It is to prevent the common people's condition from worsening into the *bellum omnium contra omnes* and to manage it into a condition of 'covenant of one with every other.'<sup>102</sup>

96 Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme di Indonesia* (Constitution and Constitutionalism in Indonesia), published by collaboration of the Constitutional Court of Republic of Indonesia and the Centre of Study of Constitutional Law, Law Faculty, University of Indonesia, 2004, p. 29.

97 K.C. Wheare, *op.cit.* pp. 67, 70.

98 Harjono, is a lecturer of Constitutional Law at Airlangga University, Surabaya and was a MPR member from F-PDIP (*Fraksi Partai Demokrasi Indonesia Perjuangan* – Faction of Indonesian Democratic Party – Struggle) in Ad-Hoc Committee for Amendment of the 1945 Constitution, 1999 - 2002. See Majelis Permusyawaratan Rakyat Republik Indonesia, *Risalah Perubahan UUD Negara Republik Indonesia Tahun 1945, Tahun Sidang 2000, Buku Dua*, Edisi Revisi, Sekretariat Jenderal, 2010, p. 430.

99 Edward Schneier, *op. cit.*, p. 3.

100 Gregoire C N Webber, *Post-Conflict Constitutions and Constitutional Narratives*, Department of Law, London School of Economics and Political Sciences, in 2010 WG Hart Legal Workshop: *Comparative Aspects on Constitutions: Theory and Practice*.

101 Cass R. Sunstein, *op.cit.* pp. 6, 239.

102 Thomas Hobbes, *Leviathan*, R. Tuck (ed.), Cambridge University Press, 1991, in Gregoire C N Webber, *op. cit.*, p. 11.

To that end, the consensual process is best, since it requires the participation of all – or at least most – political groups. Agreements and compromises are achieved through political responsibility rather than dogmatic solutions. However, it is not easy to achieve agreement among those responsible for drafting a constitution.<sup>103</sup> As Sunstein puts it, the process of deliberation in constitutional arrangements may face a pervasive problem: widespread and enduring disagreement. In that case, one should turn the disagreement into a creative force or by making it unnecessary for people to agree when it is not possible. A process in which people agree on practices or outcomes, despite disagreement or uncertainty about fundamental issues, is the solution to a deadlocked deliberation.<sup>104</sup>

Making South Africa's constitution was preceded by a compromise that the past human rights abuses and oppressions were forgiven.<sup>105</sup> Constitution-making compromises often cause ambiguities, but their obvious advantage can be that none of the involved political powers fully oppose the texts, with most supporting them.<sup>106</sup> Hence, a constitution produced by such process should not be regarded as just the intended result of conflict management, but rather a more stable and sustainable outcome to keep conflicts at bay.<sup>107</sup>

In this regard, the process should clearly answer 'for whom' the constitution is made. The constitution is for the population that has a history, culture, and political aspirations, since states cannot be built from the outside.<sup>108</sup> The process must answer the political challenges currently facing the country.

It is worth noting that Thailand's 1997 Constitution was referred to as a 'People's Constitution' because of its people's participation and its drafting process was perceived as ideal. It was also the most comprehensive and well-considered constitution in Thailand's history. Nevertheless, it only survived for a short period of time.<sup>109</sup> The remarkable instability and constitution cycle illuminate the importance of including influential stakeholders in a constitution-making process during a crisis, including a military with a history of political involvement.<sup>110</sup>

A comparison between the constitution-making process in occupied Japan after World War II and in US-occupied Iraq demonstrates that proper constitution-making should acknowledge historical and cultural aspects.

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103 K.C. Wheare, *op. cit.*, p.33.

104 Cass R. Sunstein, *op.cit.*, pp. 8-9.

105 Andrew Harding, *ditto*.

106 Andrea Bonime-Blanc, *op. cit.*, p. 422.

107 Gregoire C N Webber, *ditto*.

108 Simon Chesterman, *State-Building, the Social Contract, and the Death of God*, paper presented at The Future of State building: Ethics, Power and Responsibility in International Relations, University of Westminster, London, October 2009.

109 Andrew Harding & Peter Leyland, *Historical Analysis and Contemporary Issues in Thai Constitutionalism*, Oxford: Hart Publishing, 2011, pp. 22-24.

110 See also, Siddharta Chandra and Douglas Kammen, *op.cit.*, p. 97.

Japan's constitution adopts the history and culture of society and effectively manages the state's political dynamics, while in Iraq these were not considered properly and the constitution was much less effective.<sup>111</sup>

Constitution-makers often borrow from one another, not only within the framework of a particular constitutional tradition but across traditions as well. However, eventually those mechanisms must be integrated in a matter that is true to civil society's spirit for which the constitution is designed.<sup>112</sup>

Regarding the constitution-making process' time limits, Arato recommends that the process should be conducted with a time limit, so that no group can use delaying tactics to get its way.<sup>113</sup> It is not always relevant that transitional constitution-making should occur quickly to capture the moment.<sup>114</sup> When the political order has been controlled by the reformers, the processes may take a longer time. The transition itself may be defined as an evolutionary process coupled with regime change. Such a period may contain the pluralization and mobilization of society from below, the liberalization of socioeconomic policies, the constitutionalizing of political activity, and the liberalization and possible democratization of the bureaucracy.<sup>115</sup> With reformers in a controlling position, the deadline need not be too rigid to create more space for reasoned, far-sighted exchanges in a consensus-seeking process.

The constitution-making process, no matter how romanticised or mythologised, is always a political process. Elazar stated that the following could be a truism, that constitution-making is a pre-eminently political act. In the words of Bismarck, "Politics is the art of the possible, the attainable – the art of the next best."<sup>116</sup> Although academic theory and principles are involved in making constitutions, combining those elements and adapting them to the constituency is an art.

It is an ever-greater art to endow the constitution with legitimacy. Constitutional legitimacy involves consent. Consensual legitimacy, Elazar concluded, is utterly necessary for a constitution to have real meaning and last. Since rule can be imposed by force, constitutions can only exist as meaningful instruments by consent. This is another demonstration that constitution-making is a pre-eminently political act.<sup>117</sup>

The constitution's draft contains many principles that cannot be addressed simply by agreeing or disagreeing. In that regard, to use a referendum to decide on enacting a draft constitution may offer a quick and

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111 Philipp Dan/Zaid Al-Ali, *The Internationalized Pouvoir Constituent – Constitution-Making Under External Influence in Iraq, Sudan and East Timor*, Max Planck Yearbook of United Nations Law, Martinus Nyhoff Publisher, Volume 10 no. 1, June 2006.

112 Daniel J. Elazar, *op.cit.*

113 See Jon Elster, *op.cit.*, p. 395.

114 Edward McWhinney, *Constitution-Making Principles, Process, Practices*, 1981, p. 16.

115 Andrea Bonime-Blanc, *op.cit.*, pp. 417-418.

116 Otto von Bismarck, Prussian Prime Minister, Founder and Chancellor of the German Empire, 1815-1898, quoted on 11 August 1867.

117 Daniel J. Elazar, *op.cit.*

clear-cut decision. However, in the end, it is a winner-takes-all solution that may render the citizenry divided and polarized. In Sunstein's words, as a constitution is like a basket full of various contested basic principles and arguments, patience and perseverance are required to find the solution, possibly including incompletely theorized agreements, practices, and outcomes, despite disagreement or uncertainty about fundamental issues.<sup>118</sup> Achieving such deliberative agreement should provide opportunities for the constitution functioning as a vehicle and driver of social change that will provide opportunities for the future development of new fundamental agreements. Thus, it is important to protect the process of reason-giving, ensuring something like a "republic of reasons".<sup>119</sup>

In conclusion, there is no one-size-fits-all constitution-making process. It should consider the state's peculiarities, the process should be democratic, and the outcomes must incorporate the democratic and rule of law principles, establishing a symbiotic relationship between the text and the state's subsequent practices.

#### IV.3.1 Constitutional change and amendment

Having a constitution by itself does not solve anything. Constitutions matter because they provide political structures that protect fundamental rights.<sup>120</sup>

The opportunity to reform an existing non-democratic constitution usually comes with a crisis. Social and economic crises induce constitution-making. The link between crisis and constitution-making is quite robust.<sup>121</sup> In fact, the momentum of a constitution-making process often emerges in difficult and turbulent periods. Likewise, the emergence of liberalizers and democratizers within an authoritarian system creates a first-order force for political change who will then try to be in power, intending to ensure that changes are adhered to.<sup>122</sup> The feasibility of constitutional reform depends not only on the legal provisions that stipulate the method of change, but also the configuration of political and social groups.<sup>123</sup>

Therefore, constitutional change can occur in revolutionary or evolutionary fashion. In the latter case, it may happen by consensual process. In that case, it does not matter how fundamental the changes in substances are.

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118 See Cass R. Sunstein, *op.cit.*, p. 9.

119 Cass R. Sunstein, *op.cit.*, pp. 6, 239.

120 Mark Tushnet, *Why the constitution matters*, Yale University Press, New Haven and London, 2010, p. 1. (Emphasize added).

121 John Elster, *Forces and Mechanism in the Constitution Making Process*, Duke Law Journal, vol. 45, 1995, p. 370.

122 Samuel P. Huntington, *The Third Wave Democratization in the Late Twentieth Century*, University of Oklahoma Press, 1993, p. 129.

123 K.C. Wheare, *op. cit.*, p.23.



If they are performed in conformity with the provisions of the Constitution, the legal system's continuity will not be interrupted.<sup>124</sup> In that regard, although the effects of transitions may be revolutionary, the thread of continuity is never completely broken,<sup>125</sup> and the state and its legal order remain basically the same.<sup>126</sup>

In contrast, according to Hans Kelsen, revolution occurs whenever the legal order is nullified and replaced by a New Order illegitimately, in a way not prescribed by the first order.<sup>127</sup> Thus, the constitutional narrative of "We the People" suggests ideal conditions for constitution-making, but should be taken as ideal, an asymptotic condition to strive for that will never be fully achieved.

A complete changeover of a *flawed* constitution is usually carried out by a special committee or parliament through constitution-making.<sup>128</sup>

Besides constitution-making, there is also constitutional amendment, constitutional revision or accretion, and constitutional reform. However, these formal distinctions contribute very little to assess the substance of changes.<sup>129</sup>

In a limited change to the constitution, which is commonly referred to as constitutional change, it is an alteration that does not connote either improvement or deterioration. By contrast, constitutional amendments imply a change for the better.<sup>130</sup>

When conducting amendments, the existing constitution's substance requires evaluation and improvement so that immutable democratic principles are embedded in the outcome, such as democracy, rule of law, human rights, independent judicial power, checks and balances, and transparent and periodical circulation of powers. The enforcement institutions and mechanisms should also be embedded in the constitution. There should be no provisions that conflict with or weaken these values and mechanisms.

As has happened in many countries, the demand for far-reaching constitutional changes has been circumscribed by the complexity of having to carry out the changes within the existing Constitution's procedures and processes. *Githu Muigai* writes that, unless the amendment provision spe-

124 Ralf Dahrendorf, *Transition: Politics, Economics, and Liberty*, 13 *Washington Quarterly* 134, 1990.

125 *Ibid.*

126 Hans Kelsen, *General Theory of Law and State*, 1946, pp. 125 – 128.

127 *Ibid.*

128 See above IV.3.

129 Michel Rosenfeld, *The Problem of "Identity" in Constitution-Making and Constitutional Reform*, Benjamin N. Cardozo School of Law, Jacob Burns for Advanced Legal Studies 2005, Working Paper no. 143, p. 22.

130 Adapted from *The Law Dictionary. Featuring Black's Law Dictionary Free Online Legal Dictionary 2nd Ed.*: An alteration; substitution of one thing for another. This word does not connote either improvement or deterioration as a result. In this respect it differs from amendment, which, in law, always imports a change for the better. In that regard, constitutional revision or accretion and constitutional reform, if they also result in improving the constitution, can be categorized as constitutional amendments. (Emphasize added).

cifically provides an amendment procedure whose mandate is to undertake 'any constitutional change', the standard amendment clause denotes a limited power that ought not to be invoked to make structural or fundamental changes inconsistent with the existing Constitution.<sup>131</sup>

There are important procedural and substantive questions on constitutional change. Procedural questions ask who the constitution-making actors should be, or which institutions should conduct the changes. They question the process' legality, to what extent the process conducted by the relevant institution is in line with the regulation's text.

Substantive questions ask to what degree constitutional change will be affected by formal amendment rather than by practice or interpretation. They question to what extent the change will affect the principles of constitutional democracy. There are close relations between these questions.

It is necessary to notice that forces that change constitutions may operate in one of two ways. As discussed above, they may change circumstances that, by themselves, do not change the constitution's wording, but which cause the constitution to mean something different from what it used to mean, or which change its balance.

The second and more obvious way that such forces operate is that they produce circumstances that change a constitution either by formal amendment, through judicial decision, or by the growth and establishment of a constitutional custom or convention.<sup>132</sup>

The Constitution usually entrusts the amendment process' procedures to Parliament. However, there is both judicial and academic controversy about the extent and scope of the amendment substance that Parliament may make to the Constitution.

Another controversy is how to reconcile the Constitution's supremacy with Parliament's sovereignty. It is contended that Parliament in its sovereignty has unlimited and illimitable authority to alter or amend the Constitution in any manner that it may deem fit, subject only to its own political judgement. Conversely, it is argued that under a written Constitution, Parliament has an amending or altering power, but no power to abrogate or create an entirely new Constitution. This argument stresses that altering the Constitution's basic structure cannot be an amendment but a revolution.<sup>133</sup>

Virtually every Constitution contains provisions for its amendment or alteration. Constitutional provisions on amendment are the gatekeepers to the constitutional text. They give political actors a roadmap to alter a constitution, to identify what is subject to or immune from change. They also encourage public deliberation on constitutional meaning and foster stability by making a constitution harder to change than regular legislation.

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131 Githu Muigai, *Towards a Theory of Constitutional Amendment*, East African Journal of Human Rights and Democracy 1 (2003), p.1.

132 K.C. Wheare, *op.cit.*, p.71.

133 Githu Muigai, *op.cit.*, p. 2.

Further, they enable transformative constitutional changes without recourse to revolutionary means.<sup>134</sup>

In that regard, William Marbury writes that the power to amend the Constitution which the Constitution granted to Congress was not intended to include the power to destroy the Constitution. The term amendment implied an addition or change within the framework of the original instrument that would best affect an improvement or better carry out the purpose for which it was framed.<sup>135</sup>

Besides, it is also necessary to pay attention to the basic values that are enshrined in the constitution, glorified and exalted by the nation (e.g., a unitary or union state, or a republic or monarchy government). Similarly, one should consider the national insight, whether based on ethnic grouping, religious sentiment, or transcending those differences. Finally, one should pay attention to the fundamental contents, including the ideals of the state's existence and the state's form, where the constitution entrenches these as formally unamendable provisions.<sup>136</sup>

In line with that, Marbury contended that the Constitution had a fundamental aspect that lays beyond the amending power and that amending the Constitution ad infinitum would destroy what the Constitution constituted. Marbury also argued that the Supreme Court had jurisdiction not only to review the procedure or form of an amendment, but also the substance thereof.<sup>137</sup>

By contrast, W.L.M. Frierson contended that there was no limitation on the amending power, which covered any amendment that was regularly proposed and ratified. Frierson further contended that the Constitution committed to Congress, rather than courts, the duty of determining when amendments were necessary, and courts could only look at the amendments' procedure rather than its substance.<sup>138</sup>

In that regard, unamendability limits the delegated amendment power but cannot block the primary constituent power – the sovereignty at the constitution's basis – from its ability to amend even the constitutional order's basic principles or structure. It means that a new constitutional identity cannot be achieved through regular amendment procedure but requires a different constituent process. Unamendability should therefore not be viewed as blocking all democratic avenues, but rather as proclaiming that one such avenue – the amendment process – is unavailable.

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134 Richard Albert, *op.cit.*, pp.1,

135 William Marbury, *Limitations Upon the Amending Power*, 33 Harvard Law Review (1919), p. 223.

136 Richard Albert, *The State of the Art in Constitutional Amendment*, in *The Foundations and Traditions of Constitutional Amendment*, Richard Albert, Xenophon Contiades and Alkmene Fotiadou (Eds.), Oxford and Portland, Oregon, 2017, p. 7.

137 William Marbury, *op.cit.*

138 W.L.M. Frierson, *Amending the Constitution of the United States*, 33 Harvard Law Review, 1919, p. 659.

The power to change unamendable principles does not reside within the constitutional amendment procedure. Instead, it is appropriately part of the sovereign people's primary constituent power, from which all legitimate power springs.<sup>139</sup>

Presently, there is a broad trend towards engaging the people themselves in constitutional matters. Indeed, the modern conception of primary constituent power is strongly associated with the notion of popular sovereignty. The recent proliferation of referendums is an indicator of such trends. However, there are many familiar difficulties associated with popular mechanisms such as referendums. These include determining who is eligible to participate, drafting of ballot questions, the lack of voter knowledge, fear of the majority's tyranny, and the historical associations of plebiscite abuse. Likewise, manipulations may occur by political elites or interest groups, so that referendums do not necessarily truly express the people's will. By contrast, popular participation should take place throughout a constitutional norms-creating process and not be limited solely to a 'yes' or 'no' referendum vote. A democratic primary constituent power must be committed to the people's sovereignty and be exercised in inclusive, participatory, and deliberative ways.<sup>140</sup>

In other words, while the process should be democratic, the immutable democratic constitutional principles must be embedded in the outcome. In that regard, the Federal Constitutional Court of Germany asserts that, "*There are constitutional principles that are so fundamental that they also bind the framer of the constitution.*"<sup>141</sup>

In India's Supreme Court, it was argued that the Constitution by its nature has a basic structure whose alteration lies beyond the amending power set out by the Constitution.<sup>142</sup>

If the Constitution is both a framework for exercising public and private choices and constitutes the state upon certain shared core values, then implied limitations cannot possibly be in serious dispute. In that regard, Walter Murphy writes:

*The Constitution includes not only the text of an amendment document but also certain choices and agreements. Because it 'constitutes' the nation, it imposes real limits not only on the procedure through which the constitution can be changed but also on the substance of valid changes. If an amendment exceeds these limits, it is proper for the institutions with authority to interpret the constitution to declare the amendment invalid.*<sup>143</sup>

139 Yaniv Roznai, *Amendment Power, Constituent Power, and Popular Sovereignty, Linking Unamendability and Amendment Procedures*, in Richard Albert, Xenophon Contiades, Alkmene Fotiadou (eds), *op.cit.*, p. 25.

140 See *ibid.*, pp. 30 - 31.

141 Walter F. Murphy, *op.cit.* pp. 499-504.

142 *Structuralism as a method of constitutional interpretation has a long and distinguished history* - See J. Fleming, *Constructing the Substantive Constitution*.

143 William Murphy, "*Slaughter House: Civil Rights and the Limits of Constitutional Change*," *Harvard Law Review*, 1983, p. 21.

In that regard, Githu Muigai concludes that the proper scope for constitutional amendment must be determined by the need to retain the Constitution's fundamental structure, basic values, assumptions, principles and spirit. Any constitutional change outside the amending power would amount to a *de facto* revolution. It would abrogate the entire Constitution.<sup>144</sup>

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144 Githu Muigai, *op.cit.*, p. 8.