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

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IX Conclusions

Finally, after a long and exhausting effort that started in October 1999, the amendment of the 1945 constitution was completed in August 2002, almost four years later. It had been a gradual, sustained, open, and deliberative process. The reform did not just add or remove certain sections of the original 1945 Constitution. While the fundamentals of the nation and state embedded in the Preamble and the Republic's unitary state form were maintained and guided the reform, the amended Constitution in the end has become a hallmark of constitutionalism.[1] It stands at a clear distance from the original text in its rejection of the authoritarian concepts in the 1959 version of the 1945 Constitution. It contains all the elements required in a democratic constitution, including people's sovereignty, rule of law, protection of fundamental rights, separation of powers, checks and balances, independent judiciary, and periodic and free elections.

Thus, the amendment process and its outcomes had peacefully transformed Indonesia from the second largest authoritarian country to the third largest democracy in the world.

IX.1 A long history of attempts to establish constitutionalism

The amendment process occurred in response to a peak demand for political reform in Indonesia during the political crisis ignited by Asia's monetary crisis, which engulfed the country in 1997. However, as discussed in this study, aspirations and attempts to create a democratic constitution had existed ever since the drafting of the 1945 Constitution. This already became apparent from the discussions in the Investigating Commission for the Preparation of Independence, which convened from May to July 1945. The occupying fascist Japanese military administration envisioned a constitution that would establish an independent Indonesia as part of a geo-political Greater East Asia Co-prosperity Sphere led by Japan, as it had done earlier in Burma and the Philippines in 1943.[2] Only the Constitution's Preamble was free from Japan's WWII fascist ideas, as they were formulated by an independent team of nine, led by Soekarno, who worked outside Japanese control.

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1 See also Adriaan Bedner, *The Need for Realism*., p. 177.

2 Including as revealed in the confidential Secretariat Paper no. 3167, 14 March 1942 of the Japanese Empire Ministry of Navy. See Harry J. Benda, James K. Irikura, Koichi Kishi, *op.cit.*, p. 26.

Central to the Preamble are the five pillars of *Pancasila*: the belief in the One and Only God, a Just and Civilized Humanity, the Unity of Indonesia, the People's Sovereignty, which is Led by Wisdom in Deliberation amongst Representatives of the People and Social Justice for All the People of Indonesia. Thus, the original 1945 Constitution comprises of two unmatched parts: the Preamble, which contains the pure aspirations of Indonesian independence, and the Articles, which were tainted with Japan's fascist ideas.

Only one day after the declaration of independence, on 18 August 1945, the Committee for the Preparation of Independence of Indonesia agreed that the 1945 Constitution should be improved as soon as possible. However, this did not happen, and in October 1945 the then Minister of Justice, Soepomo, added an Elucidation to the Constitution which made it deviate further from democratic principles. Nonetheless, in the collective consciousness, the revolutionary spirit of the proclamation of Indonesia's independence and the subsequent zest for defending it were linked to the birth of the 1945 Constitution. This enhanced the constitution as a symbol of triumphant national struggle for independence and the nation's dignity, far exceeding its text and contents. The main political powers' emotional bond to the 1945 Constitution, notably the military and the police, was to remain a formidable obstacle for reform and promoted the return to this Constitution in 1959 after the political turmoil of the 1950s under the Constitution of the Federal Republic of Indonesia, the 1950 Provisional Constitution, and the failed attempt to enact a new Constitution between 1956-1959.

Between 1959-1965, based on the 1945 Constitution, President Soekarno ruled the country under an authoritarian system, which ended with a failed attempt at a coup by leftist military officers and was followed by a counter-military takeover and a massacre of communists – and those accused of being communists – in 1965-1966, organized by the army. In 1967, General Suharto, backed by the military and students, became the next president.

Suharto promised to implement the 1945 Constitution purely and consistently. His New Order government prioritized economic development, emphasized security and stability and ignored many of the people's fundamental rights. To ensure his government's stability and effectiveness, he kept the highest political institution, the MPR, under strict control. Suharto developed the Functional Groups (*Golongan Karya* – GOLKAR) to dominate the political system, together with a major role for the Armed Forces in a system called *dwifungsi*.

Under the New Order, the economy and education grew impressively. The former created a strong legitimacy for Suharto's government, but the latter promoted the rise of critical intellectuals. As the regime aged, the 1945 liberator generation of Indonesians (*Angkatan '45*) were slowly disappearing from the scene, both in the administration and in the army. This moved Suharto to envisaging a new civil-supremacy political system in which the political role of the Armed Forces would be significantly reduced, and elections would be free and transparent. Similar ideas of reform sprang up among the ruling elite, including in the military and the police.

However, Suharto was opposed by the military leadership, which led to a serious conflict between the President and the military. When the 1997 Asian monetary crisis struck it quickly destroyed Suharto's remaining legitimacy and turned into a deep political crisis, which directly weakened the regime and eventually led to Suharto's resignation. He was succeeded by his Vice-President BJ Habibie, who immediately took action to facilitate reform. Then, under pressure from student demonstrations and demands from dissidents, a special MPR session was convened from 10 to 13 November 1998. The session decided to revoke MPR Decree No. IV/MPR/1993 and to allow changes to the 1945 Constitution. It expedited the scheduled 2002 elections to June 1999 and allowed new political parties. It enacted an Assembly Decree on human rights and created a Working Platform for constitutional reform.

Key to the events that were to unfold was that, amid student demonstrations, the main political powers agreed to reform the 1945 Constitution – the government, represented by President Habibie; the opposition, represented by Megawati Soekarnoputri, Abdurrahman Wahid (Gus Dur), and Amien Rais; and the Armed Forces, represented by General Wiranto. They agreed to maintain the Constitution's Preamble, the unitary form of the Republic of Indonesia, and Pancasila as the foundation of the state. They also agreed that the reform should be conducted constitutionally, in accordance with the Constitution's provisions.

In short, the opportunity to reform the 1945 Constitution was created through several factors: (1) latent aspirations and reform pressure in society; (2) the internal conflict within the regime; (3) the serious economic crisis that weakened the regime; (4) the existence of reformist groups within the ruling elite; (5) the agreement between the main political powers to conduct constitutional reform; (6) the attitudes and concerns of prominent religious leaders and the existence of Islamic organizations such as NU and Muhammadiyah who accepted Pancasila and the national principle of unity in diversity (*bhinneka tunggal ika*); (7) the availability of procedures for constitutional amendment, and; (8) the commitment of the Armed Forces to abide by the Constitution and take part in the reform process.

IX.2 The reform process – The challenge of consensus-making

The amendment process to the 1945 Constitution was conducted from 1 October 1999 to 10 August 2002 in a four-stage process that had not been planned from the beginning. Because of the symbolical authority of the 1945 Constitution, replacing it with a new constitution was not acceptable to the main political powers and therefore the MPR decided to reform the existing Constitution through amendment. The approach was deliberative, inclusive, and consensus-oriented, committed to genuine reform and to affirming a democratic constitution's immutable principles. President Habi-

bie's commitment to the reform and his policy of respecting freedom of the press also helped the process, as did the military's attitude to abide by the Constitution. Through the MPR Special Session in November 1998 the ideas concerning reform were channelled into the formal political process.

Very important to the process was the agreement to allow new political parties to be established and to have democratic elections before amending the Constitution. The MPR that was formed after these elections had strong legitimacy to amend the 1945 Constitution.[3] This paved the way for another important feature of the process, i.e. that there was no academic draft prepared in advance. Instead, the political factions in the MPR submitted proposals, which were compiled as the base material for amending the Constitution. This promoted the openness of the process, as did the deliberation and consensus approach in decision-making. As a result, each faction, regardless of size, saw itself as an actor contributing to the process. This bolstered the factions' sense of ownership and commitment to the amendment process as a shared duty.

Similarly, the fact that deliberation and consensus-making were necessary motivated the representatives of the various factions, particularly in the Drafting Committee (PAH I), to get to better know and understand each other. This encouraged mutual respect and personal friendships and made the process increasingly inclusive, which further helped achieve consensus and compromises. The fact that PAH I members congratulated each other after finalizing the draft amendments in August 2002 is testimony to the feelings they had of having engaged in a joint undertaking and shared responsibility. Likewise, when the amendment process was completed on 10 August 2002, the MPR members spontaneously agreed to pray together and sing the national anthem *Indonesia Raya*.[4]

In any democratic constitutional reform process, consensus-making is the main challenge. Our case was no exception, as there were conflicting opinions on many subjects. Therefore, we had to develop an attitude towards and atmosphere for consensus-building. Even though the MPR initially provided a short amendments timeframe, we knew the process would be complicated. Therefore, we avoided creating an atmosphere of rushed decision-making.

If there were several suggestions or opinions, we often recorded these as various options or alternatives. All ideas were recorded in the minutes, so the members knew their views were taken seriously. We considered each speech and opinion on its merits rather than differentiating between contributions from large and small factions. All PAH-I leaders adopted this approach. When members felt respected, they became open to the opinions

3 See Donald L. Horowitz, *op.cit*., p. 1. See also Adriaan Bedner, *The Need for Realism*; p. 192.

4 Proposed by Afni Achmad (F-Reformasi). Then, Mohammad Cholil Bistri (F-KB) led the prayer and Suko Waluyo (F-PDIP) led the assemblies to sing the national anthem, *Indonesia Raya*. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit*., Tahun Sidang 2002, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 753.

of others. This method helped build a sense of unity between the PAH-I members. It even became common for PAH-I members from various factions to share opinions different from those of their factions. Such members would often successfully try to address the issue in their faction in the same spirit.

We addressed each topic individually. If we could not deal with a topic (e.g., because the atmosphere became too heated), we tried to postpone it and move to another topic. We tried to avoid tense situations. Certain issues were resolved by reference to other resolutions, such as the delicate issue of the relationship between state and religion.[5]

Personal factors also helped the process. The chairman of the F-PDIP faction in the MPR, Arifin Panigoro, had been a classmate of the national armed forces commander, general Endriarto Sutarto, in their Bandung secondary school. I attended the same school, was in the year above, and was one of the organisers of extra-curricular activities. Several members had also been activists in the 1966 student demonstrations and had remained friends ever since. These connections helped nurture the required openness and depth in the discussions.

It is telling that once the PAH-I members agreed on a position, they would defend, explain, and promote it, such as the decision-making process in establishing a Constitutional Court.[6] It could be said that we worked in the spirit of *musyawarah*, as embedded in the Pancasila.

The next important feature of the process was that it was public in nature. Most PAH I meetings were open to the public and broadcast live through the MPR television station. Students, activists, NGOs, journalists, and domestic and foreign observers were free to attend, to communicate with PAH I members and to submit written proposals to PAH I. Through various programs, such as public hearings, seminars, workshops and comparative studies, PAH I reached out to the public at large. This enabled PAH I to better deal with sensitive political issues, including whether the state

5 Proposed changes to Article 29 on religion were resolved by referring to Article 31 on education and culture. Since these topics were considered quite sensitive, resolving them involved the party's highest leadership, in this case, President Megawati Soekarnoputri, chairwoman of PDI-P and Vice-President Hamzah Haz, chairman of PPP, an Islamic political party.

6 Regarding the right to constitutionally review laws, all PAH I members agreed that such review must be carried out by an independent judicial body, in this case, the Constitutional Court. However, MPR members from a different Ad-Hoc committee disagreed. They argued that the MPR should conduct such reviews as the highest state institution. The leadership of the factions and the MPR agreed with these members. It was decided that the MPR would have the right to review the constitutionality of laws. That decision was stipulated in MPR Decree no. III/2000. However, the PAH I members remained united and kept advocating for their position. In the end, the factions and MPR leaders were convinced that the right to review the constitutionality of laws should be in the hands of an independent judiciary and MPR Decree no. III/2000 was repealed. All factions eventually agreed with PAH I's proposal to include the establishment of a Constitutional Court in the Constitution.

should implement Islamic Sharia for its adherents or whether to change from a unitary to a federal state. Through hearings PAH I became more aware of threats of secession if the state would implement Islamic law and insights on the tension between the central and regional governments.

This study has demonstrated that the public was willing to express aspirations, disappointments, and anger, frankly and openly in the constituted state forums. It also showed that the amendment process interacted with the actual political challenges in Indonesia, in which reforming the 1945 Constitution was also an attempt to resolve social challenges instead of a project dwelling solely on theoretical principles.

Clearly, this openness combined with the political nature of the debates made it more difficult to achieve decisions. Nonetheless, in the end, debates, deliberations, compromises and consensus generated acceptable solutions. While certain topics could be solved in a single session, most were completed gradually or piecemeal, such as Article 6A on the presidential election and Article 20 on law-making. Of much importance was that unsolved parts could be moved to later sessions, while previously concluded parts were maintained. Thus, bit by bit, changes were made starting from the outer edge, moving from the simple and most acceptable topics to the more difficult ones. This enabled factions to gradually move away from the original 1945 Constitution's principles, dethroning the MPR from its position as the highest state institution and holder of people's sovereignty with unlimited power, and affirming the rule of law and constitutional supremacy.[7] In the end, all changes were decided unanimously through deliberations, except that of appointed functional group delegates in the MPR.

IX.3 Risks, ongoing tensions, and the Constitutional Commission

Without the strong commitment from all parties, the security forces, military, and police, to abide by the Constitution and maintain rule and order, this phased approach would have failed, especially when the amendment process was still running, with the incomplete Constitution in force. It should be noted that the prolonged and cumbersome process in the MPR, especially in the beginning, caused discontent among the public. Critics argued that there was a lack of democratic participation and representation. The criticism mainly concerned the slowness and lack of directional clarity of the deliberation process for consensus. Certain NGOs claimed they already had the right formulations for the required changes and that

7 Horowitz concluded that "The Indonesians, … awaited the development of a consensus, which took more than three years to emerge. Only in 2001 did they enact an amendment that withdrew sovereignty from the MPR, acknowledged that it belonged with the people, and created a separation-of-powers regime, with a directly elected president and vice president not subject to removal on mere policy grounds." See Donald L. Horowitz, *op.cit.*, pp. 57-58.

the process could be completed much more rapidly. For example, they suggested changes be made quickly through voting or referendums. At some point this resulted in considerable public pressure to remove the amendment process from the MPR and assign it to an expertise-based constitutional commission. Some activists and politicians considered such a commission as a tool to cancel certain amendments that had already been adopted. A few would like to use it to thwart and take over the entire amendment process.[8]

Obviously, the MPR did not agree with this idea, and for good reason. The proposal of an expert constitutional commission ignored the Constitution's political nature and its relation with the political realities of the time. Reform through such a commission would moreover have been undemocratic, as it would not have involved properly elected political representatives.[9] It also found that the proposed expert commission's suggested procedure was flawed. The MPR and the members of PAH I finalized proposals by voting, while the members of the expert commission would debate matters and submit all ideas in compilation to the MPR if they could not reach consensus. This would have meant that the process should have started all over again. Finally, the MPR argued that the existing amendments were sufficient and should be maintained.

During its 2002 annual session, to pacify some of its critics, the MPR decided to form a constitutional commission with the task to conduct comprehensive study on the changes to the 1945 Constitution. The MPR also assigned the Working Body to formulate the composition, the position, the authority, and the membership of the commission.[10] In the 2003 annual session, the MPR issued MPR Decision no. 4/MPR/2003 on the composition, position, authority and membership of the Constitutional Commission. The Decision stated that the Commission was responsible to the People Consultative Council through the Working Body. The Decision also asserted that the study should not be concluded by voting. Further, the Commission was to study the amended Constitution comprehensively for improvements, not to start the amendment process all over again.[11] The Constitutional Commission indeed proposed several reforms to the Working Body. However, instead, the MPR plenary session on 26 September 2004 accepted the Working Body's proposal to reject the Constitutional Commission's recommendations.[12]

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8 See e.g. Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Lima, p. 543.

9 There are countries which applied this approach, such as Thailand (1999) and Iraq (2004), which eventually proved as ineffective.

10 MPR Decision no. I/MPR/2002.

11 See MPR Decision no. 4/MPR/2003, 7 August 2003.

12 See MPR Decision no. 4/MPR/2004, 26 September 2004 and its enclosure.

IX.4 Constitutional reform: The importance of process

Reforming the constitution through a majoritarian approach might have produced a textually good constitution, but it would have run a considerable risk of producing a constitution that would have been unacceptable to many Indonesians. If there is one thing the case of Indonesia demonstrates, it is that constitutional reforms can consider, but need not imitate or follow, foreign institutional forms and processes or theories.[13] There is no single correct path of constitutional democracy and no single set of institutional choices that is best for a constitutional democracy in the face of major social divisions.[14] Distinctive forms and processes (*sui generis*) that are acceptable to all parties need to be found, within the limits imposed by democracy and rule of law.[15] Indeed, although experts proposed logically sound concepts, ultimately compromises needed the political art of constitutional amendment decision-making.[16]

Likewise, the idea of a referendum being held if the MPR rejected the constitutional commission's proposal overly simplified the matter. Especially in a highly diverse society as Indonesia, a yes-or-no referendum was not an effective way of deciding substantive constitutional issues. A referendum could have caused Indonesia as a state to disintegrate, further highlighting divisions within a diverse society amidst economic hardships and strained relations with regional governments.

The minutes of the MPR discussions show that the factions were initially unaware of the scale and depth of the necessary revisions to the original 1945 Constitution and how profoundly the amendment would alter the original articles. This also applied to public intellectuals and the broader public. Somehow, a spirit of reform became dominant and concepts such as people's sovereignty, rule of law, and separation of powers became familiar to a wide audience, notwithstanding different ideas about their meaning. PAH I was the main pacesetter for reform, its members often ahead of the political parties they represented in developing ideas on specific topics, which were then later accepted.

For understanding the process, it is also important to be aware that language is not only something of ratio and logic, but also of emotion and feeling. Besides the content, the choice of words and intonation of speech were crucial in getting an idea or proposal accepted or rejected. Although scientific arguments and literary concepts were influential, conclusions were made based on the most acceptable agreements.

Where serious differences of opinion emerged, the original text of the Constitution sometimes provided a way out. This was the case with the original Article 29 on freedom to worship, which after long deliberation was

13 Compare Daniel J. Elazar, *op.cit.*
14 See Donald L. Horowitz, *op.cit.*, p. 261.
15 See also Walter Murphy, *op.cit.*, pp. 499-504.
16 Daniel J. Elazar, *op.cit.*

maintained. Factions that wanted changes to the article in the end accepted that they would have to find other opportunities to address this matter politically.[17]

In addition to debates over substantive issues, one structural flaw of a procedural nature plagued the process, i.e. the division of tasks between PAH I and PAH II. The latter had been assigned the task to review the MPR decrees and to draft new ones, which it did under the assumption that, under the amendments, the MPR would remain the supreme political body. An example is the PAH II draft which assigned the power of constitutional review of statutes to the MPR, which was approved by the leaders of the different factions and the leadership of the MPR.[18] At the same time, PAH I was discussing the establishment of an independent judicial body for constitutional review. It took considerable time and effort for PAH I to convince the MPR to select the latter option.[19] Another example is the MPR Decree which required the President to obtain prior approval from the DPR to appoint the Chief of National Police and the Armed Forces Commander, which was not in line with the design of a presidential system of government.[20] Some of these issues were only resolved after the completion of the amendment process, when the MPR plenary session cancelled a number of the MPR decrees concerned.[21] However, the fact that not all MPR decrees have been revoked indicates that there are still differences of opinion concerning the role of the MPR within the state structure, which may emerge again in the future. It is worth noting that, at least until the second amendment, most factions maintained that the MPR should remain the highest political institution within the state structure, as originally established in the 1945 Constitution.[22]

PAH II activities also helped to relieve some of the public pressure as it could respond more quickly to demands for significant and immediate reforms, where amendment to the Constitution undertaken by PAH I needed more time.

Finally, it should be noted that over this period of four years, every conceivable topic has been discussed by MPR members, many of them time and again. No topic suddenly appeared in the results of the process

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17 See e.g. Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Lima, pp. 690, 694, 695.

18 The MPR plenary session stipulated the decision in the MPR Decree no. III/MPR/2000 on the Sources and the Order of the Legislations.

19 In the third phase of amendment in 2001, the Constitution asserted that the Constitutional Court is authorized to perform judicial review upon the law toward the Constitution.

20 MPR Decree no. VII/MPR/2000 on the Role of Indonesian National Armed Forces and the Role of Indonesian National Police, Article 3 paragraph (3) and paragraph (7).

21 However, until this dissertation is written, there are MPR decrees and legislations that are inconsistent with the 1945 Constitution which are still in force, including the above statutes.

22 See e.g. Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 1999, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 24, 61, 69, 84, and 661.

by surprise, as if falling from the sky. The extensive records of the many meetings of PAH I simply refute allegations that the amendments to the 1945 Constitution had been planned or guided by foreign institutions or other outsiders.

IX.5 Result: Main features of the amended Constitution

After having looked at the history and the nature of the amendment process, this Conclusion will now look at the major results of the amendment process. They concern the preservation of the Preamble with the Pancasila as the foundation of the state, the decision to subjugate state power to the Constitution and to make Indonesia a state under the rule of law, including the introduction of a separation of powers and checks and balances, as well as fundamental rights and freedoms.

Of major importance is the introduction of a mechanism for testing the constitutionality of laws by a Constitutional Court *(Mahkamah Konstitusi)*. The democratic nature of the state is further guaranteed by introducing fair and free elections. The amended Constitution moreover guarantees the fundamental rights of Indonesian citizens to a better life, social welfare and social justice. More concretely, it obliges the state to provide basic education, decent health and other basic needs facilities, and to intervene in the market in order to achieve a proper balance between economic growth and redistribution of wealth.

IX.5.1 Maintaining the Preamble

As discussed above, the MPR decided to maintain the Preamble of 1945 Constitution. Hence, the amendments were limited to the articles of the Constitution and to the Elucidation. Maintaining the Preamble with the Pancasila served to uphold the moral values of the 1945 Constitution as well as its symbolic meaning and sense of continuity. The amendments served to democratize the 1945 Constitution in order to achieve national goals based on the Pancasila. Article 37 and Article II uniquely embed the Preamble's position. Article 37 defines how the Constitution's articles can be amended. Article II states that the Constitution consists of the Preamble and the articles. This effectively means that the Preamble of the Constitution is non-amendable.

IX.5.2 Supremacy of the Constitution

In the third phase of the amendment process, the MPR decided to amend Article 1(2). The stipulation that "Sovereignty is in the hands of the people and is exercised in full by the People's Consultative Assembly" was

replaced by "Sovereignty shall be vested in the hands of the people and be executed according to the Constitution".

This new section (2) affirms that the democratic political system adopted is subject to the fundamental principles and rights embedded in the Constitution.[23] This provision ended the supremacy of the MPR of the original 1945 Constitution. Furthermore, it affirms that the 1945 Constitution is the supreme law of the land and the highest law in the Indonesian legal system,[24] so there should be no laws and regulations that contradict it.

IX.5.3 Rule of law (negara hukum)

Ultimately, at the end of the third phase of the amendment process, on 9 November 2001, the MPR plenary meeting decided to add a new section (3) to Article 1 which confirms that *"Negara Indonesia adalah negara hukum"* (the State of Indonesia is a state based on the rule of law). Article 1(2) was also amended to become "Sovereignty shall be vested in the hands of the people and be executed according to the Constitution".

Together with the above-mentioned Article 1(2) about the supremacy of the constitution, the new Article 1(3) constitutes a fundamental change to the original 1945 Constitution. By claiming that Indonesia is a state under the rule of law all exercise of state power is subjugated to the law.[25] Unsurprisingly, it took considerable time and effort to introduce these changes, as they had been proposed and discussed in the PAH already in October 1999.[26] However, the PAH members involved were cautious, as they realized that the *negara hukum* is not a mere statement but an ideal that requires many measures and tools to be able to realize the justice it aims to achieve.[27]

IX.5.4 Separation of powers / checks and balances

The 1945 Constitution did not adhere to the principle of separation of powers or checks and balances, but confided in the spirit, wisdom, and judgement of state actors.[28] In this system, the MPR distributed power to Parliament, the President, the Audit Board and the Supreme Court, all of which were

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23 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p.102.

24 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2000, Buku Satu, Revised Edition, pp.102.

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

26 See e.g. Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 1999, Edisi Revisi, Sekretariat Jenderal, 2010, p. 106.

27 Ibid., pp. 117, 129.

28 See the 1959 version 1945 Constitution, Elucidation, IV.

accountable to the MPR. The amendments fully overhauled this system, establishing the separation of powers. The authority of state institutions no longer relies on the MPR but directly on their Constitutional mandate. The amendments have extended the number of guardian institutions with a Constitutional Court, a National Human Rights Commission and a Judicial Council.

IX.5.5 Independent judiciary

The 1959 version of the 1945 Constitution did not provide for the independence of the judiciary, as it asserted that the supreme authority is vested in the MPR. This provision undermined the statement in the Elucidation that the judicial power must be free from government intervention.[29] Now, Article 24 of the amended Constitution affirms that the judiciary is independent. It moreover attributes the power to the Supreme Court to conduct judicial review of laws and regulations below the level of acts of parliament.[30]

IX.5.6 Constitutional Court

A path-breaking amendment was the introduction of a Constitutional Court charged with constitutional review of acts of parliament.[31] Although the amended Constitution does not explicitly mention the authority of the Court to resolve petitions brought by individuals, its Article 28I does provide that the protection, advancement, enforcement, and fulfilment of human rights shall be the responsibility of the state, and more in particular of the government. Given the complexity and diversity of norms adhered to in society, PAH I decided to not explicitly open up the possibility of individual petitions in the Constitution, as this would carry broad political implications. However, once established, the Constitutional Court itself immediately made clear that it was willing to accept such petitions and is has become a major player in determining the constitutionality of acts of parliament.

IX.5.7 Constitutional democracy

The 1945 Constitution did not acknowledge elections as a constitutional instrument for the circulation of powers. General elections were regulated

29 Ibid., on Chapter IX, Judicial Power.
30 Paragraph (1) Article 24A, the 1945 Constitution.
31 Paragraph (1) Article 24C, the 1945 Constitution.

in an act of parliament instead of in the Constitution.[32] This changed in the second amendment to the Constitution, which guarantees free and periodical elections of Parliament, as well as of the President and the Vice-President. Chapter VIIB of the amended Constitution introduces this constitutional basis for elections, which should be carried out in a democratic manner, with five-year intervals and organized by a national, permanent and autonomous commission. Likewise, Article 18(4) on Regional Authorities determines that the heads of the provinces, regencies and municipalities shall be elected democratically. The amendments also provide a constitutional basis for political parties.[33]

Another important democratic novelty concerned law-making and stipulates that a law must be made by a democratically elected Parliament in a process of deliberation with the directly-elected President. A bill can only be ratified as a law by prior joint approval of both state institutions.[34]

IX.5.8 Human Rights

At the end of the second amendment phase, on 18 August 2000, the MPR decided to incorporate a full new chapter of human rights (Chapter XA Articles 28A to 28J) into the 1945 Constitution, in addition to the already existing Articles 27 (equality before the law) and 29 (freedom of religion). During the deliberations, members of PAH I asserted that human rights are *fitriyah*, inherent to the human being, and not a gift of the state or the constitution. Accordingly, they are not considered as of particularistic but as of universal validity.[35]

The new Article 28I provides that certain rights cannot be limited under any circumstances. These non-derogable rights are those to life, freedom from torture, freedom of thought, freedom of religion, freedom from enslavement, recognition as a person before the law, and the right not to be tried under a retroactive law. Article 28I (4) obliges the state, and especially the government to protect, to uphold and to fulfil these rights.

Article 28J (1) emphasizes that every person should respect the human rights of others. Article 28J (2) stipulates limitations on the exercise of human rights. First, each person shall abide by statutory limitations. These may only be stipulated with the purpose of guaranteeing the recognition of

32 The first general election during the 1945 Constitution was conducted in 5 July 1971 by the Provisional MPR Decree no. XI/1966 and under Law no. 15/1999 on General Election and Law no. 16/1999 on the Composition and the Position of MPR, the DPR and the DPRD. The subsequent elections during the new order era, including the 1999 election, were also conducted based on MPR Decrees.

33 See Articles 6A paragrah (2), Article 22E paragraph (3), the 1945 Constitution.

34 Article 20 of the 1945 Constitution.

35 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 316.

as well as respect for the rights and freedoms of others. In addition, rights may be limited in order to comply with just demands of morality, religious values, security, and public order in a democratic society.

IX.5.9 Decentralization

One of the fundamental decisions by the MPR was to maintain the unitary form of the Republic of Indonesia,[36] to keep the archipelago in all its diversity together as a nation in the spirit of the nationalists, who in 1929 pledged to the idea of "one nation, one country, and one national language", the so-called *Sumpah Pemuda*. However, PAH I concluded that the level of decision-making on many issues should be brought closer to the regions to overcome the challenges of discrepancies in their development, problems in the span of administrative control, recognition of their distinct characteristics, and to promote public participation in government.[37]

Hence PAH I's conclusion that a decentralized form of government should be included in the amendments to the Constitution. Such decentralization should take into account the needs and differences of the regions concerned, meaning that not all regions would need the same degree and form of autonomy. Thus, in the second phase of amendment, the MPR determined to revise Article 18 accordingly.

The new Article 18B rules that the State shall recognise and respect units of regional authorities that are special and distinct. It further affirms that the State shall recognize and respect the traditional communities along with their traditional customary rights. Nonetheless, the provision is clear in asserting that the powers of the regions are derived from the national government and can be changed, reduced, expanded or revoked by law.

Regional heads and members of the Regional Councils are elected and mandated by the people to implement the provisions of the laws. However, their authorities are not directly derived from the sovereignty of the people. In order to link the regions better to the centre and to guarantee a better representation of regional interests the MPR founded the Regional Council (*Dewan Perwakilan Daerah*).[38] The DPD is also part of the MPR and can balance the representation of the densely populated island of Java with representatives from the 'outer islands'.[39]

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36 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 1999, Edisi Revisi, Sekretariat Jenderal, 2010, p. 52.

37 See e.g. Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 158, 182, 361.

38 See Chapter VIIA of the 1945 Constitution.

39 See e.g. Articles 2 and 3, Article 7B paragraphs (1), (6), (7), and Article 8 paragraphs (2), (3) of the reformed 1945 Constitution.

IX.5.10 Social justice

As set forth in the Preamble of the 1945 Constitution, Indonesia aims, inter alia, to develop the intellectual life of the nation, to improve public welfare and to achieve social justice. Based on those ideals, members of PAH I considered the Constitution not merely as a set of principles and an arrangement of institutions, but also as a legal foundation and an instruction to the government to achieve these goals.

A democratic system in itself does not offer sufficient guarantees to this end,but it generates more and better information to achieve them. Therefore, the amendments to Articles 31, 32, 33 and 34 of the Constitution, and the provisions on the fundamental rights of the people as set forth in Chapter XA on Human Rights, assert that the state should actively engage in empowering the people and governing the allocation of resources.

As revealed in the discussion in PAH I, the Constitution should not emphasize a particular approach to promoting justice, such as a utilitarian, a social-egalitarian or a libertarian one.[40] Article 31 aims to improve the capacity of the person by stipulating that basic education is compulsory and must be financed by the government; Article 32 ensures the freedom of the people to maintain and develop their cultural values. The reformed Article 33 requires the state to pro-actively intervene in the economy in order to utilize the resources properly and to ensure balanced development of the regions. In doing so, the government is required to apply decent measures to avoid either a planned or a fully free market economy.[41] The guiding principle that was adopted in the fourth Amendment is the principle of just efficiency (*efisiensi berkeadilan*), which means that development has to take into account not only direct economic values, but also other values, such as the value of preservation of the environment.[42] Finally, Article 34 obliges the state to intervene to aid those who are in need of help and to establish a social system that provides health care and other services to enable them to develop themselves in accordance with human dignity.

The above provisions share a 'substantive freedom approach' to cope with poverty, inequality, poor health and similar problems, and thus realise social justice.[43] Thus, the rule of law in the amended Constitution is a

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40 See e.g. Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 51, 61, 65, 145, 237-239, and 277-278.

41 See among others Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 320-321, 338, and Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 313 – 319, and 334.

42 The chairman of PAH I proposed the term *efisiensi berkeadilan* (efficiency with justice). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 496-503.

43 See Amartya Sen, *Development as Freedom*, *op.cit.*, p. 74.

developmental and redistributive justice model of the rule of law, which is committed to eradication of backwardness, poverty and injustices.[44]

IX.5.11 Article 29 and freedom of religion

I have not discussed Article 29 in the above subsection on human rights – even though it is part of the constitution's section on human rights – because it deserves a separate subsection. Article 29 and its guarantee of freedom of religion constituted potentially one of the main stumbling blocks of the entire amendment process because of the persistent efforts of some Islamic MPR factions to incorporate into the Constitution a provision that Islamic law would apply to all Indonesian Muslims (the so-called 'seven words' or *tujuh kata*). Despite these efforts, in the end the MPR plenary meeting in August 2002 unanimously decided to maintain the original Article 29

The debate about Article 29 was no longer a contestation about the foundation of the state as it was during the Investigating Commission's session in 1945 or in the meetings of the *Konstituante* in 1956-1959. All factions affirmed that they accepted Pancasila as the foundation of the state. Instead, the debate shifted to the role of the state in religious affairs in a state based on Pancasila, whose first principle is the Belief in the One and Only God (*Ketuhanan yang Maha Esa*).

Nonetheless, the debate concerning Article 29 continued until the very end of the amendment process. A stalemate resulted from the refusal of certain factions to withdraw their proposal to include the 'seven words' into Article 29 and the refusal of their opponents who defended the original Article 29 to take a vote on this issue. Then, through informal consultations, which involved the newly elected President Megawati Soekarnoputri and Vice-President Hamzah Haz, who represented opposing sides on the issue, the Islamic factions agreed not to force a vote on their proposal on the condition that their proposal regarding section (3) of Article 31 on Education would be accepted.[45]

However, these factions also asserted that they would continue their struggle democratically in the future. Therefore, despite the fact that the MPR formally and legally has decided to retain the original Article 29, disagreement over this fundamental issue has not been resolved but postponed. This means that the solution of Article 29 is a provisional one, leaving homework for the future.

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44 See among others Articles 31, 32, 33, and 34 of the 1945 Constitution.

45 Islamic factions proposed paragraph (3) of Article 31 should affirm that the system of national education includes "raising the level of spiritual belief, devoutness and moral character in the context of developing the life of the nation". This phrase was agreed by MPR to be part of paragraph (3) of Article 31 in the 4th amendment.

IX.6 Final observations

Indonesia's experience in reforming its constitution as described in this book, through a continuous series of amendments from 1999 to 2002, allows us to make a few final observations.

First, a successful process of constitutional amendment requires that the main political forces in a country are willing to achieve a preliminary agreement on the need to reform. There needs to be the minimum of a shared vision among them. Once such agreement has been reached it can only be maintained through hard work and perseverance. This provides the minimum political order needed to support the democratic process for reforms, in particular when this process is lengthy.

In the case of Indonesia, the starting point was the agreement to maintain the unitary state of the Republic of Indonesia and the Preamble of the 1945 Constitution which contains the state ideology Pancasila. They symbolize the spirit of the proclamation of independence, and provide a beacon for national development that virtually all Indonesians agree upon. They represent something fundamentally and authentically Indonesian, a symbol of unity, of national identity, and of shared value, which evokes strong emotions.

Second, constitutional change is a serious and fundamental matter. It involves reconsidering the very basic foundation of the existence of the state, its ideals and its distinctive characteristics. This is something that requires time as well.

In the case of Indonesia, the political elites realized that Indonesia is a vast and heterogeneous nation, which consists of various groups, large and small, that can only be united when the state heeds its motto of *bhinneka tunggal ika*, unity in diversity. This insight translated into a process of changes to the constitution that was inclusive and deliberative – and unavoidably also slow, cumbersome and rambling – and that intentionally avoided change by way of a winner-takes-all approach in order to prevent the deepening of the fault lines in the country.

This inclusive and deliberative approach did not yield technically perfect formulations and made it harder to adopt clauses from other constitutions or as advocated for in the scholarly literature. However, it upheld the basic principles of constitutionalism and it made sure that all those involved in the process subscribed to them. As a result, the process became one of growing collective awareness of these principles and their importance among the Indonesian public at large and especially among the main political forces, instead of a process of mere constitutional transplantation.

Agreement on and comprehension of the principles of constitutionalism as well as creativity and ability to compromise are key ingredients in encouraging the propensity for aggregation and convergence among political groups with different orientations. This requires conducive circumstances that can only be created through good personal relationships among the key actors. If things work out well, this becomes a self-propelling

process in which the inclusive and deliberative process helps the actors to better understand each other.

Third, constitutional changes occur in the midst of the reality of political challenges external to the constitutional amendment process, and these changes can only be constituted in interaction with these challenges. This forces those engaged in constitutional change to also engage in efforts to prevent political challenges from becoming unmanageable and to find solutions for them. On the upside, this awareness of the political reality will inform the actors to forge tools in the constitutional amendments to prevent certain political controversies from emerging or to include tools for resolving them. Thus, the process of constitutional change is also an instrument for conflict resolution and reconciliation.

Fourth, a reformed Constitution is not an end goal. A diverse, ever-changing nation such as Indonesia, with its daily life governed by so many different social and religious norms that continuously evolve, cannot be assumed to directly follow all the principles in the Constitution. In that regard, the amended Constitution should be conceived as a better way to navigate the state and the nation towards the national ideals contained in the Preamble of the Constitution.

There is no perfect Constitution, and the amended Constitution should be a living Constitution that can be further improved. The changes to Article 37 on Amendment of the Constitution ensure that this can be done in a constitutional way, with the basic condition that the Preamble with the Pancasila as the basis of the state, and the unitary state form of the Republic of Indonesia are non-amendable. These basic principles of the nation and the ideals inherent in the Preamble will remain the foundation for Indonesia's future as a nation.