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Why Did the Adoption of Constitutional Deferral Lead to Unintended Consequences of Freedom of Association in Indonesia?

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Article	Abstract
<p>Keywords: Constitutional Deferral; Freedom of Association; Indonesia.</p> <p>Article History Received: Sept 14, 2022; Reviewed: Jan 9, 2024; Accepted: Jan 30, 2024; Published: Jan 31, 2024.</p> <p>DOI: 10.28946/slrev.Vol8.Iss 1.2148.pp60-78</p>	<p>A constitutional deferral is an approach utilised by constitutional drafters so that the drafters do not regulate things in detail in the constitution. This approach is believed to provide more opportunity for the constitutional framers to achieve consensus in drafting a constitution. In the end, this helps a constitution last longer. Constitutional deferral also offers some flexibility for the legislative and the judiciary in interpreting the text of the constitution in the future, which may accommodate the original intentions of the constitutional drafters. This paper argues the opposite. In Indonesia, adopting constitutional deferral causes an uncertain future of freedom of association. This paper aims to address two central questions. First, why did the framers of the first constitution adopt constitutional deferral in drafting provisions on freedom of association? Second, what are the consequences of implementing constitutional deferral toward freedom of association in Indonesia? Through historical and doctrinal approaches, the paper concludes (1) that the sharp ideological differences among constitutional drafters when drafting provisions on freedom of association forced them to employ constitutional deferral. (2) The use of constitutional deferral opens more possibilities for inconsistent interpretation by the executive, the lawmakers, and the judiciary when they establish law or adjudicated cases related to freedom of association. Through constitutional deferral, these three branches of government limit freedom of association instead of protecting such freedom.</p>

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INTRODUCTION

Drafting a constitution is a complex process. It often contains multiple aspects, parties, and lengthy procedures. It involves different interests of the drafters, various demands of the public, and uncertain political or economic situations. Some constitutional law scholars, including Edward McWhinney, believe a constitution should be drafted calmly and peacefully,

particularly when a state achieves its “political and legal maturity.”¹ However, some countries conducted constitutional reform in practice when they experienced political turbulence or financial crisis.² Such a crisis often provides the opportunity for amending a constitution.

The challenges are more significant when constitutional reform is conducted in a political transition.³ This is because two groups with contradictory views are involved in drafting the constitution. The first is a group that aims to maintain the status quo, and the latter is the group that intends to reform the existing constitution. The differing views among constitutional drafters often lead to long and intense deliberation during the drafting. Thus, it is not uncommon for it to end with a deadlock.

The constitutional drafters must adjust their demands during the process to avoid this situation. They must understand that only some of their proposals might be adopted, as many other constitutional drafters may have different views and reject them. Partial adoption of the proposal or establishing general and abstract provisions often becomes the best result for the constitutional drafters. In such a situation, the constitutional drafters often adopt constitutional deferral.⁴ Constitutional deferral is an approach utilised by constitutional drafters in a way that the drafters do not regulate things in detail in the constitution.⁵ They regulate the basic principles and leave the details to the legislative to decide. Constitutional deferral can also appear in the form of providing an ambiguous term in the constitution.⁶ Ambiguous terms offer the legislative and judiciary flexibility in interpreting the text of the constitution in the future, allowing them to consider the interests of the constitutional drafters.⁷ Adopting constitutional deferral may assist the constitutional drafters in achieving consensus. Constitutional deferral not only grants flexibility to implementing agencies in defining the content of the Constitution’s basic principles but also contributes to the long-term endurance of the Constitution.

In Indonesia, the drafters of the original 1945 Constitution, to a certain extent, adopted constitutional deferral in drafting the constitution. For instance, Article 7 on the President’s term of office needed to be clarified. Article 7 stipulates, “President and vice president hold office for five years and may subsequently be re-elected.” It did not clearly specify the limit on the number of terms the President and Vice President could serve in office. Article 28 on human rights is relatively brief, scattered, and needs to be clarified. It stipulated, among other things, that the enactment of delegated legislation shall further freedom of association.

* The author wishes to thank Prof Thomas Schmitz, Adjunct Professor (Apl. Prof.) at the University of Gottingen, Germany, for his invaluable comments and suggestions in the earlier draft. All inaccuracies remain the author.

¹ Edward McWhinney, *Constitution-Making: Principles, Process, Practice* (University of Toronto Press, 1981).

² Vernon Bogdanor, “Conclusion,” in *Constitutions in Democratic Politics* (Gower, 1988), 380.

³ Denny Indrayana, *Indonesian Constitutional Reform, 1999-2002: An Evaluation of Constitution-Making in Transition* (Penerbit Buku Kompas, 2008).

⁴ Rosalind Dixon and Tom Ginsburg, “Deciding Not to Decide: Deferral in Constitutional Design,” *International Journal of Constitutional Law* 9, no. 3–4 (October 2011): 636. Mara Malagodi, “The Rejection of Constitutional Incrementalism in Nepal’s Federalisation,” *Federal Law Review* 46 (2018): 629–530.

⁵ Dixon and Ginsburg, “Dixon and Ginsburg, “Deciding Not to Decide: Deferral in Constitutional Design,” n.d.

⁶ Dixon and Ginsburg.

⁷ Lynn A. Baker, “Constitutional Ambiguities and Originalism: Lessons From the Spending Power,” *Northwestern University Law Review* 103, no. 2 (2009): 495–96.

Approximately ten articles of the Old 1945 Constitution provide relatively abstract principles and leave the details to the legislative to determine.

The topic of Constitutional deferral has been discussed by legal and political scholars. Rosalind Dixon and Tom Ginsburg, in “Deciding Not to Decide: Deferral in Constitutional Design,”⁸ question why the constitutional drafters may apply “by law” clauses that let the future legislative decide. They argue that adopting constitutional deferral will likely minimise the decision and error costs.⁹ Decision cost means constitutional deferral enhances the possibility of reaching a constitutional consensus. Error cost reduces the likelihood of falsehood during constitutional drafting by providing somewhat general and abstract phrases. In a book chapter titled “Constitutional Design Deferred”, Rosalind Dixon contends that the current approach to constitutional design could be enhanced to encourage a more restricted form of deferral concerning various constitutional questions.¹⁰ Shamsad Pasarlay, in his article titled “The Limits of Constitutional Deferral: Lessons from the History of the 2004 Constitution of Afghanistan”, concludes that adopting constitutional deferral in dealing with major issues that could credibly threaten rebellion was a successful technique in drafting a constitution in a divided society.¹¹ Angelika Cizynska Palosz analyses the use of the deferral clause by the Polish Constitutional Tribunal.¹² She finds that the deferral clause allows the judiciary to interpret such provisions when deciding cases.¹³ This means the provision can be easily interpreted in line with the current situation. On the other hand, the judiciary could misuse such provisions.

The present paper builds upon the three articles mentioned above and uses them as the starting point in developing the manuscript. It carefully considers the existing pieces of literature and tries to broaden the discussion and the implementation of constitutional deferral. While most existing literature explores constitutional deferral application in theoretical, comparative, or country-specific contexts such as Afghanistan and Poland, this paper delves into a similar theme regarding constitutional deferral within a distinct context, Indonesia. Indonesia is selected as the focal point of analysis due to its capacity to offer a unique perspective, deviating from the consensus found in much of the current literature. Unlike the prevailing view that leans towards the positive aspects of adopting constitutional deferral, Indonesia presents a scenario where utilising constitutional deferral may result in an uncertain future.

⁸ Dixon and Ginsburg, “Dixon and Ginsburg, “Deciding Not to Decide: Deferral in Constitutional Design.”

⁹ Dixon and Ginsburg.

¹⁰ Rosalind Dixon, “Constitutional Design Deferred,” in *Comparative Constitution Making: Research Handbooks in Comparative Constitutional Law Series*, ed. David Landau and Hanna Lerner (Edward Elgar Publishing, 2019), 165–85.

¹¹ Shamsad Pasarlay, “The Limits of Constitutional Deferral: Lessons from the History of the 2004 Constitution of Afghanistan,” *Washington International Law Journal* 27, no. 3 (2018): 711–12. Asli Bali and Hanna Lerner, “Constitutional Design without Constitutional Moments: Lessons from Religiously Divided Societies,” *Cornell International Law Journal* 49, no. 2 (2016): 227–308.

¹² Angelika Cizynska-Palosz, “Polish Constitutional Tribunal Judgments with ‘Deferral Clause’ and Their Application by Polish Courts,” *Teisė* 115 (2020): 122–33.

¹³ Rosalind Dixon and Samuel Issacharoff, “Living to Fight Another Day: Judicial Deferral in Defense of Democracy,” *Wisconsin Law Review* 2016, no. 4 (2016): 729; Baker, “Constitutional Ambiguities and Originalism: Lessons From the Spending Power,” 496–97.

Using the constitutional provision on freedom of association as mentioned in Article 28, it finds that the wording of this article is abstract and general. The general and abstract provision is added by the fact that Article 28 also delegates the details to the lawmakers. The use of abstract, general, and delegated provisions can be interpreted as the adoption of constitutional deferral because the constitution's provision did not comprehensively elaborate the provision. Instead, it leaves the lawmakers to determine the content of such constitutional provisions. The present paper is expected to enrich the discussion of constitutional deferral in theory and practice. The Indonesia experience related to the concept and the implementation of constitutional deferral in drafting the constitution will undoubtedly broaden the discussion, especially because existing literature in Indonesia and how it relates to constitutional deferral is still understudied. Existing studies predominantly concentrate on both the process and outcomes of the latest constitutional reform in Indonesia. Notable works in this domain include Denny Indrayana's book, "Indonesian Constitutional Reform 1999-2002", and Nadirsyah Hosen's publication, "Shari'a & Constitutional Reform in Indonesia". Additionally, Tim Lindsey contributes to the discourse with a book chapter titled "Indonesian Constitutional Reform: Muddling Towards Democracy".

This paper addresses two essential questions: First, why did the drafters of the first 1945 Constitution adopt constitutional deferral in formulating provisions concerning freedom of association? Second, what are the practical consequences of this constitutional deferral toward protecting freedom of association? While some constitutional law theorists believe that adopting constitutional deferral in constitution-making is necessary and beneficial,¹⁴ this paper argues the opposite. In Indonesia, constitutional deferral may lead to uncertainty since it allows the executive, the lawmakers, and the judiciary to substantially interpret such constitutional provisions, which may be different or even contradictory to the intention of the constitutional drafters. As a result, through their policies and judicial interpretation, these three branches of government may, implicitly or explicitly, alter the meaning of the constitutional provisions. This paper suggests that constitutional deferral should be used occasionally to elaborate on the technicalities of the constitutional provisions. It is not supposed to regulate fundamental principles. The essential principles should be expressly stated in the constitution and not left to the legislative to determine.

The paper is structured as follows: Part I reviews existing literature on constitution-making and constitutional deferral to comprehend the most recent discussion on these two important topics. Part II explains the constitutional drafting process on freedom of association through a constitutional deferral lens and its unintended consequences. Part III analyses the impact of most constitutional amendments on freedom of association. Part IV concludes.

RESEARCH METHODS

This study aims to scrutinise the drafting techniques employed in the Indonesian constitutions and examine their unintended consequences. The research methodology involves a specific form of evidence, namely textual and historical research. Rather than opting for a quantitative approach that necessitates a data set, this study adopts a qualitative method. The qualitative

¹⁴ Tim Lindsey, "Indonesian Constitutional Reform: Muddling Towards Democracy," in *Public Law in East Asia*, ed. Albert H. Y. Chen (Routledge, 2013), 337–63.

method aims to comprehensively understand by thoroughly assessing individual facts.¹⁵ It analyses the texts of the constitutional drafting minutes and the constitution's wordings. Further, it employs a historical narrative to collect and study necessary data and information. This paper first analyses the constitutional drafting of the first constitution. It particularly focuses on how the constitutional drafters discussed, debated and negotiated when drafting provisions on freedom of association. We utilise the concept of constitutional deferral to understand why the drafters chose not to elaborate on Article 28 and let the lawmakers decide. Next, we scrutinise the wording of Article 28 concerning freedom of association in the subsequent constitutional amendment. The question at hand is whether the constitution's drafters modified their approach to amending the constitution, specifically Article 28. If they did or did not, what is the underlying rationale for their decision?

ANALYSIS AND DISCUSSION

Exploring Literature on Constitution-Making and Constitutional Deferral

Literature on Constitution-Making

We examine the existing literature on the constitution-making process to understand the Indonesian constitutional reform. These pieces of literature are important to clarify and locate the process in typologies of the constitution-making process. While some theorists believe that making a constitution should be conducted when a country achieves its legal and political maturity,¹⁶ in practice, it is not uncommon for a constitution to be drafted in crisis.¹⁷ This crisis may arise “*from the collapse of a regime, the disintegration of a country or the need to adjust the existing institution to meet the current conditions.*”¹⁸ Indonesia underwent constitutional reform amid the political transition from authoritarianism to an emerging democracy, coinciding with a financial crisis. In Jon Elster's words, “*the task of constitution-making generally emerges in conditions that are likely to work against good constitution-making*”,¹⁹ with the ruling political figures attempting to advance their specific political interests.

The existing literature attempted to provide a typology concerning the constitution-making process. Bruce Ackerman and Jon Elster explain how a constitution should be drafted. For Ackerman, constitutions should be made by specialised constituent assemblies.²⁰ According to Elster, this special body should be carefully planned and calculated, and the constitution should be drafted in secrecy and publicity.²¹

Drafting a constitution by a special assembly will likely prevent the constitution-making process from short-term political interests. The establishment of a special body promotes solid reason over short-term interests. For Landau, to avoid the involvement of short-term political interests, it is essential to ensure that constituent assembly members are significantly diverse.²²

¹⁵ John Gerring, *Case Study Research: Principles and Practices* (Cambridge University Press, 2006).

¹⁶ McWhinney, *Constitution-Making: Principles, Process, Practice*.

¹⁷ Bogdanor, “Conclusion.”

¹⁸ Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions* (Cambridge University Press, 2009).

¹⁹ Jon Elster, “Forces and Mechanisms in the Constitution-Making Process,” *Duke Law Journal* 45, no. 2 (November 1995): 394.

²⁰ David Landau, “Constitution-Making Gone Wrong,” *Alabama Law Review* 64, no. 5 (2013): 928.

²¹ Elster, “Forces and Mechanisms in the Constitution-Making Process,” 395.

²² Landau, “Constitution-Making Gone Wrong,” 933.

Moreover, normative theories on constitution-making posit that instituting a special commission may elevate the democratic legitimacy of the constitution and encourage an impartial design.²³ Further, it is also necessary to limit the authority of the constituent assembly, such as the product of this assembly being subject to judicial or legislative review.²⁴

Nathan Brown provides a different explanation. For Brown, constitution-making is a product of political interest and short-term reasoning.²⁵ This is sometimes coupled with powerful actors who respect or disregard the newly drafted constitution. In the end, according to Brown, short political interest should be part of the constitution-making process.²⁶ The accommodation of short political interests is important to prevent future problems from those groups whose political interests are ignored.²⁷ These differing views on whether it is necessary to include short-term interests in constitutional drafting will be utilised to assess constitutional reform in Indonesia.

Literature on Constitutional Deferral

In drafting a constitution, the framers often find difficulty accommodating all different insights from different parties. In such scenarios, constitutional framers may employ a strategy of “deciding not to decide” on certain constitutional issues, deferring them to the future.²⁸ Constitutional drafters can do three things: first, they can incorporate vague constitutional language.²⁹ Second, utilising specific language that explicitly delegates issues to future legislators.³⁰ Finally, introducing two or more constitutional provisions that substantially conflict,³¹ leaving the resolution of this conflict to the judiciary or legislative.³²

Why do the constitutional drafters defer to deciding certain issues when they draft a constitution? Rosalind Dixon and Tom Ginsburg argue that drafters do so because they find it difficult to make decisions when drafting the constitution. Such difficulty includes lack of common agreement, time constraints, and limited information, making decisions on certain constitutional issues risky.³³ Hence, constitutional deferral helps minimise decision and error costs.³⁴ Mark Tushnet adds that constitutional deferral may also occur because of technical

²³ Gabriel L. Negretto, “Democratic Constitution-Making Bodies: The Perils of a Partisan Convention,” *International Journal of Constitutional Law* 16, no. 1 (2018): 261.

²⁴ Landau, “Constitution-Making Gone Wrong,” 975.

²⁵ Nathan J. Brown, *Mrs. Lincoln’s Egyptian Constitution* (Carnegie Endowment for International Peace, 2013), <https://carnegieendowment.org/2013/08/20/mrs.-lincoln-s-egyptian-constitution-pub-52722>.

²⁶ Brown.

²⁷ Ulrich K. Preuss, “The Politics of Constitution Making: Transforming Politics into Constitutions,” *Law & Policy* 13, no. 2 (April 1991): 116. Solongo Wandan, “Nothing out of the Ordinary: Constitution Making as Representative Politics,” *Constellations* 22, no. 1 (2015): 48–49.

²⁸ Dixon and Ginsburg, “Dixon and Ginsburg, “Deciding Not to Decide: Deferral in Constitutional Design.”

²⁹ Dixon and Ginsburg.

³⁰ Dixon and Ginsburg.

³¹ Dixon and Ginsburg.

³² Mark A. Graber, “The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary,” *Studies in American Political Development* 7 (Spring 1993): 35–73.

³³ Dixon and Ginsburg, “Dixon and Ginsburg, “Deciding Not to Decide: Deferral in Constitutional Design.”

³⁴ Dixon and Ginsburg.

reasons.³⁵ Moreover, the use of constitutional deferral could also increase the scope for adaptation over time.³⁶

In practice, constitutional deferral can take two forms. First, the provision of a constitution expressly states that specific issues shall be furthered or resolved by enacting delegated legislation, and second, the provision of the constitution provides implicit deferral.³⁷ In this case, the constitutional drafters expressly state that particular provision in vague language. This requires relevant institutions to interpret such provisions in the future. A constitutional deferral may help the constitution last longer because it opens opportunities for negotiation. The more ambiguous a constitution, the longer it is likely to survive. For instance, Clark Lombardi argues that the Egyptian Constitution survived long because it left ambiguities.³⁸

Is this always the case? Some theorists suggest that constitutional deferral should be used sparingly. This is because constitutional deferral may “*undermine popular support for the existing constitutional system.*”³⁹ Additionally, it is cautioned that constitutional deferral should not excessively empower the legislative branch to resolve vital constitutional questions in the future,⁴⁰ as it might jeopardise the “supremacy” of the constitution. This paper will employ these perspectives to assess the favourability of constitutional deferral in the context of Indonesia.

Constitutional Deferral and Its Unintended Consequences to Freedom of Association ***Understanding Provision of Freedom of Association through Constitutional Deferral***

The endeavour of drafting the initial Indonesian constitution posed considerable challenges. In addition to the constitutional drafting undertaken during the Revolutionary era, numerous conflicting ideologies were introduced and debated among the drafters as they formulated the constitution’s fundamental principles. For instance, in the issue of the form of state, a contentious debate arose over whether Indonesia should adopt a federal or unitary state model, considering its status as an archipelagic nation with significant diversity. Another pivotal question pertained to whether Indonesia would be a secular state or one grounded in a specific religion. Regarding human rights, there was a debate on whether these provisions needed explicit mention in the constitution. The deliberation also revolved around the constitutional adoption of judicial review. Lastly, the discourse addressed whether Indonesia should embrace a liberal or state-directed economy.

The main focus of this paper revolves around scrutinising the Committees’ discussions concerning human rights provisions, with a specific emphasis on the formulation and practical

³⁵ Mark Tushnet, “Constitution-Making: An Introduction,” *Texas Law Review* 91, no. 7 (2013): 1996.

³⁶ Dixon and Ginsburg, “Deciding Not to Decide: Deferral in Constitutional Design”; See also Zim Nwokora, “Constitutional Design for Dynamic Democracies: A Framework for Analysis,” *International Journal of Constitutional Law* 20, no. 2 (2022): 592.

³⁷ Dixon and Ginsburg, “Deciding Not to Decide: Deferral in Constitutional Design,” 639–40.

³⁸ Clark B. Lombardi, “The Constitution as Agreement to Agree: The Social and Political Foundations (and Effects) of the 1971 Egyptian Constitution,” in *Social and Political Foundations of Constitutions*, ed. Denis J. Galligan and Mila Versteeg (Cambridge University Press, 2013), 426.

³⁹ Dixon and Ginsburg, “Deciding Not to Decide: Deferral in Constitutional Design,” 666.

⁴⁰ Hanna Lerner, “Constitution-Writing in Deeply Divided Societies: The Incrementalist Approach,” *Nations and Nationalism* 16, no. 1 (2010): 84–85.

implications of Article 28. Given that Article 28 is integral to the human rights provisions within the constitution, a critical analysis of the drafting process employed by the founding fathers for these provisions becomes essential. Within the Committee's deliberations, two conflicting perspectives emerged regarding the inclusion of human rights provisions in the constitution. The first viewpoint asserted the indispensability of incorporating human rights provisions, while the second perspective contended that there was no need for such provisions.⁴¹

Yamin and Hatta advocated for the first perspective, asserting the necessity of including human rights provisions and dismissing any argument against the vital role of human rights in the constitution.⁴² Yamin, in particular, argued, "*All constitutions in the world, old and new, have those basic protection clauses,*"⁴³ underscoring that incorporating human rights provisions were not indicative of liberalism but aimed at safeguarding fundamental freedoms guaranteed by the constitution.⁴⁴ Additionally, Hatta believed that including human rights provisions was essential to safeguarding individuals (the people) from arbitrary government actions.⁴⁵ For Hatta, these provisions also played a crucial role in limiting the government's actions towards its citizens, ensuring that its considerable power did not infringe upon human rights.⁴⁶ Incorporating such rights in the constitution would compel the government to respect and uphold human rights. Hatta made clear to the Committee:

"... the state we are establishing will not become an authoritarian state; we want to have a representative government; we want to create a society based on mutual cooperation and goals: to reform the society. For this reason, we should not grant unlimited power to the state because it might lead to an authoritarian state. Therefore, it is important to have in one of its provisions, for instance, on citizens' rights, that aside from all citizen rights possessed by every citizen of Indonesia."⁴⁷

The opposing perspective contended that incorporating human rights provisions in the constitution was unnecessary. Soekarno and Soepomo represented this view, rejecting the inclusion of human rights provisions. They argued that including such provisions reflected individualism, which, according to them, contradicted the communitarian values ingrained in Indonesian society.⁴⁸ In a communitarian society, they asserted, the state is perceived as an embodiment of the people,⁴⁹ wherein the state and its people are inherently unified, with the people serving as the justification for the state's existence. Consequently, they argued, there was no need to confer political rights upon the people, as doing so might undermine the very essence of the state.⁵⁰

⁴¹ Muhammad Bahrul Ulum and Nilna Aliyan Hamida, "Revisiting Liberal Democracy and Asian Values in Contemporary Indonesia," *Constitutional Review* 4, no. 1 (May 2018): 115–16.

⁴² Muhammad Yamin, *Naskah Persiapan Undang-Undang Dasar 1945* (Jajasan Prapantja, 1959), 166; Ulum and Hamida, "Revisiting Liberal Democracy and Asian Values in Contemporary Indonesia," 115.

⁴³ Yamin, "Naskah Persiapan Undang-Undang Dasar 1945," n.d.

⁴⁴ Yamin.

⁴⁵ Ulum and Hamida, "Revisiting Liberal Democracy and Asian Values in Contemporary Indonesia," n.d.

⁴⁶ Ulum and Hamida.

⁴⁷ Yamin, *Naskah Persiapan Undang-Undang Dasar 1945*, 166.

⁴⁸ Bisariyadi et al., "Competing Concepts: Human Rights in Indonesia's Constitutional Setting," *Journal of Legal, Ethical and Regulatory Issues* 24, no. Special Issues 5 (2021): 1–2.

⁴⁹ Yamin, *Naskah Persiapan Undang-Undang Dasar 1945*, 166.

⁵⁰ Herbert Feith and Lance Castles, eds., *Indonesian Political Thinking: 1945-1965* (Cornell University Press, 1970), 188–92.

Soekarno provided additional insights into why human rights should not be in the constitution, as Indonesia's foundation rested on the family principle (*asas kekeluargaan*).⁵¹ Expanding on this, he contended that incorporating human rights might instigate conflicts within the state, as it could promote liberalism and individualism.⁵² In Soekarno's words, "...if we truly want to base our nation on the family principle, mutual cooperation and social justice, let us eliminate any idea of individualism and liberalism."⁵³ Consequently, he argued that there was no necessity for provisions concerning human rights

Soepomo, in alignment with Soekarno's perspective, contended that within the family principle system, citizens' attitudes should not solely revolve around asking "*what is my right?*" but should centre on understanding their duties as members of the broader family—the Indonesian State.⁵⁴ Soepomo and Soekarno endorsed the *integralist* state (*negara integralistik* or integrated state) as the most suitable ideology for Indonesia.⁵⁵ An integralist state perceived "*the inner spirit and spiritual structure of Indonesia people is characterised by the ideal of the unity of life, the unity kawulo Gusti, that is, of the outer and the inner world of the macro cosmos and the micro cosmos of the people and their leaders.*"⁵⁶ Within this framework, there is no dichotomy or conflict between the state and citizens,⁵⁷ rendering the explicit inclusion of citizens' rights and fundamental freedoms in the constitution unnecessary. However, Hatta further emphasised that, in practice, Indonesian society had acknowledged the right to dissent, the right to petition, and freedom of movement for many years,⁵⁸ even though these notions of rights were not explicitly articulated in written documents.

This notable ideological divergence was apparent within various Committee members. The conflicting ideologies, pitting the defence of individual rights against collectivism, posed a significant challenge, particularly when the constitutional drafters endeavoured to incorporate it into the constitution. An illustration of these divergent ideologies among constitutional drafters during the constitutional drafting process is evident in the formulation of Article 28. When introducing Article 28, Soepomo (member of the constitutional drafter) stated:

"The constitution we are drafting is based on the family principle, not based on the doctrine of individualism we have rejected. Inserting the freedom of assembly and association in the constitution means adopting the doctrine of individualism so that if we declare the freedom of assembly and association in our constitution, we will challenge the rationality of the family principle doctrine."⁵⁹

The above quote shows the resistance of some constitutional drafters to include freedom of expression as part of human rights in the constitution. The reason is they believe that doing

⁵¹ Nannie Hudawati and Saafroedin Bahar, *Risalah Sidang Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan Indonesia (BPUPKI), Panitia Persiapan Kemerdekaan Indonesia (PPKI), 28 Mei 1945-22 Agustus 1945* (Sekretariat Negara Republik Indonesia, 1998).

⁵² Yamin, "Naskah Persiapan Undang-Undang Dasar 1945."

⁵³ Yamin.

⁵⁴ Yamin.

⁵⁵ Yamin.

⁵⁶ Feith and Castles, *Indonesian Political Thinking: 1945-1965*.

⁵⁷ Mark T. Berger, "Old State and New Empire in Indonesia: Debating the Rise and Decline of Suharto's New Order," *Third World Quarterly* 18, no. 2 (June 1997): 341. See also Jacques Bertrand, "Indonesia's Quasi-Federalist Approach: Accommodation amid Strong Integrationist Tendencies," *International Journal of Constitutional Law* 5, no. 4 (October 2007): 583; John Gillespie, "Public Discourse and Constitutional Change: A Comparison of Vietnam and Indonesia," *Asian Journal of Comparative Law* 11 (2016): 212.s

⁵⁸ Feith and Castles, *Indonesian Political Thinking: 1945-1965*.

⁵⁹ Yamin, "Naskah Persiapan Undang-Undang Dasar 1945."

so reflects individualism. On the other hand, it is also necessary to include human rights provisions, including freedom of association, for some other constitutional drafters. Nevertheless, the PPKI members successfully reached an agreement on human rights provisions. The constitution would incorporate provisions on citizens' rights, encompassing the rights to association and assembly. Nonetheless, it would contain only a limited number of articles addressing fundamental human rights principles, with a vaguely formulated provision on freedom of association and assembly. The operationalisation of these rights would necessitate additional implementing regulations.⁶⁰

Article 28 states, "*Freedom to associate and to assemble, to express verbal and written expression and the like shall be further regulated by law.*" This provision guarantees the freedom of association and assemble constitutionally. This can be seen in the first three wordings: "*Freedom to associate and assembly.*" However, the end of Article 28 says, "...*shall be further regulated by law.*" It implies that the specifics concerning the freedom to associate and assemble are not constitutionally assured, as Article 28 remains silent on this matter. In essence, although the drafters may have intended to secure the freedom to associate and assemble, this intention is not explicitly conveyed in the language of Article 28. Essentially, Article 28 does not provide any assurance or protection for the existence of these freedoms. Rather, it stipulates that implementing laws will govern these aspects.

The vague and brief human rights provisions, especially Article 28 in the initial constitution, required additional implementing regulations for practical application. Without offering specific guidance in the Constitution's text regarding protecting these freedoms, the Constitution granted the government considerable leeway to regulate human rights. According to Herlambang P. Wiratraman, this provision lacks clear protection for freedom of expression due to three factors: the broad and interpretable nature of the concept, the necessity for legislative operationalisation, and the later substitution of the phrase "prescribed by law" in Article 28 with a specific statute, which heavily relies on lawmakers.⁶¹ Regrettably, subsequent laws failed to fully enforce the rights articulated for individual citizens in the constitution. In Adriaan Bedner's words, "*freedom of opinion and expression is not guaranteed by the Constitution.*"⁶²

How were human rights provisions structured in the first constitution? The human rights articles within the constitution were succinct and abstract, reflecting significant ideological disparities among the constitutional drafters. Negotiations were necessary to address the evident divergence between proponents and opponents of incorporating human rights provisions. While committee members held conflicting views on specific details, there appeared to be a potential consensus on fundamental principles. Consequently, the inclination favoured concise and abstract constitutional provisions over intricate and detailed ones.

The Unintended Consequences of Ambiguous Constitutional Provision on Freedom of Association

Article 28 was part of the first constitution, which was introduced on August 18, 1945. This Article remains untouched even though there have been four constitutional amendments in

⁶⁰ Yamin.

⁶¹ Herlambang P. Wiratraman, "Press Freedom, Law and Politics in Indonesia: A Socio-Legal Study" (Universiteit Leiden, 2014).

⁶² Wiratraman.

1999-2002. Its endurance lends credence to the predictions of certain constitutional law scholars, suggesting that constitutional deferral is likely to persist for an extended period. However, the implications of constitutional deferral, as embodied in Article 28, may give rise to inconsistent interpretations by the incumbent government. This is evident in the divergent interpretations of Article 28 during Soekarno's Old Order era (1945-1967) and Soeharto's New Order era (1967 – 1998).

At the republic's beginning, the Soekarno administration used Article 28 to guarantee freedom of association and assembly.⁶³ The government issued the 1945 Decree (dated November 3, 1945) to encourage the growth of political parties.⁶⁴ The growth of political parties was quite significant for a new nation like Indonesia in 1945. The reason why the sitting government supported the development of political parties was that political parties were the symbol of democracy and also the nation's existence. It is a symbol of democracy because the existence of political parties represents freedom of association, freedom of expression and, more importantly, people's sovereignty.⁶⁵ It also represents the nation's existence because political parties are one of three vital components of a nation besides the government and territory. Political parties' activities are closely related to a nation's political process. General elections, drafting regulations, and policy-making processes often involve political parties. It is also a balancing power for the sitting government, particularly when it is about to issue policies or regulations. In addition, the issuance of the 1945 Government Decree and the Vice President's Decree also guaranteed people the ability to express their opinions and form associations, as seen in the significant development of political parties.⁶⁶ This particularly can be seen in how different political parties with various ideologies can live hand in hand and express their view without fear.

Things were significantly different in the 1960s when Soekarno attempted to prolong his term of office through the MPR Decree (TAP MPR). In this case, the MPR issued an MPR Decree (TAP MPR), which determines the sitting President has a lifetime term of office.⁶⁷ This situation violated the constitution, which expressly limits the President's term of office to two terms.⁶⁸ In order to maintain Soekarno's power, freedom of association and assembly were limited instead of guaranteed, even though Indonesia was under the same constitution. Through Presidential Decree 7/1959, Soekarno limited the number of political parties or even dismissed political parties.⁶⁹ The reason was considering the prevailing circumstances in Indonesia, including the post-presidential decree of July 5, 1959, and the threats of disintegration potentially impeding the country's development toward a just and prosperous society, it is crucial to promulgate regulations addressing the prerequisites and streamlining of political

⁶³ Fajar Nurhardianto, "Politik Hukum HAM Di Indonesia," *Jurnal TAPIS* 10, no. 2 (2014): 77.

⁶⁴ Nurhardianto.

⁶⁵ Miriam Budiarto, *Dasar-Dasar Ilmu Politik* (Gramedia Pustaka Utama, 2008).

⁶⁶ Budiarto.

⁶⁷ Ketetapan MPRS Nomor III/MPRS/1963, "Tentang Pengangkatan Pemimpin Besar Revolusi Bung Karno Menjadi Presiden Republik Indonesia Seumur Hidup (MPRS Decree on the Determination of Soekarno as Lifetime President).," n.d.

⁶⁸ Article 7 of the 1945, "Constitution of the Republic of Indonesia," n.d.

⁶⁹ Penetapan Presiden Republik Indonesia Nomor 7 Tahun 1959, "Tentang Syarat-Syarat Dan Penyederhanaan Kepartaian," n.d.

parties.⁷⁰ The 7/1959 Presidential Decree grants significant power to the President in simplifying or dismissing political parties. The President was able to prohibit or dismiss a political party if the political party: (a) adopts principles and purpose which are contradictory with the nation's ideology; (2) its agenda was to alter the nation's goals and ideology; (3) committing rebellion; (4) does not fit with the requirement mentioned in this Presidential Decree.⁷¹ This provision shows that the President is the leading actor. It also indicates how powerful the President is in simplifying and dismissing political parties. Such provision was undoubtedly in contradiction with the purpose of Article 28 of the 1945 Constitution. A study by Ganjar Razuni analyses Soekarno's speech and finds that Soekarno's ideas on Pancasila were systematised and ingrained in the Indonesian citizens' comprehension, as Soekarno explained.⁷² However, Soekarno Guided Democracy consistently emphasises human social justice values but potentially limits people's right to form associations. Guided democracy justifies politics by wrapping the President's political legitimacy in the Indonesian national character.⁷³ These contradictory policies occurred when Indonesia adopted the same constitution and referred to the same constitutional provision, Article 28.

During the New Order era, there was the same tendency. The sitting government misused Article 28 by implementing the MPR Decree 22/1966 to limit the freedom of association and assembly instead of protecting such freedom.⁷⁴ The 22/1966 MPR Decree regulates political parties, mass/civil organisations and functional organisations (*Kepartaian, Keormasan dan Kekaryaan*). Article 1 expressly states that "*the government and the parliament (DPR GR) shortly will make a law which regulates political parties, civil organisation and functional organisation intending to simplify such systems*". In the pre-New Order era, there were nine political parties. These include PNI, Partai Katolik, IPKI, Parkindo, Murba, PSII, Parmusi, NU and PERTI. The New Order Government simplified these nine political parties into two political parties (*Partai Persatuan Pembangunan/PPP*⁷⁵ and *Partai Demokrasi Indonesia/PDI*⁷⁶) and *Golongan Karya*. These include the issuance of legislation to reduce the number of political parties to only three political parties.⁷⁷ Employing Presidential Decree 0156/U/1978, the government exercises effective restriction and oversight over civil society, universities, and university students to preserve its authority. Utilising methods inconsistent with human rights norms, repressive actions have evolved into a significant instrument for upholding the government's authority. In the words of Nadirsyah Hosen, mass protest

⁷⁰ 1959.

⁷¹ III/MPRS/1963, "Tentang Pengangkatan Pemimpin Besar Revolusi Bung Karno Menjadi Presiden Republik Indonesia Seumur Hidup (MPRS Decree on the Determination of Soekarno as Lifetime President)."

⁷² Ganjar Razuni, "Bung Karno's Political Thought According to Pancasila: A Study of Bung Karno's Speech on June 1, 1945, and the President Soekarno/Bung Karno's Pancasila Course Throughout 1958-1959," *Jurnal Wacana Politik* 8, no. 2 (October 2023): 223–34.

⁷³ Muhammad Bahrul Ulum, "Indonesian Democracy and Political Parties After Twenty Years of Reformation: A Contextual Analysis," *Indonesia Law Review* 10, no. 1 (2020): 29–43.

⁷⁴ Wiratraman, "Press Freedom, Law and Politics in Indonesia: A Socio-Legal Study," 96.

⁷⁵ PPP is the merger of PSII, "Parmusi, NU and PERTI," n.d.

⁷⁶ PDI is the merger of PNI, "Parkindo, Partai Katolik, Murba, and IPKI," n.d.

⁷⁷ Nurhardianto, "Politik Hukum HAM Di Indonesia," 80.

engagements were often intimidated by violent tools, and protestors were put in jail with minimal judicial mechanism.⁷⁸

Moving toward a Better Constitutional Guarantee on Freedom of Association?

The human rights landscape underwent substantial transformations as the Soeharto New Order government approached its collapse in 1998. Intensified pressure from both the international community and Indonesian citizens compelled efforts to enhance human rights conditions. The public demanded the government insert a set of bills of rights in the constitution to guarantee better protection of human rights.⁷⁹ The constitutional guarantee of human rights is crucial because a constitution is the highest law of the land. It means all laws and regulations beneath the constitution should be in line and in accordance with the provisions of the constitution. In addition, considering many unresolved human rights violations in the past, the public demands serious investigation. The government should investigate human rights violations that occurred in the past, both during the New Order era⁸⁰ and during the Soekarno Old Order era. Such investigation is important because political prisoners during the New Order era were often targeted without proper judicial process. Not to mention how the government policies systematically discriminated against those who were close to the Indonesian communist party or Soekarno loyalists. Finally, the government should guarantee freedom of the press.⁸¹ The fact is that during the New Order era, many government policies frequently limited the right to form associations. The issuance of Law on Press and Law on Mass Organization were two examples of government policies that potentially limit public constitutional rights and freedoms, including freedom of speech, expression, and form of assembly. The public demanded the repeal of many laws and regulations that aimed to restrict people's freedom.

The international community, including financial institutions like the World Bank, expressed apprehensions regarding the human rights situation, urging the Indonesian government to take substantive measures to address past violations. The World Bank underscored Indonesia's need to undergo significant reforms as a precondition for continued international financial assistance.⁸² Consequently, during the subsequent government led by the Habibie administration, concerted efforts were made as both the government and the legislative branch passed legislation addressing human rights issues. Indonesia also ratified international conventions related to human rights. Finally, under the Habibie administration, the government established a human rights monitoring institution, the National Human Rights Commission (*Komisi Nasional Hak Asasi Manusia*).

In 1998, the MPR issued a decree concerning human rights (TAP MPR XVII MPR 1998), recognised as the inaugural comprehensive human rights charter in Indonesian history since the 1949 and 1950 Constitutions. The government passed the 39/1999 Law on Human Rights a year later. The 39/1999 Human Rights Law elaborates on the MPR decree on Human

⁷⁸ Nadirsyah Hosen, "Reform of Indonesian Law in the Post-Soeharto Era (1998-1999)" (Dissertation, University of Wollongong, 2004), 222.

⁷⁹ Hosen, "Reform of Indonesian Law in the Post-Soeharto Era (1998-1999)," n.d.

⁸⁰ Hosen.

⁸¹ Hosen.

⁸² Dana L. Clark, "The World Bank and Human Rights: The Need for Greater Accountability," *Harvard Human Rights Journal* 15 (2002): 215.

Rights. The law comprehensively addresses human rights, encompassing civil and political rights, economic, social, and cultural rights, and development/solidarity rights. The Human Rights Law introduces a court dedicated to human rights. The objective of this court is to address instances of human rights violations, especially those categorised as gross violations that occurred in the past. The unresolved nature of certain gross human rights violations prompts this initiative. The introduction of this special court is expected to address the problems.

The Law 39/1999 underscores the state's, particularly the government's, duty to uphold, safeguard, promote, and fulfil human rights, indicating a robust guarantee of human rights within the legislation. On the one hand, individual rights are formally assured, while on the other hand, the government is obligated to ensure the comprehensive protection of all human rights. Failure to fulfil this responsibility signifies a breach of constitutional duty, carrying inherent consequences. In all the mentioned documents, including the MPR Decree and the Law on Human Rights, freedom of association receives legal guarantees.

The issuance of the MPR Decree on Human Rights in 1998 and the Human Rights Law in 1999 prompted a concerted effort to incorporate comprehensive human rights provisions during constitutional amendments. While human rights posed challenges during the drafting of the initial constitution in 1945, this was not the case in the constitutional amendments of 1999-2002. Constitutional drafters and civil society held a unified perspective on the necessity of incorporating a dedicated human rights chapter in the new constitution. They argued that despite the presence of existing laws governing human rights, the inclusion of a bill of rights in the constitution held paramount importance, given that the constitution is the highest law of the land. Hence, all laws and regulations must adhere to and cannot contradict the constitution. Furthermore, integrating a bill of rights into the constitution offers a more robust constitutional guarantee. This is attributed to the inherent difficulty in amending the constitution compared to the MPR decree and law.

In the process of formulating a bill of rights, there was an alignment of perspectives between the constitutional framers and the public. They shared a consensus on incorporating an extensive array of human rights provisions into the revised document. Their primary concern lies in effectively integrating comprehensive human rights provisions while maintaining conciseness in the constitution.⁸³

Discussion on provision concerning freedom of association is far from challenging. In the 2000 MPR session, Abdul Kholiq, a member of the MPR, said:

“Even though Article 28 was not comprehensively discussed in the Ad Hoc Committee meeting, I believe we should carefully consider and take into account public aspiration. It seems that the wording of Article 28 is a form of restriction. Therefore, we proposed that Article 28 be reformed so that the provision will be the following: freedom of association and assembly, expressing opinions orally and in written form, and the like, which is guaranteed by the state. So, the phrase “stipulated by law” was replaced by “guaranteed by the state. I believe this new phrase is more logical and can provide a better understanding that democracy is well implemented.”⁸⁴

⁸³ Andy Omara, “Protecting Economic and Social Rights in a Constitutionally Strong Form of Judicial Review: The Case of Constitutional Review by the Indonesian Constitutional Court” (Dissertation, University of Washington, 2017).

⁸⁴ Tim Penyusun Naskah Komprehensif, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*, 8th ed., 2010.

Another MPR member, Seto Harianto, stated that Article 28 is basically a regulation, not a guarantee of the freedom of association and assembly.⁸⁵ This has been stated in the Chapter on Human Rights, so it should be distinct.⁸⁶ Taufiqurrohman Ruki said, *“It is necessary to be completed with political rights, and the position in the government. Article 28 becomes, “freedom of association and assembly, express opinion orally and in written form. And the like stipulated by the Law. Every citizen has the right to be nominated or vote in a general election based on equality through democratic general election, direct, general, free, confidential, honest, and just. Every citizen can be nominated in every governmental office.”*⁸⁷ Therefore, after some meetings, the MPR decided to maintain Article 28 of the Constitution. It means the wording of Article 28 remains the same. The MPR also expanded human rights provisions in a new chapter, Chapter XA. Chapter XA contains ten articles from Articles 28A to 28J, and paragraphs are within every article within the human rights chapter. The fact that Article 28 remained brief and abstract does not mean that the constitutional guarantee of freedom of association remains the same. This is because, under the new Chapter on human rights, freedom of association is considered part of human rights. A new article under the new Chapter, Article 28 E (3), guarantees that “every individual is entitled to freedom of association, assembly, and expression of *opinions*.” This means the new provision expressly guarantees everyone’s freedom of association, assembly, and expression of opinions.

This new Chapter substantially reflects the two important international covenants, the Universal Declaration of Human Rights and the International Covenants on Human Rights. Domestically, it is also consistent with the MPR Decree on Human Rights and Indonesia’s Law on Human Rights. The Human Rights Chapter contained fundamental principles such as non-derogable rights, a non-retroactive principle, and freedom of expression, association and assembly. It also stipulated the government’s responsibility to respect, protect, and fulfil human rights.⁸⁸ Dewa Gede Atmadja, a legal scholar, said, *“I was of the opinion that the restriction should be expressly determined”*.⁸⁹ Government responsibility toward human rights protection requires the government to carry out all government responsibilities, including respecting, protecting, promoting, and fulfilling human rights. In the event that the government fails to carry out its constitutional obligation, there will be constitutional consequences. Such consequences include submitting petitions to the court requesting the court to assess whether the government action is adequate to fulfil government constitutional responsibilities.

⁸⁵ Komprehensif.

⁸⁶ Komprehensif.

⁸⁷ Komprehensif.

⁸⁸ Chapter X A of the 1945 Constitution (as Amended in 1999-2002) In brief Chapter XA contains: civil and political rights such as the right to life, freedom of speech, freedom of religion; association and expression; freedom of information; right to seek political asylum; economic social and cultural rights such as right to establish family and procreation; right to self-betterment, right to justice, education, employment, citizenship, place of residence, personal security; right of well-being including social security and health provision; right to personal property; and development/solidarity rights freedom from torture and degrading treatment; protection and non-discrimination, including freedom of conscience, traditional cultural identity, recognition under the law and unacceptability of retrospective criminal legislation; the primary responsibility of the government to protect, advance and uphold human rights; the obligation to uphold human rights of others and to be bound by the law for this purpose; and the restriction of the application of human rights provisions on justified grounds of moral and religious values or of security and public order.”

⁸⁹ Komprehensif, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*.

Beyond Chapter XA, various provisions outside this Chapter were intricately linked to the protection of human rights. These encompass Article 27, addressing equality before the law; Article 28, safeguarding freedom of association, assembly, and expression; Article 31, affirming the right to education; Article 32, recognising the right to culture; Article 33, focusing on natural resources; and Article 34, delineating rights to social security and health. It is reasonable to assert that the new constitution encompasses an abundance of economic and social rights.⁹⁰ With these new provisions on human rights, some laws were updated. The law on Political Parties opens the possibility of having more political parties. The Law on Mass Organizations also abolished the registration requirement to establish an organisation. Introducing the freedom of association as part of human rights in the updated 1945 Constitution is a good sign for better constitutional protection. The question remains whether such a constitutional guarantee alone is adequate. The problem is often located in the law and regulations or government policies and their implementation.⁹¹ In short, while accommodating a bill of rights is an important endeavour, more is needed.

CONCLUSION

This paper has investigated the impact of constitutional deferral on the Indonesian government's guarantees of freedom of association. The use of vague, abstract, and ambiguous language in Article 28 is indicative of constitutional deferral, a choice made due to profound ideological differences among the framers regarding the inclusion of human rights articles in the constitution. This constitutional deferral has substantial consequences for human rights protection, allowing lawmakers considerable discretion in decision-making due to the lack of clear guidance in the provision. Unintended outcomes include the issuance of divergent and even contradictory policies by the government, even though all reference the same constitutional article (Article 28). During the Soekarno Old Order era and the Soeharto New Order era, inconsistencies arose in utilising Article 28, initially guaranteeing freedom of association but later restricting it. Significant changes occurred in the 1999-2002 constitutional amendments, with the addition of a new Human Rights Chapter ensuring every individual's entitlement to freedom of association and assembly, impacting government policies. Consequently, there is now greater consistency in safeguarding freedom of association, including the elimination of registration requirements for establishing Mass Organizations and the 2011 Law on Political Parties, which facilitates the establishment of more political parties. Nevertheless, given the constitutional dynamics in Indonesia, which lean toward democratic decline,⁹² it is also important to reconsider constitutional oversight of constitutionally delegated provisions to protect citizens' rights, including the freedom of association.

⁹⁰ Tim Lindsey, "Indonesia: Devaluing Asian Values, Rewriting the Rule of Law," in *Asian Discourse of Rule of Law*, ed. Randall Peerenboom (Routledge, 2004), 311.

⁹¹ Paul J. Carnegie, "Reorganising Constitutional Power in Indonesia: The Politics of Reform," *Journal of Politics and Democratization* 4, no. 4 (December 2020): 65.

⁹² Asrinaldi and Mohammad Agus Yusoff, "Power Consolidation and Its Impact on the Decline of Democracy in Indonesia under President Jokowi," *Cogent Social Sciences* 9 (2023): 16–17. Eve Warburton and Edward Aspinall, "Explaining Indonesia's Democratic Regression: Structure, Agency, and Popular Opinion," *Contemporary Southeast Asia* 41, no. 2 (2019): 261; Ken M. P. Setiawan, "Vulnerable But Resilient: Indonesia in An Age of Democratic Decline," *Bulletin of Indonesian Economic Studies* 58, no. 3 (2022): 284–85.

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