

**INDONESIAN CONSTITUTIONAL  
REFORM 1999-2002**  
AN EVALUATION OF CONSTITUTION-MAKING IN TRANSITION

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# Abstract

In 1999, the MPR (*Majelis Permusyawaratan Rakyat*, the People's Consultative Assembly) enacted the First Amendment to the 1945 Constitution of Indonesia. Over each of the next three years, it passed a further amendment. Despite their important contribution to Indonesia's transition from Soeharto's authoritarian regime, no comprehensive study has been made of these four amendments, and the process by which they were produced. This thesis is an attempt to fill this gap, by critically evaluating the process and outcomes of these amendments, in the context of constitutional theory and the experience of other countries, in particular, South Africa and Thailand.

This thesis argues that the 1999-2002 constitutional amendments lacked what have widely been accepted as key features of a democratic constitution-making process: (i) there was no clear plan for determining the key elements of the process, such as *when* the amendment would occur, *how* it would be conducted, and *what* the outcomes would be; (ii) the MPR failed to win the people's trust in its capacity as a constitution-making body; and (iii) public participation was limited and badly organized.

Many of these problems with the reform process, however, related to fundamental issues within the Constitution itself. It contained two aspects seen as crucial to the identity and survival of the country by most nationalists, including the military: the rejection of an Islamic state and the imposition in its place of a nationalist state ideology, the *Pancasila*, contained in the preamble to the Constitution. Many nationalists feared that opening the Constitution to real change would jeopardize these positions, which they saw, and still see, as non-negotiable. The result was a slow, patchy and tentative process marked by constant negotiation and deal-making as most stakeholders sought a way to dismantle Soeharto's dictatorship without disturbing these twin nationalist principles.

Despite these problems, at the end of the process, the Constitution was more democratic in form. In particular, the amendments established a clearer separation of powers between the executive, legislature and judiciary; and more impressive human rights protections. This is because the euphoric transitional period provided a setting that encouraged open constitutional debates in the MPR and allowed public participation in these debates, despite the flaws in the MPR's system for public engagement.

The amended Constitution remains, however, far from perfect. This thesis recommends further amendments to, first, strengthen the system of checks and balances introduced between 1999 – 2002; and, second, to entrench the preamble and guarantee the difficult relationship between Islam and state in their current form.

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# Glossary

ABRI	<i>Angkatan Bersenjata Republik Indonesia</i> , Armed Forces of the Republic of Indonesia.
BPK	<i>Badan Pemeriksa Keuangan</i> , State Audit Body.
Commission A	Commissions A of 2000, 2001 and 2002 were Commissions set up at the MPR Annual Sessions to further discuss the amendment draft prepared by the <i>Ad Hoc</i> Committee of the MPR.
Commission C	Commission C of 1999 was a Commission set up at the 1999 MPR General Session to further discuss the amendment draft prepared by the <i>Ad Hoc</i> Committee of the MPR.
DPA	<i>Dewan Pertimbangan Agung</i> , Supreme Advisory Council.
DPD	<i>Dewan Perwakilan Daerah</i> , Regional Representatives' Council.
DPR	<i>Dewan Perwakilan Rakyat</i> , People's Representative Council.
DPRD	<i>Dewan Perwakilan Rakyat Daerah</i> , Regional People's Representative Council.
Dwifungsi	'Dual function', the formal ideology by which the ABRI claimed a socio-political role as well as a military role.
Golkar	<i>Golongan Karya</i> , the Functional Group. One of the political parties in the current system. It was the state political party machine under the New Order.
KKN	<i>Korupsi, Kolusi dan Nepotisme</i> ; corruption, collusion and nepotism.
Korpri	<i>Korps Pegawai Republik Indonesia</i> , Indonesian Civil Servants Corps.
MA	<i>Mahkamah Agung</i> , Supreme Court. The highest court in Indonesia.
MPR	<i>Majelis Permusyawaratan Rakyat</i> , People's Consultative Assembly.
Muhammadiyah	This is Indonesia's second largest Islamic organization. It was established in 1912 as an institutional expression of the Indonesian modernist movement. The organization is well-known for its involvement in providing the education system and providing basic health care for Moslems.
<i>Nahdlatul Ulama</i>	Association of Islamic Scholars. This is a traditionalist Moslem organization established in 1926. It is the country's largest Moslem organization, even may be in the world.

<i>Negara Hukum</i>	Law state, state based on law. A concept refers to the Dutch notion of <i>rechtsstaat</i> as opposed to <i>maachtstaat</i> , that is a state based on law rather than power.
PAH	<i>Panitia Ad Hoc, Ad Hoc</i> Committee. The MPR had three Ad Hoc Committees: PAH I, PAH II and PAH III to prepare the outcomes of its annual and general sessions. The PAH III of 1999 and the PAH I of 2000, 2001 and 2002 were assigned to prepare the draft of the First to Fourth Amendments.
PAN	<i>Partai Amanat Nasional, Nasional</i> Mandate Party.
<i>Pancasila</i>	Sanskrit for 'Five Principles'. The principles, which are deliberately highly abstract, are Belief in One God, a Just and Civilized Humanity, the Unity of Indonesia, Democracy Guided by Inner Wisdom in Unanimity Arising out of Deliberation among Representatives and Social Justice for All the People of Indonesia.
PBB	<i>Partai Bulan Bintang, Crescent</i> Star Party was an Islamic faction in the MPR which supported the adoption of the 'seven words' of the Jakarta Charter into Article 29(1) of the 1945 Constitution.
PDIP	<i>Partai Demokrasi Indonesia Perjuangan, Indonesian</i> Democratic Party of Struggle.
PDU	<i>Perserikatan Daulat Ummat, Union</i> of Moslem Sovereignty was an Islamic faction in the MPR which supported the adoption of the 'seven words' of the Jakarta Charter into Article 29(1) of the 1945 Constitution. It was a coalition of the MPR members from the PNU ( <i>Partai Nahdlatul Ummat, Nahdlatul</i> Ummat Party), the PKU ( <i>Partai Kebangkitan Ummat, Ummat</i> Awakening Party), the PSII ( <i>Partai Syarikat Islam Indonesia, Indonesian</i> Islamic Union Party), PPIM ( <i>Partai Politik Islam Indonesia Masyumi, Indonesian</i> Masyumi Islamic Party) and the PDR ( <i>Partai Daulat Rakyat, People's</i> Sovereignty Party).
<i>Piagam Jakarta</i>	Jakarta Charter. This is a draft preamble to the 1945 Constitution, containing a controversial 'seven words' to the effect that Moslem citizens would be obliged to perform Islamic law ( <i>dengan kewajiban menjalankan Syariat Islam bagi pemeluk-pemeluknya</i> , with the obligation to carry out <i>syariah</i> for adherents of Islam). Nationalists strongly objected to this phrase. Previously, in the constitutional debates of 1945 and in those of 1956-1959 the 'seven words' had been rejected. It was rejected again in the 1999-2002 constitutional debates.
PKB	<i>Partai Kebangkitan Bangsa, National</i> Awakening Party.
PPP	<i>Partai Persatuan Pembangunan, United</i> Development Party was an Islamic faction in the MPR which supported the adoption of the

'seven words' of the Jakarta Charter into Article 29(1) of the 1945 Constitution.

- Polri *Polisi Republik Indonesia*, Police of the Republic of Indonesia.
- Supersemar* *Surat Perintah Sebelas Maret*, Letter of Instruction of Eleven March. By this 1966 letter, Soekarno transferred presidential authority for the restoration of security – and effective control of the government – to General Soeharto.
- TNI *Tentara Nasional Indonesia*, Indonesian National Army.
- TVRI *Televisi Republik Indonesia*, Television of the Republic of Indonesia.



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## **PART ONE: INTRODUCTION**

# Chapter One

## In Search of a Democratic Constitution

### A. Introduction

In 1999, the MPR<sup>1</sup> (*Majelis Permusyawaratan Rakyat*, the People's Consultative Assembly) enacted the First Amendment to the 1945 Constitution of Indonesia. Over each of the next three years, it passed a further amendment. Despite their important contribution to Indonesia's transition from Soeharto's authoritarian regime, no comprehensive study has been made of these four amendments, and the process by which they were produced. This thesis is an attempt to fill this gap, by critically evaluating the process and outcomes of these amendments, in the context of constitutional theory and the experience of other countries, in particular, South Africa and Thailand.<sup>2</sup>

This thesis argues that the 1999-2002 constitutional amendments lacked what have widely been accepted as key features of a democratic constitution-making process: (i) there was no clear plan for determining the key elements of the process, such as when the amendment would occur, how it would be conducted, and what the amendment would be; (ii) the MPR failed to win the people's trust in its capacity as a constitution-making body; and (iii) public participation was limited and badly organized.

Many of these problems with the reform process, however, related to fundamental aspects of the Constitution itself. It contained two aspects seen as critical to the identity and survival of the country by most nationalists, including the military: the rejection of an Islamic state and the imposition in its place of a nationalist state ideology, the *Pancasila*,<sup>3</sup> both contained in the

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<sup>1</sup> The MPR, according to the 1945 Constitution before amendment, was the Indonesia's supreme sovereign body. It represented and exercised the sovereignty of the people. Most of its members were elected and some were appointed. The MPR that carried out the amendments consisted of 695 members, including 500 members of the DPR (*Dewan Perwakilan Rakyat*, People's Representative Council), whose structure was: 462 elected members — in a proportional general election by provinces — and 38 appointed members — from the TNI (*Tentara Nasional Indonesia*, Indonesian National Army) and the *Polri* (*Polisi Republik Indonesia*, Police of the Republic of Indonesia). The other MPR members were: 130 regional representatives chosen by the elected DPRD (*Dewan Perwakilan Rakyat Daerah*, the Regional DPR), five from each of 26 provinces existed in 1999 and 65 representatives of designated social groups (functional groups). Pursuant to article 2 paragraph 2 of the Law Number 4 of 1999 determining membership of the MPR, the DPR and the DPRD, the total of MPR members should be 700. The difference of five number was because East Timor, the Indonesia's 27<sup>th</sup> Province, voted for independence in August 1999, shortly before the establishment of the said MPR, and consequently, East Timor's five representatives were cancelled.

<sup>2</sup> Chapter Two explains why these two countries are chosen.

<sup>3</sup> *Pancasila* is Sanskrit for 'Five Principles'. The principles, which are deliberately highly abstract, are: Belief in One God, a Just and Civilised Humanity, the Unity of Indonesia, Democracy Guided by Inner Wisdom in Unanimity Arising out of Deliberation among Representatives and Social Justice for All the People of Indonesia.

preamble of the Constitution. Many nationalists feared that opening the Constitution to real change would jeopardize these positions, which they saw, and still see, as non-negotiable foundation for the Republic. The result was a slow, patchy and tentative process marked by constant negotiation and deal-making as most stakeholders sought a way to dismantle Soeharto's dictatorship without disturbing these twin nationalist principles.

Despite these problems, at the end of the process, the Constitution was more democratic in form. In particular, the amendments established a clearer separation of powers between the executive, legislative and judiciary; and more impressive human rights protections. This is because the euphoric transitional period provided a setting that encouraged open constitutional debates in the MPR and allowed public participation in these debates, despite the flaws in the MPR's system for public engagement.

The amended Constitution remains, however, far from perfect. This thesis recommends further amendments to, first, strengthen the system of checks and balances introduced between 1999-2002; and, second, to entrench the preamble and guarantee the difficult relationship between Islam and state in their current form.

## **B. Thesis Questions**

The Indonesian 1945 Constitution was so limited, so poorly-drafted and so biased toward authoritarianism <sup>4</sup> that it seemed to most observers that only a constitutional revolution could transform it into a democratic document. This did not happen. Instead, the MPR adopted an evolutionary approach, revising the Constitution through slow, step-by-step amendment.<sup>5</sup> This thesis evaluates whether this troubled approach allowed the MPR to conduct a democratic constitution-making process; and whether the outcome was, in fact, a more democratic Constitution.

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<sup>4</sup> Chapter Three elaborates on this authoritarianism in the 1945 Constitution.

<sup>5</sup> Chapters Four to Eight elaborate on this issue.

## **C. Why this Study is Important**

In conducting this study, I have been motivated by two chief factors. First, historically, Indonesia has never before successfully carried out constitutional reform. The four earlier attempts in 1945, 1949, 1950 and 1956-1959 failed to create a democratic Constitution. Second, the fifth attempt in 1999-2002 was crucial to safeguarding Indonesian transition from Soeharto's authoritarian rule to democratic institutional arrangements. The reasons for the failure of the previous four attempts therefore need to be understood in order to explain the relative success of the fifth attempt.

As background, the following section outlines key elements of the history of these four earlier constitutional reform attempts in Indonesia, before I turn in the next chapter to current theory on constitutional change.

### **1. The Four Failures of Indonesian Constitutional Reform**

#### **a. The 1945 Constitution: A Temporary, Express and Revolutionary Constitution**

The 1945 constitution-making process was the first effort following colonization to write an Indonesian Constitution and it thus formally started Indonesia's Constitutional history as a modern independent state.<sup>6</sup> The situation at the end of the Second World War, however, forced Indonesia's founders to draft the 1945 Constitution very hastily – within just twenty working days.<sup>7</sup> It is clear that the founders' priority was to have a minimal Constitution just to fulfill the basic requirements of Indonesian independence. Therefore, they were less concerned with creating a complete and democratic Constitution.<sup>8</sup>

The draft of the Constitution was prepared by the BPUPKI.<sup>9</sup> The draft was then ratified by the PPKI.<sup>10</sup> The legitimacy of both committees has, however, been questioned many times, not least because they were formed by the occupying Japanese forces.<sup>11</sup>

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<sup>6</sup> Slamet Effendy Yusuf and Umar Basalim, *Reformasi Konstitusi Indonesia: Perubahan Pertama UUD 1945* (2000) 6.

<sup>7</sup> Ibid 58.

<sup>8</sup> Ibid.

<sup>9</sup> *Badan Penyelidik Usaha-usaha Persiapan Kemerdekaan Indonesia*, Investigating Committee for the Preparation of Indonesian Independence.

<sup>10</sup> *Panitia Persiapan Kemerdekaan Indonesia*, Preparatory Committee for Indonesian Independence.

Realizing the shortcomings and imperfections of the 1945 Constitution, the founders had wisely decided that it would be a temporary Constitution. The Constitution itself explicitly stated: “Within six months of the *Majelis Permusyawaratan Rakyat* being set up, the MPR shall sit in order to determine a Constitution”.<sup>12</sup> On 18 August 1945, Soekarno, one of the main creators of the 1945 Constitution, and later Indonesia’s first President, declared in a speech defending the draft of the Constitution that the 1945 Constitution would be a short-term and revolutionary document, and consequently, should be replaced by a better Constitution as soon as possible. Soekarno declared:

[t]he Constitution we are now drafting is a temporary one. If I may say, this is an express Constitution. Later if we have already established a state and are in peaceful situation, we will certainly call the MPR which will frame a complete and perfect Constitution. In the future, we should make a perfect and complete Constitution.<sup>13</sup>

Unfortunately, the election to form the MPR and to make a more democratic Constitution had to be repeatedly postponed because of the unstable situation of the revolution. Accordingly, despite its temporary nature, the 1945 Constitution was applied for more than four years before it was replaced by the 1949 Constitution on 27 December 1949.

## **b. The 1949 Constitution: A Temporary Federal Constitution**

The 1949 Constitution was made in the shadow of the Round Table Conference, the formal negotiations between the Dutch and the Indonesian that ended the revolution that began in 1945. This conference led to the formal transfer of sovereignty from the Dutch to Indonesians.<sup>14</sup> According to this Constitution, Indonesia became a federal state. This was not the intention of the founders, who preferred a unitary state. In fact, the federal system is widely believed to

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<sup>11</sup> C.S.T. Kansil, Christine S.T. Kansil, and Engeline R. Palandeng, *Konstitusi-konstitusi Indonesia Tahun 1945 2000* (2001) 4 – 12; Suhartono W. Pranoto, *Revolusi Agustus: Nasionalisme Terpasung dan Diplomasi Internasional* (2001) 88 – 91; Rozikin Daman, *Hukum Tata Negara, Suatu Pengantar* (1993) 114-118; Abdullah Zailani, *Pengantar Hukum Tata Negara* (1991) 111-115; Yusuf and Basalim, above n 6, 9.

<sup>12</sup> Article (2) of the Additional Provision of the 1945 Constitution.

<sup>13</sup> Muhammad Yamin, *Naskah Persiapan Undang-undang Dasar 1945* (1959) vol. 1, 410.

<sup>14</sup> Adnan Buyung Nasution, *The Aspiration for Constitutional Government in Indonesia: A Socio-legal Study of the Indonesian Konstituante 1956-1959* (1992) 27. The Round Table Conference was held in Den Haag in late 1949. During the conference the Dutch finally acknowledged Indonesian independence.

have been an attempt by the Dutch to leave a political legacy that would eventually fragment Indonesia, using its established colonial strategy of 'divide and conquer' (*divide et impera*).<sup>15</sup>

In this context, it is understandable that the 1949 Constitution was little more than a strategy employed by Indonesians to obtain international acknowledgment for its independence. Anthony Reid noted, "for many convinced Republicans the Republic of the United States of Indonesia was only tolerable as a stepping stone to the true aim of the revolution, the unitary Republic proclaimed in 1945".<sup>16</sup> Holding the same opinion, Muhammad Yamin, one of Indonesia's best-known founding fathers, wrote in 1960 that the format of United States of Indonesia was temporary and intended to stimulate the forming of the unitary state of Indonesia.<sup>17</sup> This is because as a 'strategic' document, this Constitution – like its predecessor – was expressed to be temporary in nature. This can be clearly seen in article 186.

[t]he *Konstituante* together with the government shall enact as soon as possible the Constitution of the Republic of the United States of Indonesia, which shall replace this provisional Constitution.

Its 'strategic' objectives and temporary nature made the life of the 1949 Constitution very short. In the end, the Constitution was in force for less than eight months: from 27 December 1949 until 17 August 1950. The shortest period that a Constitution has been applied in Indonesia and one of the shortest in the world.

### **c. The 1950 Provisional Constitution: A more Democratic but Temporary Constitution**

The 1950 Provisional Constitution replaced the 1949 Federal Constitution. This Constitution was more democratic than the previous constitutions. It firmly asserted the people's sovereignty and provided detailed protection for human rights, such as adopting the United Nations Declaration on Human Rights and incorporated the right to hold demonstrations and strikes.<sup>18</sup>

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<sup>15</sup> Kansil, Kansil, and Palandeng, above n 11, 42 – 43.

<sup>16</sup> Anthony Reid, *The Indonesian National Revolution 1945-1950* (1974) 162.

<sup>17</sup> Muhammad Yamin, *Proklamasi dan Konstitusi Republik Indonesia* (1960) 34.

<sup>18</sup> Nasution, above n 14, 28.

Despite its democratic nature, the 1950 Constitution was - again - intended to be a temporary one. This was obvious from its official name: “The Provisional Constitution of Republic of Indonesia”. In article 134 it explicitly stated - in exactly the same terms as Article 186 of the 1949 Constitution - that:

[t]he *Konstituante* together with the government shall enact as soon as possible the Constitution of the Republic of Indonesia which shall replace this provisional Constitution.

Based on this article, the government finally conducted its first general election in 1955 to elect members of the *Konstituante* (Constituent Assembly). The following paragraphs discuss the *Konstituante*, the organ of state which had specific responsibility for drafting a new Constitution for Indonesia and played a crucial role in Indonesian Constitutional history.

#### **d. The *Konstituante*'s Constitutional Draft: An Unfinished Democratic Constitution?**

From *Konstituante*'s first meeting on 10 November 1956 until its last on 2 June 1959, the *Konstituante* conducted regular discussions to develop a new Constitution.<sup>19</sup> During that period, many heated debates emerged regarding the philosophy of the state, human rights and the possible re-application of the 1945 Constitution.<sup>20</sup> Nasution has praised the *Konstituante*'s meetings. He argues:

[t]he whole enterprise of the *Konstituante* ... manifested a truly democratic spirit, a complete freedom of expression and a fundamental commitment to a constitutional reform of government on the part of majority of its members ... the enterprise of the *Konstituante* can rightly be appreciated as the peak of Indonesia's effort to achieve constitutional government.<sup>21</sup>

Nasution has disagreed with the opinion — promoted both by the Soekarno and Soeharto regimes — that the *Konstituante* had failed in conducting its task of drafting a Constitution. In Nasution's opinion:

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<sup>19</sup> Ibid 41.

<sup>20</sup> Further exploration on the debates in the *Konstituante* 1956-1959, see Nasution, above n 14, 51 – 401.

<sup>21</sup> Ibid 405.



[t]here is no proof for the allegations that the *Konstituante* failed to draft a Constitution because of the ideological conflicts which manifested themselves most clearly in the debate on the *Dasar Negara*.<sup>22</sup> The fact is that the *Konstituante* did not have the opportunity to conclude its deliberations on this issue; until the ultimate positions concerning the *Dasar Negara* have been taken by the contending factions, any judgement on the outcome of this ideological debate must still be considered premature.<sup>23</sup>

As Nasution says, the democratic discussions and debates in the *Konstituante* from 1955-1959 were, in fact, never finished. They were discontinued by President Soekarno's Decree of 5 July 1959<sup>24</sup> which unilaterally dissolved the *Konstituante* and reinstated the 1945 Constitution.<sup>25</sup> At that time, the *Konstituante* had almost completed a draft Constitution and only needed to resolve the debates on the *Dasar Negara*.<sup>26</sup> The Decree, therefore, ended Indonesia's chances of having a Constitution which was committed to democracy, human rights and limitation of power.<sup>27</sup>

Soekarno's Decree was strange policy, because Soekarno himself had previously agreed that the *Konstituante* was a more legitimate constitution-making body compared to other constitution-making bodies in the past – including the committees which produced the 1945 Constitution that he had now reinstated. The *Konstituante* was directly elected in a relatively free and secret ballot with the specific task of drafting a new Constitution.<sup>28</sup> This did not, however, stop Soekarno from dissolving it.

Disappointment with the *Konstituante's* dissolution grew because Soekarno chose to reapply the 1945 Constitution rather than any of the other Indonesian constitutions.<sup>29</sup> This was highly inconsistent behavior on his part since he was the one who, on the day of enactment of the 1945 Constitution (18 August 1945) had firmly stated that it was temporary, express, and revolutionary. Nevertheless, from 1959 until the end of his presidential power in 1966, Soekarno no longer treated the 1945 Constitution as temporary. By reapplying the 1945

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<sup>22</sup> The philosophy of state (Indonesian).

<sup>23</sup> Nasution, above n 14, 405.

<sup>24</sup> The Decree contains three decisions: (1) to dissolve the *Konstituante*, (2) to put the 1945 Constitution into effect again and, therefore, to declare invalidation of the 1950 Provisional Constitution and (3) to form a Provisional MPR and a Provisional DPA (*Dewan Pertimbangan Agung Sementara* or Provisional Supreme Advisory Council).

<sup>25</sup> For further elaboration of the reasons why Soekarno issued this decree, see: Daniel S. Lev, *The Transition to Guided Democracy: Indonesian Politics, 1957-1959* (1966) 235 – 289. See also Nasution, above n 14, 313 – 401.

<sup>26</sup> Nasution, above n 14, 405.

<sup>27</sup> Ibid 405 – 410.

<sup>28</sup> Ibid 36 – 37.

<sup>29</sup> Bagir Manan, *Teori dan Politik Konstitusi* (2002) 4.

Constitution and implementing personal rule under his 'Guided Democracy' rubric, Soekarno created his own authoritarian regime, one that was to last until 1966.

Indeed, as will be discussed in Chapter Three, it is the vague and incomplete nature of the 1945 Constitution which contributed to the rise of authoritarian regimes under President Soekarno and, later, his successor, President Soeharto.<sup>30</sup> Therefore, one of the basic demands of the student movements that succeeded in toppling Soeharto in 1998 was to reform the 1945 Constitution.<sup>31</sup> This is the significance of the fifth constitutional reform attempt - from 1999-2002 - which is the focus of this study.

**Closing.** The constitution-making attempts in 1945, 1949 and 1950 failed because they were conducted in a very hasty and short period. In these three earlier attempts, the legitimacy of the relevant constitution-making body was very weak. This Constitution-maker issue was actually solved in the 1956-1959 attempt. The *Konstituante* enjoyed a strong legitimacy, because its members had been democratically elected through the 1955 election. Further, the *Konstituante* had almost three years to draft a Constitution. The problem with the *Konstituante* was, however, it did not have a strategic decision-making process, and therefore lacked an effective mechanism to resolve deadlocks. It was this possibility of deadlock which was used by Soekarno - with the support of the military - to intervene and effectively discard the promising constitutional draft prepared by the *Konstituante*.<sup>32</sup>

The possible deadlock in the *Konstituante* was closely related to the debates on whether Indonesian should be based on nationalism or Islam. The following section considers this issue in more detail.

## 2. The Nationalism versus Islamic state Constitutional Debates

Indonesian constitutional history cannot be separated from the existence of the Jakarta Charter (*Piagam Jakarta*). The discussion of the Jakarta Charter has always been one of the most

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<sup>30</sup> See, eg, R. William Liddle, 'Indonesia's Democratic Transition: Playing by the Rules' in Andrew Reynolds (ed), *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy* (2002) 373, 376; National Democratic Institute, *Indonesia's Road to Constitutional Reform: the 2000 MPR Annual Session* (2000) 1.

<sup>31</sup> Indra J. Piliang, 'Amandemen Konstitusi dan Gerakan Mahasiswa: Sebuah Proyeksi' (2000) 4 *Analisis CSIS* 441.

<sup>32</sup> Nasution, above n 14, 400 – 401.

contentious issues in Indonesian constitution-making processes and it was hotly debated in both 1945 and 1956-1959. The following paragraphs deals with these two events.

**The 1945 Constitutional Debates.** The Jakarta Charter was completed on 22 June 1945 and Mohammad Yamin gave the charter its name. It was intended to become the preamble to the independent Constitution. The draft was written by a Committee of Nine (*Panitia Sembilan*).<sup>33</sup> This was a committee formed by the BPUPKI. The committee consisted of five representatives from the nationalist faction and four from the Islamic faction.<sup>34</sup> This composition reflected the deep conflict between those who wished to preserve a state which was free from religious influence; and those who advocated an Islamic state.<sup>35</sup> Soepomo stated:

[t]here are indeed two opinions, namely the opinion of members who are religious experts urging that Indonesia should establish an Islamic state and another opinion ... of a national unitary state which separates state affairs and Islamic affairs, in other words, not an Islamic state.<sup>36</sup>

In the Committee of Nine meetings, the Islamic leaders agreed to withdraw their Islamic state proposal. In exchange, the Islamic faction proposed that the Jakarta Charter included *Pancasila* but with the following 'seven words' in its first *sila* or principle: *dengan kewajiban menjalankan syariat Islam bagi pemeluk-pemeluknya* (with the obligation to carry out *syariah*<sup>37</sup> for adherents of Islam). The compromise contained in the Charter was declared to be a 'gentlemen's agreement'. Soekiman, a member of the BPUPKI from the Islamic faction, argued that both the Islamic and nationalist factions should hold firmly to it.<sup>38</sup>

When the charter was submitted to the BPUPKI meetings, however, it met with heated debate.<sup>39</sup> The nationalist faction was concerned that the 'seven words', as the Charter is also sometimes called, would trigger discrimination against religions other than Islam. The nationalist faction was also worried because the 'seven words' were also inserted to a draft of Article 29(1). This article previously had stipulated, "The state is based upon belief in God". In addition, a draft of Article 6 required that a presidential candidate should be a Moslem. The

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<sup>33</sup> Sri Soemantri, *Prosedur dan Sistem Perubahan Konstitusi* (1987) 24.

<sup>34</sup> Umar Basalim, *Pro-Kontra Piagam Jakarta di Era Reformasi* (2002) 25.

<sup>35</sup> Nasution, above n 14, 61.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Syariah* is an Arabic word meaning Islamic law.

<sup>38</sup> Nasution, above n 14, 64.

Jakarta Charter and drafts of Articles 29(1) and 6 almost led the meetings of the BPUPKI to a deadlock. Radjiman Wedyodiningrat, the Chairperson of the BPUPKI, proposed a vote to avoid the deadlock. This was not, in fact, done because members of the BPUPKI agreed that a religious issue should not be voted on because of its sensitivity.<sup>40</sup>

On 16 July 1945, after a persuasive argument from Soekarno, the Christian representatives half-heartedly agreed to accept the constitutional draft of the BPUPKI. This included the Jakarta Charter and the drafts of Articles 29(1) and 6.<sup>41</sup> However, on 18 August 1945, one day after the proclamation of independence, Hatta proposed to withdraw the 'seven words' from the draft of the Constitution.<sup>42</sup> Nasution argued that Hatta's intervention was due to:

... his fear that Christian regions in Eastern Indonesia would not join the newly proclaimed republic, if Islam were to be accorded a special status in the Constitution.<sup>43</sup>

Hatta's proposal was accepted, and the draft of the Constitution was then ratified, with some amendments. These amendments were a major compromise in Indonesian constitution-making history. They were as follows:

- The Jakarta Charter was ratified as the preamble of the Constitution with the changing of its title from '*Mukadimah*', an Arabic word, to '*Pembukaan*' (Indonesian for Preamble);
- The 'seven words' relating to *syariah* were deleted from the preamble and Article 29(1); and
- The requirement that presidential candidates should be Moslem was deleted from Article 6.<sup>44</sup>

**The 1956-1959 Constitutional Debates.** Basalim argues that the Islamic faction agreed to these amendments to secure the new-born country from a potential disintegration.<sup>45</sup> However, this was not the end of differences between the Islamic and the nationalist factions. The differences continued in the constitution-making process in the 1956-1959 *Konstituante*.

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<sup>39</sup> Basalim, above n 34, 28 — 34.

<sup>40</sup> Ibid 33.

<sup>41</sup> Ibid 34.

<sup>42</sup> Ibid 37 — 38.

<sup>43</sup> Nasution, above n 14, 64.

<sup>44</sup> Basalim, above n 34, 39.

<sup>45</sup> Ibid 42.

Nasution points out that during the debates the nationalist faction proposed the *Pancasila*, while the Islamic faction proposed Islam as the philosophy of the state.<sup>46</sup> None of the factions had absolute majority support to pursue their proposals. The Islamic faction had only 44.75% of the seats of the *Konstituante*.<sup>47</sup> Therefore, the differences between the two groups again led the debates to a potential deadlock.

During the discussions, the government proposed to reapply the 1945 Constitution.<sup>48</sup> The nationalist faction supported this proposal.<sup>49</sup> In response, the Islamic faction proposed amendments to insert the 'seven words' of the Jakarta Charter into the preamble, and Article 29(1) of the 1945 Constitution.<sup>50</sup> Commenting on this proposal, Abdul Wahab, a member of the *Konstituante* argued that:

[i]f this is accepted, 100% of the Moslem [sic] will support the 1945 Constitution again. If this is rejected, 100% of the Moslems will not accept it. To be or not to be, that is my conviction.<sup>51</sup>

On 1 June 1959, the Islamic faction's proposal was rejected.<sup>52</sup> In return, the government proposal, to return to the 1945 Constitution was rejected by the Islamic faction.<sup>53</sup> Because of this situation, the *Konstituante* went into recess. Later, as noted earlier, by arguing that the *Konstituante* had failed to fulfill its duty, Soekarno issued the Presidential Decree of 5 July 1959, which dissolved the *Konstituante* and reapplied the 1945 Constitution.<sup>54</sup> With the support of the army, this decree was effective. This resulted in the end of all of the work of the *Konstituante* which had started its sessions with so much promise in November 1956.<sup>55</sup>

To gain the support from the Islamic faction, Soekarno's Presidential Decree of 5 July 1959 relied on the *Piagam Jakarta*.<sup>56</sup> It stated:

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<sup>46</sup> Nasution, above n 14, 51.

<sup>47</sup> Ibid 32 — 34.

<sup>48</sup> Basalim, above n 34, 46 — 49.

<sup>49</sup> Ibid 54.

<sup>50</sup> Ibid 49 — 50.

<sup>51</sup> Nasution, above n 14, 396 — 397.

<sup>52</sup> Ibid 397.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid 400 — 401.

<sup>55</sup> Ibid 401.

<sup>56</sup> Basalim, above n 34, 56.

... the Jakarta Charter of 22 June 1945 inspired the 1945 Constitution. Therefore, the charter and the 1945 Constitution are inseparable.<sup>57</sup>

Later, this thesis will demonstrate that the 1999-2002 constitutional amendments were also overshadowed by the issue of adopting the 'seven words' of the Jakarta Charter into the Constitution. This again almost led the amendments process into a deadlock.

### **3. The Importance of the 1999-2002 Constitutional Reform**

The 1999-2002 reform process thus carried an historical burden, and at the same time sought to anticipate the country's future fortunes. The historical burden was the continuing constitutional reform failures of 1945, 1949, 1950, and 1956-1959, as discussed above. As Harun Alrasid puts it, the failures had resulted in Indonesia always applying constitutions which were temporary.<sup>58</sup> In 1998, he wrote that after more than a half century of independence, Indonesia had never had a stable Constitution.<sup>59</sup>

Therefore, the MPR's task of reforming the Constitution was essential in order to break the historical chain of failures and secure the transition from Soeharto's authoritarian rule. Other fields of reform for example, politics and economics depended on legal reform, which was, itself, dependant on constitutional reform. Constitutional reform was thus a pre-requisite for the success of the country's reform as a whole, and its failure would be an early indicator of the death of the vulnerable transition to democracy.<sup>60</sup> This was stated clearly by Alrasid:

... to have a better system we have to do a 'total reform', especially constitutional reform  
... therefore the first thing that must be done is to reform the 1945 Constitution.<sup>61</sup>

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<sup>57</sup> The consideration of the Presidential Decree of 5 July 1959.

<sup>58</sup> Yusuf and Basalim, above n 6, 12.

<sup>59</sup> Ibid.

<sup>60</sup> Bachtiar Effendy, 'Reformasi Konstitusi sebagai Prasyarat Demokratisasi: Pengalaman Indonesia' (2000) 4 *Analisis CSIS* 389 – 390.

## **D. Thesis Overview**

### **1. Focus of the Study**

1999 has been selected as the starting date of the study, because this was the year when the MPR formally initiated constitutional reform. The year 2002 has been chosen as the final year because it was the year stipulated by the MPR as the deadline to finish constitutional reform.<sup>62</sup> Events after this year will generally not be a concern of this thesis, although, specific exceptions have been made where issues that arose after 2002 are especially significant for the arguments within this thesis.<sup>63</sup>

### **2. Research Methodology**

This thesis is based on both library and field research, and a broadly socio-legal approach is adopted, similar to that adopted in Nasution's seminal 'The Aspiration for Constitutional Government: A Socio-Legal Study of the Indonesian Konstituante 1956 – 1959'.

In terms of library research, I have collected data from journals, periodicals, books, newspapers, legislation, the Internet and other assorted secondary materials, as cited in the bibliography.

Field research was carried out in Indonesia, specifically in Jakarta, where most of the meetings of the MPR for the purpose of amending the Constitution took place. I collected material inaccessible from outside Indonesia, such as the full minutes of the meetings of the MPR. Additionally, I conducted a wide range of interviews, particularly with important figures involved in the constitution-making process. These interviews included:

- MPR members;
- experts from the working committee of the MPR;

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<sup>61</sup> *Wawancara Prof. Dr. Harun Alrasid: Jika Fundamen Rumahnya Rapuh, Negeri ini Bisa Ambruk* (1998) Tempo Interaktif <<http://www.tempo.co.id/ang/min/03/10/nas5.htm>> at 12 June 2002.

<sup>62</sup> Article 3 of MPR Decree No. IX of 2000 on the Authorization of the Working Body of the MPR to prepare the Amendment Draft of the 1945 Constitution.

<sup>63</sup> As at the date of the writing of this thesis in 2005, no further amendments have been passed.

- members of non-governmental organizations who had participated in monitoring and campaigning for the amendment process, for example CETRO (Centre for Electoral Reform); and
- members of the academic community, particularly those specializing in constitutional law and politics.

The interviews concentrated on the interviewees' own direct experiences of the amendment process and their opinions on the process and outcomes. A typical example of the interviews is attached as 'Appendix 2'.

In relation to English translation, unless otherwise noted, all of the translations are the author own. Where appropriate, and for the benefit of readers familiar with Indonesian, I have included the relevant Indonesian words or expressions as found in the original text.

With regard to Indonesian spelling, I have adopted the standard Indonesian orthography first introduced in 1972. However, I continue to use the old spelling pre-1972 for personal names which are spelled that way by the person named (for example Soekarno instead of Sukarno).

For easier reference, a comparative table of the 1945 Constitution showing the Constitution before and after the four amendments is attached as 'Appendix 1'.

### **3. Thesis Outline**

This thesis is organized into five parts and eight chapters. It starts with the introduction in Part One and this consists of this introductory chapter.

The next section is Part Two and this incorporates Chapter Two. The emphasis is on providing a theoretical framework for understanding the nature of constitutional reform in transitions from authoritarian rule. The experiences of selected countries, particularly South Africa and Thailand, are examined to see whether their approaches aid my analysis of Indonesia and to compare their experiences of constitutional reform at a time of transition to the Indonesian experience.



The background to the Indonesian political transition is described in Part Three (Chapter Three). This chapter describes how Indonesia, under the New Order of Soeharto, was undemocratic. This undemocratic system was enabled by the 1945 Constitution, and therefore, the document needs to be reformed to secure the Indonesian transition from authoritarian rule.

Chapter Three is then followed by a detailed examination of the constitution-making process in Part Four, which consists of Chapters Four to Seven. Each of these chapters deals with one of the four amendments. The format of the four chapters is similar. Each canvasses the background, the process and the result of the constitutional amendments.

Data from these four chapters is analyzed in Part Five (Chapter Eight). It evaluates whether the constitution-making process of the four amendments was democratic. Chapter Eight considers whether the outcome of the four amendments has, in fact, been a more democratic Constitution, and recommends further amendments necessary to strengthen the system of checks and balances. Finally, this chapter also presents the conclusion of my thesis.

## **PART TWO: THE THEORETICAL APPROACH**

## Chapter Two

# A Theoretical Framework of Democratic Constitution Making

Constitution-making is at once the most varied and the most concentrated form of political activity during the transition. In it, political maneuvering, bargaining and negotiating takes place and the political positions, agreements and disagreements between groups and leaders come to the fore. How the Constitution drafters handle these issues may tell us crucial things about the transition and about the regime it leads up to. The discrepancies between the words agreed to in the Constitution and the political reality that emerges may point to potential serious future conflicts. The general character of both the process and its outcome may reveal clues about the new regime's potential for stability or instability (Andrea Bonime-Blanc).<sup>64</sup>

### A. Introduction

This chapter takes the form of a literature review. It aims to provide a theoretical framework for understanding democratic constitution-making in a period of transition from authoritarian rule. This theoretical framework supports the thesis that constitution-making in transition is central in setting up a basic legal system for a democratic country, as suggested by Bonime-Blanc, in the quote above.

This chapter is divided into three sections. This section introduces and clarifies some basic concepts used in this thesis. Section B considers the key features necessary for the process of making a Constitution. This section will be applied when I describe and evaluate the Indonesian 1999-2002 constitution-making process in Chapters Four to Eight. Section C identifies the key elements for a democratic Constitution. This section will also be utilized in Chapters Four to Eight when I analyze whether or not the four amendments have created a more democratic Constitution.

Specifically, the discussion in this chapter draws on the last three decades of constitution-making in transitional environments across the world. This period has seen constitutional development in countries in Africa;<sup>65</sup> Latin America;<sup>66</sup> Central, Eastern and Southern Europe;<sup>67</sup>

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<sup>64</sup> Andrea Bonime-Blanc, *Spain's Transition to Democracy* (1987) 13.

<sup>65</sup> See generally John Mukum Mbuku, 'Constitutional Engineering and the Transition to Democracy in Post-Cold War Africa' (1998) 11:4 *The Independent Review* 501 – 502. For discussion on Constitution-Making in Transition in South Africa, see Penelope Andrews and Stephen Ellman (eds), *Post-Apartheid constitutions: Perspectives on South Africa's Basic Law* (2001); Per Strand, *Decisions on Democracy: The Politics of Constitution-Making in South Africa 1990-1996* (2000).

and Asia<sup>68</sup> — a phenomenon which John Elster refers to as the sixth and seventh waves of constitution-making.<sup>69</sup>

Despite the broad comparative review I focus principally on constitutional reform in two countries: South Africa (1994-1997) and Thailand (1996-1997). There were four reasons for doing this. Firstly, in the two countries selected the constitutional reform took place in a period of transition from authoritarian rule, as in Indonesia. Secondly, South Africa's reform was led by its Parliament, sitting as Constituent Assembly. This was similar to the Indonesian reforms, which were led by the MPR, the Indonesian Parliament. Thirdly, the Thai reforms were carried out in a period of economic crisis, as well as political turbulence. Similarly, in Indonesia the devaluation of the *Rupiah* in mid-1997 — which was triggered by the Thai Baht evaluation — started a financial and political crisis that subsequently engulfed the country. Fourthly, like Indonesia, the two countries are developing countries. Further, each of the country represents different regions, South Africa is — obviously — from Africa whilst Thailand, like Indonesia, is from Asia.

I will start by clarifying three basic concepts: Constitution, constitution-making and transition from authoritarian rule. These three concepts are the main ideas of this thesis.

## 1. Constitution

Franscois Venter notes that the basic characteristic of a modern constitutional state is a written Constitution to which “superior legal consequence is attached”.<sup>70</sup> According to Giovanni Sartori,

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<sup>66</sup> See generally Carlos Santiago Nino, 'Transition to Democracy, Corporatism and Constitutional Reform in Latin America' (1989) 44 *University of Miami Law Review* 129 – 164; Carlos Santiago Nino, 'The Debate over Constitutional Reform in Latin America' (1993) 16 *Fordham International Law Journal* 635 – 651.

<sup>67</sup> See generally A.E. Dick Howard, *Constitution Making in Eastern Europe* (1993); A.E. Dick Howard, 'Constitution-Making in Central and Eastern Europe' (1994) 28 *Suffolk University Law Review* 5 – 16; For discussion on Constitution-Making in Transition in Spain and Poland, see Bonime-Blanc, above n 64; Mark Brzezinski, *The Struggle for Constitutionalism in Poland* (1998).

<sup>68</sup> See, eg, Kevin Y.L. Tan, 'The Making and Remaking of constitutions in Southeast Asia: An Overview' (2002) 6, *Singapore Journal of International and Comparative Law* 1 – 41. James M. West and Edward J. Baker, 'The 1987 Constitutional Reforms in South Korea: Electoral Processes and Judicial Independence' (1988) 1 *Harvard Human Rights Year Book* 135 — 177; Andrew Harding, 'May There be Virtue: 'New Asian Constitutionalism' in Thailand' (2001) 3:3 *The Australian Journal of Asian Law* 236.

<sup>69</sup> Jon Elster, 'Forces and Mechanisms in the Constitution-Making Process' (1995) 45 *Duke Law Journal* 394. In Section B.1. of this chapter, I will elaborate on Elster's constitution-making classification.

<sup>70</sup> Franscois Venter, 'Constitution Making and the Legitimacy of the Constitution' in Antero Jyranki (ed), *National constitutions in the Era of Integration* (1999) 18.

the Latin word 'constitutio' had no relation to what we call a 'Constitution'.<sup>71</sup> In the era of ancient Rome, a 'constitutio' meant a "particular administrative enactment".<sup>72</sup> In the middle of the seventeenth century written documents containing the principles of governmental organization were called covenants, instruments, agreements, and fundamental laws — but never 'constitutions'.<sup>73</sup> In fact, Charles Howard McIlwain argues that the modern definition of constitutionalism dates from the end of the eighteenth century.<sup>74</sup> K.C. Wheare notes the use of the term 'Constitution' for a collection of fundamental principles of government only began when the Americans declared in 1787: 'We the people of the United States ... do ordain and establish this Constitution for the United States of America'.<sup>75</sup> After the adoption of the United States Constitution, Thomas Paine argued that a:

... Constitution is not the act of a government, but of a people constituting a government; and government without a Constitution, is power without a right.<sup>76</sup>

Holding the same opinion as Paine, Wheare, writing in the late 1950s, defined a Constitution as a written document which describes "the whole system of government of a country, the collection of rules which establish and regulate or govern the government".<sup>77</sup> Sartori, writing in the early 1960s, described a Constitution as a "technique of liberty".<sup>78</sup> He was of the opinion that a Constitution is a technical document which shows: how political power is limited, and how individual and societal rights are protected.<sup>79</sup> In the 1990s, Sartori changed his position by strengthening his definition in the direction of the restriction of political power, claiming that the protection of rights did not really matter.<sup>80</sup> He argued that:

... a Constitution without declaration of rights is still a Constitution, whereas a Constitution whose core and centerpiece is not a frame of government is not a Constitution ... So, constitutions are, first and above all, instruments of government which limit, restrain and allow for the control of the exercise of political power.<sup>81</sup>

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<sup>71</sup> Giovanni Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes* (2<sup>nd</sup> Ed, 1997) 195.

<sup>72</sup> Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (revised ed., 1947) 24.

<sup>73</sup> Sartori, above n 71, 195.

<sup>74</sup> McIlwain, above n 72, 1 – 2.

<sup>75</sup> K.C. Wheare, *Modern constitutions* (1958) 3.

<sup>76</sup> Thomas Paine, *Rights of Man* (1792) Constitution Society <<http://www.Constitution.org/tp/rightsman2.htm>> at 9 March 2003.

<sup>77</sup> Wheare, above n 75, 1.

<sup>78</sup> Giovanni Sartori, 'Constitutionalism: A Preliminary Discussion' (1962) LVI:4 *American Political Science Review* 862.

<sup>79</sup> Ibid.

<sup>80</sup> Sartori, above n 71, 196.

<sup>81</sup> Ibid.

Sartori's later definition has been supported by Richard-Holder Williams who argues that a Constitution is a legal document which contains "the rules of the political game".<sup>82</sup> Likewise, Carl J. Friedrich notes that the meaning of a Constitution in modern political thinking is a very distinct one, that is, the process by which governmental activities are efficiently controlled.<sup>83</sup> Based on this notion of restraint, Friedrich classifies regimes along a continuum, from unconstitutional government (which are regimes with no restraints), through actual governments (which are those that have some restraints), to constitutional governments (which are those with 'complete' restraints).<sup>84</sup>

Nevertheless, a notion of Constitution that leans more toward the control of political power does not negate the idea of a Constitution acting as the protector of individual and societal rights. In 1995, S.E. Finer, Vernon Bogdanor and Bernard Rudden argued that:

[c]onstitutions are codes of norms which aspire to regulate the allocation of functions, powers and duties among the various agencies and offices of government, and to define the relationship between these and the public.<sup>85</sup>

It is my view that to ensure that human rights are protected, a declaration of rights should be explicitly mentioned. When there is unclear protection of human rights the possibility for human rights violations increases. Applying this definition to Indonesia's circumstances, I argue that the limited protection of human rights in the 1945 Constitution contributed to the many human rights violations during Soeharto's authoritarian regime. I mention this because it is connected to the discussions of the Second Amendment of the 1945 Constitution, particularly in relation to the possibility of incorporating a Bill of Rights.<sup>86</sup>

A Constitution can be a single document, or a combination of basic laws and customs.<sup>87</sup> On this basis, constitutions are classified as written and unwritten.<sup>88</sup> C.F. Strong, however, argues that

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<sup>82</sup> Richard Holder-Williams, 'The Constitution (1787) and Modern American Government' in Vernon Bogdanor (ed.), *constitutions in Democratic Politics* (1988) 95.

<sup>83</sup> Carl J. Friedrich, *Constitutional Government and Democracy: Theory and Practice in Europe and America* (1950) 131.

<sup>84</sup> *Ibid* 125.

<sup>85</sup> S.E. Finer, Vernon Bogdanor and Bernard Rudden (eds), *Comparing constitutions* (1995) 1.

<sup>86</sup> I will discuss this human rights in the Second Amendment debates in Chapter Five.

<sup>87</sup> Hans Kelsen, *General Theory of Law and State* (1946) 125 – 128; Peter Paczolay, 'The New Hungarian Constitutional State: Challenges and Perspectives' in A.E. Dick Howard (ed), *constitution-making in Eastern Europe* (1993) 30.

<sup>88</sup> Wheare, above n 75, 19.

the basis of such a classification system is illusory: there is no Constitution which is completely written or unwritten.<sup>89</sup> It has been argued that this classification should be discarded.<sup>90</sup> Strong points out that the United Kingdom – which is usually regarded as the leading example of a country with an unwritten Constitution – does, in fact, have some written laws (e.g. the Bill of Rights of 1689, the Parliament Act of 1911) which have considerably formed its Constitution.<sup>91</sup> On the other hand, he also argues that in practice the Constitution of the United States, which is considered to be the most complete written Constitution,<sup>92</sup> uses unwritten conventions or customs to complement its Constitution.<sup>93</sup> In fact, according to Jan-Erik Lane:

[n]o state lives to 100 per cent in accordance with its written documents. Customary law plays a major role in every state Constitution of the world.<sup>94</sup>

In reality, however, these classifications – written and unwritten – are regularly used and so Lane argues that the term ‘Constitution’ has a double meaning: articles in a written document and ongoing state activities.<sup>95</sup> Therefore, for practical reasons it is sometimes necessary to distinguish between so-called written and unwritten constitutions. Even Strong recognizes this necessity, although he has proposed using a slightly different terminology: documentary and non-documentary.<sup>96</sup>

In most countries, with the exception the United Kingdom, New Zealand and Israel,<sup>97</sup> the word ‘Constitution’ is used to describe a collection of laws which rule the government of that country and which have been gathered into a written document.<sup>98</sup> This thesis defines ‘Constitution’ in this sense. Here, ‘Constitution’ always refers to a written document. This is, in part, because

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<sup>89</sup> C.F. Strong, *Modern Political constitutions* (1973) 57 – 58.

<sup>90</sup> Wheare, above n 75, 19.

<sup>91</sup> *Ibid.*

<sup>92</sup> Strong's opinion, that the Constitution of the United States is the most completely written Constitution, needs further clarification. Many other constitutions are more complete, at least longer, than the Constitution of the United States. The Indian and Nigerian constitutions, for example, have 151 and 320 Articles respectively, compared to the Constitution of the United States, which only has seven articles, plus twenty-seven amendments (up to 1992).

<sup>93</sup> Strong, above n 89, 57.

<sup>94</sup> Jan-Erik Lane, *constitutions and Political Theory* (1996) 118.

<sup>95</sup> *Ibid.* 5.

<sup>96</sup> Strong, above n 89, 58.

<sup>97</sup> Through a series of enactments by its parliament, sitting as a constitution-making body, Israel has been transforming its constitutional arrangements into a written Constitution.

<sup>98</sup> Wheare, above n 75, 19.

Indonesia has not yet developed an accepted and sophisticated jurisprudence of unwritten constitutional law.<sup>99</sup>

Therefore, when I discuss constitution-making, constitutional amendment and constitutional reform, I am concerned exclusively with the making and amending of a written Constitution. In the words of Wheare, this thesis is focused on ‘formal’ rather than ‘informal’ amendment.<sup>100</sup> The former occurs according to the amendment mechanism set up in the Constitution itself, while the latter takes place through custom and usage or judicial interpretation.<sup>101</sup> This thesis shares Friedrich’s opinion that despite the importance of changes which informal amendment may produce, particular changes - such as the structure of a federal country and its division into states - may be impossible without a formal amendment.<sup>102</sup>

## 2. Constitution-Making

According to Venter, the concept of the ‘Constitution’ itself is dynamic.<sup>103</sup> John P. Wheeler, Jr. expressly argues that constitutional change is unavoidable.<sup>104</sup> Romano Prodi suggested that, “A non-amendable Constitution is a weak Constitution” because “it is not adapted to reality, and the Constitution must be adapted to changing reality”.<sup>105</sup> In fact, according to Brannon P. Denning, a mechanism of constitutional amendment is essential to guarantee that future generations have the tools to effectively “exercise their sovereign powers”.<sup>106</sup> The changing nature of national constitutions is highlighted by Venter who notes that:

[t]here is no such thing as a ‘final’ Constitution, because a national Constitution is as alive as the state, consisting of a multitude of thinking human beings, for whom it exists. The idea of a Constitution which is immutable would not be consistent with the precepts of the modern constitutional state.<sup>107</sup>

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<sup>99</sup> Tim Lindsey, ‘Indonesian Constitutional Reform: Muddling Towards Democracy’ (2002) 6 *Singapore Journal of International and Comparative Law* 244, 276 – 277.

<sup>100</sup> Wheare, above n 75, 121 — 145.

<sup>101</sup> Brannon P. Denning, ‘Means to Amend: Theories of Constitutional Change’, 65:155 *Tennessee Law Review*, 197 — 198.

<sup>102</sup> Friedrich, above n 83, 141.

<sup>103</sup> Venter, above n 70, 19.

<sup>104</sup> John P. Wheeler, Jr., ‘Changing the Fundamental Law’ in John P. Wheeler, JR. (ed), *Salient Issues of Constitutional Revision* (1961) 49.

<sup>105</sup> Anthony Browne, ‘Prodi fears sceptics will neuter EU Constitution’ Vote 2004 <<http://www.vote2004.com/mediacentre/display.asp?IDNO=1395>> at 15 June 2004.

<sup>106</sup> Denning, above n 101, 160.

<sup>107</sup> Venter, above n 70, 19.



Venter's opinion is reminiscent of Thomas Jefferson's idea that:

... laws and institutions must go hand in hand with the progress of the human mind. As that becomes more develop, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times.<sup>108</sup>

As James L. Sundquist acknowledges, soon after the adoption of the first written Constitution in America, James Madison noted, "I am not one of the number if there be any such, who think the Constitution lately adopted a faultless work".<sup>109</sup> Twenty-eight years afterward, Gouverneur Morris wrote:

[n]othing human can be perfect. Surrounded by difficulties, we did the best we could; leaving it with those who should come after us to take counsel from experience, and exercise prudently the power of amendment, which we had provided.<sup>110</sup>

In the same way, Edward McWhinney argues that, as is the case with a Constitution, constitutionalism is a dynamic concept as well.<sup>111</sup> The connection between constitutionalism and government is continually changing, with the Constitution itself is the clearest evidence of that change.<sup>112</sup> Further, McWhinney underlines that the principal task and responsibility of political elites in a constitutional government is to anticipate, correct, and change the substances of a Constitution in order to ensure it is in the same path to a process to democracy.<sup>113</sup> Therefore, Friedrich argues that in most well-drawn modern constitutions, the provisions for amendment form a vital part.<sup>114</sup> Along the same lines, McWhinney notes that every:

[c]onstitutional system must always include an in-built quality of change; and constitutionalism itself becomes not merely the substantive values written into the constitutional charter, but the actual processes of constitutional changes themselves.<sup>115</sup>

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<sup>108</sup> Jeffrey Reiman, 'The Constitution, Rights, and the Conditions of Legimacy' in Alan S. Rosenbaum (ed), *Constitutionalism: the Philosophical Dimension* (1988) 127.

<sup>109</sup> James L. Sundquist, *Constitutional Reform and Effective Government* (1986) 1.

<sup>110</sup> Ibid.

<sup>111</sup> Edward McWhinney, *Constitution-Making: Principles, Process, Practices* (1981) 132.

<sup>112</sup> James A. Curry, Richard B. Riley, and Richard M. Battistoni, *Constitutional Government: The American Experience* (1989) 6.

<sup>113</sup> McWhinney, above n 111, 132.

<sup>114</sup> Friedrich, above n 83, 135.

<sup>115</sup> McWhinney, above n 111, 132.

This thesis accepts that constitutional change is necessary and must be facilitated. A non-amendable Constitution is nothing more than a façade document. Applying this argument to Indonesia's situation, it was inevitable that the policy of Soeharto's administration that the 1945 Constitution was a sacred document, and therefore beyond amendment, would be rejected once Soeharto himself had fallen from power.<sup>116</sup>

Constitutional changes are only part of constitution-making.<sup>117</sup> Wheeler distinguishes between a constitutional amendment and a constitutional revision.<sup>118</sup> He defines an 'amendment' as "a change of limited scope involving one or a limited number of provisions of a Constitution"; and a 'revision' as a "reconsideration of the whole or a major portion of the Constitution".<sup>119</sup> Venter rejects this division and argues that constitution-making covers both the amendment and the revision.<sup>120</sup>

According to Bonime-Blanc, constitution-making is a "policy-making process" in which political elites determine the limitations of the government's powers and the rights and duties of citizens.<sup>121</sup> Gabriel L. Negretto defines constitution-making as:

... a temporary limited process in which a group of political actors engage in the drafting, discussion and approval of a written document that intends to regulate the machinery of government, the relation between individuals and public authorities, states of exception and amendment procedure.<sup>122</sup>

For Daniel J. Elazar constitution-making is a "pre-eminently political act" because our conception of constitutions depends on "the relationship between the contents of the constitutional document and the fundamental character or form of the polity it is designed to serve".<sup>123</sup> Bonime-Blanc argues that, at its best, constitution-making is an extensive effort at

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<sup>116</sup> This Soeharto's policy will be elaborated in Chapter III.

<sup>117</sup> Venter, above n 70, 19.

<sup>118</sup> Wheeler, above n 104, 50.

<sup>119</sup> Ibid.

<sup>120</sup> Venter, above n 70, 19.

<sup>121</sup> Bonime-Blanc, above n 64, 13.

<sup>122</sup> Gabriel L. Negretto, 'Constitution-Making and Institutional Design: The Reform of Presidentialism in the Argentine Constitution of 1994' (Paper presented at the meeting of the Latin American Studies Associations, The House Hilton Hotel, Chicago, Illinois, 24 – 26 September 1998) 3.

<sup>123</sup> Daniel J. Elazar, 'The Pre-eminently Political Act' in Keith G. Banting & Richard Simeon (eds), *The Politics of Constitutional Change in Industrial Nations: Redesigning the states* (1986) 232, 248.

social and political problem solving.<sup>124</sup> This definition, however, favors the elite and ignores the role of the people. Having acknowledged that policy-making deals with the rights and duties of people, as well as the powers of a government, Bonime-Blanc should provide more place for public involvement in the constitution-making process.

Indeed, Bonime-Blanc identifies that, “two major clusters of decisions” should be addressed in the process of constitution-making: the “political formula” and the “sociogovernmental formula”.<sup>125</sup> The ‘political formula’ refers to the shape, limits and functioning of the government, while ‘sociogovernmental formula’ consists of the relationship between government and society.<sup>126</sup> The sociogovernmental formula implies that any constitution-making process should widely include the people in order to properly cover this relationship between government and individuals. This does not mean that the people should have less concern for the political formula. Both formulae are intimately related.

With regard to the method of constitution-making, Rosen argues that it can significantly affect the progress of constitutionalism.<sup>127</sup> The form in which the constitution-making process is adopted may reveal the character of the future political configuration, particularly if the process takes place during a transition from an authoritarian rule.<sup>128</sup>

This thesis defines the 1999-2002 amendment process as Indonesia’s constitution-making process during the transition from Soeharto’s authoritarian rule. A democratic processes necessary to ensure the birth of a democratic Constitution, and therefore, to safe the Indonesian transition to democracy. The concept of transition is hereby elaborated.

### **3. Transitions from Authoritarian Rule**

According to Samuel P. Huntington, specific forms of authoritarian regimes are referred to as “one-party systems, totalitarian system, personal dictatorships, military regimes, and the like”.<sup>129</sup>

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<sup>124</sup> Bonime-Blanc, above n 64, 13.

<sup>125</sup> Ibid 13 – 14.

<sup>126</sup> Ibid.

<sup>127</sup> Richard A. Rosen, ‘Constitutional Process, Constitutionalism, and the Eritrean Experience’ (1999) 24 *North Carolina Journal of International Law & Commercial Regulation* 276 — 277.

<sup>128</sup> Bonime-Blanc, above n 64, 5 — 9.

<sup>129</sup> Samuel P. Huntington, *The Third Wave Democratization in the Late Twentieth Century* (1991) 13.

In defining 'transition', Bonime-Blanc refers to a period of reform from authoritarian to democratic forms of government.<sup>130</sup> An authoritarian regime has been defined by Juan J. Linz as a political system with:

... limited, not responsible, political pluralism; without elaborate and guiding ideology (but with distinctive mentalities); without intensive or extensive political mobilization...and in which a leader (or occasionally a small group) exercises power within formally ill-defined limits but actually quite predictable ones.<sup>131</sup>

By contrast to Linz's definition of an authoritarian regime, Bonime-Blanc argues that democratic regimes are:

... political systems with mostly unrestricted and responsible political pluralism; with a variety of political ideologies and mentalities; with some political mobilization and participation possible through political parties; and in which a leader(s) exercises power within formally well defined limits (constitutional ones) that are normally quite predictable.<sup>132</sup>

Guillermo O'Donnell and Phillippe C. Schmitter argue, however, that transitions which start from definite authoritarian regimes do not always end with democratic governments.<sup>133</sup> Instead, the transition may go toward an indefinite "something else", including, for example, the restoration of a new, and more likely harsher, type of authoritarian regime.<sup>134</sup>

Bonime-Blanc argues that four developments are required to ensure that the democratic government is the end-point of a transition: first, pluralization and mobilization of society from below; second, the liberalization of socioeconomic policies; third, the constitutionalization of political activity; and fourth, the liberalization and possible democratization of the bureaucracy.<sup>135</sup> These developments reflect Bonime-Blanc's view that transition is an evolutionary process.<sup>136</sup> It is not a "revolutionary transformation"<sup>137</sup> or the change of government

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<sup>130</sup> Bonime-Blanc, above n 64, 5 — 6.

<sup>131</sup> Juan J. Linz, 'An Authoritarian Regime: Spain' in Erik Allardt and Stein Rokkan (eds), *Mass Politics* (1970) 255.

<sup>132</sup> Bonime-Blanc, above n 64, 8.

<sup>133</sup> Guillermo O'Donnell and Phillippe C. Schmitter, 'Tentative Conclusion about Uncertain Democracies' in Guillermo O'Donnell, Phillippe C. Schmitter and Laurence Whitehead (eds), *Transition from Authoritarian Rule: Prospect for Democracy* (1986) 3.

<sup>134</sup> *Ibid.*

<sup>135</sup> Bonime-Blanc, above n 64, 6 — 8.

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.* 8.

within the same constitutional structure.<sup>138</sup> This is a narrower definition of transition. In wider sense, transition may happen through revolution, civil war or coup d'état.<sup>139</sup>

**Evolutionary and Revolutionary Transition.** Ralf Dahrendorf shares Bonime-Blanc's idea of evolutionary transition. He argues that transitions are:

... the controlled transformation of illiberal states into liberal ones. Transitions ... may be a response to more or less popular pressure, but they are carried out by the government of the day. Such governments generally undergo great changes as transitions continue. Although the effects of transitions may be revolutionary, the thread of continuity never is broken completely.<sup>140</sup>

In differentiating between this transition and revolution, the legal continuity theory of Hans Kelsen is relevant. For him, a revolution in the most general sense:

... occurs whenever the legal order of community is nullified and replaced by a new order in an illegitimate way, that is, in a way not prescribed by the first order itself.<sup>141</sup>

Kelsen describes a particular test for identifying this continuity: if the Constitution is changed according to its own provisions, then the state and its legal order remain the same.<sup>142</sup> It does not matter how fundamental the changes in substance are. If they are performed in conformity with the provisions of the Constitution, the continuity of legal system will not be interrupted.<sup>143</sup>

Peter Paczolay, although using the phrase "constitutional revolution", supports the definition of evolutionary transition of Bonime-Blanc.<sup>144</sup> Referring to Hungarian constitution-making at the end of 1980s, Paczolay argues that "constitutional revolution" means a preference for the superiority of law, instead of power and force.<sup>145</sup> In this regard, an effort was made to ensure that transitions "were not only legally prepared, but were also based on the existing Constitution and emphasis was placed upon the continuity of the existing legal system".<sup>146</sup>

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<sup>138</sup> Ibid.

<sup>139</sup> Ibid 5.

<sup>140</sup> Ralf Dahrendorf, 'Transitions: Politics, Economics, and Liberty' (1990) 13 *Washington Quarterly* 134.

<sup>141</sup> Kelsen, above n 87, 117.

<sup>142</sup> Ibid 117 — 119.

<sup>143</sup> Ibid.

<sup>144</sup> Peter Paczolay, 'Constitutional Transition and Legal Continuity' (1993) 8 *Connecticut Journal of International Law* 560.

<sup>145</sup> Ibid.

<sup>146</sup> Ibid 562.

I need to discuss the evolutionary and revolutionary concepts of transitions because, during the 1999-2002 constitution-making, one of the huge debates was whether a constitutional revolution was needed to renew the 1945 Constitution or a constitutional evolution through amendments was enough to reform the Constitution. I will further elaborate the debates on this issue in Chapters Four to Eight. In doing so, however, it is important to understand that this thesis focuses merely on the third stage of Bonime-Blanc's analysis, namely, the democratic "reordering and restructuring of political rules and institutions".<sup>147</sup> Finally, this thesis defines 'democratic constitution-making in transition' as the policy making process in which new written provisions are given formal constitutional status in a democratic way during a transitional period.

## **B. The Key Features of Constitution-Making**

This section elaborates four aspects of the process of constitution-making: (i) when it should occur; (ii) how the constitution-making should be conducted; (iii) who should be the constitution-making body; and (iv) how should public participation be organized. There is also the fifth aspect of what the Constitution should contain, but this aspect will be dealt with in Section C of this Chapter on the elements of a democratic Constitution.

One may argue that the third and fourth aspects on the constitution-making body and public participation should be inserted in the second aspect of how the constitution-making should be conducted. My answer to this is that this section is structured and discussed in this way because it allows me to clearly and carefully evaluate the 1999-2002 constitution-making process in a structured and competent manner. During this process the problems of the constitution-making body and public participation were consistently apparent and controversial, and therefore, should be seriously considered on their own.

### **1. When Constitution-Making should occur**

This question of when the constitution-making should occur is important as the 1999-2002 constitution-making process was colored by the discussions of this issue. At least two problems

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<sup>147</sup> Bonime-Blanc, above n 64, 7 — 8.

in relation to the timing of constitution-making arose in Indonesia: first, whether the transition from Soeharto's authoritarian regime was conducive to reform; and second, whether a specific schedule for making Constitution is necessary.

Robert A. Goldwin and Art Kaufman argue that making a Constitution is possible only at "certain extraordinary moments" in a nation's history.<sup>148</sup> Von Savigny argues that such a moment occurs when a nation has "reached its full political and legal maturity".<sup>149</sup> To conduct a constitution-making process before this maturity would be a "premature codification" and to do so afterwards would bring a country into an "act of futility".<sup>150</sup> Elster raises another point that that a constitution-making process ideally should be adopted in "maximally calm and undisturbed conditions".<sup>151</sup>

**Constitutional Moment.** In reality, however, both Savigny's 'political and legal maturity' requirement and Elster's 'calm and undisturbed conditions' are difficult to reach. Paczolay warns "it is extremely difficult to define the exceptional moments when a just Constitution can be drafted".<sup>152</sup> In fact, the momentum of a constitution-making process often occurs in a difficult and turbulent period.<sup>153</sup> Elster argues that constitutions are often written in "times of crises that invite extraordinary and dramatic measures".<sup>154</sup> Elster identifies eight events which trigger constitution-making: social and economic crisis; revolution; regime collapse; fear of regime collapse; defeat in war; reconstruction after war; creation of a new state; and liberation from colonial rule.<sup>155</sup> Taking the same view, McWhinney concludes that successful acts of Constitution codification almost consistently happen in, or immediately after, such difficult periods; or after periods of great public enthusiasm followed by public euphoria.<sup>156</sup> These are times when the constitution-making bodies find it easier to discover the nature of the public mood and to transform it into technical constitutional text.

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<sup>148</sup> Robert A. Goldwin and Art Kaufman (eds), *Constitution Makers and Constitution Making: The Experience of Eight Nations* (1988) 1.

<sup>149</sup> McWhinney, above n 111, 15.

<sup>150</sup> *Ibid.*

<sup>151</sup> Elster, above n 69, 394.

<sup>152</sup> Paczolay, above n 144, 30.

<sup>153</sup> Vernon Bogdanor, 'Conclusion' in Vernon Bogdanor (ed.), *constitutions in Democratic Politics* (1988) 380.

<sup>154</sup> Elster, above n 69, 347.

<sup>155</sup> *Ibid* 370 — 371.

<sup>156</sup> McWhinney, above n 111, 15.

For Bogdanor, political turmoil is necessary for reforming a Constitution, because the turmoil:

... comes to be pressure for constitutional change when the Constitution of a country ceases to be congruent with changing social values and political tendencies; ... in these circumstances, political parties will be able, with some degree of success, to adopt the reform of the Constitution into their programmes.<sup>157</sup>

Holding the same opinion as Bogdanor, Wheare argues that the feasibility of constitutional reform depends not only on the legal provisions that stipulate the method of change, but also the configuration of political and social groups.<sup>158</sup> As long as these groups are satisfied with the performance of the Constitution, constitutional reform will be unlikely.<sup>159</sup> Consequently, in a political turmoil situation, when the configuration of politics usually changes dramatically, the possibility of constitutional reform is greater.

For Huntington, crises are the perfect time to stimulate a wave of democratization. This wave is a transition from totalitarian to democratic regimes which happens within a specified period of time.<sup>160</sup> According to Huntington, there are three waves of democratization which have occurred in the modern world.<sup>161</sup> The first wave, from 1828 to 1926, was started by the American and French revolutions. The second wave, from 1943 to 1962, occurred after World War II. Whilst, the third wave had its roots in the end of the Portuguese dictatorship in 1974. Within fifteen years, approximately thirty other countries throughout Europe, Asia and Latin America had followed Portugal in replacing a dictatorial regime with a democratic one.<sup>162</sup>

Corresponding to the time periods specified in Huntington's 'wave of democratization', Elster identifies seven waves of constitution-making in modern political history.<sup>163</sup> The first wave occurred during 1780-1791, when the United States, France and Poland wrote their constitutions. The second took place during a period of revolution in Europe in 1848. The third wave began after the First World War. The fourth occurred subsequent to the Second World War. The fifth wave occurred in relation to the de-colonization process, mainly in the British and

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<sup>157</sup> Bogdanor, above n 153, 381.

<sup>158</sup> Wheare, above n 75, 23.

<sup>159</sup> Ibid.

<sup>160</sup> Huntington, above n 129, 15; Klaus von Beyme, *Transition to Democracy in Eastern Europe* (1996) 1 — 5. With quite similar analyses, Beyme counted differently and came up with the 'fourth wave of democratization'.

<sup>161</sup> Huntington, above n 129, 13 — 26.

<sup>162</sup> Ibid.

<sup>163</sup> Elster, above n 69, 368.



French colonies in the 1940s and the 1960s. The sixth took place after the fall of the dictatorships in Europe in the middle of the 1970s. The last wave took place when former communist countries in Eastern and Central Europe implemented new constitutions after the collapse of the Soviet empire in the late 1980s.<sup>164</sup>

Building on the Elster's analysis, I would argue that from the 1990s to early twenty first century, the eighth waves of constitution-making took place. Pointing to documentation on the University of Wuerzburg's website,<sup>165</sup> Saunders has counted more than sixty new constitutions that have been brought into effect within the last two decades.<sup>166</sup> The site also shows that, over the same period, more than twenty-six other constitutions have been substantially altered.<sup>167</sup> This group of sixty include South Africa after the apartheid regime; the Philippines after Ferdinand Marcos; and Nigeria and Thailand after the fall of military regimes in the 1990s. The Indonesian 1945 Constitution amendment process of 1999-2002, which is the focus of this thesis, should be included in this last constitution-making wave.

**Short Period.** Unfortunately, the euphoric atmosphere conducive to the constitution-making process usually lasts only a short time.<sup>168</sup> The art of constitution-making is to profit from such brief periods. To delay commencing the process too long is to risk losing both the stimulus for constitutional reform and also strong popular support for a people's Constitution to enable a "break with a dark past and bridge to a promising future".<sup>169</sup>

Thailand has faced this dilemma. There was a question of whether 1996-1997 was the right time for conducting the constitution-making or whether the enormous efforts involved would not have been better directed to the economic crisis.<sup>170</sup> Thailand's answer was that the economic and constitutional issues were "inextricably linked" in addressing the issue of good governance.<sup>171</sup> Prudhisana Jumbala argues that the economic crisis made the path of Thai

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<sup>164</sup> Ibid 368 — 369.

<sup>165</sup> <<http://www.uni-wuerzburg.de/law/index.html>>. This website however has not been accessible anymore. The other website which contains almost similar information is <<http://www.oefre.unibe.ch/law/icl/>> accessed on 5 December 2004.

<sup>166</sup> Cheryl Saunders, 'Women and Constitution Making' (Paper presented at the International Conference on "Women Peace Building and constitution-making"), Colombo, Sri Lanka 2 – 6 May 2002 1.

<sup>167</sup> Ibid 20.

<sup>168</sup> McWhinney, above n 111, 16.

<sup>169</sup> Ibid 42.

<sup>170</sup> Harding, above n 68, 239.

<sup>171</sup> Ibid.

constitutional reform much easier than was ever expected.<sup>172</sup> In fact, according to Harding, Chuan Leekpai's administration (1996-2001) successfully handled both the economic and governance problems.<sup>173</sup> Although Leekpai lost office after the January 2001 election, the constitutional reforms delivered under his administration will be noted in history as having been the "progenitor of fundamental reforms" in Thailand.<sup>174</sup>

Although constitution-making in transition is a difficult task, a country usually has no choice but to perform it. Per Strand argues that in "Transitions to democracy imply by definition an element of constitutional reform".<sup>175</sup> In the same way, Paczolay argues that:

... drafting and adopting a new Constitution for a society entering a new period of existence is grueling but at the same time it is also a solemn and exceptional task.<sup>176</sup>

In this problematic relationship between a transitional period and constitution-making, Elster identifies two basic paradoxes. First, constitution-making generally comes out in conditions that are likely to work against a constructive constitution-making process.<sup>177</sup> Second, important and substantial constitution-making is unlikely to happen except when a crisis is impending.<sup>178</sup> This paradox may be a blessing in disguise. The difficult circumstances during a transition period may create a critical situation allowing for different elements in a country to unite and address its problems, including making a better governance system through constitutional reform. As Peter H. Russell states, "a country must have a sense that its back is to the wall for its leaders and its people to have the will to accommodate their differences".<sup>179</sup>

**Specific Time Schedule.** In regulating the time for making the Constitution, one should consider that it should not be too long or too short. Too long a period of constitution-making adds to much uncertainty to the transition from authoritarian rule. Too long a period also increases the possibility of a country losing the constitutional 'moment' to make a democratic

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<sup>172</sup> Prudhisan Jumbala, 'Thailand: Constitutional Reform Amidst Economic Crisis' in Derek da Cunha and John Funston (eds), *Southeast Asian Affairs 1998* (1998) 207, 289. See also Suchitra Punyaratabandhu, 'Thailand in 1997: Financial Crisis and Constitutional Reform' (1998) XXXVIII:2 *Asian Survey* 161, 165.

<sup>173</sup> Harding, above n 68, 239.

<sup>174</sup> *Ibid.*

<sup>175</sup> Strand, above n 65, 54.

<sup>176</sup> Paczolay, above n 144, 21.

<sup>177</sup> Elster, above n 69, 394.

<sup>178</sup> *Ibid.*

<sup>179</sup> Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (2<sup>nd</sup> Ed, 1993) 106.

Constitution in transition, a moment which usually happens within a very short time period.<sup>180</sup> However, too short a period for making a Constitution is not wise either. The time allocated for making the Constitution should be flexible to allow the constitution-making body to conduct negotiations among the factions in the body and hold consultations with the public. There is, however, no exact formula to address the duration of such processes. The experience of different countries shows the variety of such schedules. The Thai Constitutional Drafting Assembly was allocated 240 days to draft the new Constitution,<sup>181</sup> while the South African Constituent Assembly had 2 years to prepare the Constitution draft.<sup>182</sup>

It is better to have specific time allocated for making the Constitution.<sup>183</sup> This is particularly important to give a clear mandate to the constitution-making body. The specific time helps the body to arrange its plan. In addition, the specific time puts pressure on the body to finish its work. If a specific period does not exist, it is possible that the body will keep postponing its work every time it faces difficulties in making constitutional decisions. The Indonesian constitutional reform in 1999-2002 experienced exactly this problem.<sup>184</sup> Therefore, Arato recommends that the constitution-making body, “should work with a time limit, so that no group can use delaying tactics to get its way”.<sup>185</sup>

A ‘better’ system needs a ‘better’ Constitution or, in the words of Howard, “new times require new constitutions”.<sup>186</sup> constitution-making bodies have to utilize the euphoric atmosphere following the political transition. The difficult situation has to be seen by the constitution-making bodies as an opportunity and challenge. In this regard, choosing the correct constitution-making body is one of the keys of success. Section 3 on constitution-making body will consider this issue in more detail.

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<sup>180</sup> McWhinney, above n 111, 16.

<sup>181</sup> Article 211 of the 1991 Constitution.

<sup>182</sup> Section 73 Subsection (1) of the Interim Constitution.

<sup>183</sup> Denny Indrayana, ‘Proses Reformasi Konstitusi Transisi (Pengalaman Indonesia dan Perbandingannya dengan Afrika Selatan dan Thailand)’, (2002) 7:2 *Kajian* 83, 90.

<sup>184</sup> Chapters Five and Six will elaborate on this issue.

<sup>185</sup> Elster, above n 69, 395.

<sup>186</sup> Howard, above n 67, 9.

Meanwhile, to utilize the transitional constitutional moment to make a Constitution, a democratic constitution-making process should be carried out. The following section will discuss this issue.

## **2. How a Democratic Constitution-Making Process should be conducted**

In this section, I will discuss two things: first, the importance of the process and; second, the stages of a constitution-making process.

### **a. Does Process Matter?**

This section argues that the process undertaken for constitution-making does matter. Vivien Hart argues that:

[h]ow Constitution is made, as well as what it says, matters. Process has become equally as important as the content of the final document for the legitimacy of a new Constitution ... A democratic Constitution is no longer simply one that establishes democratic governance. It is also a Constitution that is made in democratic process.<sup>187</sup>

Julius Ihonvbere believes that a democratic constitution-making process is “critical to the strength, acceptability, and legitimacy of the final product”.<sup>188</sup> In the same way, from the perspective of democratic theory, Arato is of the opinion that the kind of process that sets up the rules of the game for democratic politics can hardly be considered as irrelevant.<sup>189</sup> Furthermore, Rosen stresses that if the basic goal of a Constitution is to create a democratic political system, a constitution-making process has to be “as purely democratic as possible”.<sup>190</sup>

Nevertheless, Rosen implicitly admits that totally eliminating undemocratic elements in a constitution-making process is impossible. For him, there should be different treatment between the constitution-making process in an — already — democratic country and that in a country which has just started to learn how to be democratic. Rosen argues that:

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<sup>187</sup> Vivien Hart, *Democratic Constitution Making*, Special Report No. 107 of United States Institutes of Peace (2003) 1, 3 – 4.

<sup>188</sup> Julius Ihonvbere, ‘How to Make An Undemocratic Constitution: The Nigerian Example’ (2000) 21:2 *Third World Quarterly* 346.

<sup>189</sup> Andrew Arato, ‘Forms of Constitution-Making and Theories of Democracy’ (1995) 17 *Cardozo Law Review* 191.

<sup>190</sup> Rosen, above n 127, 304.

[i]n a society that already operates as a democracy, it might be possible to write a new Constitution without violating any democratic norms. However, a society in which democracy is the unrealized goal of the Constitution drafters, at some point in the process an element of non-democracy or “pre-democracy”, is inevitable.<sup>191</sup>

In supporting Rosen’s opinion, Arato even notes that to produce a democratic Constitution, not only does a country need democratic procedures, but it should also pay attention to the influence of anti-democratic elements.<sup>192</sup> Looking at the experience of the French when making the Constitution of the Fourth Republic of 1946, Arato concludes that in spite of its “ultra-democratic” constitution-making procedures - as the constitution-making process involved the passing of three referenda - just how democratic the Constitution of the Fourth Republic was is still in dispute.<sup>193</sup> This is due to the anti-democratic elements implied into the French Election Law that was applied to elect the French Constituent Assembly.<sup>194</sup>

The experience of the French has proven that a constitution-making process is a complicated issue. Even ‘ultra-democratic’ procedures give no warranty to the production of a democratic Constitution. However, this does not mean that a democratic process is less important. In contrast, this should be treated as a challenge in order to find a more democratic constitution-making process approach from the very beginning until the end.

In terms of constitution-making in transition from authoritarian rule, Bonime-Blanc argues that the constitution-making process is “central to a successful transition to democracy”.<sup>195</sup> This can indicate whether the transition to democracy will succeed or not. The battle between the supporters and the opponents of democracy will be clearly visible during this process. Obviously, if the supporters of democracy in the constitution-making body are stronger than their opponents, the successful transition to democracy has a greater likelihood of success.

**The Types of Constitution-Making Process.** Another argument as to why the constitution-making process matters is due to the fact that process influences the constitutional

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<sup>191</sup> Ibid 304 — 305.

<sup>192</sup> Arato, above n 189, 192.

<sup>193</sup> Ibid 193 — 194.

<sup>194</sup> Ibid.

<sup>195</sup> Bonime-Blanc, above n 64, 135.

outcomes.<sup>196</sup> On this issue, Bonime-Blanc categorizes the process into three types - the 'consensual', the 'dissensual', and the 'stillborn'.<sup>197</sup>

The consensual process is the best form of constitution-making process of the three. This is because consensual constitution-making has four characteristics. First, the consensual process requires the participation of all – or at least most – political groups.<sup>198</sup> Second, agreements are achieved by ensuring political responsibility guarding against dogmatic solution and the use of compromise.<sup>199</sup> Third, this compromise frequently leads to ambiguity in the articles.<sup>200</sup> Fourth, although this ambiguity often annoys one or more political groups, none of them completely disagree with the whole text and the majority still supports the Constitution.<sup>201</sup>

In the dissensual process, constitution-making is not inclusive of all political groups.<sup>202</sup> Dogmatic solutions are common and problems are not resolved adequately.<sup>203</sup> Accords are hard to attain, and even if reached, they often involve rejection of the opinions of one or more major political groups.<sup>204</sup> The dissensual Constitution most likely contains solutions palatable only to the dominant political groups.<sup>205</sup> Consequently, a potential threat to the new political system may increase, particularly from the groups which are excluded.<sup>206</sup>

It is also important to note that the decision-making process in the drafting period frequently faces obstacles. In spite of their best efforts, these obstacles may prevent the constitution-making body from producing a final draft Constitution. This is the third type of constitution-making: stillborn. It is a constitution-making “process that fails prior to approval and implementation”.<sup>207</sup> This failure occurs because the differences between political groups are too deep, so “that it is impossible to form a predominant coalition”.<sup>208</sup> The main characteristic of a

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<sup>196</sup> Ibid 147.

<sup>197</sup> Ibid 13 — 14, 142 — 144.

<sup>198</sup> Ibid 13.

<sup>199</sup> Ibid.

<sup>200</sup> Ibid.

<sup>201</sup> Ibid.

<sup>202</sup> Ibid.

<sup>203</sup> Ibid.

<sup>204</sup> Ibid.

<sup>205</sup> Ibid 13 — 14.

<sup>206</sup> Ibid 13.

<sup>207</sup> Ibid 14.

<sup>208</sup> Ibid 144.

stillborn process is that a Constitution is neither made, nor even if it is drafted, nationally approved.<sup>209</sup>

**Formula for a Constitution-Making Process.** Although there is agreement that process does matter, Elster argues that there is no literature that has succeeded in explaining the constitution-making process in a comprehensive way.<sup>210</sup> McWhinney believes that:

[t]hose who look for general rules or axioms as to constitutional drafting will find none. Instead, there are alternative conventions or models, depending on the particular national legal style on the predominance of particular schools of legal and constitutional philosophy at the particular time of drafting.<sup>211</sup>

Likewise, Wheare argues that “there is a great variety in the amending process prescribed in constitutions and it is not easy to find any common principles behind them”.<sup>212</sup> Additionally, Paczolay states that there is no single universal way of making constitutions.<sup>213</sup> Saunders argues that the distinct and specific circumstances surrounding the process affect how the process would be carried out.<sup>214</sup> In her opinion, therefore, constitutions should be made in “whatever way is acceptable to the community for whom the system of government is established”.<sup>215</sup> Consequently, the process differs from country to country, and therefore, Arato argues that “one easily runs into the problem of circularity when demanding constitutions be made democratically”.<sup>216</sup>

**General Formula.** Wheare argues that although the methods and principles may vary the constitution-making process should aim to safeguard four objectives.<sup>217</sup> First, the Constitution should be made only with deliberation.<sup>218</sup> Second, the people should have an opportunity to give their opinion during the process.<sup>219</sup> Third, in a federal system, no party acting alone should

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<sup>209</sup> Ibid.

<sup>210</sup> Elster, above n 69, 364.

<sup>211</sup> McWhinney, above n 111, 57.

<sup>212</sup> Wheare, above n 75, 121.

<sup>213</sup> Paczolay, above n 87, 30.

<sup>214</sup> Saunders, above n 166, 5.

<sup>215</sup> Cheryl Saunders, *Its Your Constitution* (2<sup>nd</sup> ed, 2003) 4.

<sup>216</sup> Arato, above n 189, 191.

<sup>217</sup> Wheare, above n 75, 121.

<sup>218</sup> Ibid.

<sup>219</sup> Ibid.

amend the powers of the units and of the federal government.<sup>220</sup> Fourth, individual or community rights - particularly those of minorities - should be protected.<sup>221</sup>

This thesis argues that despite there being no one formula for a democratic constitution-making process, the process matters. The Indonesian 1999-2002 constitution-making experience has shown that although the outcomes of the amendments are a more democratic Constitution, because the process lacked what have widely been accepted as key features of a democratic constitution-making process, the legitimacy of the amended 1945 Constitution was widely questioned. Chapters Four to Eight will further discuss this issue.

## **b. Stages of Constitution-Making**

Saunders is of the opinion that the constitution-making process can be divided into three stages: agenda setting; development and design; and approval.<sup>222</sup>

### **(1) Agenda Setting**

This stage involves the basic preparation of a constitution-making process and is critical.<sup>223</sup> It involves creating a terms of reference for the constitution-making body; developing constitutional principles on which the Constitution should be based; obtaining advanced agreement among the key figures; and deciding on an agreed approval procedure for the Constitution draft.<sup>224</sup>

**Pre-Constitutional Period.** In the transition from an authoritarian rule constitution-making process, it is advisable to begin the agenda setting with an election. This election is crucial because following the collapse of authoritarian regime, there are usually no legitimate bodies that can be trusted by the people to make a Constitution.<sup>225</sup> Accordingly, directly following the breakdown of an authoritarian regime, the new temporary government should prepare a “pre-

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<sup>220</sup> Ibid 121 — 122.

<sup>221</sup> Ibid 122.

<sup>222</sup> Saunders, above n 166, 5 — 13.

<sup>223</sup> Ibid 5.

<sup>224</sup> Ibid.

<sup>225</sup> Ibid 6.



constitutional period”.<sup>226</sup> Bonime-Blanc defines this period as the time after the turning point from the authoritarian regime to the new transitional government and before the constitution-making process.<sup>227</sup>

Bonime-Blanc argues that three conditions must develop during the pre-constitutional period.<sup>228</sup> One of the conditions is to hold a nationwide legislative election preceded by legalization of political parties and the making of electoral law.<sup>229</sup> The other two conditions are: (i) a process of “sociopolitical legalization” in which authoritarian controls on basic freedoms are revoked; and (ii) a process of “authoritarian illegalization” in which constraints and prohibitions are placed on the most arbitrary authoritarian mechanisms.<sup>230</sup> If any of these pre-constitutional period conditions are missing, the whole constitution-making process may be jeopardized.<sup>231</sup>

**Amendment or Renewal.** Further, the agenda setting should decide whether the outcome of the constitution-making process should be a brand new Constitution or amendments to the existing Constitution. Most of the countries in transition from authoritarian rule agree to draft a new Constitution, rather than to amend their old constitutions. On this issue, Paczolay argues that the adoption of a new Constitution would be preferred for four reasons.<sup>232</sup> First, the Constitution itself stipulates the urgency of adopting a new Constitution.<sup>233</sup> Second, a stronger downstream legitimacy would be better based on a “ceremoniously promulgated document”.<sup>234</sup> Third, if the adoption of the new Constitution is taken by referendum it will give the new document an unchallenged downstream legitimacy.<sup>235</sup> Finally, the new Constitution could remove the inconsistencies of the old Constitution.<sup>236</sup>

**The Thai Experience.** In Thailand, the agenda-setting stage began with the amendment of Article 211 of its 1991 Constitution, which provides for a constitution-making procedure. The amended article stipulated: the establishment of the Constitutional Drafting Assembly as an

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<sup>226</sup> Bonime-Blanc, above n 64, 139.

<sup>227</sup> Ibid.

<sup>228</sup> Ibid 140.

<sup>229</sup> Ibid.

<sup>230</sup> Ibid.

<sup>231</sup> Ibid.

<sup>232</sup> Paczolay, above n 87, 48.

<sup>233</sup> Ibid.

<sup>234</sup> Ibid.

<sup>235</sup> Ibid.

authorized institution to draft the Constitution; the selection process of the Constitutional Drafting Assembly membership; the approval of 240 days as the working period of the Constitutional Drafting Assembly; and the ratification mechanisms of the new Constitution.<sup>237</sup>

## (2) Development and Design

At this stage, the constitution-making bodies prepare a draft Constitution. In this drafting period, the mechanisms of decision-making and public consultation play a crucial role.<sup>238</sup> Public consultation will be further discussed in the next part of this chapter, but the decision-making formula is considered in this section.

**Decision-making formula.** Saunders argues that there are two main formulas for the decision-making: majority and consensus.<sup>239</sup> Both choices have advantages and disadvantages. Majority decision-making can be relatively faster in solving disagreement. However, it will be problematic if approval requires a special majority.<sup>240</sup> A decision which is made in the drafting stage may be useless in the approval stage. Meanwhile, the consensus formula is interesting since it creates the potential for harmony, but tends to require more time, especially if there is a minority militant group opposing the majority position.<sup>241</sup>

For Arato, consensus is preferable for making a Constitution to majority decision-making.<sup>242</sup> Indeed, he argues that consensus is one of the principles of the constitution-making process along with publicity, legal continuity and plurality of democracies.<sup>243</sup> Without giving special attention to striking a balance between consensus and the other principles, the “constitutional construction cannot succeed”.<sup>244</sup>

To stimulate consensus, it is crucial that the public be involved in the constitution-making process. This public participation opens the process to external opinion, which may help the

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<sup>236</sup> Ibid.

<sup>237</sup> Article 211 of the Thai Constitution of 1991.

<sup>238</sup> Saunders, above n 166, 5 — 13.

<sup>239</sup> Ibid 10.

<sup>240</sup> Ibid.

<sup>241</sup> Ibid.

<sup>242</sup> Arato, above n 189, 225 — 226.

<sup>243</sup> Ibid 224 — 228.

<sup>244</sup> Ibid 224.

political factions to reconsider their positions. According to Cass R. Sunstein, public involvement in this context plays the role of “external shock” to stop “polarization games”,<sup>245</sup> that is, the shock of external public opinion may prevent polarization among political factions, which may otherwise, over time, take more extreme positions.<sup>246</sup>

In respect to the public involvement, the popular access to the drafting process should be granted because the accessibility is a key principle in making a democratic Constitution.<sup>247</sup> It ensures a more open and transparent process.<sup>248</sup> However, Elster argues that the process should be balanced between secrecy and publicity.<sup>249</sup> For him, with “total secrecy, partisan interests and logrolling come to forefront, whereas full publicity encourages grandstanding and rhetorical overbidding”.<sup>250</sup> Elster further argues that the:

... secrecy of the debates is likely to have two consequences. On the one hand, it will tend to shift the center of gravity from impartial discussion to interest-based bargaining .... On the other hand, secrecy tends to improve the quality of whatever discussion does take place because it allows framers to change their mind when persuaded of the truth of an opponent’s view. Conversely, while public debate drives out any appearance or bargaining, it also encourages stubbornness, overbidding, and grandstanding in ways that are incompatible with genuine discussion.<sup>251</sup>

### (3) Approval

Approval is the last step in a constitution-making process. Its objective is to give “legal effect” to a Constitution.<sup>252</sup> It is crucial to select an effective approval procedure, because it will influence the downstream legitimacy of the Constitution.<sup>253</sup> However, Saunders argues that there is no specific form of approval.<sup>254</sup> Rather, approval will vary in accordance with the country’s conditions.<sup>255</sup>

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<sup>245</sup> Cass R. Sunstein, *Designing Democracy: What constitutions Do* (2001) 30.

<sup>246</sup> *Ibid.*

<sup>247</sup> Commonwealth Human Rights Initiatives, *Promoting a Culture of Constitutionalism and Democracy in Commonwealth Africa*, background paper to accompany CHRI’s recommendations to Commonwealth Health of Government Meeting 1999 (1999) 13.

<sup>248</sup> *Ibid* 12 — 13.

<sup>249</sup> Elster, above n 69, 395.

<sup>250</sup> *Ibid.*

<sup>251</sup> *Ibid* 388.

<sup>252</sup> Saunders, above n 166, 12.

<sup>253</sup> *Ibid.*

<sup>254</sup> *Ibid.*

An adequate approval procedure should provide various and anticipatory alternatives to avoid a deadlock which could lead to a constitutional crisis. This kind of crisis is dangerous, particularly when it occurs during the transition from authoritarian rule. The fragile conditions of transition will not be strong enough to cope with a systemic crisis.

Approval by the people in a referendum is one way of ratifying a Constitution, in addition to ratification by a representative body.<sup>256</sup> Saunders argues that the referendum “has symbolic significance and is likely to give a greater sense of ownership to the people at large”.<sup>257</sup> For Paczolay, the “ratification of a Constitution by popular vote would give it unchallenged legitimacy”.<sup>258</sup> Nevertheless, he further argues that a referendum is only appropriate in cases where there is the ratification of a new Constitution. However, in the case of a minor amendment, approval by parliament would usually suffice.<sup>259</sup> In addition, Saunders warns that a referendum without adequate public participation is “an empty gesture”.<sup>260</sup>

**The South African Experience.** In South Africa, the approval step was provided in article 73 of the Interim Constitution, which contained rules about “adoption of new constitutional context”. It adequately anticipated the potential-deadlock by preparing various and anticipatory approval methods. It provided that the constitutional draft prepared by the constitutional Assembly should at first gain approval of a majority of at least two-thirds of all its members. In case this could not be achieved, there was a second method: inviting opinions from a panel of constitutional experts before the Constitutional Assembly to make a decision. If this failed also, the third approval procedure would be applied, that is an approval of 60% of votes cast at a national referendum (after approval from the Constitutional Court agreeing that the draft was consistent with the principles of the Constitution). If this support could not be achieved in the referendum, there was the fourth approval attempt: a general election would be held to form a new Constitutional Assembly. The new Assembly would then have the task of approving the Constitution.<sup>261</sup>

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<sup>255</sup> Ibid.

<sup>256</sup> Ibid 12.

<sup>257</sup> Ibid.

<sup>258</sup> Paczolay, above n 87, 48.

<sup>259</sup> Paczolay, above n 144, 568.

<sup>260</sup> Saunders, above n 166, 12.

<sup>261</sup> Article 73 of the Interim Constitution

In reality, the Constitutional Assembly succeeded in approving the constitutional drafting using only the first method for two important reasons. First, South Africa had encouraged active popular participation in the constitution-making process. This had led to popular de facto acceptance of the constitutional draft.<sup>262</sup> Jeremy Sarkin feels that the:

... deadlock mechanisms ... were powerful incentives for reaching agreement ... it is equally true that the final Constitution reflects to a large degree an authentic participatory process.<sup>263</sup>

The second factor was a political configuration which supported the constitutional reform agenda. The African National Congress Party, chaired by Nelson Mandela, obtained 62% of seats in the Constitutional Assembly.<sup>264</sup> Therefore, this reformist party - which strongly supported the democratic constitution-making effort - needed only a little more support from other parties in order to obtain the two-third of votes needed to approve the Constitution.

**The Thai Experience.** Thailand has employed a similar method to South Africa for approving its Constitution. The draft Constitution had to be submitted to the Parliament for approval. If more than half of the Parliament members agreed, the draft would be presented to the King for ratification. However, if the Parliament disagreed, there was a second mechanism: a referendum.<sup>265</sup>

Nevertheless, as was the case in South Africa, Thailand ratified the draft successfully, without needing to invoke the deadlock mechanism. The draft prepared by the Constitutional Drafting Assembly had been well explained to the public and was, therefore, well-supported by the majority and was eventually ratified by the Thai Parliament.

### 3. Who the constitution-making body should be

This section will analyze constitution-making bodies from three perspectives: its legitimacy, its interests and the experience of other countries, particularly South Africa and Thailand. The

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<sup>262</sup> Further exploration of public participation in South Africa will be in Section B.4. on the importance of public participation.

<sup>263</sup> Jeremy Sarkin, 'The Drafting of South Africa's Final Constitution from a Human Rights Perspective' (1999) 47 *American Journal of Comparative Law* 86.

<sup>264</sup> Katharine Savage, 'Negotiating South Africa's New Constitution: An Overview of the Key Players and the Negotiation Process', Penelope Andrews and Stephen Ellman (eds), *Post-Apartheid constitutions: Perspectives on South Africa's Basic Law* (2001) 164.

legitimacy and interests are selected because the MPR had these two issues during the 1999-2002 constitution-making process. Choosing an appropriate constitution-making body is crucial toward creating a democratic Constitution. The choice will affect whether the outcome of the constitution-making process is accepted and perceived as legitimate. Carl Schmitt, quoted by Renato Cristi, argues that a Constitution is legitimate “when the power and authority of its constituent power on whose decision it rests, is recognized” by the people.<sup>266</sup>

**Types of Legitimacy.** John Elster identifies three types of legitimacy: upstream legitimacy; process legitimacy; and downstream legitimacy.<sup>267</sup> ‘Upstream legitimacy’ is related to the constitution-making body; ‘process legitimacy’ is related to the decision-making process of the constitution-making body; and ‘downstream legitimacy’ is related to a Constitution’s ratification.<sup>268</sup>

A Constitution can enjoy legitimacy, Elster considers, simply by being produced by a constitution-making body that came into being in a legitimate way.<sup>269</sup> There are a wide variety of alternatives for forming a legitimate constitution-making body. The choice among these, therefore, should be considered carefully. McWhinney warns that none of these alternatives will be value-neutral in their consequences.<sup>270</sup>

**Interest Classifications.** Another mandatory requirement for a constitution-making body is institutional independence. This is particularly important to avoid any interest which may interfere the constitution-making process. Elster divides the potential interests into three categories: personal, group and institutional.<sup>271</sup> The ‘personal interests’ of Constitution makers is a relatively minor issue.<sup>272</sup> It refers to the private advantage that an individual expects to derive from particular constitutional institution.<sup>273</sup> The issue of ‘group interests’ is, however, far

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<sup>265</sup> Article 211 the Thai Constitution of 1991.

<sup>266</sup> Renato Cristi, ‘The Metaphysics of Constituent Power: Schmitt and the Genesis of Chile’s 1980 Constitution’ (2000) 21 *Cardozo Law Review* 1749.

<sup>267</sup> John Elster, ‘Constitution-Making in Eastern Europe: Rebuilding the Boat in the Open Sea’, in J. Hesse (ed), *Administrative Transformation in Central and Eastern Europe* (1993) 178 — 179.

<sup>268</sup> *Ibid.*

<sup>269</sup> *Ibid* 178.

<sup>270</sup> McWhinney, above n 111, 27.

<sup>271</sup> Elster, above n 69, 376 — 380.

<sup>272</sup> *Ibid* 377.

<sup>273</sup> Negretto, above n 122, 6.

more significant.<sup>274</sup> Included in this category are the interests of political parties, territorial subunits or social economic corporations.<sup>275</sup>

Negretto notes that ‘institutional interests’ in constitution-making happens “when a body that participates in that process writes an important role for itself into the Constitution”,<sup>276</sup> for example, the executive or legislature.<sup>277</sup> In the case of constitutional amendment, the executives normally tries to keep (or increase) the independence of the executive from the legislative body, as well as increase its power.<sup>278</sup> Likewise, legislatures which become constitution-making bodies will try to balance the control of the executive, or increase the power of the legislative branch.<sup>279</sup>

The question of the designation of the constitution-making body needs be discussed, because throughout the 1999-2002 amendment process the MPR’s role as constitution-making body was constantly challenged by those who seek to form a Constitutional Commission. Chapters Four to Eight will discuss this further. Therefore, it is important to discuss these two alternatives – an expert commission and normal legislature – in more detail.

#### **a. Expert Commission**

An expert commission may also be named a Constitutional Commission or an “independent body”.<sup>280</sup> It may be comprised of any amount of experts deemed appropriate for effective decision-making. The membership should have the constitutional knowledge considered necessary. Current practice, however, has shown that expertise is not the sole criterion for the members of the commission.<sup>281</sup> To satisfy the representativeness issue, and to therefore increase its legitimacy, the Commission should be as inclusive as possible. It should, therefore, broaden its membership criteria to include representation by key communities (even at the expense of expertise).<sup>282</sup> Pointing to the Fiji experience, Saunders notes that two of the three

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<sup>274</sup> Elster, above n 69, 378.

<sup>275</sup> Ibid 379.

<sup>276</sup> Ibid 380.

<sup>277</sup> Negretto, above n 122, 6.

<sup>278</sup> Ibid.

<sup>279</sup> Ibid. The next section on normal legislature will further discuss this legislature’s institutional interests.

<sup>280</sup> Saunders, above n 166, 7.

<sup>281</sup> Ibid 8.

<sup>282</sup> Ibid.

members of the Constitutional Review Commission were chosen respectively from the indigenous Fijian and Indo-Fijian communities.<sup>283</sup> Similarly, in Thailand, of the total of ninety-nine members of the Constitutional Drafting Assembly, seventy six members were drawn from provinces and only the balance of twenty-three members were chosen from the category of 'expert'.

**Upstream Legitimacy problem.** Upstream legitimacy is a weak point for an expert commission, because the commission members are usually selected by the executive or legislature and are not directly elected by the people.<sup>284</sup> Consequently, a commission receives less legitimacy from the people, compared with a normal legislature. The legitimacy problem may become even worse if the people have no confidence in the selecting institution.

In a period of transition from authoritarian rule there may be no legitimate institutions to select members of an expert commission. Because of the bad experience in the past, neither the executive nor the legislature will be trusted by the people to select the commission. This problem can be solved by holding elections to form a legitimate executive or legislative body that could be directly followed by a democratic procedure for selecting the commission.

**Thailand's experience.** In Thailand, the expert commission, which was called the Constitutional Drafting Assembly, enjoyed strong upstream legitimacy. This was as a result of the semi-direct election by which it was formed. Ninety-nine members of the assembly were elected by the National Assembly through two mechanisms: election and university nominations.<sup>285</sup> The former mechanism was used to select seventy-six members representing the provinces, while the latter mechanism was applied to select the balance of twenty-three members representing experts.<sup>286</sup> Therefore, the Thailand's Constitutional Drafting Assembly should be classified as a 'hybrid' expert commission.

The selection mechanisms were stipulated in the amendments to Section 211 of the Thailand Constitution of 1991 and the Parliament passed the Constitution Amendment Bill in May 1996. Hajisalah named Section 211 as the "gateway for a political reform of Thailand" since it

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<sup>283</sup> Ibid.

<sup>284</sup> Bonime-Blanc, above n 64, 35.

<sup>285</sup> Section 211 of the 1991 Constitution.



provided the right for the Thai people to become actively involve in the constitution-making process.<sup>287</sup>

The seventy-six members (one for each province) were selected by the National Assembly from a list of ten candidates from each province who were previously elected in each provincial election.<sup>288</sup> Approximately 20,000 candidates throughout Thailand applied for the position.<sup>289</sup> Most of them were lawyers, political scientists, former members of parliament, retired bureaucrats or well-known local businessmen.<sup>290</sup> This whole election process took place over a short period of only 17 days (9—26 December 1996).<sup>291</sup>

The remaining twenty-three persons were selected by the National Assembly from the list of forty-five academics nominated by the universities.<sup>292</sup> To ensure the capacity of these experts in making the Constitution, only universities which offered the degree of political science, public administration or law were entitled to nominate academics candidates.<sup>293</sup> Among the forty-five academics each of the three fields were represented by fifteen candidates.<sup>294</sup> On 26 December 1996, the National Assembly screened and elected eight experts from law, another eight from political science and the remaining seven were chosen from public administration for the Constitutional Drafting Assembly.<sup>295</sup>

**Process Legitimacy.** If an expert commission can pass the upstream legitimacy test, the test of process legitimacy will be easier. Saunders argues that the advantage of an expert commission lies in two things: “quality of the draft Constitution” and “distance from political process”.<sup>296</sup> The enhanced quality will come from its members’ depth of understanding

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<sup>286</sup> Ibid.

<sup>287</sup> Alayas Hajisalah, ‘Thailand’, in Cheryl Saunders and Graham Hassall (eds), *Asia-Pacific Constitutional Yearbook 1997* (1999) 278.

<sup>288</sup> Harding, above n 68, 238. See also Alayas Hajisalah, *The New Constitution of the Kingdom of Thailand 1997: The People Constitution* <<http://www.muslimlawstudent.com/ssrthai/p1.php>> at 3 July 2002; Amara Raksataya, *The Making of the People’s Constitution* <<http://www.ids.ac.uk/ids/civsoc/final/thailand/tha6a.doc>> at 4 January 2003; Kanokkan Anukansai, *Role of Civil Society Movement and the Making of New Constitution in Thailand* <<http://www.ids.ac.uk/ids/civsoc/final/thailand/tha6b.doc>> at 4 January 2003.

<sup>289</sup> Hajisalah, above n 288.

<sup>290</sup> Ibid.

<sup>291</sup> Ibid.

<sup>292</sup> Ibid.

<sup>293</sup> Ibid.

<sup>294</sup> Ibid.

<sup>295</sup> Ibid.

<sup>296</sup> Saunders, above n 166, 8.

constitutional issues. This understanding is extremely important since drafting a Constitution is not an easy task. Even among constitutional experts the theory of constitution-making is still contested. On the other hand, Saunders also warns that experts may come up with too many constitutional alternatives. A lack of willingness to compromise amongst experts may create a serious possibility of deadlock.<sup>297</sup>

**Expert Commission Interests.** Saunders notes that an expert commission is more independent than representative bodies in it tends to stay away from group and institutional interests.<sup>298</sup> This is because the members of the commission are supposed to be free from political affiliation.<sup>299</sup> The independence from group interests is a key ingredient to the commission's ability to successfully draft a Constitution.<sup>300</sup> Further, the commission's independence from institutional interests is related to the nature of a commission as an *ad hoc* institution. A commission should dissolve itself prior to the implementation of the amended, or the renewed, Constitution that it was involved in drafting.

For McWhinney, however, the effect of a reduction of group interests in a commission may be merely theoretical.<sup>301</sup> This is because the relation between a Constitution and politics is always close<sup>302</sup> – as Friedrich says, the development of a Constitution is an inherently political process.<sup>303</sup> Therefore, a selected institution may influence a commission by electing its members based on their past opinion on constitutional issues.<sup>304</sup> In McWhinney's words:

[a]n expert commission, therefore, tends to become politically suspect, unless its members are selected on some genuinely independent, non-partisan basis, or unless its terms of reference are so precisely and narrowly defined in advance that it will be compelled to limit itself, in its work to a purely technical non-partisan, non-political function.<sup>305</sup>

**Thailand's Experience.** To maximize its Assembly's independence Thai law required that all candidates applying to become members of the Constitutional Drafting Assembly must be free

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<sup>297</sup> Ibid.

<sup>298</sup> Ibid 7 — 8.

<sup>299</sup> McWhinney, above n 111, 27 — 28.

<sup>300</sup> Saunders, above n 166, 9.

<sup>301</sup> McWhinney, above n 111, 27.

<sup>302</sup> Ibid.

<sup>303</sup> Friedrich, above n 83, 121.

<sup>304</sup> McWhinney, above n 111, 27.

of political affiliation.<sup>306</sup> Hajjilah argues, however, that this requirement was no guarantee that members of the Assembly would not be influenced by political parties.<sup>307</sup> Hajjilah further argues that the final selection by the National Assembly was vulnerable to political interference.<sup>308</sup> The parties in the National Assembly were likely to elect people who would write the Constitution that best suited their parties interests.<sup>309</sup>

Nevertheless there is evidence that in Thailand's experience the selection process reduced the effect of political interests. These reduced interests were indicated in the outcome of the Constitutional Drafting Assembly's work. Harding notes that while compromises had to be made, the Constitutional Drafting Assembly adopted a "zero tolerance" approach in respect to its basic constitutional objectives.<sup>310</sup> As a result, the Constitutional Drafting Assembly's constitutional draft imposed some restrictions and intense scrutiny upon government which affected the politicians in the National Assembly.<sup>311</sup> The National Assembly, therefore, approved the Constitutional Drafting Assembly's draft with some reluctance.<sup>312</sup>

**Downstream Legitimacy Problem.** Indeed Saunders notes that a draft of a Constitution prepared by the commission cannot immediately take effect.<sup>313</sup> Usually it must be submitted to a law-making body of some kind, whether a legislature or a popular referendum. This is different from a draft prepared by a normal legislature, which may be directly approved by the assembly or legislature itself.

Wheeler, therefore, argues that a commission is an "auxiliary device ... the main service of the commission has been research, identification of issues and education of the public".<sup>314</sup> Indeed, one way to solve the downstream legitimacy problem is to maximize public participation. In so doing, when the draft is submitted to the Parliament or referendum, the possibility of its adoption increases. A well-managed process of public involvement may result in the

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<sup>305</sup> Ibid 28.

<sup>306</sup> Hajjilah, above n 288.

<sup>307</sup> Ibid.

<sup>308</sup> Ibid.

<sup>309</sup> Ibid.

<sup>310</sup> Harding, above n 68, 239.

<sup>311</sup> Ibid.

<sup>312</sup> Ibid. See also William F. Case, 'Thai Democracy, 2001: Out of Equilibrium' (2001) XLI:3 *Asian Survey* 525, 530.

<sup>313</sup> Saunders, above n 166, 9.

<sup>314</sup> Wheeler, above n 104, 57.

acceptance of the constitutional draft by the people, this create public pressure on the Parliament to adopt the draft Constitution.

**The Thai Experience.** In Thailand, wide-ranging public participation increased the downstream legitimacy of the 1997 Constitution. The next section on the urgency of such participation elaborates on the Thai experience.

In addition to the widespread participation, another factor which contributed to the strong downstream legitimacy of the Assembly's draft was the approval procedure for the Constitution itself. This amended Section 211 of the Constitution which stipulated that Parliament merely had the authority to approve or reject the draft. Parliament did not have the authority to amend discrete aspects of the draft. Had Parliament rejected it, a public referendum would have been conducted.<sup>315</sup> In any event, the referendum was not needed. As a result of comprehensive public involvement, the people felt that they 'owned' the document.<sup>316</sup>

Having understood that there was actually some reluctance in Parliament to accept the draft,<sup>317</sup> the approval was more as a result of the pressure from the public than voluntary acceptance by Parliament. Jumbala argues that the draft was approved in the midst of fears that the draft's rejection would trigger further economic and political crisis, and therefore, would lead to a spiral of instability.<sup>318</sup> Indeed, Harding notes that a clear threat of another military coup haunted the approval process.<sup>319</sup>

**Closing.** This section on expert commission suggests that if the upstream legitimacy of an expert commission can be addressed, by establishing a democratic selection process (such as shown in Thailand) the process legitimacy will be improved and the commission has a better chance to complete its work relatively free from group and institutional interests. In addition, the chance to produce a democratic Constitution is enhanced when the process widely involves the public, and therefore, increases the downstream legitimacy of the constitution-making process.

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<sup>315</sup> Section 211 of the 1991 Constitution.

<sup>316</sup> Tan, above n 68, 38.

<sup>317</sup> Harding, above n 68, 239.

<sup>318</sup> Jumbala, above n 172, 265.

<sup>319</sup> Harding, above n 68, 239.

## b. Normal Legislature

**Principle of Flexibility.** McWhinney argues that choosing a normal legislature as a constitution-making body is based on the principle of ‘flexibility’.<sup>320</sup> This principle came from the French Revolutionary experience, where creating insurmountable barriers to the constitutional amendment process led to “an exercise in futility and an encouragement to the resort to force if all else fails”.<sup>321</sup> Therefore, it is more practical if the legislative body — which has the original task of producing law — is the one that has the constitution-making power.

However, McWhinney warns that granting this mandate to a legislative body will only be effective if “the constitutional system is already a going concern”<sup>322</sup> and if the constitutional change does not involve a radical restructuring of the state system.<sup>323</sup> In such a situation, a constitution-making process which involves a huge level of direct popular involvement, as through a constituent assembly, “may become not merely expensive and time-consuming but also functionally unnecessary or irrelevant”.<sup>324</sup>

Transition from authoritarian rule has a different nature to an already established constitutional system. During a constitution-making process in a period of transition, the principle of ‘flexibility’ could become the principle of ‘inflexibility’. This is because a normal legislature does not merely focus its attention on the process. The legislature should divide its concentration into other legislative roles. A lot of times during the transition, the task of normal legislature as constitution-making body may be destructive by conflicts between state institutions. If such conflict occurs, the constitution-making process may not become the priority of the legislature. The Indonesian 1999-2002 constitutional amendment process involved both inflexibility and institutional conflicts. Chapters Five and Six will elaborate on these issues further.

**Problem of Independence.** Independence is the weakest point of a normal legislative body. This is because, it is usually difficult to free a normal legislature from the interests of its various members. As a political institution, which consists of political parties’ representation, a

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<sup>320</sup> McWhinney, above n 111, 29.

<sup>321</sup> Ibid.

<sup>322</sup> Ibid 31.

<sup>323</sup> Ibid.

legislative body will be strongly affected by the political parties' interests in making a constitutional draft. These group interests may negatively impact upon the constitution-making process.

**The Institutional Interests problems.** Further, as an institution which will regulate itself in the Constitution, a legislative body will be heavily influenced by institutional interests. Elster argues that having a constitution-making body which also serves as an ordinary legislature will have three implications on the constitution-making process. These were confirmed in the constitution-making processes in Eastern Europe that took place following the collapse of the Soviet Empire.<sup>325</sup>

The first implication is that the legislative body will grant more power to the legislative branch at the expense of the executive and judiciary.<sup>326</sup> Except in Hungary, no country has implemented provisions that would strengthen the position of the executive in comparison with legislature.<sup>327</sup> Elster also acknowledges, however, that, except for Poland and Romania (where the constitutional courts decisions can be overruled by the legislative body) the other Eastern European countries have enjoyed the strong constitutional court adopted in their constitutions.<sup>328</sup>

The second implication is that unicameral and bicameral legislatures will be inclined to make, respectively, unicameral and bicameral constitutions.<sup>329</sup> For example, unicameral constitutions in Bulgaria, Slovakia and Hungary were produced by unicameral legislatures, while bicameral constitutions in Romania and Poland were created by bicameral legislatures.<sup>330</sup> The only exemption for this pattern is, however, the Czech Republic. In this country, a unicameral assembly created a bicameral legislature.<sup>331</sup>

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<sup>324</sup> Ibid.

<sup>325</sup> Elster, above n 69, 380.

<sup>326</sup> Ibid.

<sup>327</sup> Ibid.

<sup>328</sup> Ibid.

<sup>329</sup> Ibid 381.

<sup>330</sup> Ibid.

<sup>331</sup> Ibid.

The third implication is that the legislative body will often grant itself enormous powers to alter the Constitution.<sup>332</sup> For instance, it is not in the body's institutional interests to recommend that constitutional amendments be submitted to referendum.<sup>333</sup> This, again, was confirmed by the experience of constitution-making in Eastern European countries, except for Romania, where ratification by referendum is mandatory.<sup>334</sup>

Because of the danger of the group and institutional interests of a normal legislature distorting the constitution-making process, Elster argues that:

... to reduce the scope for institutional interests, constitutions ought to be written by specially convened assemblies and not by bodies that also serve as ordinary legislatures. Nor should the legislatures be given a central place in the process of ratification.<sup>335</sup>

**South Africa's Experience.** Unlike the experience in Eastern Europe, the South African experience shows that a legislature can succeed in drafting a democratic Constitution. One of the arguments which rationalize the success is that the legislature was not a "normal" one. There are at least five factors that contributed to the South African success: the 1994 democratic election which gave a strong upstream legitimacy to the legislature; the legislature which had specific responsibility as a Constitutional Assembly based on the Interim Constitution; the experts' support; the involvement of Constitutional Court in certifying the constitutional draft; and widespread public participation.

The following paragraphs will elaborate on each of the five factors in turn.

**Democratic Election.** One of the critical stages of South Africa's constitutional reform process was the adoption of the Interim Constitution on 27 April 1994.<sup>336</sup> On the same day, the first election in South Africa's history was peacefully concluded.<sup>337</sup> The Interim Constitution and the election were a "democratic breakthrough" which allowed the 1997 'final' Constitution to be

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<sup>332</sup> Ibid.

<sup>333</sup> Ibid.

<sup>334</sup> Ibid.

<sup>335</sup> Ibid 395.

<sup>336</sup> Cyril Ramaphosa, 'Negotiating a New Nation: Reflections on the Development of South Africa's Constitution' in Penelope Andrews and Stephen Ellman (eds), *Post-Apartheid constitutions: Perspectives on South Africa's Basic Law* (2001) 79.

<sup>337</sup> Ibid.

written with legitimacy.<sup>338</sup> Because of these Constitution and election, a strongly legitimate legislature was established; and the foundation to start a constitution-making process was in place. The African National Congress (ANC) and its allies underlined that “an unelected body could not claim to have requisite mandate from the electorate” to draft a Constitution.<sup>339</sup>

**Constitutional Provisions.** Pursuant to Section 68 of the Interim Constitution, the democratically elected National Assembly and the Senate became the Constitutional Assembly.<sup>340</sup> This clear constitutional basis was a strong mandate for this Assembly to carry out its ultimate mission, “to draft and adopt a credible and enduring Constitution which enjoys the support and allegiance of all South Africa’s people”.<sup>341</sup>

**Expert Support.** As set out in the Interim Constitution, the Constitutional Assembly established an Independent Panel of Constitutional Experts who was ‘recognized constitutional experts, not being members of Parliament or any other legislature and not holding office in any party’.<sup>342</sup> Besides its role as an important protection against deadlock in the approval stage,<sup>343</sup> the Panel also produced some supporting documents for the Constituent Assembly.<sup>344</sup> For example, the Panel distributed a paper on style and language for the new Constitution,<sup>345</sup> outlining criteria on how much detail the new Constitution should contain.<sup>346</sup>

**The Constitutional Court’s Certification.** The Interim Constitution stipulated that text of the new constitutional ‘shall comply with the constitutional principles’.<sup>347</sup> If a Constitution was adopted by the Constituent Assembly, but the Constitutional Court found that it did not conform to the constitutional principles, the Assembly was given an opportunity to change it and resubmit it to the court.<sup>348</sup> The thirty four principles with which the final Constitution had to

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<sup>338</sup> Ibid 80.

<sup>339</sup> Saras Jagwanth, ‘Democracy, Civil Society and South African Constitution: Some Challenges’ (Discussion Paper 65, Management of Social Transformation, UNESCO, 2003) 9.

<sup>340</sup> Section 68 (1) of the Interim Constitution.

<sup>341</sup> *Constitutional Assembly: Annual Report May 1994-1995* (1995) <[http://www.polity.org.za/html/govdocs/Constitution/ca/ANREPORT/Ca94\\_95.pdf](http://www.polity.org.za/html/govdocs/Constitution/ca/ANREPORT/Ca94_95.pdf)> at 12 October 2003.

<sup>342</sup> Section 72 Subsection (2) of the Interim Constitution. This panel consisted of seven members: Prof. MG Erasmus, Prof. J. Kruger, MP Sedibe-Ncholo, Adv I Semanya, Prof. J. Van Der Westhuizen, Adv Z Yacoob and Prof. C. Murray.

<sup>343</sup> Section 73 Subsection (3), (4) and (5) of the Interim Constitution.

<sup>344</sup> *Constitutional Assembly*, above n 341.

<sup>345</sup> Ibid.

<sup>346</sup> Ibid.

<sup>347</sup> Section 71 of the Interim Constitution.

<sup>348</sup> Section 71 in relation to Section 73 Subsection (6) of the Interim Constitution.



conform consisted of basic constitutional provisions, such as: constitutional supremacy and judicial review; an independent judiciary; the protection of the right to equality; separation of power with checks and balances; protection of human rights; and a division of powers between national and provincial governments.<sup>349</sup>

For Jagwanth, the Constitutional Court's certification of the draft Constitution was the South African way of making a compromise as to which body should have been charged with the task of drafting the Constitution.<sup>350</sup> On the one hand, it opened the way for the involvement of the political parties. Whilst on the other hand, the Court was required to certify the Constitution before it came into force.<sup>351</sup> This Court certification was a legal mechanism which prevented irrelevant groups and institutional interests from being incorporated inappropriately into the Constitution.<sup>352</sup>

In fact, the Court declined to certify the first submission and ordered the Constitutional Assembly to amend certain provisions.<sup>353</sup> Only with the second submission did the Court certify that the draft Constitution conformed to the principles.<sup>354</sup>

**Public Participation.** Widespread public participation was another factor which reduced the likelihood of group and institutional interests from contaminating the South African 'final' Constitution.<sup>355</sup> The public participation ensured that the Constitution was not drafted by an "isolated political elite".<sup>356</sup>

**Closing.** A legislature has a better chance to have a strong upstream legitimacy compared to an expert commission. However, a normal legislature is vulnerable because it can be contaminated by political parties' interests and the legislature's interests. South Africa's

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<sup>349</sup> Christina Murray, 'Negotiating Beyond Deadlock: From the Constitutional Assembly to the Court', in Penelope Andrews and Stephen Ellman (eds), *Post-Apartheid constitutions: Perspectives on South Africa's Basic Law* (2001) 105.

<sup>350</sup> Jagwanth, above n 339, 8 — 9.

<sup>351</sup> *Ibid* 9.

<sup>352</sup> Murray, above n 349, 120 — 121.

<sup>353</sup> Constitutional Court of South Africa, *Certification of the Constitution of Republic of South Africa* (1996) <<http://www.polity.org.za/html/govdocs/Constitution/cert.html>> at 12 October 2003.

<sup>354</sup> Murray, above n 349, 122.

<sup>355</sup> *Ibid* 112.

<sup>356</sup> *Ibid*.

experience shows that this vulnerability could be addressed through the involvement of Constitutional Court and widespread public participation.

#### **4. The Importance of Public Participation**

Public participation is very important in making a democratic Constitution, because it strengthens the people's ownership of the Constitution. The recommendations from Commonwealth Human Rights Initiatives to Commonwealth Heads of government Meeting 1999, for example, outlined twelve constitution-making principles which are closely related to the public participation: (i) legitimacy; (ii) inclusivity; (iii) empowerment of civil society; (iv) openness and transparency; (v) accessibility; (vi) continuous review; (vii) accountability; (ix) the importance of process; (x) the role of political parties; (xi) the role of civil societies; and (xii) the role of experts.<sup>357</sup>

Wheare argues that it is crucial that the people have a say in amending their Constitution.<sup>358</sup> For Rosen, people should not be ruled by constitutions which they do not understand.<sup>359</sup> The public involvement allows the Constitution to be declared as a "product of popular sovereignty of the peoples' will, rather than an expression of their rulers' interests".<sup>360</sup> Further, Ihonvbere argues that the participation will help to build ownership around the Constitution.<sup>361</sup> It will become a popular text which "the people will be willing to defend at all times".<sup>362</sup> Therefore, the involvement may contribute to strengthening national solidarity and a national identity.<sup>363</sup>

For Wheeler, the power "to make and change the fundamental law of the state" must not be too dependent on the constitution-making body.<sup>364</sup> Indeed, he further argues that the major procedural issue of constitution-making is to ensure popular control over the constituent power.<sup>365</sup> In Ihonvbere's words:

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<sup>357</sup> Commonwealth Human Rights Initiatives, above n 247, 8 — 18.

<sup>358</sup> Wheare, above n 75, 122.

<sup>359</sup> Rosen, above n 127, 277.

<sup>360</sup> *Ibid.*

<sup>361</sup> Ihonvbere, above n 188, 346 — 347.

<sup>362</sup> *Ibid.* 347.

<sup>363</sup> Rosen, above n 127, 299.

<sup>364</sup> Wheeler, above n 104, 58.

<sup>365</sup> *Ibid.*

[i]t is quite easy to make a really bad Constitution. All the state and its custodians need to do is treat the exercise as a private or secret process, consult no one or allow only minimal consultation, and aim for legal recognition rather than building popular legitimacy around the Constitution. Once such a process is followed, it can be guaranteed that the content of the so-called Constitution will be undemocratic and insensitive to the yearning of the majority of the society ...<sup>366</sup>

**Active and Inclusive.** Saunders argues that public consultation should fulfill at least two basic rules: active and inclusive contribution.<sup>367</sup> To be an active contribution, public consultation should begin “before the features of the new Constitution are effectively set”.<sup>368</sup> The consultation activities should go beyond just educating a passive public, and should make every attempt to actively engage the population in the constitution-making process.<sup>369</sup> The activities should be “interactive and empowering, encouraging people to make a constructive contribution to the process”.<sup>370</sup> Therefore, follow-up is crucial to show the people that their contributions have been considered seriously.<sup>371</sup>

Then, to have an inclusive public participation, strategies are needed to overcome the dominance of particular groups and to persuade the participation of other groups that are likely to be reticent.<sup>372</sup> Unfortunately, constitutional issues are matters which rarely gain widespread public interest.<sup>373</sup> Therefore, Wheeler argues that public apathy to the constitutional questions must be combated:<sup>374</sup> This requires that public participation must be focus; and electoral contests should not be held at the same time as the constitution-making process.<sup>375</sup> Further to this, Saunders argues that constitutional questions should be presented in a form which can easily be understood by the general public.<sup>376</sup> All types of media (television, print and radio) should be used, because different groups in society utilise different communication medium.<sup>377</sup>

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<sup>366</sup> Ihonvbere, above n 188, 348 — 349.

<sup>367</sup> Saunders, above n 166, 11.

<sup>368</sup> *Ibid.*

<sup>369</sup> Rosen, above n 127, 294.

<sup>370</sup> Saunders, above n 166, 11.

<sup>371</sup> *Ibid.*

<sup>372</sup> *Ibid.*

<sup>373</sup> Wheeler, above n 104, 61.

<sup>374</sup> *Ibid.*

<sup>375</sup> *Ibid.*

<sup>376</sup> Saunders, above n 166, 11.

<sup>377</sup> *Ibid.*

**The South African Experience.** In South Africa, the Constitutional Assembly's public awareness and education campaign was designed to educate the public on constitutionalism and basic human rights, as well as to elicit the views of the public on the substance of the new Constitution.<sup>378</sup>

Media campaigns incorporated the use of newsletters, television and radio – all bearing the title, *Constitutional Talk* – a telephone hot-line and an Internet home page (see details later in this section).<sup>379</sup> In addition, thousands of public meetings were held across the country, while sectoral meetings were conducted with about 200 organizations representing a number of diverse interest groups.<sup>380</sup> The group meetings were advertised extensively on television and radio.<sup>381</sup>

Indeed, radio is one of the most effective means of communication because it reaches people in both rural and urban areas (where 82 per cent of the population over 18 listen to the radio).<sup>382</sup> Over 10 million people a week listened to the Constitutional Assembly's show on the radio in one of eight of the country's eleven official languages.<sup>383</sup> The television campaign and the *Constitutional Talk* programmes were launched in thirty-seven editions which reached 34 per cent of television viewers.<sup>384</sup>

The Assembly's newsletter was produced fortnightly in eleven languages and distributed to 160,000 people.<sup>385</sup> A constitutional website was launched which contained all necessary information for understanding the process: minutes of meetings, constitutional drafts, opinions and submissions of the Constitutional Assembly.<sup>386</sup> The *Constitutional Talk* hot-line was set up to enable people to make submissions over the telephone; and to enable them to get an up-to-date briefing on constitutional discussions.<sup>387</sup> This service was available in five languages and

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<sup>378</sup> Murray, above n 349, 106.

<sup>379</sup> Commonwealth Human Rights Initiative, above n 247, 19.

<sup>380</sup> Jagwanth, above n 339, 9 – 10.

<sup>381</sup> Ibid 9.

<sup>382</sup> *Constitutional Assembly: Annual Report 1996* (1996) <[http://www.polity.org.za/html/govdocs/Constitution/ca/ANREPORT/Ca95\\_96.pdf](http://www.polity.org.za/html/govdocs/Constitution/ca/ANREPORT/Ca95_96.pdf)> at 12 October 2003.

<sup>383</sup> Ibid.

<sup>384</sup> Murray, above n 349, 107.

<sup>385</sup> Ibid.

<sup>386</sup> Commonwealth Human Rights Initiative, above n 247, 20.

<sup>387</sup> Ibid.

was used by 10,000 people.<sup>388</sup> In addition, for students, the working draft Constitution was also formulated into human rights comics; while for the visually impaired, tape-recorded and Braille-printed constitutions were available.<sup>389</sup>

The success of the campaign strategies were indicated in the more than 2 million submissions received by the Constitutional Assembly.<sup>390</sup> This was possible because, according to an independent survey, the wide-ranging campaign reached 73 per cent of adult South Africans (18.5 million people).<sup>391</sup> For Jagwanth, the successful public participation enabled the birth of a democratic new Constitution. She argues that, “one of the most important reasons for the success of the process was the Constitutional Assembly’s public awareness and education campaign”.<sup>392</sup> Further, the participation also increased awareness of the new Constitution, and created a popular sense of ownership of the text.<sup>393</sup>

**The Thai Experience.** In Thailand, public participation was laid down as one of the requirements established within Section 211 of the 1991 Constitution. This section stipulated that in making the Constitution, the Constitutional Drafting Assembly had to give special attention to the public opinion. Quoted by Jumbala, Bovornsak Uwanno argues that constitution-making is “all about decoding what the people are saying and producing a legal document out of them”.<sup>394</sup> In order to do this, the Assembly set up a special committee in each of the seventy-six provinces. Then, members of the Assembly traveled across the country to canvass and listen the opinions at local meetings organized by the Assembly in cooperation with civil society groups.<sup>395</sup> It was estimated that 850,000 people and at least 300 organizations turned up and participated in these meetings.<sup>396</sup>

Anukansai praised the role of the civil society groups who made the extensive participation possible.<sup>397</sup> These groups worked effectively to organize open public campaign on

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<sup>388</sup> *Constitutional Assembly: Annual Report 1996*, above n 382.

<sup>389</sup> Commonwealth Human Rights Initiative, above n 247, 20.

<sup>390</sup> *Constitutional Assembly: Annual Report 1996*, above n 382.

<sup>391</sup> Murray, above n 349, 107.

<sup>392</sup> Jagwanth, above n 339, 9.

<sup>393</sup> Siri Gloppen, *South Africa: The Battle over the Constitution* (1997) 266.

<sup>394</sup> Jumbala, above n 172, 273.

<sup>395</sup> *Ibid* 272 — 273.

<sup>396</sup> *Ibid* 273.

<sup>397</sup> Anukansai, above n 288.

constitutional issues at the same time as the Assembly discussed the issues.<sup>398</sup> They published submissions in the form of position papers and public letters; invited experts to attend the public hearings and comment on contents of the Constitution; and mobilized a mass movement to support the Constitution.<sup>399</sup> On 26 – 27 September, when Parliament was scheduled to vote on the Constitution, the groups organized public rallies around the country.<sup>400</sup> These rallies were an effective form of pressure which contributed to the Parliament's approval to the Constitution.

Another factor which developed the public's support of the Constitution was the active participation of the media.<sup>401</sup> Numerous television debates, dramas and news item were shown frequently and educated the public about constitutional issues.<sup>402</sup> Similarly radio and printed media gave special attention to the making of the Constitution.<sup>403</sup>

Because of this successful public participation, the 1997 Thai Constitution was credited as being a "popular Constitution"<sup>404</sup> and "people's Constitution".<sup>405</sup> Harding has acknowledged that this Constitution "represents the first concerted attempt to break the cycle" of the previous fifteen undemocratic Thai constitutions.<sup>406</sup>

### **C. The Elements of a Democratic Constitution**

This section will focus on considering what should be contained within a democratic Constitution? This discussion is significant to the analysis of whether the four amendments of the 1999-2002 have produced a more democratic Constitution compared to the original 1945 Constitution.

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<sup>398</sup> Ibid.

<sup>399</sup> Ibid.

<sup>400</sup> Ibid.

<sup>401</sup> Ibid.

<sup>402</sup> Punyaratabandhu, above n 172, 165.

<sup>403</sup> Anukansai, above n 288.

<sup>404</sup> Pinai Nanakom, 'Re-Making of the Constitution in Thailand' (2002) 6 *Singapore Journal of International and Comparative Law* 90, 90.

<sup>405</sup> Jumbala, above n 172, 273.

<sup>406</sup> Harding, above n 68, 236.

## 1. Democracy and Constitution

**Democracy.** Before proceeding, the term ‘democracy’ should first be defined. Debates on what ‘democracy’ means have been going on for centuries and will continue. There is, however, no one definition of democracy that is acceptable to all scholars.<sup>407</sup> Dahl argues that democracy has different interpretations for different people at different places and times.<sup>408</sup> This thesis does not presume to solve the debate. As a guide, however, democracy in this thesis is used in the sense as it is generally understood in Indonesian politics, that is “government of the people, by the people, and for the people”.<sup>409</sup>

For Bagir Manan, democracy in Indonesia can only be established by consistently applying the notion of ‘a state of law’ (the *negara hukum*) that is, (i) to apply the principle of constitutional government, which is the limitation of government powers through a Constitution; (ii) to have an independent and fair judicial system; (iii) to honor the principle of equality before the law; (iv) to guarantee the protection of human rights; and (v) to conduct a free, fair and just election.<sup>410</sup> Lubis in similar terms argues that there are three basic ingredients of *negara hukum*: (i) a guarantee of human rights protection; (ii) an independent and impartial judiciary; and (iii) strict adherence to the principle of legality.<sup>411</sup>

Lindsey argues that the concept of *negara hukum* is “a highly charged notion that has played a central role” in Indonesian legal and political system.<sup>412</sup> The meaning of *negara hukum* has been contested since 1945 when it was written to the elucidation of the 1945 Constitution.<sup>413</sup> It

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<sup>407</sup> For further debates on ‘democracy’ see for example: Robert A. Dahl, *A Preface to Democratic Theory* (1963); M.I. Finley, *Democracy Ancient and Modern* (1985); Giovanni Sartori, *Democratic Theory* (1965); Jack Lively, *Democracy* (1975); Robert A. Dahl, *Democracy in the United States: Promise and Performance* (1976); Robert A. Dahl, *Democracy, Liberty, and Equality* (1986); Giovanni Sartori, *The Theory of Democracy Revisited* (1987); Robert A. Dahl, *Democracy and Its Critics* (1989); Huntington, above n 129; Bernard Crick, *Democracy: A Very Short Introduction* (2002); Jan-Erik Lane and Svante Ersson (eds), *Democracy: A Comparative Approach* (2003); Robert Dahl, Ian Shapiro, and José Antonio Cheibub (eds), *The democracy Sourcebook* (2003).

<sup>408</sup> Robert A. Dahl, *On Democracy* (2000) 3.

<sup>409</sup> For further discussion on ‘democracy’ in Indonesia see for example: Herbert Feith, *The Decline of Constitutional Democracy in Indonesia* (1962); Moh. Mahfud, *Demokrasi dan Konstitusi di Indonesia: Studi tentang Interaksi Politik dan Kehidupan Ketatanegaraan* (1993); Eep Saefulloh Fatah, *Masalah dan Prospek Demokrasi di Indonesia* (1994); and David Bourchier and John Legge (eds), *Democracy in Indonesia, 1950s and 1990s* (1994)

<sup>410</sup> Manan, above n 29, 151 – 155.

<sup>411</sup> Todung Mulya Lubis, ‘The *Rechtsstaat* and Human Rights’ in Timothy Lindsey (ed) *Indonesia: Law and Society* (1999) 172

<sup>412</sup> Timothy Lindsey, ‘From Rule of Law to Law of the Rulers – to Reformation?’ in Timothy Lindsey (ed) *Indonesia: Law and Society* (1999) 13.

<sup>413</sup> *Ibid.*

referred to the Dutch notion of *rechtsstaat* as opposed to *machtsstaat*, that is, a state based on law rather than power.<sup>414</sup> For David Bouchier, in practice, however, the concept of *negara hukum* was not applied consistently. Bouchier referred to the mixed signals of Soeharto's administration which routinely mentioned that Indonesia was a *rechtsstaat* but at the same time the government rejected the doctrine of separation of powers,<sup>415</sup> which is a fundamental element of a democratic Constitution, as this thesis will argue later in this section.

**Do constitutions matter for democracy?** This question has left scholars divided. Some scholars argue that most countries have codified constitutions, but very few are democratic states. Vernon Bogdanor states for example:

... the vast majority of the ... members states comprising the United Nations have codified constitutions, although less than a third of these can fairly claim democratic credentials. The latter can ... be counted on one's fingers and toes.<sup>416</sup>

Wheare argues that the majority of the constitutions are either suspended or openly dishonored.<sup>417</sup> Conversely, Bogdanor felt that the United Kingdom, Israel and New Zealand lack codified constitutions, but nonetheless follow with extraordinary consistency and continuity what constitutional regulations they do have.<sup>418</sup>

This is an argument based on the "ineffectiveness of constitutions".<sup>419</sup> This argument points that having a Constitution is one thing whilst creating a democratic country is another. Opponents of constitutionalism have even concluded that "constitutions are otiose".<sup>420</sup> If regimes implement self-restraint, a written Constitution will be unnecessary, and if they do not then it is ineffective.<sup>421</sup> Therefore, Bogdanor concludes the existence of "constitutions are not, of course, confined to democratic states".<sup>422</sup>

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<sup>414</sup> Lubis, above n 411, 171 – 172.

<sup>415</sup> David Bouchier, 'Positivism and Romanticism in Indonesian Legal Thought' in Timothy Lindsey (ed) *Indonesia: Law and Society* (1999) 186.

<sup>416</sup> Vernon Bogdanor, 'Introduction' in Vernon Bogdanor (ed.), *constitutions in Democratic Politics* (1988) 3.

<sup>417</sup> Wheare, above n 75, 5 — 6.

<sup>418</sup> Bogdanor, above n 416, 3

<sup>419</sup> Finer, Bogdanor and Rudden above n 85, 2.

<sup>420</sup> Ibid.

<sup>421</sup> Ibid.

<sup>422</sup> Bogdanor above n 416, 3.



Further, according to Lane, the idea of a Constitution might not be compatible with the notion of democracy.<sup>423</sup> Lane divides constitutionalism into ‘strong’ versus ‘weak’ based on the “extent to which a state entrenches immunities and inertia”.<sup>424</sup> In a strong constitutional state there would be many immunities accompanied by a Constitution institutionalized as superior law, which would be protected by strong judicial review, so the Constitution would be difficult to change.<sup>425</sup> On the other hand, in a weak constitutional state “there would be less of immunities and not much of constitutional inertia in combination with only weak judicial review”.<sup>426</sup>

Strong constitutionalism clashes with democracy because there can be too many immunities and too much inertia towards social decisions.<sup>427</sup> Only weak constitutionalism would complement democracy by passing to it more stability in social decisions.<sup>428</sup> Holding the same opinion, Richard Bellamy Dario Catiglione states constitutionalism and democracy can appear to both contradict and support each other. On the one hand, constitutionalism refers to limiting and dividing powers, while democracy means “unified and unconstrained exercise”.<sup>429</sup> Likewise, Carlos Santiago Nino warns that:

[t]he marriage of democracy and constitutionalism is not an easy one ... Tensions arise when the expansion of democracy leads to a weakening constitutionalism, or when the strengthening of the constitutional idea entails restraint of the democratic process.<sup>430</sup>

Wheare highlights that democracy does not always produce constitutional government.<sup>431</sup> He said:

[i]f democracy means no more than universal suffrage or equality of conditions, it does not follow at all that it will produce constitutional government. Universal suffrage can create and support a tyranny of the majority or of a minority or of one man ... It is only if a democracy means liberty as well as equality that it can be expected with any confidence to produce constitutional government.<sup>432</sup>

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<sup>423</sup> Lane, above n 94, 263 — 264.

<sup>424</sup> Ibid 261.

<sup>425</sup> Ibid.

<sup>426</sup> Ibid 261 — 262.

<sup>427</sup> Ibid 263 — 264.

<sup>428</sup> Ibid 264.

<sup>429</sup> Richard Bellamy Dario Catiglione, ‘Constitutionalism and Democracy – Political Theory and the American Constitution’ (1997) 27:4 *British Journal of Political Science* 1.

<sup>430</sup> Carlos Santiago Nino, *The Constitution of Deliberative Democracy* (1996) 1 — 2.

<sup>431</sup> Wheare, above n 75, 205.

By contrast, according to supporters of constitutionalism, constitutions are not only a symbol of the political times of when they were adopted, but also systematically affect the course of public policy. For this group, constitutions have been regarded as providing a necessary framework for democracy. Democracy is the main idea underlying a Constitution.<sup>433</sup> In the context of transition to democracy, Bonime-Blanc argues that Constitution is “the legitimator of democracy. It represents the democratic prerequisite without which no democracy can exist”.<sup>434</sup>

Although acknowledging the tension between democracy and constitutions is real, the advocates of constitutionalism suggest one must not overstate their dissimilarities. In the issue of centrality of human dignity, for example, although disagreeing with the way to guard that value, both constitutions and democracies recognize the centrality of dignity.<sup>435</sup> Consequently, to an extent, the two theories should work hand-and-hand.<sup>436</sup> The mix of constitutionalism and democracy creates a reasonably effective but still limited system of government known as a constitutional democracy. For the supporters, the combination between the two notions is “a happy marriage of two valuable ideals”.<sup>437</sup> For them, constitutional democracy is a better form of government than “pure democracy” or “nondemocratic constitutional government”.<sup>438</sup>

Therefore, in responding to the ‘ineffective’ argument, its advocates argue that constitutional government is not synonymous with democratic government: one should differentiate between the two.<sup>439</sup> It is quite possible to find examples of constitutional government which are not democratic. Often authoritarian governments employ ‘façade constitutions’.<sup>440</sup> This happens, for example, in many developing countries. Although the governments of these countries have formally adopted constitutions, they generally ignore the principles of democratic constitutions, such as separation of powers and protection of human rights. Therefore, these countries may have constitutions, but their political systems are not constitutional. Indeed the twentieth

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<sup>432</sup> Ibid.

<sup>433</sup> John O. McGinnis and Michael B. Rappaport, ‘Our Supermajoritarian Constitution’, (2002) 80 *Texas Law Review* 705.

<sup>434</sup> Bonime-Blanc, above n 64, 13.

<sup>435</sup> Walter F. Murphy, ‘constitutions, Constitutionalism, and Democracy’ in Douglas Greenberg et al (eds), *Constitutionalism and Democracy: Transitions in the Contemporary World* (1993) 6.

<sup>436</sup> Ibid.

<sup>437</sup> Nino, above n 430, 1.

<sup>438</sup> Ibid.

<sup>439</sup> Wheare, above n 75, 206.

<sup>440</sup> Sartori classifies constitutions into nominal, real and façade constitutions, depending on whether they are unexecuted documents, effectively implemented blueprints or devices hidden behind dictatorial regimes.

century saw many countries live under such constitutions, but the constitutions were “treated with neglect or contempt”.<sup>441</sup>

Façade constitutions exist because constitutions, according to McWhinney, can be divided into ‘nominal’ and ‘normative’ constitutions.<sup>442</sup> ‘Nominal’ constitutions contain more rhetoric and symbolic elements, and mostly have a public relations function. This type of Constitution may be legally valid but not implemented. It is an unexecuted document.<sup>443</sup> Meanwhile, ‘normative’ constitutions have more functional and operational characteristics. These are the constitutions which in practice are fully activated and effective.<sup>444</sup> As a result, constitutions need to be more normative in order to ensure the birth of not only a constitutional, but also a democratic government.

It is the challenge for the advocates to ensure that constitutional governments will be democratic governments. Formally written constitutions have to be translated into constitutional practices. Moving a Constitution from a documentary stage to an institutional stage, however, is a difficult task involving many problems related to institutional design and judicial interpretation.<sup>445</sup> As a result, many constitutions remain simply as dead paperwork. The likelihood of success in transferring a Constitution from a ‘dead’ legal text into to a practical document depends on a variety of forces: politics, economic and social.<sup>446</sup> It also depends on the nature of the Constitution itself.<sup>447</sup> Lane argues that “complicated constitutions with contradictory institutions ... prove more difficult to implement than a simple compact constitutional document”.<sup>448</sup>

Finally, on the relation between democracy and Constitution, I would like to quote Dahl who argues that:

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<sup>441</sup> Wheare, above n 75, 5 — 6.

<sup>442</sup> McWhinney, above n 111, 9.

<sup>443</sup> Ibid.

<sup>444</sup> Ibid.

<sup>445</sup> Lane, above n 94, 211.

<sup>446</sup> Ibid 189.

<sup>447</sup> Ibid.

<sup>448</sup> Ibid.

[a] well designed Constitution might help democratic institution to survive, whereas a badly designed Constitution might contribute to the breakdown of democratic Constitution.<sup>449</sup>

## 2. Democratic Constitution

What is a democratic Constitution? Ann Stuart Diamond argues that the basic definition of a democratic Constitution is, “one which the will of majority prevails, or in which the majority rules”.<sup>450</sup> For Andreas Kalyvas, a democratic Constitution is a Constitution which should “embody democratic values and principles”.<sup>451</sup> In Jan Erik Lane words, a democratic Constitution is a ‘just’ Constitution.<sup>452</sup> Lane links his definition to John Rawls who defines a just Constitution as “a just procedure arranged to ensure a just outcome”.<sup>453</sup>

### a. No Single Formula

The above definitions of democratic Constitution are, obviously, just example. A definition of a democratic Constitution is different, as democracy has many different interpretation.<sup>454</sup> For Dahl there is no single structure of a democratic Constitution.<sup>455</sup> Even among countries which are considered democratic, “democratic constitutions come in a variety of styles and forms”.<sup>456</sup> The varieties, among others, range from whether the Constitution is written or unwritten, federal or unitary, unicameral or bicameral legislature, and presidential or parliamentary.<sup>457</sup> Therefore, for those who look for one formula of a democratic Constitution, Dahl warns that:

[a]ll constitutional arrangements have some disadvantages; none satisfy all reasonable criteria. From a democratic point of view, there is no perfect Constitution.<sup>458</sup>

Similarly, Wheare argues that “the constitutions of different countries show at once that people differ very much in what they think it necessary for a Constitution to contain”.<sup>459</sup> On these

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<sup>449</sup> Dahl, above n 408, 128.

<sup>450</sup> Ann Stuart Diamond, ‘Decent, Even Though Democracy’ in Robert A Goldwin and William A Schambra (eds), *How Democratic Is the Constitution* (1980) 21.

<sup>451</sup> Andreas Kalyvas, ‘Carl Schmitt and the Three Moments of Democracy’ (2000) 21 *Cardozo Law Review* 1547.

<sup>452</sup> Lane, above n 94, 217 — 218.

<sup>453</sup> John Rawls, *A Theory of Justice* (1972) 197.

<sup>454</sup> Dahl, above n 408, 3.

<sup>455</sup> *Ibid* 36.

<sup>456</sup> *Ibid* 119.

<sup>457</sup> *Ibid* 120 — 124.

varieties, Rawls is of the opinion that it depends on the social condition of where the Constitution is applied.<sup>460</sup>

In Wheeler's words:

[f]raming an "ideal" Constitution which any one or all of the states could adopt *in toto* is impossible. A Constitution like all human institutions must grow out of the history, the traditions, the peculiar problems, the felt needs of the political community.<sup>461</sup>

According to Ulrich K. Preuss:

[c]onstitutions are not all alike. They differ according to the tradition, physical, economic, and social conditions, world view, culture, and historical experience of a people which gives itself a Constitution.<sup>462</sup>

Further, the assessment of whether a Constitution is a democratic text or not may be different from person to person. The American Constitution is an example. For Stephen Breyer, the Constitution is a democratic document which creates a framework of: (a) democratic self-government; (b) dispersion of power; (c) individual dignity; (d) equality before the law; and (e) the rule of law.<sup>463</sup> But Dahl strongly disagrees. He employs "democratic standards" to explore whether the constitutional charter is "enable politically equal citizens to govern themselves".<sup>464</sup> Dahl concludes that the American Constitution is not all that democratic.<sup>465</sup> Dahl, therefore, argues that to make the American Constitution a model for the rest of the world is an illusion.<sup>466</sup>

## **b. Elements of a Democratic Constitution**

Despite the varieties on the formulation and the differences on the assessment on a democratic Constitution, Wheeler argues that there are "principles of sound constitutional structure" which

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<sup>458</sup> Ibid 140.

<sup>459</sup> Wheare above n 75, 46.

<sup>460</sup> Rawls, above n 453, 339.

<sup>461</sup> Wheeler, above n 104, xi.

<sup>462</sup> Ulrich K. Preuss, 'Patterns of Constitutional Evolution and Change in Eastern Europe' in Joachim Jens Hesse and Nevil Johnson (eds), *Constitutional Policy and Change in Europe* (1995) 95.

<sup>463</sup> Stephen Breyer, 'Our Democratic Constitution' (2002) 77 *New York University Law Review* 247.

<sup>464</sup> Robert A. Dahl, *How Democratic is the American Constitution?* (2001) 3 — 4.

<sup>465</sup> Ibid 110 — 139.

<sup>466</sup> Ibid 41.

may be implemented in different ways, but which “provide common guidelines to the development of modern constitutions”.<sup>467</sup>

I would argue that there are two essential elements which should be included in a democratic Constitution: separation of powers and protection of human rights. Lane argues “constitutionalism today would comprise at least two distinct set of institutions, namely: (a) human rights and (b) separation of powers institutions”.<sup>468</sup> Referring to S. Holmes, Preuss views that separation of powers and the guarantee of individual rights as “the main institutional devices” for a Constitution.<sup>469</sup>

Daniel S. Lev argues that constitutionalism is “a matter of distribution of power and authority”.<sup>470</sup> For Friedrich, the essence of constitutionalism is the division of power.<sup>471</sup> He further argues that by dividing power, constitutionalism provides a system of effective limitations upon governmental actions.<sup>472</sup> Indeed, according to Annen Junji, constitutionalism is by definition the limitation of political power by a Constitution.<sup>473</sup> Likewise, Lane defines constitutionalism as the “political doctrine that claims that political authority should be bound by institutions that restrict the exercise of power”;<sup>474</sup> and Scott Gordon argues that constitutionalism is “a political system that imposes constraints upon the exercise of political power”.<sup>475</sup> For McIlwain:

... in all its successive phases, constitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law ... the most persistent and the most lasting essentials of true constitutionalism still remains what it has been almost from the beginning, the limitation of government by law.<sup>476</sup>

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<sup>467</sup> Wheeler, above n 104, xi.

<sup>468</sup> Lane, above n 94, 62.

<sup>469</sup> Preuss, above n 462, 95.

<sup>470</sup> Daniel S. Lev, ‘Some Movements, Constitutionalism, and Human Rights: Comments from the Malaysian and Indonesian Experiences’ in Douglas Greenberg et al (eds), *Constitutionalism and Democracy: Transitions in the Contemporary World* (1993) 140.

<sup>471</sup> Friedrich, above n 83, 5, 25.

<sup>472</sup> Ibid 26.

<sup>473</sup> Annen Junji, ‘Constitutionalism as a Political Culture’ (2002) 11 *Pacific Rim Law & Policy Journal* 562.

<sup>474</sup> Lane, above n 94, 19.

<sup>475</sup> Scott Gordon, *Controlling the State: Constitutionalism from Ancient Athens to Today* (1999) 236.

<sup>476</sup> McIlwain, above n 72, 21 — 22.

Alongside the division of power, Walter M. Murphy argues that another central principle of constitutionalism is human rights.<sup>477</sup> Alan S. Rosenbaum argues that constitutionalism has evolved to mean “the legal limitations placed upon the rightful power of government in its relationship to citizens”.<sup>478</sup>

Indeed, for Lane, the basis of constitutionalism is both the limitation of the state versus society in the form of protection of human rights; and the implementation of the separation of powers within the state.<sup>479</sup> He argues that constitutionalism is:

... the political theory that underlines the rule of law limiting state sovereignty by means of institutions that guarantee separation of powers and citizens rights.<sup>480</sup>

This thesis argues that to achieve true constitutionalism a Constitution must include provisions that allow for control of political powers and protection of human rights. A Constitution without these two elements of constitutionalism would only be a lifeless document. Further arguments which support the two elements of a democratic Constitution are hereby elaborated.

### **(1) Separation of Powers**

The notion of separation of powers should be related to *De l'Esprit des Loix* of Montesquieu and *Two Treatises of Civil Government* written by John Locke. Another early and strong enunciation of the doctrine was argued by the founding fathers of the United States of America. George Washington warns, “The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism”.<sup>481</sup> Referring to Montesquieu, Gerhard Casper argues that separation of powers is a functional concept which is necessary to allow liberty: the absence of separation of powers promotes tyranny.<sup>482</sup> Casper’s opinion is reminiscent of James Madison’s idea that:

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<sup>477</sup> Murphy, above n 435, 3.

<sup>478</sup> Alan S. Rosenbaum (ed), *Constitutionalism: The Philosophical Dimension* (1988) 4.

<sup>479</sup> Lane, above n 94, 25, 62.

<sup>480</sup> Ibid 58.

<sup>481</sup> Arthur T. Vanderbilt, *The Doctrine of the Separation of Powers and Its Present-Day Significance* (1963) 4.

<sup>482</sup> Gerhard Casper, *Separating of Powers: Essays on the Founding Period* (1997) 9.

[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.<sup>483</sup>

Therefore, Bernard H. Siegan argues that government power should be separated so that “a combination legislative enactment, executive implementation, and judicial interpretation, no group or person will be able to impose its unchecked will”.<sup>484</sup> Referring to the American Constitution, Siegan outlined some examples of constitutional separation of powers: the Senate must consent by majority vote to major appointment made by the President; the President has the power to veto Congressional legislation however this can be overridden by a two-thirds vote of Congress; and the President appoints Supreme Court all federal judges, but again confirmation is needed from the Senate.<sup>485</sup>

**Judicial Review.** One of the important institutions of the separation of powers is the notion of judicial review. This institution has become increasingly popular. Lane notes that several new constitutions provide some kind of Constitutional Court that has the task of reviewing whether laws are in accordance with the Constitution.<sup>486</sup> Dahl, however, argues that the power of a Supreme Court to declare a legislation unconstitutional is “far more controversial”.<sup>487</sup> Dahl further argues that in making their review, the judges might be contaminated by their own ideology, biases and references.<sup>488</sup>

On the other hand, Rawls argues that judicial review is among the legitimate institutions that is necessary in a democratic Constitution to constrain potential abuses of the legislature.<sup>489</sup> Quoted by Freeman, Rawls, however, agrees that judicial review might become anti-democratic when it is, for example, used to make unnecessary decisions to overturn legitimately, enacted laws that are designed to promote the effective exercise of human rights.<sup>490</sup> Referring to Rawls’ view of “justice as fairness”, Joseph M. Farber argues that “judicial

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<sup>483</sup> Vanderbilt, above n 481, 4.

<sup>484</sup> Bernard H. Siegan, *Drafting a Constitution for a Nation or Republic Emerging into Freedom* (1994) 8.

<sup>485</sup> Ibid.

<sup>486</sup> Lane, above n 94, 129.

<sup>487</sup> Dahl, above n 464, 54 – 55.

<sup>488</sup> Ibid 55.

<sup>489</sup> Rawls, above n 453, 224, 228 – 234.

<sup>490</sup> Samuel Freeman, ‘Political Liberalism and the Possibility of a Just Democratic Constitution’ (1994) 69 *Chicago-Kent Law Review* 659 – 660.



review can be justified under certain circumstances as a means to protecting various fundamental political rights".<sup>491</sup>

Dieter Grimm argues that "judicial review is not inconsistent with democracy, neither is it indispensable for democracy."<sup>492</sup> Grimm further argues that:

[t]hose who take the opposite position and declare judicial review a necessary condition of democracy use to argue that democratic constitutions are of little or no value without an institution that guarantees government compliance with constitutional provisions.<sup>493</sup>

**The South African Experience.** D.J. Brand argues that in South Africa's 1996 Constitution, the principle of separation of powers was recognized with the establishment of a two-chamber parliament, namely the Assembly and Senate, as the legislative branch, a state President, a prime minister and cabinet as the executive and the judiciary, which was organized and appointed at national level, as the third branch of government.<sup>494</sup> Further, the Constitution established independent and impartial agencies designed for the purpose to strengthen democracy: the Public Protector; the Human Rights Commission; the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; the Commission for Gender Equality; the Auditor-General; and the Electoral Commission.<sup>495</sup>

With the adoption of the 1996 Constitution, South African constitutional law has replaced the concept of parliamentary sovereignty to usher in an era in which the Constitution is supreme.<sup>496</sup> The Constitutional Court is a new state institution created by the Constitution to "guard and protect constitutional supremacy".<sup>497</sup> On the nature of judicial review, the 1996 Constitution maintained the concept provided in the Interim Constitution. The Constitutional Court has the power to make "abstract review" on bills brought by the President or on laws brought to the Court by Members of Parliament.<sup>498</sup> By properly using the judicial review power, Margaret A.

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<sup>491</sup> Joseph M. Farber, 'Justifying Judicial Review' (2003) 32 *Capital University Law Review* 69.

<sup>492</sup> Dieter Grimm, 'Constitutional Adjudication and Democracy' (1999) 33 *Israel Law Review* 199.

<sup>493</sup> *Ibid.*

<sup>494</sup> D.J. Brand, 'Constitutional Reform' (2002) 3 *Cumberland Law Review* 4.

<sup>495</sup> Section 181 of the South Africa Constitution.

<sup>496</sup> Nicholas Haysom, 'Federal Features of the Final Constitution', in Penelope Andrews and Stephen Ellman (eds), *Post-Apartheid constitutions: Perspectives on South Africa's Basic Law* (2001) 547.

<sup>497</sup> *Ibid.*

<sup>498</sup> *Ibid.*

Burnham believes that the Constitutional Court will enable South Africa to assume its place among the pre-eminent constitutional democracies of the world.<sup>499</sup>

**The Thai Experience.** The Thai 1997 Constitution, despite having the monarchy as the fundamental basis of Thai constitutionalism, successfully strengthened the concept of separation of powers.<sup>500</sup> Further the Constitution created some independent agencies designed to monitor the government administration,<sup>501</sup> namely: Election Commission; a National Counter Corruption Commission; the Supreme Court's Criminal Division for Persons Holding Political Positions; the Ombudsman; the State Audit Commission; the National Human Rights Commission; the Constitutional Court; and the Administrative Courts.

## (2) Protection of Human Rights

In arguing that the adoption of protection of human rights into a democratic Constitution is essential, Muna Ndulo argues that:

[b]eyond the essential ingredients of a democracy, a democratic Constitution should be seen as a liberating document – one that not only limits the powers of the state and its institutions, but guarantees the kinds of liberties that will make the pursuit of happiness and self-fulfillment a reality for the people.<sup>502</sup>

In the same way, Lane argues that one of the normative criteria which should be satisfied by a just Constitution related to two different conceptions of justice: legal justice and social justice.<sup>503</sup> Legal justice implies providing for due process of law, equal protection and individual liberties.<sup>504</sup> Social justice refers to the distribution of income and wealth should be to everyone advantage.<sup>505</sup> In Rawls' words, legal justice is the notion that "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty to others".<sup>506</sup>

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<sup>499</sup> Margaret A. Burnham, 'Cultivating a Seddling Charter: South Africa's Court Grows Its Constitution' (1997) 3 *Michigan Journal of Race and Law* 58.

<sup>500</sup> Harding, above n 68, 240 – 241.

<sup>501</sup> Ibid 247 – 248.

<sup>502</sup> Muna Ndulo, 'The Democratization Process and Structural Adjustment in Africa' (2003) 10 *Indiana Journal of Global Legal Studies* 346.

<sup>503</sup> Lane, above n 94, 239.

<sup>504</sup> Ibid 227.

<sup>505</sup> Ibid 228 – 229.

<sup>506</sup> Rawls, above n 453, 60.

In regard to liberty and equality, Dahl argues that constitutional reform in America requires a reduction of “the vast inequalities in the existing distribution of political resources”.<sup>507</sup> This means that people must “posses the minimal resources in order to take advantage of the opportunities and to exercise their rights”.<sup>508</sup> Dahl further argues the democratic institutions that satisfy this principle of justice are the institutions of constitutional democracy which protect basic liberties, laws that guarantee fair equality of opportunity and a “property-owning democracy”.<sup>509</sup> Similarly, Rawls argues that to design a just procedure the “liberties of equal citizenship” should be protected by and incorporated into the Constitution.<sup>510</sup> These liberties include those of “liberty of conscience and freedom of thought, liberty of the person, and equal political rights.”<sup>511</sup>

In the other words, Franklin I. Gamwell argues that a democratic Constitution should stipulate private liberties and public liberties.<sup>512</sup> Private liberties cover the rights to life, bodily integrity and movement, personal property, and conscience; while the public liberties include the freedom of speech, freedom of the press, freedom to assemble and petition, due process, and equal protection of the laws.<sup>513</sup>

**The South African Experience.** Siri Gloppen argues that in the South African experience, the constitution-making process and outcomes reflects principles such as the human rights and distributive justice.<sup>514</sup> For Gloppen, social stability in South Africa would only be achieved when the Constitution adopts a “democratic social structure respecting individual human rights and distributing opportunities and social goods reasonably fairly among citizens”.<sup>515</sup>

The result of the constitution-making is a comprehensive Bill of Rights in the 1996 Constitution. These rights cover not only classic civil and political rights, but have an extensive commitment to socio-economic rights, which include: environmental rights, the rights to access land, housing, health-care services, food, water, and social security, children’s socio-economic rights

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<sup>507</sup> Dahl, above n 464, 156.

<sup>508</sup> Ibid 152.

<sup>509</sup> Ibid 274.

<sup>510</sup> Rawls, above n 453, 197.

<sup>511</sup> Ibid.

<sup>512</sup> Franklin I. Gamwell, ‘The Purpose of Human Rights’ (2003) 22 *Missipi College Law Review* 253.

<sup>513</sup> Ibid.

<sup>514</sup> Gloppen, above n 393, 58.

and educational rights.<sup>516</sup> On the question of whether socio-economic rights should be protected by a Constitution, Sunstein's answer is that it should.<sup>517</sup> He further argues that:

[a] right to minimal social and economic guarantees can be justified, not only on the ground that people in desperate condition will not lead good lives but also on the ground that democracy requires a certain independence and security for everyone.<sup>518</sup>

To strengthen the protection of human rights, Chapter 9 of the South African Constitution establishes a Human Rights Commission. This Commission has been given with the general mandate of protecting human rights. The functions of the Commission are to promote, monitor and assess the observance of human rights.<sup>519</sup>

These comprehensive Bill of Rights are a reflection of the socio-political condition after the apartheid regime. As Karen Cavanaugh argues that:

[r]epetition and emphasis regarding the rights of all people in South Africa clearly indicates a recognition of the inequalities in their history and a strong desire and willingness to make sure that history does not repeat itself, while providing for a progressive foundation for the new South Africa.<sup>520</sup>

Jeremy Sarkin concludes that the 1996 Constitution "further entrenches human rights as a cornerstone of South African democracy".<sup>521</sup>

**The Thai Experience.** Chapter III (Section 26 – 65) of the Constitution stipulates an "extensive litany of fundamental rights".<sup>522</sup> The chapter is further supplemented by Sections 236 – 247, which deal with the rights of accused persons during criminal processes, and Sections 199 – 200 which elaborate the investigation power of the National Human Rights Commission.<sup>523</sup> Like the South African Bill of Rights, the Thai human rights protections covers

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<sup>515</sup> Ibid.

<sup>516</sup> Sandra Liebenberg, 'Violation of Socio-Economic Rights: The Role of the South African Human Rights Commission' in Penelope Andrews and Stephen Ellman (eds), *Post-Apartheid constitutions: Perspectives on South Africa's Basic Law* (2001) 405.

<sup>517</sup> Sunstein, above n 245, 235.

<sup>518</sup> Ibid.

<sup>519</sup> Section 184(1) of the South African Constitution.

<sup>520</sup> Karen Cavanaugh, 'Emerging South Africa: Human Rights Responses in the Post-Apartheid Era' (1997) 5 *Cardozo Journal of International and Comparative Law* 297.

<sup>521</sup> Sarkin, above n 263, 85.

<sup>522</sup> Harding, above n 68, 252.

<sup>523</sup> Ibid.

both legal and social justice. Among the extensive rights, one right is clearly based on “historical experience” of regular military coup d’etat and stipulates the right of peaceful resistance to any unconstitutional act committed for the acquisition of power.<sup>524</sup>

**Conclusion.** Based on this literature review chapter, it is clear that there is no single formula for developing a democratic Constitution. However, during the constitution-making process, there are guiding principles that should be followed: First, a democratic constitution-making process should be arranged according to a specific time schedule. This process could become a golden moment for constitution-making if it is conducted during a transition from authoritarian rule and managed carefully. Second, the constitution-making body should be chosen carefully. The legitimacy and the interests of each constitution-making body, which may affect the process and the outcomes of the constitution-making, should be analyzed thoroughly before the decision about who the constitution-making body should be is made. Third, the basic agenda setting should be agreed in advance. This includes, for example, whether the Constitution should only be amended or revised. Fourth, public participation needs to be organized to involve as many people as possible. This participation is important in order to give the Constitution more legitimacy.

For the content of a democratic Constitution, two basic elements should be covered: separation of powers and protection of human rights. Without having adopted these two principles a Constitution would be easily become a ‘dead’ letter and ignored in daily politics.

Chapters Four to Seven explore how Indonesia conducted its Constitution amendments and outline the resulting amendments. Then Chapter Eight evaluates the process and the outcomes of the four amendments. Prior to these chapters, Chapter Three will consider Indonesian political condition to show why a constitutional reform is needed.

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<sup>524</sup> Section 65 of the Thailand Constitution.

**PART THREE:  
AUTHORITARIANISM IN  
THE 1945 CONSTITUTION**

## Chapter Three

### Soeharto's Authoritarianism and the Urgency for Constitutional Reform

The nation must not repeat the same mistake. It should learn the right lesson and get the right message from the experiences of both the New Order and the Old Order. It is clear that the 1945 Constitution contains within itself its own weaknesses that can be open to abuse, manipulation and exploitation. It is a recipe for dictatorship, and thus for disaster, for it does not provide a mechanism of effective control, for power sharing or power distribution, for separation of powers and thus for a system of checks and balances (Soedjati Djiwandono).<sup>525</sup>

This chapter provides the Indonesian setting prior to the amendments of the 1945 Constitution of 1999-2002. It is divided into two sections. Section A argues that President Soeharto's administration was an authoritarian regime. Section B argues that this authoritarianism was enabled by the 1945 Constitution, because it lacked provisions on separation of powers and protection of human rights. As I have argued in Chapter Two, these two concepts are key elements of a democratic Constitution. This chapter, therefore, concludes that the Constitution needed to be reformed to assure Indonesia's transition from authoritarian rule to democracy.

#### A. Soeharto's Authoritarian Order

Soeharto was formally confirmed as acting President in 1967 and as President in 1968, ruling until his resignation in 1998.<sup>526</sup> He had been in power, however, since 11 March 1966, when he received the *Supersemar*<sup>527</sup> decree from Soekarno, Indonesia's first President.<sup>528</sup> By this decree, Soekarno handed over his presidential powers to restore security and control the government to Soeharto.<sup>529</sup>

Soeharto named his administration the 'New Order' (*Orde Baru* or *Orba*), in contrast to Soekarno's administration, which was described as the 'Old Order' (*Orde Lama* or *Orla*). The

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<sup>525</sup> Soedjati Djiwandono, 'Constitutional Change a Must', *The Jakarta Post*, 9 June 1999.

<sup>526</sup> Article 4 of Provisional MPR Decree No. XXXIII of 1967 on the Revocation of Presidential Powers from President Soekarno; Provisional MPR Decree No. XLIV of 1968 on the Appointment of Soeharto as the Indonesian President.

<sup>527</sup> *Supersemar* is the abbreviation of *Surat Perintah Sebelas Maret* or the Letter of Instruction of Eleven March.

<sup>528</sup> Many books have been published about this transfer of power from Soekarno to Soeharto. For further information see I Gusti Agung Ayu Ratih, *Soeharto's New Order State: Imposed Illusions and Invented Legitimations* (Final Paper for Master of Arts in Southeast Asian Studies-History, University of Wisconsin, 1997) 2.

<sup>529</sup> Timothy Lindsey, 'Introduction: An Overview of Indonesian Law' in Timothy Lindsey (ed), *Indonesia Law and Society* (1999) 1.

New Order was initially presented as a correction to the authoritarian Old Order,<sup>530</sup> however, the reality was that Soeharto's New Order and Soekarno's Old Order were both authoritarian regimes. In R. William Liddle's words:

... since the late of 1950s, Indonesia has experienced two types of authoritarianism: the personal rule of President [Soekarno's] Guided Democracy until 1965 and the army-backed New Order of President [Soeharto].<sup>531</sup>

This chapter will concentrate on Soeharto's authoritarian regime, because his entire presidency based on the 1945 Constitution, which is the focus of this study. However, Soekarno's administration will also be examined to show that, when Soekarno applied the 1945 Constitution, his administration was also authoritarian, with the result that authoritarianism was deeply engrained in the Indonesian legal and political systems.

## 1. Indonesia under Soekarno: an Old Authoritarian Order

Soekarno's presidency started on 18 August 1945 and was formally revoked by a decree of MPRs (MPR *Sementara*, Provisional MPR)<sup>532</sup> in 1967.<sup>533</sup> Soekarno's presidency can be divided into four periods, each of which is marked by switching between constitutions: (i) from 1945 to 1949, based on the 1945 Constitution;<sup>534</sup> (ii) from 1949 to 1950, based on the 1949 Constitution; (iii) from 1950 to 1959, based on the 1950 Provisional Constitution; and (iv) from 1959 to 1966, again based on the 1945 Constitution.

**Commencement of the Old Order.** To understand that Soekarno's Old Order was more authoritarian when the 1945 Constitution was applied, the period of the Old Order should firstly be clarified.

There are three different views on the dates of Old Order period, that is, the period of Soekarno's direct personal rule. The first view, as argued by Mahfud, is that this period began

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<sup>530</sup> A. H. Nasution, *ABRI Penegak Demokrasi UUD 1945* (1966) 13 — 26.

<sup>531</sup> R. William Liddle, *Leadership and Culture in Indonesian Politics* (1996) 179.

<sup>532</sup> The Provisional MPR (MPR *Sementara* or MPRs) is the MPR established based on the Presidential Decree of 5 July 1959. It was temporary because none of its members were recruited through an election, but were appointed by President Soekarno. The establishment of 'permanent' MPR only started in 1973 after the New Order's first election in 1971.

<sup>533</sup> MPR Decree No. XXXIII of 1967 on the Revocation of Presidential Powers of President Soekarno.

<sup>534</sup> During this first period, however, the 1945 Constitution was not consistently applied. See Moh. Mahfud MD, *Amandemen Konstitusi Menuju Reformasi Tata Negara* (1999) 52.



when Soekarno proclaimed his Presidential Decree of 5 July 1959 which ordered (i) the dissolution of the *Konstituante*; (ii) the re-enactment of the 1945 Constitution; (iii) the abrogation of the 1950 Provisional Constitution; and (iv) the establishment within the shortest possible time of a Provisional MPR and a Provisional DPA.<sup>535</sup> It ended when Soeharto took over presidential powers from Soekarno in 1966.<sup>536</sup>

The second view, favored by Liddle, is that the Old Order started in 1950 and ended in 1965.<sup>537</sup> These fifteen years were divided into a period of parliamentary democracy (1950-1957), and a period of Guided Democracy (1959-1965).<sup>538</sup> Liddle, however, agrees with Mahfud's view that it was in the latter period that the Old Order became an authoritarian regime.<sup>539</sup>

For the two-year period from 1957 to 1959, Liddle refers to Lev,<sup>540</sup> who argues that the Guided Democracy effectively started in 1957 and ended in 1965. Lev is of the opinion that 1957 was when Soekarno's "Guided Democracy took form",<sup>541</sup> as Soekarno declared effective martial law with his 'state of War & Siege',<sup>542</sup> stipulating that all Indonesian territories were at war and thus in a state of emergency, and therefore, the military held dominant authority. Consequently, the martial law declaration "marked the end of liberal democracy".<sup>543</sup>

Next, Lindsey has put a third view that the Old Order started from 1945 and ended in 1966.<sup>544</sup> These periods encompassed all of the four periods of Soekarno's presidency. Lindsey argues that the first period of the Old Order (1945-1950) was the period of Indonesian war of independence against the Dutch.<sup>545</sup> Indonesia then experienced parliamentary democracy (1950-1957)<sup>546</sup> and then the presidential rule period from 1957 to 1965.<sup>547</sup> Lindsey also agrees

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<sup>535</sup> Presidential Decree No. 150 of 1959 on the Re-enacting of the 1945 Constitution. DPA is abbreviation for *Dewan Pertimbangan Agung* or Supreme Advisory Council.

<sup>536</sup> Moh. Mahfud MD, *Politik Hukum di Indonesia* (1998) 196.

<sup>537</sup> Liddle, above n 531, 181.

<sup>538</sup> *Ibid.*

<sup>539</sup> *Ibid.*

<sup>540</sup> *Ibid.*

<sup>541</sup> Daniel S. Lev, 'Between State and Society: Professional Lawyers and Reform in Indonesia', in Timothy Lindsey (ed), *Indonesia Law and Society* (1999) 233.

<sup>542</sup> Lev, above n 25, 12. See also Merle C. Ricklefs, *A History of Modern Indonesia: c 1300 to the Present* (2<sup>nd</sup> ed, 1993) 312 — 313.

<sup>543</sup> Harold Crouch, 'Indonesia' in Zakaria Haji Ahmad and Harold Crouch (eds), *Military-Civilian Relations in South-East Asia* (1985) 55.

<sup>544</sup> Lindsey, above n 529, 5.

<sup>545</sup> *Ibid.*

<sup>546</sup> *Ibid* 5 — 6.

that in this last period Soekarno controlled the Indonesian legal system and built his authoritarian regime.<sup>548</sup> Similarly, Adnan Buyung Nasution argues that Soekarno's concept of Guided Democracy was a "new political formula for a more authoritarian form of government".<sup>549</sup> Michael R.J. Vatikiotis similarly argues that by applying Guided Democracy, Soekarno wrapped himself in the "trappings of power".<sup>550</sup>

Although Mahfud, Liddle and Lindsey have difference of opinion as to when the Old Order period actually began, they agree that most of the Soekarno's presidency in the 1950's was a more democratic political configuration. They also agree that in the period following that – when he reapplied the 1945 Constitution and exercised what he called Guided Democracy – his administration was more authoritarian than other period of his rule.

**Guided Democracy.** Soekarno himself gave many definitions of Guided Democracy.<sup>551</sup> One of these contained in Provisional MPR Decree No. VIII of 1965 on Guided Democracy, showed how authoritarian the concept was. It was a mechanism by which all state institutional decision-making could be decided through a *musyawarah-mufakat* (discussion to reach unanimous agreement). If unanimous agreement could not be reached, issues were not to be put to vote, but rather should be given to a leader to decide. This meant Soekarno, as Chief-of-state, was given full authority to make decisions. In reality, Guided Democracy enabled President Soekarno to control all decision-making process.<sup>552</sup>

**Soekarno's Constitutional Breaches.** The broad authoritarianism of Guided Democracy allowed Soekarno to become the sole political power in the Old Order. In making decisions, he frequently breached the 1945 Constitution with impunity,<sup>553</sup> as the following three examples show.

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<sup>547</sup> Ibid 7.

<sup>548</sup> Ibid.

<sup>549</sup> Nasution, above n 14, 297.

<sup>550</sup> Michael R.J. Vatikiotis, *Indonesian Politics under Suharto: The Rise and Fall of The New Order* (3<sup>rd</sup> ed, 1998) 1.

<sup>551</sup> A. Syafii Maarif, 'Islam di Masa Demokrasi Liberal dan Demokrasi Terpimpin' (1988) 5 *Prisma*, 34. Maarif notes that Soekarno had at least 12 definitions for his Guided Democracy.

<sup>552</sup> Mahfud, above n 536, 143.

<sup>553</sup> The 1945 Constitution had three parts. They were: (i) the preamble, which contained the declaration of independence and the statement of basic principles; (ii) the body, which contained the 37 Articles accompanied by 4 transitional and 2 additional provisions; and (iii) the elucidation which expanded the general principles and individual Articles.

In 1960, Soekarno dissolved the DPR for rejecting a draft budget proposed by him.<sup>554</sup> This breached the 1945 Constitution which explicitly stated that ‘the position of the DPR is strong’ and it ‘cannot be dissolved by the President’ (Section VII of the Government System Elucidation). Further, the Constitution stipulated that in deciding the budget, the DPR ‘is in a stronger position than the government’ (elucidation to Article 23). Even if the DPR does not approve a draft budget, the President cannot dissolve the House. Instead, ‘the government shall adopt the budget of the preceding year’ (Article 23(1)).

Next, Soekarno intervened in the judicial power. Pursuant to Law No. 19 of 1964 on Judicial Power, he formally subordinated the courts to the presidential prerogative on questions of ‘national interest’, the meaning of which was at the discretion of Soekarno.<sup>555</sup> Article 19 of this Law stipulated that:

[f]or the sake of revolutionary interests, national and state dignity, or society’s interests which are paramount, a President may become involved in, or intervene in, judiciary cases.

Soekarno’s actions breached the principle of an independent judiciary provided in the 1945 Constitution (elucidation to Article 24 and 25), which stated that the ‘judicial power is independent. It is free from government interference’.

Another constitutional breach occurred when Soekarno accepted his appointment as ‘President for Life’ pursuant to a Provisional MPR decree. This decree stipulated that:

Dr. Ir. Soekarno (Mr. Soekarno), the great leader of the Indonesian revolution, who is currently the President of the Republic of Indonesia, with the blessing of the God shall hereby become the Indonesian President for life.<sup>556</sup>

This breached the Article 7 of the Constitution which stipulated that the President ‘shall hold office for a term of five years and shall be eligible for re-election’.

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<sup>554</sup> Presidential Decree No. 3 of 1960 on the Dissolution of the DPR.

<sup>555</sup> Daniel S. Lev, ‘Comments on the Course of Law Reform in Modern Indonesia’, in Tim Lindsey (ed), *Indonesia: Bankruptcy, Law Reform & the Commercial Court* (2000) 80.

<sup>556</sup> Article 1 MPR Decree Number III of 1963 on the Appointment of the Great Leader of the Indonesian Revolution, Mr. Soekarno to be a President for Life.

**Shortcomings of the 1945 Constitution.** These breaches may suggest that Soekarno's authoritarianism did not come from the 1945 Constitution but from his willingness to breach the 1945 Constitution. My view is, however, that the shortcomings in the 1945 Constitution contributed to the breaches.

In the two earlier cases, the breaches were possible since there were no articles in the body of the 1945 Constitution which expressly prohibited them. Both the prohibitions on dissolving the DPR and the principle of independent judiciary only appeared in the elucidation of the Constitution. It would have been appropriate if the prohibition and the principle had appeared in the body of the Constitution, because it would have had stronger binding power.<sup>557</sup> In the case of the President for life, it would have been better if Article 7 of the Constitution had clearly stipulated how many times a President could be re-elected.

## **2. Indonesia under Soeharto: a New Authoritarian Order**

Despite the appointment of Soekarno as President for life, Soeharto effectively replaced Soekarno in 1966 and the New Order substituted the Old Order at the same time. Soekarno's 'Guided Democracy' was thus replaced with Soeharto's '*Pancasila* Democracy', drawing on the *Pancasila* idea developed by Soekarno, and found in the preamble to the Constitution. The latter is defined by Hans Antlov as "political rule through consultation, taking into consideration belief in God, a united Indonesia, humanitarianism and justice".<sup>558</sup> Antlov argues that the *Pancasila* Democracy was:

... authoritarian; opposition is not necessary since decisions are made in consensus. Political unity and order is more important than pluralism and accountability. The leader is the paternal figure that maintains political order, economic prosperity and social harmony.<sup>559</sup>

Accordingly, *Pancasila* Democracy was, in reality, similar to the Guided Democracy. Both systems depended on their authoritarian leaders: Soeharto and Soekarno and both relied on

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<sup>557</sup> The point that the body has stronger binding power than the elucidation is further elaborated in section B point 7 in this chapter.

<sup>558</sup> Hans Antlov, 'Demokrasi *Pancasila* and the Future of Ideology in Indonesia' in Hans Antlov and Tak-Wing Ngo (eds), *The Cultural Construction of Politics in Asia* (2000) 205.

<sup>559</sup> *Ibid* 205 — 6.

the same ideological formulation in the Constitution. Indeed, the undemocratic conditions of the New Order described by Antlov could also be applied to the Old Order.

The following sections will consider in more detail part how authoritarian Soeharto's New Order regime was. Huntington in Chapter Two has argued that specific forms of authoritarian regimes are referred to as one-party system, personal dictatorship, and military regime.<sup>560</sup> The following sections will argue that Soeharto's administration fits all of these forms.

### a. Soeharto's One Party System

The government tightly controlled the New Order political party system. From the early 1970s to 1998, only three parties had been permitted to exist in Indonesia: Golkar,<sup>561</sup> the PPP<sup>562</sup> and the PDI.<sup>563</sup> The latter two parties were the result of a government-sponsored "forced fusion"<sup>564</sup> of the nine parties in existence prior to the 1971 election, the first election under the New Order. Although Golkar formally was not a political party but merely a 'functional group', this section will argue that, in practice, Golkar was the one and only 'real party' during the New Order regime.

In order to tighten control over the parties, Article 14 (1) of Law No. 1 of 1985 on the Political Parties, authorized the President to dissolve any party not compatible with state goals. Further, according to Article 2 (1) of the same law, political parties had to accept *Pancasila*, the philosophy of the state, as their sole foundation (*asas tunggal*). Vatikiotis argues that this control through the 'sole foundation' principle was, "the New Order's effective containment of society. This entailed neutering all political parties, channeling Islam through state-controlled institutions".<sup>565</sup>

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<sup>560</sup> Huntington, above n 129, 13.

<sup>561</sup> Golkar is the abbreviation of *Golongan Karya* or Functional Group.

<sup>562</sup> PPP is the abbreviation of *Partai Persatuan Pembangunan* or United Development Party. The PPP was made up of Islamic parties: *Nahdlatul Ulama*, Parmusi (*Partai Muslimin Indonesia*, Indonesian Moslems Party), PSI (*Partai Serikat Islam*, Islamic Association Party) and Perti (*Pergerakan Tarbiyah Islamiyah*, Islamic Education Movement).

<sup>563</sup> PDI is the abbreviation of *Partai Demokrasi Indonesia* or Indonesian Democratic Party. The PDI was comprised of nationalist and Christian parties: the PNI (*Partai Nasionalis Indonesia*, Indonesian Nationalist Party), Parkindo (*Partai Kristen Indonesia*, Indonesian Christian Party), *Partai Katolik* (Catholic Party), Murba (this literally means the lower class, a socialist party) and IPKI (*Ikatan Pendukung Kemerdekaan Indonesia*, League for the Upholding of Indonesian Independence).

<sup>564</sup> Liddle, above n 531, 189.

<sup>565</sup> Vatikiotis, above n 550, 95.

**Soeharto's Golkar Party System.** The weight of government control, however, was different to the three parties. The control over the PPP and PDI was tighter than in the case of Golkar which soon became a state political party closely linked to the Indonesian military.<sup>566</sup> Soeharto's government helped Golkar's performance and as shown in Table 1, Golkar was undefeated in all of the New Order elections: 1971, 1977, 1982, 1987, 1992 and 1997.

**Table 1 The New Order's General Election Results 1971—1977** <sup>567</sup>

Year	Golkar		PPP		PDI	
	% of seats	% of votes	% of seats	% of votes	% of seats	% of votes
1971	66	59	27	26	8	9
1977	64	56	28	27	8	8
1982	60	64	24	28	6	8
1987	75	73	15	16	10	11
1992	70	68	16	17	14	15
1997	76	75	21	22	3	3

**Monoloyalty of Civil Servants.** One of the mechanisms to helped Golkar win so consistently was an obligation for public sector employees to support Golkar.<sup>568</sup> All civil servants were automatically members of the Korpri,<sup>569</sup> an institution that was associated to Golkar;<sup>570</sup> and since the early 1970s all have been required to sign a letter giving their 'monoloyalty' to Golkar.<sup>571</sup> Those who declined were classified as committing an act of political disloyalty and this was ground for dismissal.<sup>572</sup>

**Floating Mass.** Another concept that assisted Golkar was the so-called the 'floating mass'.<sup>573</sup> This concept de-politicized rural people by closing down party branches below the regency (a provincial sub-division) level.<sup>574</sup> It significantly limited the capacity of the two legal parties – PPP and the PDI – to reach their constituents. However, because Golkar claimed that officially it was not a political party, this floating mass rule did not limit Golkar's campaign at all. Golkar

<sup>566</sup> Andrew MacIntyre, 'Indonesia', in Ian Marsh, Jean Blondel, and Takashi Inoguchi (eds), *Democracy, Governance, and Economic Performance: East and Southeast Asia in the 1990s* (1999) 263.

<sup>567</sup> Ibid 267.

<sup>568</sup> V. Silaen, 'Korpri-Golkar, Pemilu 1997, dan Demokrasi' (1997) 26 *Analisis CSIS* 162 — 167.

<sup>569</sup> Korpri is the abbreviation of *Korps Pegawai Republik Indonesia* or Indonesian Civil Servants Corps.

<sup>570</sup> Lev, above n 555, 84.

<sup>571</sup> K.E. Ward, *The 1971 Election in Indonesia: An East Java Case Study* (1974) 34.

<sup>572</sup> Ibid.

<sup>573</sup> Antlov, above n 558, 206.

<sup>574</sup> Loekman Soetrisno, 'Current Social and Political Conditions of Rural Indonesia', in Geoff Forrester (ed), *Post-Soeharto Indonesia Renewal or Chaos* (1999) 164.

was able to use the local officials to mobilize votes and run de facto campaigns. This was of huge significance for Golkar's victories since the greater parts of the population lived in rural villages.<sup>575</sup>

**Financial Resources.** Another variable that contributed Golkar's victories was the systematically unequal distribution of financial resources among the parties.<sup>576</sup> All political parties accepted public funding to support their activities. The PPP and PDI depended heavily on this support to fund their campaigns. To raise the support of business, however, was not an easy task for the two parties, particularly given that businessmen understood that the two official parties had no chance of winning the elections.<sup>577</sup> By contrast, Golkar enjoyed economic support from many sources including the slush funds managed by shadowy social foundations that collected money from business groups with close connections to the government.<sup>578</sup>

**Media Access.** Similar to the problem of unequal financial resources was the difference of access among political parties to the media.<sup>579</sup> One example was the coverage of TVRI,<sup>580</sup> the state-owned television station. According to one survey conducted TVRI covered Golkar 98 times, the PPP 10 times and the PDI just 2 times in its news programs in 1995.<sup>581</sup>

**The Electoral Commission.** MacIntyre argues that the other factor in favor of Golkar was the status of the Electoral Commission, the body responsible for conducting the election.<sup>582</sup> The fact that the Commission was chaired by the Minister of Home Affairs, a Golkar member, made it clear that the Commission was not an independent statutory agency,<sup>583</sup> a basic requirement for an institution to run a fair and just election.

**Closing.** In conclusion, the three New Order parties were a camouflage for Soeharto's de facto 'one party' system. Leo Suryadinata calls this party structure a "hegemonic party system led by

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<sup>575</sup> MacIntyre, above n 566, 264.

<sup>576</sup> Ibid 265.

<sup>577</sup> Ibid.

<sup>578</sup> Ibid.

<sup>579</sup> Ibid.

<sup>580</sup> TVRI is the abbreviation for the *Televisi Republik Indonesia* or Television of the Republic of Indonesia.

<sup>581</sup> M. Cohen, 'On-Air Campaigning: Politicians Reach out to Voters Via Television', *Far Eastern Economic Review*, 15 May 1997.

<sup>582</sup> MacIntyre, above n 566, 266.

<sup>583</sup> Ibid.

Golkar”.<sup>584</sup> MacIntyre concludes that the New Order party and electoral system was “a far cry from meaningful democracy”.<sup>585</sup> Similarly, Liddle argues that electoral process had become a “useful fiction” for Soeharto to keep all power in his hands.<sup>586</sup> He further argues that:

[t]he function of elections in this system has been not to choose, but to legitimate ... the party organizations and electoral process are closely managed by the government to ensure substantial Golkar victories ...<sup>587</sup>

## b. Soeharto’s Personal Dictatorship

Nevertheless, MacIntyre argues that Golkar was not the central player in the New Order political process. Despite the fact that Golkar won all the New Order elections, it was neither a locus of power in the Indonesian political system.<sup>588</sup> Rather, as Liddle argues, the ‘king of New Order politics’ was Soeharto himself.<sup>589</sup> Soeharto not only ruled the executive but also the legislature and the judiciary. Liddle further argued that behind:

... this democratic façade of elections, Parliament, and Assembly lies the authoritarian reality of a political system dominated by [Soeharto], a former general whose power derives from his extraordinary adept husbanding and shrewd use of political resources.<sup>590</sup>

**Control over the Executive.** In regard to the executive, Soeharto held an “absolute power of appointment”.<sup>591</sup> MacIntyre argues that:

[w]ithout the need for confirmation from the legislature, he can hire and fire at will cabinet members, all senior bureaucratic appointments, all senior military appointments ... all senior state enterprise appointments. Unambiguously then, within the executive branch all accountability lines trace back to the President.<sup>592</sup>

By this monopoly of appointment power, Soeharto managed to become the central power of the executive. Further, by posting all of his men in strategic governmental positions, Soeharto

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<sup>584</sup> Leo Suryadinata, *Elections and Politics in Indonesia* (2002) 122.

<sup>585</sup> MacIntyre, above n 566, 266.

<sup>586</sup> R. William Liddle, ‘A Useful Fiction: Democratic Legitimation in New Order Indonesia’ in Robert H. Taylor (ed), *The Politics of Elections in Southeast Asia* (1996) 34 — 60.

<sup>587</sup> Liddle, above n 531, 210.

<sup>588</sup> MacIntyre, above n 566, 267.

<sup>589</sup> Liddle, above n 531, 17.

<sup>590</sup> Ibid 209.

<sup>591</sup> MacIntyre, above n 566, 270.

<sup>592</sup> Ibid.



controlled the Indonesian bureaucracy. This was a crucial step to dominate other branches of power such as legislature and judiciary, because the procedural recruitment of these two branches was closely managed through the bureaucracy. For example, the selection of judges were carried out by the Department of Justice, while the selection of members of Parliament were highly controlled by the Department of Home Affairs, the manner in which this occurred is elaborated in the following paragraphs.

**Control over the Legislative Body.** In practice, the majority members of the New Order MPR were not elected but were appointed by Soeharto. The 1945 Constitution ruled that the MPR “shall consist of the members of the DPR augmented by the delegates from the regional territories and groups as provided for by statutory regulations”.<sup>593</sup> Based on this provision, the practice of the New Order was that the 1000 MPR members consisted of 500 hundred members of the DPR and the remaining 500 were appointed to represent the nation’s regional, functional, and social groups.<sup>594</sup>

Except for the last DPR (when the appointed members of the DPR were 75),<sup>595</sup> the DPR had 500 members from the early of the New Order, 100 members were appointed from the armed forces and 400 selected through election.<sup>596</sup> However, the “formal and informal rules covering political parties and elections gave the government great control over politicians”.<sup>597</sup> All candidates for the DPR were subject to an approval process administered through the General Election Commission. Because the Minister of Home Affairs chaired the institution, the government could prevent strong critics from entering the DPR. Consequently, President Soeharto ultimately controlled the MPR (and the DPR) membership.

Given that Soeharto had ‘100% control’ of the members of the MPR, it is no wonder that the constitutional power of the MPR to control a President or to choose an alternative presidential candidate was never exercised.<sup>598</sup> Sugeng Permana has cynically criticized this situation by saying the “Soeharto People’s Assembly elects Soeharto as President”,<sup>599</sup> and indeed, from

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<sup>593</sup> Article 2(1) of the 1945 Constitution.

<sup>594</sup> Law Number 5 of 1995 on Structure of the MPR, the DPR and the DPRD.

<sup>595</sup> Article 10(3) and (4) of Law Number 5 of 1995 on Structure of the MPR, the DPR and the DPRD.

<sup>596</sup> Ibid.

<sup>597</sup> MacIntyre, above n 566, 268.

<sup>598</sup> See Article 6(2) of the 1945 Constitution.

<sup>599</sup> Sugeng Permana, ‘Not your Local Member’, in Lindsey above n 529, 198.

1973 to 1998, the MPR named only one presidential candidate, Soeharto, and each time it unanimously approved him as Indonesian President.

By controlling the selection process of the legislative body, Soeharto also took control of the legislature itself. Although the DPR members had the right to initiate legislation<sup>600</sup> and had to approve all legislation,<sup>601</sup> in practice the DPR was a “tame institution”.<sup>602</sup> During more than three decades of the New Order, the executive proposed most of the bills. None of these presidential bills were vetoed by the DPR, although it had the authority to do so.<sup>603</sup>

**Control over the Judiciary.** Like the legislature, Soeharto also controlled the judiciary through his bureaucratic system. The President, as Chief-of-state, appointed and removed judges without the need for legislative approval.<sup>604</sup> All judges were classified as civil servants, and therefore, members of the KORPRI and Golkar. This of course jeopardized the judges’ position as independent officers. It created the ‘two hats’ judiciary system,<sup>605</sup> which “rendered judges at once nominally independent judicial officers, and salaried government public servants”.<sup>606</sup>

At the beginning of the New Order, the government actually made a promising decision by issuing a new statute<sup>607</sup> repealing Law No. 19 of 1964 on Judicial Power which had breached the basic principle of the independence of judiciary in many of its provisions. The new Law No. 14 of 1970 on Judicial Power provides the MA (*Mahkamah Agung* or Supreme Court)<sup>608</sup> with judicial review authority over regulations below statutes.<sup>609</sup> In theory, this review should have been a ‘checks and balances system’ used by the judiciary to control the executive and legislature. However, since Soeharto controlled the recruitment of the judges, judicial review was never effective.

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<sup>600</sup> Article 21(1) of the 1945 Constitution.

<sup>601</sup> Article 20(1) of the 1945 Constitution.

<sup>602</sup> MacIntyre, above n 566, 268.

<sup>603</sup> Article 20(2) of the 1945 Constitution.

<sup>604</sup> Article 31 of Law No. 14 of 1970 on Judicial Power.

<sup>605</sup> Tim Lindsey, ‘Black Letter, Black Market and Bad Faith: Corruption and the Failure of Law Reform’, in Chris Manning and Peter Van Diermen (eds), *Indonesia in Transition: Social Aspects of Reformasi and Crisis* (2000) 280.

<sup>606</sup> *Ibid.*

<sup>607</sup> Law No. 6 of 1969 concerning Invalidation of some Statutes and Government Regulations in Lieu of Statute.

<sup>608</sup> The highest court in Indonesia.

<sup>609</sup> Article 26(1) of Law No. 14 of 1970 on Judicial Power.

### c. Soeharto's Military Regime

Soeharto's regime was eventually a military regime. One of the clues was, of course, that Soeharto himself, was a former military general. Liddle argues that Soeharto's "most important resource is his control over the armed forces".<sup>610</sup> The other clue was the wide-ranging military officers involved in political activities, justified by the *dwifungsi* doctrine.

***Dwifungsi* (Dual function).** This doctrine is a political concept which allows the Indonesian military to act as both a "military force" and a "social-political force".<sup>611</sup> Formulated since the introduction of martial law in 1957, 'Dual Function' is usually thought of becoming influential from 1965 when General Abdul Haris Nasution presented his "Middle Way" military concept in the Indonesian first army seminar.<sup>612</sup> During the New Order period, the concept became known as the *dwifungsi* doctrine.

Harold Crouch divides the historical development of the *dwifungsi* into four different periods: the revolution against Dutch colonial rule (1945-1949); liberal democracy (1950-1957); Guided Democracy (1957-1966); and the New Order (1966-1998).<sup>613</sup> Crouch further argues that since the beginning of the New Order regime "the army has been the dominant political force".<sup>614</sup> Similarly, Liddle argues that, the *dwifungsi* justified the subordination of the civilians to the military during the New Order authoritarian system.<sup>615</sup> He further argues that the *dwifungsi* doctrine legitimized the military as de facto ruling party in Indonesia.<sup>616</sup>

**Control over the Executive.** Within the bureaucracy, the Department of Defense and Security — the home for military activities — played two "unique roles".<sup>617</sup> First, according to Liddle, in the 1971, 1977, and 1982 elections, military officers held the key positions within Golkar<sup>618</sup> and

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<sup>610</sup> Liddle, above n 531, 209.

<sup>611</sup> Soebijono, 'Pendahuluan' in Soebijono et al (ed), *Dwifungsi ABRI Perkembangan dan Peranannya dalam Kehidupan Politik di Indonesia* (1992) 1, 1.

<sup>612</sup> Harold Crouch, *The Army and Politics in Indonesia* (1978) 24 and 344. But see David Jenkins, *Suharto and His Generals Indonesian Military Politics 1975-1983* (1984) 2. Jenkins argues that it was Prof. Djokosutono, not General Nasution, who named the concept "the army's Middle Way".

<sup>613</sup> Crouch, above n 543, 50 — 51.

<sup>614</sup> Ibid 51, 60.

<sup>615</sup> Liddle, above n 531, 29 — 30.

<sup>616</sup> Ibid 30.

<sup>617</sup> Ibid 19.

<sup>618</sup> Ibid.

therefore, contributed to the landslide victories of the government party. The military also regularly intervened in the internal affairs of the PPP, PDI and other social organizations.<sup>619</sup>

Second, an agency in the Department of Defense and Security routinely selected military officers to fill civilian government positions<sup>620</sup> and retired military officers might also hold such positions. Apart from the President himself, these positions included vice presidents, ministers and officials holding lower positions. Umar Wirahadikusumah and Try Sutrisno were generals who became vice presidents. As for the ministers, Liddle notes that fourteen of thirty-seven ministers in Soeharto's sixth cabinet (1993-1998) had military backgrounds,<sup>621</sup> and a study by John MacDougal in the 1980s showed that military officers occupied fifty-two of one hundred and six sub-cabinet positions (secretaries general, directors-general, and inspectors general).<sup>622</sup> The study further showed that, in provincial and districts level, the armed forces once filled about three-quarters of the positions in all the twenty-seven provinces.<sup>623</sup>

**Control over the Legislature.** As discussed earlier, the *dwifungsi* doctrine legitimized the appointment of 100 (then 75) military officers to the 500-seat of the DPR.<sup>624</sup> Permana has criticized this process in an imagined dialogue between teacher and student:

*Teacher:* ... 200 million Indonesians divided by 500 means each member of the DPR represents 400,000 people, correct?

*Student:* In that case, the 75 ABRI<sup>625</sup> members times 400,000 makes 30 million people. Is that right sir? In that case our country must have the largest military force in the world.

*Teacher:* No, our country's armed forces don't even reach a million. But ABRI membership in the MPR/DPR is a special right not possessed by the other civil political parties.<sup>626</sup>

**Closing.** This thesis argues that both Soekarno's and Soeharto's authoritarianism was enabled by the 1945 Constitution. This authoritarianism of the 1945 Constitution is further elaborated in the following section.

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<sup>619</sup> Ibid 217.

<sup>620</sup> Ibid 19 and 187.

<sup>621</sup> Ibid 19.

<sup>622</sup> Ibid.

<sup>623</sup> Ibid.

<sup>624</sup> Article 10(3) and (4) of Law No. 2 of 1985 in relation to Law No. 5 of 1995 on Structure of the MPR, the DPR and the DPRD.

<sup>625</sup> ABRI is the abbreviation of *Angkatan Bersenjata Republik Indonesia* or Indonesian Armed Forces.

<sup>626</sup> Permana, above n 599, 198.

## B. Authoritarianism in the 1945 Constitution

In the eyes of Liddle, the relationship between the 1945 Constitution and Soeharto's New Order authoritarian regime is clear. He argues that the 1945 Constitution was vital to Soeharto's conception of the New Order regime, given the dominance of governmental power by the President.<sup>627</sup>

MaHFud argues that the 1945 Constitution had never produced a democratic government<sup>628</sup> and, in fact, the democratic government of 1945-1949 was made possible only by not applying the 1945 Constitution in the daily political system.<sup>629</sup> Mohammad Hatta, who was then Vice-President, issued "Decree No. X"<sup>630</sup> of 16 October 1945, which had transferred the powers of the President Soekarno to the legislature, thus applying a parliamentary system, something clearly a breach from the 1945 Constitution.<sup>631</sup> Although Hatta did not have the authority to do this, his decree was, in practice, effective. This decree limited the 'pure' application of the 1945 Constitution.

**The 1945 Constitution's Shortcomings.** MaHFud argues that there were five basic weaknesses in the 1945 Constitution (before amendment).<sup>632</sup> First, the constitutional system under the 1945 Constitution was executive-heavy.<sup>633</sup> Second, it lacked checks and balances.<sup>634</sup> Third, it delegated too many constitutional provisions to the statute level.<sup>635</sup> Fourth, it contained articles which were ambiguous.<sup>636</sup> Fifth, it depended too heavily on the political good will and integrity of the politicians.<sup>637</sup>

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<sup>627</sup> Liddle, above n 531, 120.

<sup>628</sup> MaHFud MD, above n 534, 52.

<sup>629</sup> *Ibid.*

<sup>630</sup> This text should be read as Decree 'X', not '10', because at the time it was drafted it happened that no one knew where it belonged chronologically.

<sup>631</sup> *Ibid.*

<sup>632</sup> MaHFud, above n 534, 66 – 67.

<sup>633</sup> *Ibid.* 66.

<sup>634</sup> *Ibid.*

<sup>635</sup> *Ibid.*

<sup>636</sup> *Ibid.*

<sup>637</sup> *Ibid.* 67.

The Team for Study of Amendments of the Faculty of Law of the University of Brawijaya (*Tim Kajian Amandemen Fakultas Hukum Universitas Brawijaya*) argues that in addition to these defects, the 1945 Constitution also contained *kekosongan hukum* (legal vacuums)<sup>638</sup> because it was so brief and sparse.<sup>639</sup> Finally, Bagir Manan<sup>640</sup> argues that the fact that too many critical constitutional issues were outlined in the elucidation and not in the body of the 1945 Constitution is another shortcoming of the Constitution.<sup>641</sup> These flaws of the original 1945 Constitution are now each considered in turn.

## 1. 'Executive-Heavy' Constitution

The 1945 Constitution was an 'executive-heavy' Constitution. This means it provided the executive with enormous powers but lacked sufficient constitutional controls. Under the 1945 Constitution, the President is the Chief-of-Executive<sup>642</sup> and Chief-of-state. As the Chief-of-Executive, the President had exclusive authority over Ministers and formation of the cabinet (Article 17(1) and (2)). As Chief-of-state<sup>643</sup> the President had the power to (i) be the Chief-of-Commander of the Army, the Navy and the Air Force (Article 10); (ii) declare war, make peace and conclude treaties with other states (Article 11); (iii) declare a state of emergency (Article 12); (iv) appoint ambassadors and consuls, and receive the credentials of foreign ambassadors (Article 13); and (v) grant titles, decorations and other distinctions of honor (Article 15).

Except for the power to declare war, make peace and conclude treaties — which were subject to the agreement of the DPR (Article 11) — none of these presidential powers were subject to an agreement or confirmation of the other state institutions. Even the body of the 1945 Constitution did not give this controlling authority to the DPR, although according to the elucidation to the Constitution, the DPR should 'at all times control the acts of President'.<sup>644</sup>

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<sup>638</sup> The concept of legal vacuum will be further discussed in this section point 6.

<sup>639</sup> Tim Kajian Amandemen Fakultas Hukum Universitas Brawijaya, *Amandemen UUD 1945: Antara Teks dan Konteks dalam Negara yang Sedang Berubah* (2000) 14.

<sup>640</sup> Manan is a Professor of Constitutional Law in the Faculty of Law, the University of Padjajaran. When this thesis is written, he is the Chief Justice of the Indonesian Supreme Court.

<sup>641</sup> Bagir Manan, above n 29, 16 — 26.

<sup>642</sup> Article 4 of the 1945 Constitution.

<sup>643</sup> The elucidation to Articles 10, 11, 12, 13 and 15.

<sup>644</sup> The Elucidation of System of Government Section VII of the 1945 Constitution.

In practice, these broad and largely uncontrolled presidential powers were used by Soeharto as legal foundation for selecting key person in strategic positions. Therefore, President Soeharto unsurprisingly managed to control the bureaucracy, the military, the legislative body and the judiciary. He basically became the one and only authority who had the power to appoint or dismiss anybody as he wished. One clear example was when Soeharto appointed his eldest daughter, Siti 'Tutut' Hardiyanti Rukmana, as the Minister of Social Affairs in his last cabinet in 1998.

Further, the system became more executive-heavy because, besides these enormous executive powers, a President also held legislative power. The 1945 Constitution clearly stated:

[t]he President shall hold the power to make statutes in agreement with the *Dewan Perwakilan Rakyat* (legislature).<sup>645</sup>

Apart from the executive power, the President together with the *Dewan Perwakilan Rakyat* (legislature) exercises the legislative power in the state.<sup>646</sup>

The terms that "the President shall hold the power to make statutes" contributed to the dominance of the President's legislative power over the DPR's legislative power. As quoted by Nasution, Yap Thiam Hien argues that the President's legislative power surpassed that of the DPR, because it was the President who could issue a government Regulation in lieu of Statute and the President could also determined a state of emergency for issuing such Government Regulation (Article 22(1)).<sup>647</sup>

In sum, the executive-heaviness of the 1945 Constitution was reflected in its elucidation, which stated:

... the President is the Highest Executive of the government of the state. In conducting the administration of the state, the authority and responsibility are in the hands of the President (concentration of power and responsibility upon the President).<sup>648</sup>

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<sup>645</sup> Article 5 of the 1945 Constitution.

<sup>646</sup> The elucidation Article 5 of the 1945 Constitution.

<sup>647</sup> Nasution, above n 14, 367.

<sup>648</sup> The elucidation of System of Government Section IV of the 1945 Constitution.

## 2. Unclear System of Checks and Balances

The elucidation of the 1945 Constitution stated that:

[i]t is the MPR that holds the highest power of the state, whereas the President shall pursue the state policy as outlined by the MPR. The President who is appointed by the MPR shall be subordinate and accountable to the MPR. He is the mandatory of the MPR; it is his duty to carry out its decisions. The President is not in an equal position to, but subordinate to the MPR.<sup>649</sup>

The MPR was therefore the highest institution of the state and ‘the manifestation of all the people of Indonesia’,<sup>650</sup> which ‘exercised in full’ the sovereignty of the people.<sup>651</sup> Therefore, the power of the MPR was – in theory – unlimited.<sup>652</sup> This was a concept of the MPR as a “superior Parliament”.<sup>653</sup>

On the one hand, these provisions of the superior MPR led the Indonesian system to “appear parliamentary”.<sup>654</sup> On the other hand, the executive-heavy Constitution argument strongly indicated that Indonesia applied a Presidential system.<sup>655</sup> On this mixed message from the Indonesian Constitution, Lindsey argues that:

[t]he 1945 Constitution did not clearly establish either a parliamentary or a President political system but instead created a blended and vague hybrid that relied on the notion of ‘distribution’ of powers ... As a result the system of checks and balances between judiciary, legislature and executive necessary for a democratic political system had always been absent.<sup>656</sup>

In practice, the ‘superior’ MPR was therefore not sufficiently strong to control the President. In fact, the executive-heavy Constitution system managed to override the ‘superior Parliament’ concept. Muhammad Ridwan Indra says, according to “the 1945 Constitution MPR is supreme (highest state institution), but in practice, the President is supreme”.<sup>657</sup>

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<sup>649</sup> Ibid.

<sup>650</sup> Ibid.

<sup>651</sup> Article 1(2) of the 1945 Constitution.

<sup>652</sup> Elucidation of article 2(2) of the 1945 Constitution.

<sup>653</sup> Lindsey, above n 99, 244.

<sup>654</sup> Ibid.

<sup>655</sup> Ibid 248 — 249.

<sup>656</sup> Ibid 247.

<sup>657</sup> Muhammad Ridwan Indra, *The 1945 Constitution: A Human Creation* (1990) 45.



**The MPR's Composition.** One of the reasons why the superior MPR could not control the President was because of the vague provisions regarding its membership.<sup>658</sup> The 1945 Constitution merely stated that the MPR contained the members of the DPR plus delegates from the regions and other groups.<sup>659</sup> Specific criteria as to who should be the other groups beside the DPR were absent. The elucidation of the 1945 Constitution stated only that the term “groups” referred to such bodies as “cooperatives, labor unions, and other collective organizations”.<sup>660</sup> It was from this vague provision that the military argued that it was a ‘group’ under the 1945 Constitution, and therefore, had the right to sit in the MPR.

This lack of clarity on the membership also allowed Soeharto to control the MPR. In Koichi Kawamura’s words, to “put it strongly, the President can appoint by his authority all members of the MPR”.<sup>661</sup> Consequently, instead of controlling the President, the MPR became a New Order “silent partner” which followed Soeharto’s bidding.<sup>662</sup>

### 3. Too Many Delegations to Statute

It was not only the MPR composition which was regulated by statute, but the 1945 Constitution also delegated 12 other important issues to be further regulated by statute. These statutes included: the conditions for declaring a state emergency;<sup>663</sup> the composition of the DPA;<sup>664</sup> the division of local government;<sup>665</sup> the composition of the DPR;<sup>666</sup> financial and tax matters;<sup>667</sup> the composition of the BPK;<sup>668</sup> the composition and power of legal institutions, including the Supreme Court;<sup>669</sup> the appointment and dismissal of judges;<sup>670</sup> citizenship matters;<sup>671</sup> freedom

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<sup>658</sup> Liddle, above n 531, 186.

<sup>659</sup> Article 2(1) of the 1945 Constitution.

<sup>660</sup> Elucidation of the 1945 Constitution.

<sup>661</sup> Koichi Kawamura, ‘Politics of the 1945 Constitution: Democratization and Its Impact on Political Institutions in Indonesia’ (Research Paper No. 3, Institute of Developing Economy, 2003) 17.

<sup>662</sup> Andrew Ellis, ‘The Indonesian Constitutional Transition: Conservatism or Fundamental Change’ (2002) 6, *Singapore Journal of International and Comparative Law* 124.

<sup>663</sup> Article 12 of the 1945 Constitution.

<sup>664</sup> Article 16 of the 1945 Constitution.

<sup>665</sup> Article 18 of the 1945 Constitution.

<sup>666</sup> Article 19(1) of the 1945 Constitution.

<sup>667</sup> Article 23 of the 1945 Constitution.

<sup>668</sup> Article 23(5) of the 1945 Constitution. The BPK is the abbreviation for *Badan Pemeriksa Keuangan* or State Audit Board. This Board conducts official examinations of the government’s finances.

<sup>669</sup> Article 24 of the 1945 Constitution.

<sup>670</sup> Article 25 of the 1945 Constitution.

of association and expression;<sup>672</sup> the rules governing defense;<sup>673</sup> and the national educational system.<sup>674</sup>

This delegation to statute would not have been problematic if the 1945 Constitution had provided a strong ‘checks and balances system’ and clear guidelines of what should have been regulated. These guidelines were crucial because the DPR – which was supposed to work together with the President to make statutes – was practically unable to control the President’s legislative power since the composition of the DPR itself depended on statutes prepared by the President. Consequently, having so many unclear delegations at the statute level was another characteristic of the authoritarianism of the 1945 Constitution.

#### **4. Ambiguous Articles**

The 1945 Constitution also contained some crucial articles which were ambiguous. As mentioned above, one of the articles which strongly contributed to Soeharto’s authoritarian regime was article 7 of the 1945 Constitution. It stated:

[t]he President and Vice-President shall hold office for a term of five years and shall be eligible for re-election.

Mahfud argues that, from a constitutionalism perspective, this article should be interpreted as a President only being able to hold his or her position for a maximum of two terms.<sup>675</sup> However, Soeharto and his supporters interpreted this article as meaning there was no limitation on the period of presidency. The President can therefore be re-elected every 5 years, for an unlimited number of times, and because Soeharto practically monopolized all of the powers, his interpretation had to be accepted as the “right” one.<sup>676</sup> Hence, Soeharto was re-elected six times in 1973, 1978, 1983, 1988, 1993 and 1998. Just like Soekarno who once appointed as Indonesian President for life, to ensure he was re-elected every five years, Soeharto practically also became a “President for Life” by exploring the weaknesses of this Article 7.

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<sup>671</sup> Article 26 of the 1945 Constitution.

<sup>672</sup> Article 28 of the 1945 Constitution.

<sup>673</sup> Article 30(2) of the 1945 Constitution.

<sup>674</sup> Article 31 of the 1945 Constitution.

<sup>675</sup> Yusuf and Basalim, above n 6, 66 — 67.

Manan argues that, another example of vagueness was Article 28 of the 1945 Constitution.<sup>677</sup>

This article stated:

[f]reedom of association and assembly, of verbal and written expression and the like, shall be determined by law.

One of the interpretations of this provision was that as long as the law had not yet been promulgated, these rights were not protected. Lindsey argues that this provision is not a guarantee of rights at all, but a demonstration of the government's power to restrict rights.<sup>678</sup>

## 5. Too Much Dependence on Political Goodwill and Integrity

The 1945 Constitution was a Constitution that depended heavily on the political goodwill and integrity of the person who runs the country. The general elucidation of the 1945 Constitution stated that:

[t]he most important aspects in government and state life is the political goodwill of the authorities, of the government leaders ... if the political goodwill of the state authorities and the leaders of government are individualistic, then the Constitution is in reality meaningless. On the other hand, even if a Constitution is imperfect, but the political goodwill of the government leaders is right, such a Constitution will in no way hinder the process of government. Thus, what is important is the political goodwill. It must be a living and dynamic political goodwill.<sup>679</sup>

This elucidation was written by Soepomo, one of the key drafters of the 1945 Constitution and the foremost proponent of the 'integralistic state', that is a state which embraces "the whole nation, uniting all the people".<sup>680</sup> This idea "emphasized the unity of all things,"<sup>681</sup> or in the Javanese tradition, *manunggaling kawulo lan gusti* (unity of servant and master).<sup>682</sup> As pointed out by Nasution, Soepomo's view was, under this unity:

[t]here could be no conflicts of interest between the rulers and the ruled. government officials were assumed to be good and wise, always representing the interests of the people. There was no fear of abuse of power.<sup>683</sup>

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<sup>676</sup> Ibid, 66.

<sup>677</sup> Manan, above n 641, 15 — 16.

<sup>678</sup> Lindsey, above n 99, 253.

<sup>679</sup> The General Elucidation Section IV of the 1945 Constitution.

<sup>680</sup> Nasution, above n 14, 421.

<sup>681</sup> Ibid.

<sup>682</sup> Ibid.

<sup>683</sup> Ibid 422.

Therefore, the people needed no fundamental of rights to protect them from potential violations by the state, because the state was the same as the people and “their interests were therefore identical”.<sup>684</sup> Because of these similar interests, Soepomo was also named its integralistic state as a “family-state” in which criticisms between members of the family would be considered undesirable.<sup>685</sup> Therefore, opposition or control from the citizens to the government would not be necessary because it would be against the principle of trusting the good faith (*itikad baik*) of their leaders.<sup>686</sup> Lindsey argues that this naïve concept of integralistic state unsurprisingly failed when it came into force, because the state and the people do not, obviously, act and think as one.<sup>687</sup> Further, Nasution argues that Soepomo’s notion of integralistic state is undemocratic. In Nasution words:

... the concept of an integralistic state was a denial of the very problematic nature of the constitutional state, namely the chronically and ubiquitously problematic nature of government power, which requires special devices under modern constitutions to prevent it from becoming despotic.<sup>688</sup>

## 6. Legal Vacuums

Before proceeding, legal vacuums should first be defined. A ‘legal vacuum’ is a concept of law recognized in civil law systems where large areas of law are codified.<sup>689</sup> It refers to a condition where a situation is not regulated yet by a written law. In the words of Pistor and Xu, “a legal vacuum is created by the absence of lawmaking”.<sup>690</sup> In the common law system this concept is not known since a judge can discover, or create law. John Henry Merryman defines common law is “the law created and molded by the judges.”<sup>691</sup>

According to the Team for Study of Amendments of the Faculty of Law University of Brawijaya, the 1945 Constitution contained four serious legal vacuums. These vacuums were: (i) the

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<sup>684</sup> Lindsey, above n 99, 253.

<sup>685</sup> Nasution, above n 14, 422.

<sup>686</sup> Ibid 422 – 423.

<sup>687</sup> Lindsey, above n 99, 253 – 254.

<sup>688</sup> Nasution, above n 14, 423.

<sup>689</sup> Arthur Taylor von Mehren and James Russel Gordley, *The Civil Law System* (2<sup>nd</sup> edition, 1977) 3.

<sup>690</sup> Katharina Pistor and Chenggang Xu, ‘*Fiduciary Duty in Transitional Civil Law Jurisdictions Lessons from the Incomplete Law*’ (2002) Columbia International Affairs Online < <http://www.ciaonet.org/conf/cip01/cip01f.pdf>> at 15 December 2004.

<sup>691</sup> John Henry Merryman, *The Civil Law Tradition* (1985) 34.

Indonesian economic system, (ii) a bill of rights; (iii) the limitation of the enormous powers of the President; and (iv) the electoral system.<sup>692</sup>

Except for the first two of the vacuums, I accept the arguments of the Team. As to the first supposed vacuum, the economic system, Indonesia had formally adopted a socialist economic system in Article 33.<sup>693</sup> The elucidation of the 1945 Constitution named the system as “the principle of economic democracy”.<sup>694</sup> This meant that it was the “prosperity of the community which is stressed, not prosperity of the individual”.<sup>695</sup> The problem was not that the Constitution has been silent but that Article 33 has been largely ignored by successive governments since 1945.

In relation to the second supposed vacuum, the bill of rights, there were articles in the 1945 Constitution which provided some protections for human rights: equality under the law, the right to work and the right to live (Article 27); freedom of association and opinion (article 28); freedom of religion (Article 29); right to participate in national defense (30); right of education (Article 31); and social welfare (Article 34). However, crucial rights such as freedom of association and freedom of opinion ‘shall be prescribed by law’.<sup>696</sup> For Bivitri Susanti, this phrase is a clear legal defect: it opens the possibility for those in power to ‘twist’ the right.<sup>697</sup> In fact, during Soeharto’s authoritarian regime, such a law was never been introduced.

The absence of crucial human rights in the 1945 Constitution was not an oversight. It was a result of a constitutional debate, in 1945, between Mohammad Hatta and Muhammad Yamin, who supported the adoption of bill of rights into the Constitution, and Soekarno and Soepomo, who opposed it.<sup>698</sup> The vague formulation of Article 28 was intended to be a ‘meeting ground’ between the two camps.

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<sup>692</sup> Tim Kajian Amandemen Fakultas Hukum Universitas Brawijaya, above n 639, 14 — 15.

<sup>693</sup> Article 33 of the 1945 Constitution: (1) The economy shall be organized as a common endeavour based upon the principle of the family system. (2) Branches of production which are important for the state and which affect the life of most people shall be controlled by the state. (3) Land and water and the natural riches contained therein shall be controlled by the state and shall be made use of for the people.

<sup>694</sup> Elucidation of Article 33 of the 1945 Constitution.

<sup>695</sup> Ibid.

<sup>696</sup> Article 28 of the 1945 Constitution.

<sup>697</sup> Bivitri Susanti, ‘Constitution and Human Rights Provisions in Indonesia: An Unfinished Task in the Transitional Process’ (Paper presented at the Conference on “Constitution and Human Rights in a Global Age: An Asia Pacific History”, Canberra, 30 November-3 December 2001) 3.

<sup>698</sup> Yamin, above n 13, 114. See also Sekretariat Negara Republik Indonesia, *Risalah Sidang BPUPKI-PPKI 28 Mei 1945 – 22 Agustus 1945* (1995) 262 — 276.

With regard to the electoral system pursuant to the 1945 Constitution the word 'election' did not even appear in the 1945 Constitution! As a result in the absence of constitutional limitations, the authoritarian interests of Soeharto's regime easily dominated the electoral process during the New Order.

## 7. The Elucidation

Unlike other constitutions, the 1945 Constitution had an elucidation in addition to its preamble and body.<sup>699</sup> In fact, Indra notes that this Constitution is the only Constitution in the world which has an elucidation.<sup>700</sup> Lindsey has defined an elucidation as:

... the explanatory memorandum that accompanies most Indonesian legislative and regulatory instruments and, although not a formal source of law on its own, is usually read as part of the text of the instrument ... it plays an absolutely essential role in interpreting the Constitution.<sup>701</sup>

However, the existence of this elucidation of the 1945 Constitution created two problems. First, this elucidation was not the product of the BPUPKI and the PPKI, the committees which prepared and drafted the 1945 Constitution. Instead, Soepomo, one of the members of the two institutions, wrote the elucidation.<sup>702</sup> The elucidation simply 'appeared' as part of the 1945 Constitution in 1946,<sup>703</sup> and in 1959, when Soekarno issued his 5 July Presidential Decree, but was not included in the original draft.<sup>704</sup> For these reasons, the legitimacy of the elucidation has often been questioned, and therefore, its binding power should have been weaker than the preamble and body of the Constitution.

Second, as discussed earlier, the elucidation contained many crucial provisions which should properly have been placed in the body of the Constitution. This is because, as Maria Farida Indrati Soeprapto argues, an elucidation should not contain new principles.<sup>705</sup> As a matter of fact, many provisions in the elucidation were entirely new and very significant constitutional

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<sup>699</sup> Manan, above n 29, 16.

<sup>700</sup> Indra, above n 657, 21.

<sup>701</sup> Lindsey, above n 99, 247.

<sup>702</sup> Yusuf and Basalim, above n 6, 13.

<sup>703</sup> The Indonesian State News Number 7 of 1946.

<sup>704</sup> State Gazette Number 75 of 1959.

principles, and hence, might be argued to be invalid, for example (i) the principle of Indonesia as a state of law (*negara hukum, rechtsstaat*); (ii) the principle and system of Presidential responsibility; and (iii) the principle of the independence of the BPK (*Badan Pemeriksa Keuangan*, state Audit Body) and the judiciary.<sup>706</sup>

**Other Reasons to Reform.** Beside the shortcomings considered so far, there are theoretical, historical, and practical reasons why the 1945 Constitution should be reformed.<sup>707</sup> These reasons are now discussed in turn.

**Theoretical Reasons.** As discussed in Chapter Two, a Constitution should be reformed in accordance with the changing of society. The 1945 Constitution should not be immune from change. Indra has thus argued that the 1945 Constitution was a human creation, which would never be perfect.<sup>708</sup>

Under Soeharto's administration the myth of the 1945 Constitution being an unamendable Constitution was formulated in three policies. First, a 'national consensus' authorized the President to appoint Soeharto's loyalists as one-third of the MPR's members.<sup>709</sup> By doing so, any attempt to amend the 1945 Constitution would not have succeeded, because one of the requirements to amend the 1945 Constitution was the attendance of more than 2/3 of the MPR members.<sup>710</sup> Soeharto stated the significance of this number in his speech before the staff conference of the armed forces on 27 March 1980:

[b]ecause the Armed Forces itself does not want to amend (the 1945 Constitution), we have to use guns if an amendment is enacted. If we do not want to use guns, then I will explain to all political parties as follows: When facing amendment of the 1945 Constitution and *Pancasila*, it would be better for us to kidnap one third of the two thirds who want to amend than to use guns.<sup>711</sup>

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<sup>705</sup> Maria Farida Indrati Soeprapto, *Ilmu Perundang-undangan: Dasar-dasar dan Pembentukannya* (1998) 175.

<sup>706</sup> Manan, above n 641, 26.

<sup>707</sup> Yusuf and Basalim, above n 6, 55 — 64.

<sup>708</sup> Indra, above n 657, 52.

<sup>709</sup> Harry Tjan Silalahi, *Konsensus Politik Nasional Orde Baru* (1990) 32 – 48.

<sup>710</sup> Article 37 (1) of the 1945 Constitution.

<sup>711</sup> A.M. Fatwa, *Demi Sebuah Rezim: Demokrasi dan Keyakinan Beragama Diadili* (2000) 214.

Second, MPR Decree No. IV of 1983 on Referendums strengthened the national consensus. This decree clearly showed Soeharto's authoritarian regime sought to 'sanctify' the 1945 Constitution. It stated:

... the MPR has determined to maintain the 1945 Constitution, it does not wish and does not want to make changes to it and intends to implement it purely and consistently.<sup>712</sup>

Third, the 1983 MPR referendum decree was then confirmed by Law No. 5 of 1985 on Referendum. Although this statute seemed to allow the possibility of amending the 1945 Constitution, the very difficult requirements set up in it, paradoxically, made amendment almost impossible. To amend the Constitution, the statute required a referendum to be held in which:

- a) at least 90% of the authorized voters to vote; and
- b) at least 90% of these voters agree to the MPR proposal to amend the 1945 Constitution.<sup>713</sup>

As a 90 per cent voter turn up and agreement is probably impossible, the New Order's strategy was clearly to entrench and sanctify the 1945 Constitution. Further, the requirements under the statute were only some of the requirements to amend the 1945 Constitution. Even if the referendum statute's requirements had been met, the amendment would not have been valid if the requirements under 37 of the 1945 Constitution had not been satisfied that is a minimum two-third of the MPR members attend the plenary meeting, and at least two-thirds of those attending agree on the amendment proposal.

**Historical Reasons.** As explained in Chapter One, the 1945 Constitution was drafted in a very short period of time and in a state of wartime emergency, and hence, was originally designed to be a temporary document.<sup>714</sup> Therefore, the text historically required change and was prepared in anticipation of it.

**Practical Reasons.** In practice, during the New Order, the 1945 Constitution was effectively amended several times. The above MPR Decree and statute on referendum, which amended the amendment procedure, were examples of 'silent amendments'. Mohammad Fajrul Falaakh

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<sup>712</sup> See also Article 115 of MPR Decree Number I of 1978.

<sup>713</sup> Article 18 of the Law Number 5 of 1985 on Referendum.

<sup>714</sup> Yamin, above n 13, 410.



argues that other examples of silent amendments were: (i) the broader definition of ‘groups’ of the MPR members to include the military; (ii) interference with the independence of the judiciary by Soeharto assumption of authority to appoint the Chief and Deputy Chief Justices of the Supreme Court; and (iii) the expansion of Indonesian territory to include East Timor.<sup>715</sup> Yusuf and Basalim have similarly argued that the broader definition of the Indonesian military, which included the Polri,<sup>716</sup> was a silent amendment to Article 10 of the 1945 Constitution, which had limited the military to the army, navy and air force.<sup>717</sup>

**Conclusion.** This chapter concludes that the 1945 Constitution is an authoritarian document. Both Soekarno and Soeharto used the Constitution to centralize numerous powers of the state in their hands. This authoritarian Constitution should therefore had to be reformed if Indonesian was to become a more democratic country. The transition from Soeharto’s authoritarian regime was one of the chances to carry out such reform.

The next Chapters Four to Seven, on the amendment process and outcome, will describe how the reform was conducted. Chapter Eight will then evaluate whether or not Indonesia has succeeded in reforming its authoritarian Constitution.

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<sup>715</sup> Yusuf and Basalim, above n 6, 63 — 64. See also I Made Leo Wiratma, ‘Reformasi Konstitusi: Potret Demokrasi dalam Proses Pembelajaran’ (2000) 4 *Analisis CSIS* 404 — 405.

<sup>716</sup> *Polri* is the abbreviation of *Polisi Republik Indonesia* or the Police of the Republic Indonesia.

<sup>717</sup> Yusuf and Basalim, above n 6, 63.

**PART FOUR:  
THE INDONESIAN  
CONSTITUTION-MAKING OF 1999-2002**

## **Chapter Four**

### **The First Amendment: Amending the Sacred Constitution**

This chapter is the first of four following chapters which describe each of the four amendments. Evaluation and critics of these amendments can be found in Chapter Eight. This chapter focuses on describing the process and the outcome of the First Amendment of the 1945 Constitution. It is divided into three sections. Section A deals with the situational background to the First Amendment. It considers the pre-amendment period, from May 1998 to October 1999, to show that this period was crucial to start the amendment process. Section B describes the process of the First Amendment by analyzing discussions prior to, and during, the 1999 MPR General Session. Section C outlines the outcome of the First Amendment which was mostly directed at limiting the power of President and increases the power of DPR.

#### **A. The Back Ground: the Pre-Amendment Period**

This section deals with the period between Soeharto's forced resignation and prior to the First Amendment discussions. This pre-amendment period corresponds to what Bonime-Blanc calls the "pre-constitutional period".<sup>718</sup> As elaborated in Chapter Two, Bonime-Blanc argues that in a constitutional period three conditions should develop: (i) a nationwide legislative election, preceded by electoral reform; (ii) a process of "sociopolitical legalization" in which basic freedoms are secured; and (iii) a process of "authoritarian illegalization" in which prohibitions are placed on the arbitrary authoritarian mechanism.<sup>719</sup> These three conditions are important to set down a basic foundation for a democratic constitution-making process.

In Indonesia, these three conditions were met during Habibie's presidency. The manner in which this occurred is elaborated in the following section.

#### **1. Habibie's Presidency**

**The Constitutionality of Habibie's Presidency.** On 21 May 1998, Vice-President B.J. Habibie took an oath as Indonesia's President immediately after President Soeharto read his letter of

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<sup>718</sup> Bonime-Blanc, above n 64, 139.

<sup>719</sup> Ibid 140.

resignation. However, this transfer of presidency was soon under attack.<sup>720</sup> Golkar, Habibie's own party, argued that because Soeharto and Habibie had been elected as a 'package', both had to resign, and the MPR should then hold a special session to elect a new President and Vice President.<sup>721</sup>

This 'package' argument was incorrect. The 1945 Constitution only stipulated that the MPR should elect the President and Vice President (Article 6). There was no Article in the Constitution which stated that both positions were a 'package'. In fact, the election for each position was held in a separate meeting of the MPR. Furthermore, Article 8 of the 1945 Constitution provided:

[s]hall the President die, resign or be unable to perform his duties during his term of office, he shall be succeeded by the Vice President until the expiry of his term of office.

Habibie's presidency was, therefore, legitimate because Soeharto had unilaterally declared his intention to resign.

Many critics also questioned the legitimacy of Habibie's presidency because he had taken his oath of office at Merdeka Palace before the MA (Supreme Court) justices instead of at the MPR or DPR.<sup>722</sup> These criticisms were also incorrect. Although the 1945 Constitution made no provision for a situation such as Habibie's case, the legal authority for the presidential oath is derived from MPR Decree No. VII of 1973 on The Situation when the President and Vice-President are Incapacitated, which stipulated:

- Should the President be permanently incapacitated, he shall be succeeded by the Vice President until the expiry of his term of office.
- Before assuming the presidency, The Vice President shall take the oath of office before the DPR.
- If the DPR is unable to hold a session, the Vice President shall take the oath before the Supreme Court.<sup>723</sup>

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<sup>720</sup> Dewi Fortuna Anwar, 'The Habibie Presidency' in Geoff Forrester (ed), *Post-Soeharto Indonesia: Renewal or Chaos* (1999) 34 — 35.

<sup>721</sup> Ibid 34.

<sup>722</sup> Ibid.

<sup>723</sup> Article 2 of MPR Decree No. VII of 1973 on the Situation when the President and Vice-President Incapacitated.

Since students were occupying the Parliament building at the time of Soeharto's resignation, it was impossible to hold a DPR meeting. Habibie's oath before the Supreme Court was, therefore, legitimate.<sup>724</sup>

**Habibie's Initiatives.** Questions related to the constitutionality of Habibie's presidency eventually subsided.<sup>725</sup> However, criticisms of Habibie's illegitimacy remained strong for two reasons: he merely replaced Soeharto and never himself elected as President; and he had a close association with Soeharto's authoritarian regime.<sup>726</sup> This problem of legitimacy influenced many of Habibie's policies.<sup>727</sup> Under pressure from the public, he introduced popular initiatives: (i) promoting the 1998 special MPR session to set the 1999 election schedule; (ii) supporting the 1999 electoral reform, (iii) liberalizing freedom of the press and freedom of expression; (iv) releasing political prisoners; and (v) conducting the 1999 general election.<sup>728</sup> All of these initiatives became part of the Indonesian pre-amendment period. These initiatives are now considered in more detail, in turn.

#### **a. The 1998 MPR Special Session**

In order to carry out the general election in 1999, the MPR was legally required to have a special session to amend the existing decree stating that the next election would be held in 2002.<sup>729</sup> Consequently, a special session was held on November 1998. This session produced twelve MPR decrees.<sup>730</sup> Three of the twelve decrees formed the embryo of the constitutional reform that followed. They were: (i) MPR Decree No. VIII of 1998 on Revocation of MPR Decree No. IV of 1983 on Referendums; (ii) MPR Decree No. XIII of 1998 on Limitation of Presidential and Vice-Presidential Terms; and (iii) MPR Decree No. XVII of 1998 on Human Rights.<sup>731</sup>

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<sup>724</sup> Mohammad Fajrul Falaakh, 'Megawati dan Suksesi Pola Habibie', *Kompas*, 6 March 2000.

<sup>725</sup> Anwar, above n 720, 34 — 35.

<sup>726</sup> *Ibid* 35.

<sup>727</sup> *Ibid*.

<sup>728</sup> Marcus Mietzner, 'From Soeharto to Habibie: the Indonesian Armed Forces and Political Islam during the Transition' in Geoff Forrester (ed), *Post-Soeharto Indonesia: Renewal or Chaos* (1999) 91. See also Liddle, above n 30, 387 — 388; Edward Masters, *Indonesia's 1999 Elections: A Second Chance for Democracy* (1999) Asian Update <<http://www.ciaonet.org/wps/mae01>> at 30 September 2003.

<sup>729</sup> MPR Decree Number II of 1998 on Broad Guideline on State Policy.

<sup>730</sup> Anwar, above n 720, 40.

<sup>731</sup> Majelis Permusyawaratan Rakyat, *Panduan dalam Memasyarakatkan Undang-undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses dan Hasil Perubahan Undang-undang Dasar Negara Republik Indonesia Tahun 1945* (2003) 29 — 31.

With the revocation of the 1983 MPR Decree on Referendums, Law No. 5 of 1985 on Referendums,<sup>732</sup> was also automatically, annulled. The New Order's policy of preventing amendment of the 1945 Constitution was legally abolished. The amendment procedure was once again simple, as it reverted to the procedure under Article 37 of the 1945 Constitution which stipulated that the two-third of the MPR members should attend the amendment meeting, and two-third of those in attendance agree to the amendment proposal.

MPR Decree No. XIII of 1998 altered the interpretation of Article 7 of the Constitution dealing with the terms of the presidency. Article 1 of this MPR decree stated that:

[t]he President and Vice President shall hold office for a term of five years, and shall be eligible for re-election to the same office for one further term.<sup>733</sup>

This provision ended the previous interpretation that a President could be elected for more than two periods, an interpretation effectively used by Soeharto to be re-elected six times. This provision was then adopted as Article 7 of the First Amendment of the 1945 Constitution.

Next, MPR Decree No. XVII of 1998 on human rights was the legal basis for Law No. 39 of 1999 on Human Rights. Most of the Articles in this human rights law were then adopted in the Second Amendment of the 1945 Constitution, promulgated in the 2000 MPR Annual Session.

## **b. The 1999 Electoral Reform**

Preparation for the 1999 general election continued with the enactment of three new laws on elections,<sup>734</sup> political parties<sup>735</sup> and the composition of the MPR, the DPR and the DPRD.<sup>736</sup> Unfortunately, the DPR committee in charge of considering the statutes conducted out the process largely behind closed doors.<sup>737</sup> Public hearings were held merely for show.<sup>738</sup> Short-

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<sup>732</sup> For the important content of this law see above n 713.

<sup>733</sup> Article 1 of MPR Decree No. XIII of 1998 on Limitation of President and Vice-President Term.

<sup>734</sup> Law No. 3 of 1999 on Elections.

<sup>735</sup> Law No. 2 of 1999 on Political Parties.

<sup>736</sup> Law No. 4 of 1999 on the Composition of the MPR, the DPR and the DPRD. DPRD is the abbreviation for *Dewan Perwakilan Rakyat Daerah* or Regional DPR.

<sup>737</sup> National Democratic Institute, *The New Legal Framework for Elections in Indonesia: A Report of an NDI Assessment Team*, 23 February 1999, 2.

<sup>738</sup> *Ibid.*

term political compromises, therefore, influenced the result of the discussions and created flaws in the new electoral laws.

**'Free Seats' for the TNI-Polri.**<sup>739</sup> One of the significant shortcomings was the fact that the new law on parliamentary composition stipulated that the TNI-Polri would be granted 38 'free seats' from the 500 seats in the DPR.<sup>740</sup> Although the number of these free seats had been reduced from 75, reservation of seats is, of course, "inherently undemocratic".<sup>741</sup> It prolonged the application of the anti-democratic military doctrine of *dwifungsi*.

**Multiparty System.** Despite criticism, the electoral laws provided an adequate basis for the 1999 general election.<sup>742</sup> One of the reforms was the adoption of a multiparty system based on the law on political parties, to replace the New Order authoritarian one party system. The political euphoria of the post-Soeharto period led to the formation of 141 parties, of which 48 parties qualified to participate in the 1999 general election. Later, this multiparty system strongly contributed to more open and deliberative debates that took place before each of the four amendments.

### c. Freedom of the Press and Freedom of Expression

Soeharto's government had applied strong censorship to limit the freedom of the press.<sup>743</sup> His Minister of Information issued a Ministerial Regulation Number 01 of 1984 on Publication License. This regulation authorized the minister to revoke the SIUPP<sup>744</sup> or publishing license of any media enterprise which did not support government policy.<sup>745</sup> In June 1998, Habibie's administration invalidated this regulation and simplified the licensing procedure for publications.<sup>746</sup> This policy generated hundreds of new publications and a new era of press freedom.

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<sup>739</sup> TNI is abbreviation for *Tentara Nasional Indonesia* or Indonesian National Army. Before the Polri was separated from the military on 1 April 1999, the military was called ABRI.

<sup>740</sup> Law No. 4 of 1999 on the Composition of the MPR, the DPR and the DPRD.

<sup>741</sup> National Democratic Institute, above n 737, 10.

<sup>742</sup> Ibid 2.

<sup>743</sup> For further information on the New Order policy toward the press, see David T. Hill, *The Press in New Order Indonesia* (1994); Omi Intan Naomi, *Anjing Penjaga: Pers di Rumah Orde Baru* (1996).

<sup>744</sup> The Abbreviation for *Surat Izin Usaha Penerbitan Pers* (Press Publication Business Licenses).

<sup>745</sup> Article 33 h of Ministerial Regulation Number 01 of 1984 on Publication License.

<sup>746</sup> Dewi Fortuna Anwar, 'Indonesia's Transition to Democracy: Challenges and Prospects', in Damien Kingsbury and Arief Budiman (eds), *Indonesia the Uncertain Transition* (2001) 9.

Further, the public also enjoyed new freedom of expression.<sup>747</sup> They could freely and actively discuss critical issues, including the urgency of reforming the 1945 Constitution. This freedom of expression influenced the constitutional reforms of 1999-2002. Without restriction, the media covered the constitutional discussions. Experts and non-governmental organizations freely criticized shortcomings of the process and the outcome of the amendments.

#### **d. Releasing Political Prisoners**

Under Soeharto's authoritarian regime, any opposition leaders had to prepare to go to jail and became political prisoners. By the end of the regime, there were more than 200 political prisoners, ranging from student leaders, Moslem activists, East Timorese and elderly communist cadres, some of whom had been held for more than 25 years.<sup>748</sup> After the fall of the regime, therefore, the international and domestic pressures to release all these prisoners strengthened. Indeed, in response to these pressures, Habibie ordered 179 Indonesian and East Timorese political prisoners to be released.<sup>749</sup> Muladi, Habibie's Minister of Justice, acknowledged that the policy was the administration's attempt to improve its image in the field of human rights.<sup>750</sup>

Whatever the intention, the releasing of political prisoners was one of the processes that put constraints on the authoritarian practices that had prevailed under Soeharto's regime. Further, the releases strengthened the more open political environment needed to discuss an important issue such as constitutional reform.

#### **e. The 1999 General Election**

Habibie found his legitimacy questioned by both the opposition forces and the people.<sup>751</sup> Liddle points out that:

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<sup>747</sup> Ibid.

<sup>748</sup> Amnesty International, *Indonesia: An Audit of Human Rights Report* (1999) 1 – 15.

<sup>749</sup> Ibid.

<sup>750</sup> *Indonesia Frees Two Political Prisoners* (1998) <[http://news.bbc.co.uk/1/hi/events/indonesia/latest\\_news/100266.stm](http://news.bbc.co.uk/1/hi/events/indonesia/latest_news/100266.stm)> at 28 October 2003.

<sup>751</sup> Angel Rabasa and Peter Chalk, *Indonesia's Transformation and the Stability of Southeast Asia* (2002) 10.



Habibie began as an extremely weak President, disliked personally and disdained politically by nearly every important group in Indonesian society, including significant elements of his own Golkar party.<sup>752</sup>

If Habibie had had stronger political legitimacy, he would most probably have argued that his presidency should not expire until 2003. This is because pursuant to Article 8 of the 1945 Constitution, Habibie should have continued his presidency until the expiry of Soeharto's term (1998-2003). The general election should therefore have only been held one year before the term ended, or in 2002. However, as his presidency lacked legitimacy, Habibie felt obliged to call an earlier general election in 1999.<sup>753</sup> Anwar explained that:

[a]lthough constitutionally, Habibie's term of office runs till 2003, it is clear that his government's weak political mandate makes such an option quite out of the question. In order to form a government with strong constitutional and political legitimacy... a new general election has to be carried out as soon as possible.<sup>754</sup>

This choice to hold the 1999 General Election was an important decision of the Indonesian pre-amendment period. By holding a general election so soon after the fall of Soeharto, Indonesia properly embarked on its transition from authoritarian rule.

## **2. The Election Result**

After an election was held on 7 June 1999 to elect members of the MPR, DPR and DPRD. International and domestic observers declared that the election, while not problem-free, was free and fair.<sup>755</sup> This is particularly significant when the election is compared to the façade elections held under Soeharto's administration. Of the seven previous elections (in 1955, 1971, 1977, 1982, 1987, 1992 and 1997), only the first in 1955 can be described, with the 1999 election, as a truly competitive election.<sup>756</sup> Liddle argues that the post-Soeharto election was the "turning point or defining moment of the transition".<sup>757</sup> For Liddle democratic election

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<sup>752</sup> Liddle, above n 30, 387.

<sup>753</sup> Rabasa and Chalk, above n 751, 10.

<sup>754</sup> Anwar, above n 720, 39.

<sup>755</sup> National Democratic Institute and The Carter Center, statement of the National Democratic Institute and the Carter Center International Election Observation Delegation to Indonesia's June 7, 1999, Legislative Election, Jakarta, 9 June 1999, 1.

<sup>756</sup> Ibid. But see Ricklefs, above n 542, at 303 — 304. Ricklefs argues that although the 1955 election was fairer and open than the façade elections under Soeharto, but it was not truly democratic either, due to military and religious pressures.

<sup>757</sup> Liddle, above n 30, 373.

indicates that the “threshold from democracy to authoritarianism has been crossed” by Indonesia.<sup>758</sup>

**The Election Result.** Only 21 out of 48 parties won seats in the DPR in the 1999 general election. Table 2 shows this result and the overall distribution of seats in the DPR.

**Table 2 The 1999 General Election Results & Composition of the DPR<sup>759</sup>**

No.	Party	% of Votes	Seats	% of Seats
1.	PDIP <sup>760</sup>	33.73	153	30.6
2.	Golkar	22.46	120	24
3.	PPP	10.72	58	11.6
4.	PKB <sup>761</sup>	12.66	51	10.2
5.	TNI-Polri ( Non-party, Reserved Seats)	0	38	7.6
6.	PAN <sup>762</sup>	7.12	34	6.8
7.	PBB <sup>763</sup>	1.94	13	2.6
8.	Other 15 Parties <sup>764</sup>	11.4	33	5.2
	TOTAL	100	500	100

Notes: Because of its wider distribution in the less-populous provinces outside Java, which had greater electoral weight, the PPP, with only 10.72% of the vote, won 58 seats in the DPR, while the PKB, because of its concentration of voters in East and Central Java, won only 51 seats, despite gaining 12,66% of the vote.

The table shows that, on the one hand, the political configuration was still dominated by the three parties which existed under Soeharto’s authoritarian regime, with the PDIP, Golkar and

<sup>758</sup> Ibid.

<sup>759</sup> Rearranged from David Bourchier, ‘Habibie’s Interregnum: *Reformasi*, Elections, Regionalism and the Struggle for Power’ Chris Manning and Peter van Diermen (eds), *Indonesia in Transition: Social Aspects of Reformasi and Crisis* (2000) 21; and Suryadinata, above n 584, 103.

<sup>760</sup> PDIP is *Partai Demokrasi Indonesia Perjuangan* or Indonesian Democratic Party of Struggle.

<sup>761</sup> PKB is *Partai Kebangkitan Bangsa* or National Awakening Party.

<sup>762</sup> PAN is *Partai Amanat Nasional* or National Mandate Party.

<sup>763</sup> PBB is *Partai Bulan Bintang* or Star Crescent Party.

<sup>764</sup> These 15 parties are PK (*Partai Keadilan*, Justice Party), PDKB (*Partai Demokrasi Kasih Bangsa*, Love the Nation Democratic Party), PNU (*Partai Nahdlatul Ummat*, Nahdlatul Ummat Party), PKP (*Partai Keadilan dan Persatuan*, Justice and Unity Party), PDI (*Partai Demokrasi Indonesia*, Indonesian Democratic Country), PBI (*Partai Bhinneka Tunggal Ika Indonesia*, Indonesian Unity and Diversity Party), PKD (*Partai Katolik Demokrat*, Democratic Catholic Party), PDR (*Partai Daulat Rakyat*, People’s Sovereignty Party), IPKI (*Ikatan Penerus Kemerdekaan Indonesia*, Independence Vanguard Party), PP (*Partai Persatuan*, United Party), PSII (*Partai Syarikat Islam Indonesia*, Indonesian Islamic Union Party), PNI-MM (*Partai Nasional Indonesia-Massa Marhaen*, Indonesian National Party-Marhaen Masses) PNI-FM (*Partai Nasional Indonesia-Front Marhaenis*, Indonesian National Party-Marhaenis Front), the PPIIM (*Partai Politik Islam Indonesia Masyumi* or Indonesian Masyumi Islamic Party) and PKU (*Partai Kebangkitan Ummat*, Ummat Awakening Party).

the PPP being the three biggest parties in the DPR.<sup>765</sup> Because during Soeharto's authoritarian regime the three parties were loyal supporters of the 1945 Constitution, their continued domination was one of the biggest challenges to the constitutional reform.

On the other hand, out of the 500 members of the DPR, only 116, or 23 per cent of the total number, were members of the previous DPR. 77 per cent were new.<sup>766</sup> Most of the new members were entrepreneurs, bureaucrats and teachers.<sup>767</sup> This demonstrates radical change in the occupational background of the DPR members, with the numbers of bureaucrats and retired military officers falling extensively and members with an entrepreneurial background taking their place.<sup>768</sup>

**The MPR's Composition.** For the purposes of constitutional reform, however, the distribution of seats in the DPR was less significant than the composition of the MPR, because it was the MPR that constitutionally holds the power to determine and to amend the 1945 Constitution (Articles 3 and 37).

Pursuant to the Law No. 4 of 1999 on the parliamentary composition, the MPR consisted of 700 members, of which 500 were from the DPR and 200 from additional members, representing regional and functional groups.<sup>769</sup> In the DPR itself, only 462 seats were contested, while 38 seats were reserved for the free seats of the TNI and Polri <sup>770</sup> (17 from the army, 8 each from the navy and the air force, and 5 from the police).<sup>771</sup>

From the remaining 200 seats in the MPR occupied by non-DPR members, 135 were appointed by the Provincial DPRD's (5 from each 27 provinces) and 65 were representatives from non-governmental organizations and other non-political organization. These 65

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<sup>765</sup> Although, one may argue that PDIP (Partai Demokrasi Indonesia Perjuangan or Indonesian Democracy Party of Struggle) was different from the PDI (under Soeharto), the PDIP was actually the continuation of the PDI with quite similar name and symbol. PDIP changed their appearance a little bit to differentiate it from another party, engineered by Soeharto, which was still claiming as the 'true' PDI.

<sup>766</sup> Suryadinata, above n 584, 119.

<sup>767</sup> Ibid.

<sup>768</sup> National Democratic Institute, The 1999 Presidential Election and Post-Election Development in Indonesia: A Post-Election Assessment Report, 28 November 1999, 12.

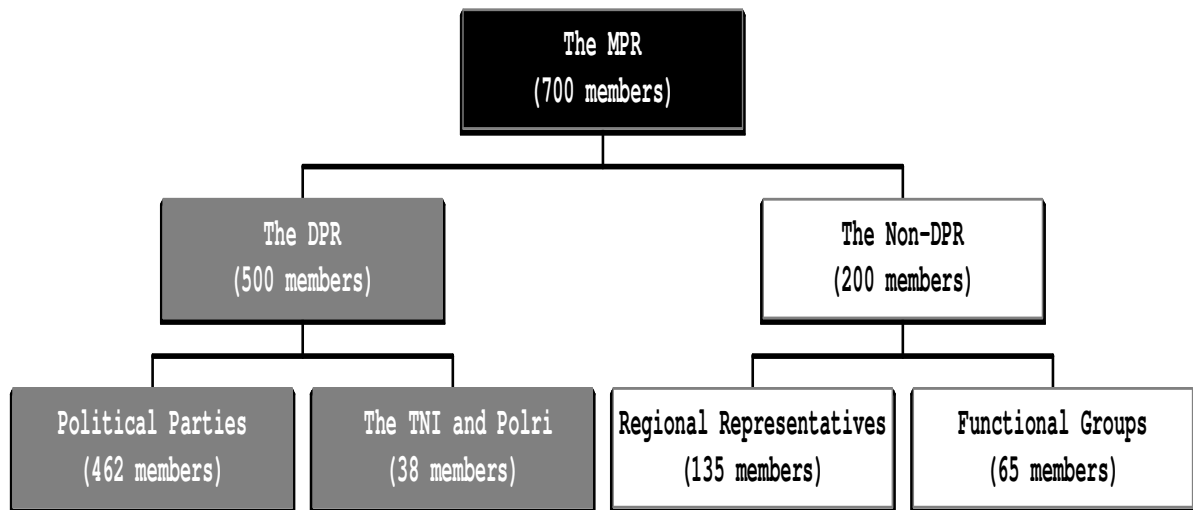
<sup>769</sup> Article 2 of the 1945 Constitution in relation to Article 2(2) of Law No. 4 of 1999 on the Composition of the MPR, the DPR and the DPRD's.

<sup>770</sup> Article 11 of Law Number 4 of 1999 on the Composition of the MPR, the DPR and the DPRD's.

<sup>771</sup> National Democratic Institute and The Carter Center, Post-Election statement Number 4, Post-Election Developments in Indonesia, the Formation of the DPR and the MPR, Jakarta, 26 August 1999, 8.

representatives were selected from 20 religious leaders (15 for Moslems, 2 for Protestants, 1 each for Catholics, Hindus and Buddhists), 5 veterans' organizations, 9 economic organizations, 5 women's groups, 5 ethnic minority groups, 2 disabled groups, 9 academics and intellectual associations, 5 civil servants' organization and 5 NGOs, students and youth organizations.<sup>772</sup>

**Table 3 The Structure of the 1999-2004 MPR**



Source: Extracted from Law No. 4 of 1999  
 In reality, the MPR consisted of 695 members, the difference of five number is because East Timor was independence in 1999, and therefore, its five representatives were cancelled.

**The MPR's Factions.** The MPR is divided into factions. According to the MPR Decree No. II of 1999 on the MPR Standing Orders, a faction is defined as group of the MPR's members which represent configurations of a political party, military or regional and functional groups.<sup>773</sup> There were 11 factions in the MPR: PDIP, Golkar Party, Functional Group Representatives (*Fraksi Utusan Golongan*, FUG), the PPP, the PKB, the *Reformasi*, the TNI and Polri, the PBB, the KKI, the PDU and the PDKB.<sup>774</sup>

<sup>772</sup> Ibid 4. See also Suryadinata, above n 584, 140 — 141.

<sup>773</sup> Article 13(1) of MPR Decree Number II of 1999 on Standing Order.

<sup>774</sup> Some of the factions were coalition of political parties, such as *Reformasi* was coalition between PAN and PK; Faction of KKI (*Kesatuan Kebangsaan Indonesia*, Indonesian National Unity) was a coalition the MPR members from the PDI, the IPKI, the PNI—Massa Marhaen, the PNI—Front Marhaen, the PKP, the PP, the PBI and the PKD; Faction of the PDU (*Perserikatan*

Table 4 shows details of the composition of the 11 factions.

**Table 4 The Factions and Composition of the 1999-2004 MPR <sup>775</sup>**

No.	Factions	DPR Seats	Additional Seats <sup>776</sup>	Total Members	% of Members
1.	PDIP	153	32	185	26.62
2.	Golkar Party	120	62	182	26.19
3.	FUG (65)	0	8	73	10.5
4.	PPP	58	12	70	10.07
5.	PKB	51	6	57	8.2
6.	<i>Reformasi</i>	41	8	49	7.05
7.	TNI-Polri (reserved seats)	38	0	38	5.5
8.	KKI	12	2	14	2
9.	PBB	13	2	13	1.87
10.	PDU	9	0	9	1.3
11.	PDKB	5	0	5	0.7
	<b>TOTAL</b>	<b>500</b>	<b>130</b>	<b>695 <sup>777</sup></b>	<b>100</b>

The establishment of a military faction prolonged the practice in the MPR during Soeharto's authoritarian regime. None of the other factions in the MPR rejected this military faction. In contrast, a proposal to establish a regional representatives faction was rejected, despite the fact that they had 135 members – more than three times the 38 military members.<sup>778</sup> In 1999, the regional representatives members were forced to join with other political parties' factions.<sup>779</sup> Most of them preferred to join the two biggest factions. Sixty-two, or almost half of the members, chose to join Golkar, nearly twice as many as the 32 who preferred to join the PDIP.<sup>780</sup>

*Daulat Ummat*, Union of Moslem Sovereignty) was coalition of the MPR members from the PNU, the PKU, the PSII, PPIIM and the PDR. See also the MPR Decision Number 2 of 1999 on the MPR Factions.

<sup>775</sup> National Democratic Institute, above n 768, appendix 9.

<sup>776</sup> These were the additional seats from the members of the Regional Representatives who joined the faction which they chose.

<sup>777</sup> As discussed above, pursuant to Article 2(2) of the Law No. 4 of 1999, the number of MPR members had been set at 700, including 135 Regional Representatives, but the five representatives from East Timor could not be chosen in September given the conditions there following the 30 August 1999 referendum. Consequently, the actual number of Regional Representatives was 130, and the total membership of the MPR was 695.

<sup>778</sup> National Democratic Institute, above n 768, 14.

<sup>779</sup> *Ibid.* However, later in the 2001 MPR Annual Session, these members from regional representation succeeded to establish their own faction, namely the FUG (*Fraksi Utusan Golongan*, Regional Representation Faction).

## B. The First Amendment: the Process

This section considers the amendment process in four divisions: (i) when the constitution-making should occur; (ii) how the constitution-making was conducted (iii) who the constitution-making body was to be; and (iv) how public participation was organized.

### 1. When the Constitution-Making should occur

**The Transition: a Constitutional Moment.** There were arguments that the amendment should not be carried out during the difficult transition from Soeharto's authoritarian regime. In late 1998, Yudhoyono argued that while Indonesia was in a crisis, it was not an appropriate time to amend the 1945 Constitution.<sup>781</sup> He further argued that amendment in the midst of turmoil would only create further problems.<sup>782</sup> I would argue against Yudhoyono. As indicated in Chapter Two, Elster argued that constitutions are often written in a crisis situation.<sup>783</sup> Bogdanor points out that a difficult and turbulent period is a golden moment for constitutional reform.<sup>784</sup> Thailand, which had gone through a quite similar and difficult political transition, had succeeded in reforming its Constitution.<sup>785</sup> Indeed, Thailand was in the middle of an economic crisis that was very much like the Indonesian economic crisis of the late 1990s when it drafted and ratified the people's Constitution in 1997.<sup>786</sup>

**No Sufficient Time.** This belief that a transition period is a 'golden moment' was adopted by the MPR factions. As it got closer to the time of Soeharto's forced resignation, however, constitutional reform was still not on the table. The focus of the students and the opposition leaders was simply to topple Soeharto.<sup>787</sup> Demands for constitutional reform only emerged after Soeharto's resignation. The students called for the amendment of the 1945 Constitution as well

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<sup>780</sup> National Democratic Institute, above n 768, 14.

<sup>781</sup> 'ABRI Supports Habibie, Rejects Presidium', *The Jakarta Post* 24 November 1999.

<sup>782</sup> *Ibid.*

<sup>783</sup> Elster, above n 69, 347, 370 – 371.

<sup>784</sup> Bogdanor, above n 153, 380.

<sup>785</sup> Harding, above n 68; Jumbala, above n 172; and Punyaratabandhu, above n 172.

<sup>786</sup> *Ibid.*

<sup>787</sup> National Democratic Institute, above n 768, 12.

as more effective law enforcement, the eradication of the KKN,<sup>788</sup> the abolition of the *dwifungsi* doctrine and the trial of Soeharto and his cronies.<sup>789</sup>

Regardless of these demands of the students, discussion of the constitutional reform among the power holders was never focused. From the period of Soeharto's forced resignation until the 1999 general election, the political debate was focused on electoral and political legislation.<sup>790</sup> In addition, most of the energies of the parties were devoted to winning the 1999 general election.<sup>791</sup> These all slowed down discussion of constitutional reform.<sup>792</sup>

Furthermore, in the MPR 1999 General Session, although the discussion of constitutional reform was actively underway, it was still less heated than the issue of the presidential election.<sup>793</sup> This was indicated by the predominance of news concerning the election of President and Vice President, compared to discussions concerning the amendment of the 1945 Constitution.<sup>794</sup>

**Twelve Days.** As a result, the only time available for the MPR to discuss the constitutional reform was prior to and during the General Session, from 1 to 21 October 1999. In fact, only twelve days out of these twenty-one days were allocated for this purpose. For a country which had been "denied constitutional debate for four decades",<sup>795</sup> twelve days was certainly a grossly insufficient time to discuss a complex and important issue such as constitutional amendment.

The twelve days of discussions of the First Amendment of the 1999 MPR General Session were divided into four stages (Table 5):

- discussions in the MPR Working Body (6 and 14 October);
- discussions in the Ad Hoc Committee III for Amendment (*Panitia Ad Hoc III* or PAH III) (7—13 October);
- discussions in the Commission C of the 1999 MPR General Session (17—18 October); and
- discussions in the Plenary Meeting of the 1999 MPR General Session (17—19 October).

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<sup>788</sup> KKN is the abbreviation of *Korupsi, Kolusi dan Nepotisme* or Corruption, Collusion and Nepotism.

<sup>789</sup> Piliang, above n 31, 441.

<sup>790</sup> Ellis, above n 662, 125.

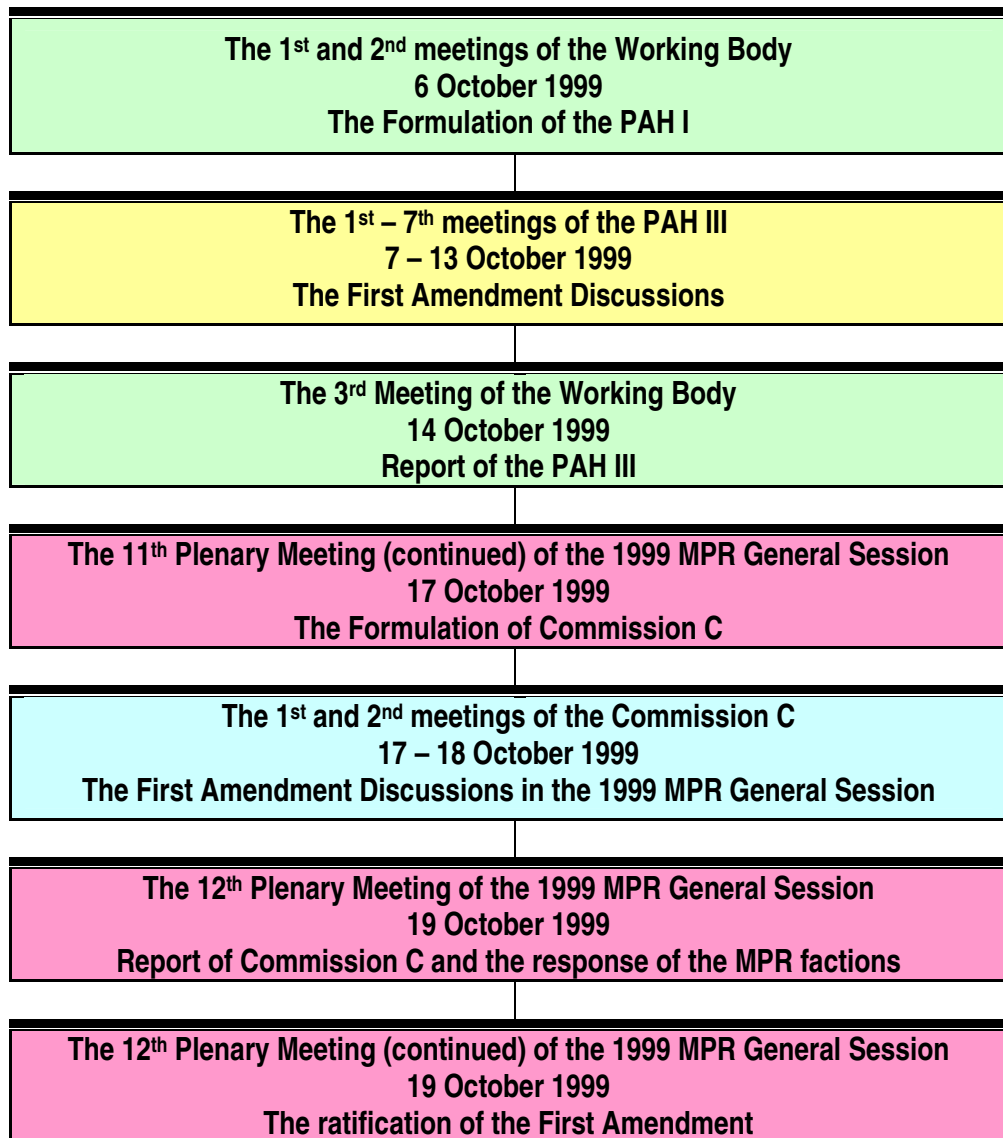
<sup>791</sup> Yusuf and Basalim, above n 6, 49, 86.


<sup>792</sup> Ellis, above n 662, 125.

<sup>793</sup> *Ibid* 86.

<sup>794</sup> *Ibid*.

**Table 5 Proceedings of the MPR's First Amendment Discussions**



- |   |  |
|---|--|
|  First Stage |  Second Stage |
|  Third Stage |  Fourth Stage |

Source: Extracted Minutes of Meeting of the MPR's First Amendment discussions.

<sup>795</sup> Lindsey, above n 99, 244.



After realizing how tight the 1999 MPR General Session's schedule was, the factions agreed that the amendment should be adjourned to the following year and be ratified on 18 August 2000.<sup>796</sup> This particular date was chosen because it had a symbolic meaning: Mustafa (Golkar) pointed out that 18 August 2000 was the 55<sup>th</sup> birthday of the 1945 Constitution.<sup>797</sup>

## 2. How the Constitution-Making was Conducted

The MPR's First Amendment discussions were much more open and deliberative than any of the MPR's discussions under Soeharto. Although the Amendment was finally agreed by consensus, during the discussions MPR members were free to express different arguments and certainly did so.<sup>798</sup> Yusuf and Basalim points out that:

... the most interesting thing ... is the enormous freedom and flexibility for the members of the MPR Ad Hoc Committee III to present their opinions and to speak their minds ... The journey of ideas from the members, therefore, are so rich, critical, constructive, and represent a strong commitment to the reform agenda.<sup>799</sup>

In addition, the First Amendment discussions were based on future concerns rather than short-term political interests. For example, Valina Singka Subekti (FUG) argued that the MPR's composition should be amended.<sup>800</sup> She suggested that Functional Group Representatives should not exist in the MPR.<sup>801</sup> Instead the people should directly elect all MPR members. This was, in effect, a self-liquidating proposal for FUG faction.<sup>802</sup>

During this First Amendment discussions, matters relating to the overall agenda for constitutional reform were debated. The following paragraphs will elaborate on two important agreements reached regarding: (i) choosing amendment or renewal; and (ii) rejecting or maintaining the preamble to the Constitution. These two agreements were actually closely related. The agreement to maintain the preamble rejected the choice to renew the Constitution.

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<sup>796</sup> Article 2 of the MPR Decree No. IX of 1999 on the Authorization of the Working Body of the MPR to Continue the Amendment of the 1945 Constitution.

<sup>797</sup> Minutes of the 1<sup>st</sup> meeting of the PAH III, 7 October 1999, 54.

<sup>798</sup> National Democratic Institute, above n 768, 15.

<sup>799</sup> Yusuf and Basalim, above n 6, 117 — 118.

<sup>800</sup> Minutes of the 1<sup>st</sup> meeting of the PAH III, 7 October 1999, 7.

<sup>801</sup> *Ibid.*

<sup>802</sup> *Ibid.*

### a. Amendment Yes, Renewal No

On 6 October 1999, all the factions agreed to amend and not renew the 1945 Constitution.<sup>803</sup> This agreement was a historical moment because the MPR had been one of the lead institutions resisting attempts to change the Constitution. On the other hand, the agreement delivered a clear message that the constitutional reform had to be limited.<sup>804</sup>

**The PDIP's Position.** Leaders of the PDIP frequently questioned the urgency of amending, much less renewing, the Constitution. Alex Litaay, who was the Secretary-General of the PDIP, argued that it was not necessary to amend the 1945 Constitution.<sup>805</sup> He further argued that the country's problems did not come from the Constitution itself but from its inconsistent application.<sup>806</sup>

Megawati Soekarnoputri, the Chairperson of the PDIP, endorsed Litaay's statement. She pointed out that the PDIP's reasons to be careful were:

... linked directly with PDIP's consistent efforts to safeguard our national life from attempts to alter the basic philosophy of our country in a direction that incrementally forces the demands and ideology of only one segment of society to be adopted, and yet implants a whole new ideology that does not conform with the interests of an independent Indonesia.<sup>807</sup>

Yusuf and Basalim argue that the PDIP was deeply concerned that the movement to establish an Islamic state would re-emerge during this post-Soeharto constitutional reform process. This situation had occurred during the 1945 and 1956-1959 constitution-making processes.<sup>808</sup> Because of the vacillating position of the PDIP (the biggest faction in the MPR) as regards constitutional reform, renewing the 1945 Constitution was out of the question. This 'wait and see' policy of the PDIP continued until the Fourth Amendment process (Chapters Five to Eight will look at more detail at the PDIP's concern).

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<sup>803</sup> Minutes of the 2<sup>nd</sup> meeting of the Working Body, 6 October 1999, 2 — 35. See also 'Seluruh Fraksi MPR Sepakat Lakukan Amandemen UUD 1945', *Kompas*, 7 October 1999.

<sup>804</sup> Ibid.

<sup>805</sup> 'Alex Litaay: Untuk Apa UUD '45 Diamandemen', *Republika*, 21 July 1999.

<sup>806</sup> Ibid.

<sup>807</sup> Policy Speech of Megawati Soekarnoputri, 29 July 1999. The translation from: *The People's Victory in the 1999 Election* (August 1999) Van Zorge, Heffernan & Associates <[http://www.vanzorgereport.com/report/popup/index.cfm?fa=ShowReport&pk\\_rpt\\_id=258&CFID=315606&CFTOKEN=71680888](http://www.vanzorgereport.com/report/popup/index.cfm?fa=ShowReport&pk_rpt_id=258&CFID=315606&CFTOKEN=71680888)> at 3 October 2003.

<sup>808</sup> Yusuf and Basalim, above n 6, 53.

**Two Technical Issues.** The policy to amend, rather than renew, the Constitution raised two technical issues: (i) what Article should be used to carry out the amendment; and (ii) what amendment model should be adopted.

**(1) Article 3 or Article 37**

The 1945 Constitution stipulated that the constitutional reform process could be carried out either by applying Article 3 or Article 37. Article 3 of the 1945 Constitution stated:

The MPR shall determine the Constitution and the guidelines of the policy of state.

Article 37 of the Constitution set up procedures to amend the Constitution which stipulated that:

1. In order to amend the Constitution, not less than two thirds of the total number of members of the MPR shall be in attendance.
2. Decisions shall be taken with the approval of not less than two thirds of the number of members in attendance.

In regard to these two choices, there were three views from the leading constitutional law experts. Alrasid argued that Article 3 – and not Article 37 – of the 1945 Constitution should be applied to start the constitutional reform.<sup>809</sup> The MPR had never used Article 3, and therefore, Indonesia had never had a definitive Constitution.<sup>810</sup>

Ismail Suny argued against Alrasid's view, saying that Indonesia already had a definitive Constitution.<sup>811</sup> Although the MPR had never directly implemented Article 3 of the 1945 Constitution, it has been 'in the process of being implemented' for four decades. Thus the Constitution had to be classified as a definitive one. Suny further argued that, by issuing an MPR Decree of 1966 which acknowledged the Constitution as Indonesia's basic legal source,<sup>812</sup> the MPR "silently executed" Article 3.<sup>813</sup> Therefore, if the MPR decided to reform the

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<sup>809</sup> Minutes of the 6<sup>th</sup> meeting of the PAH III, 12 October 1999, 39 – 40.

<sup>810</sup> Ibid.

<sup>811</sup> Ibid 41.

<sup>812</sup> MPR Decree Number XX of 1966.

<sup>813</sup> Minutes of the 6<sup>th</sup> meeting of the PAH III, 12 October 1999, 41.

1945 Constitution by directly implementing the amendment procedures as provided in Article 37, that would be constitutionally correct.<sup>814</sup>

Mulyosudarmo presented a third view, arguing that Article 3 should be used to renew the Constitution, while article 37 should be used to amend the 1945 Constitution<sup>815</sup> and, therefore Article 37 should be used for the First Amendment. Then, for any following amendment, Article 3 should be used to make a new Constitution, prepared by a “state Commission”.<sup>816</sup>

**The MPR’s Position.** All of the factions agreed that the constitutional reform should be carried out according to Article 37 and not Article 3. I am of the opinion that this technical choice is consistent with the earlier policy agreement to only amend but not renew the Constitution. I share Mulyosudarmo’s interpretation that Article 3 was more suitable to renew the Constitution, while Article 37 was more appropriate to amend the Constitution.

## (2) The United States Model

Also consistent with the decision to amend the Constitution, the MPR agreed that the original text of the 1945 Constitution would be maintained. The amendment then would be an attachment to this original Constitution. This means that Indonesia – at least intentionally – followed the United States amendment model. The *Reformasi* faction argued that:

[f]or the format of the amendment, we propose to adopt the United States’ model. This model revokes and completes specific articles by maintaining the original text of the Constitution. By doing this way, our next generation can study the history of this nation state.<sup>817</sup>

The *Reformasi* faction’s argument was merely technical. There was another, more substantial, reason behind the preference of the United States amendment model: the wish to avoid making a totally new Constitution.

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<sup>814</sup> Ibid.

<sup>815</sup> Ibid 41 — 43.

<sup>816</sup> Ibid 40 – 44.

<sup>817</sup> Ibid 11.

## b. The Preamble No, the Body and the Elucidation Yes

Another agreement reached by the MPR was to amend the body and elucidation but keep the preamble of the 1945 Constitution.<sup>818</sup> This agreement to keep the preamble was actually one of the main reasons behind the MPR factions' decision to merely amend the Constitution. This is due to the fact that the preamble does not only contain the declaration of independence but also the *Pancasila*, the Indonesia's unique "pan-religious state ideology".<sup>819</sup> For the nationalist factions in the MPR (the PDIP, TNI-Polri and Golkar), the *Pancasila* is a constitutional guarantee that Indonesia will not be an Islamic state.

One should note, however, that the Islamic factions in the MPR (clearly represented by the PPP, PBB and PDU) also agreed to maintain the preamble. This was an important changing of the Islamic factions' position which previously, in the 1945 and 1956-1959 constitution-making process, has proposed Islam as the formal basis of the state. By accepting in 1999 that the Preamble would be retained (which contained the *Pancasila*), the Islamic factions' demand to establish an Islamic state was in decline.

During the First Amendment discussions, the nationalist factions' position of maintaining the preamble was represented by Golkar, the *Reformasi*, the KKI and the TNI and Polri factions.<sup>820</sup> Golkar argued that:

... the preamble has to be maintained. It contains some declarations of Indonesia as a country. These declarations are fundamental and final. They are the declaration of independence, the declaration of Indonesia as a unitary state and, [the declaration of] the state philosophy, the *Pancasila*.<sup>821</sup>

Similarly, the TNI-Polri argued that:

[i]n relation to the preamble of the 1945 Constitution, without any intention to make it sacred, the TNI and Polri faction does not agree that it should be amended. The Preamble contains a holy agreement among the people to become a nation ... and to become a

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<sup>818</sup> Minutes of the 6<sup>th</sup> meeting of the PAH III, 7 October 1999, 44. See also Minutes of the 3<sup>rd</sup> meeting of the Working Body, 14 October 1999, 16; Minutes of the 1<sup>st</sup> meeting of the Commission C, 17 October 1999, 24.

<sup>819</sup> National Democratic Institute, above 768, 18.

<sup>820</sup> Minutes of the 2<sup>nd</sup> meeting of the MPR Working Body, 6 October 1999, 8, 11, 18 and 32.

<sup>821</sup> *Ibid* 8.

unitary state ... Further, the preamble declares the *Pancasila* as the philosophy of the state.<sup>822</sup>

**Maintaining the Unitary State.** Hamdan Zoelva (PBB) argued that, in addition to the preamble, the idea of unitary state should not be amended.<sup>823</sup> He did not, however, give further clarification and simply mentioned that the unitary state should be considered ‘final’ for Indonesia.<sup>824</sup> This argument was met neither agreement nor disagreement from other factions at the First Amendment discussions, but later, in the Fourth Amendment, the unitary state became an entrenched (non-amendable) Article.

### 3. Who the Constitution-Making Body was to be

As to the question of who the constitution-making body should be, the MPR was almost unchallenged. Indeed, Articles 3 and 37 of the 1945 Constitution gave the authority to determine or to amend the 1945 Constitution to the MPR.<sup>825</sup> To carry out the amendment, the MPR established the Working Body, the PAH III (Ad Hoc Committee III for amendment) and the Commission C, consisting of 90, 25 and 171 MPR’s members respectively.<sup>826</sup> In each of the three bodies the eleven factions were represented in proportion with the number of seats they held in the MPR.

**Inside the MPR.** During the First Amendment discussions, of the eleven factions in the MPR, only the PKB and Golkar proposed that there could be another constitution-making body besides the MPR. The PKB proposed forming a “Constitutional Reform Team” to prepare amendments to the 1945 Constitution.<sup>827</sup> The duty of this team would be to examine the body and the elucidation of the Constitution, to identify amendments needed to ‘keep up with social development’.<sup>828</sup> The draft of the amendment would then be ratified in stages by the MPR, within one year.<sup>829</sup> However, the PKB was vague on how the formation of the team should be

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<sup>822</sup> Ibid 32.

<sup>823</sup> Minutes of the 1<sup>st</sup> meeting of the PAH III, 7 October 1999, 6.

<sup>824</sup> Ibid.

<sup>825</sup> Soemantri, above n 33, 74.

<sup>826</sup> The Decision of the MPR Leadership Number 7 of 1999.

<sup>827</sup> Yusuf and Basalim, above n 6, 97 — 98.

<sup>828</sup> Ibid.

<sup>829</sup> Ibid.

decided.<sup>830</sup> In one of the drafts of its MPR Decree, the PKB proposed that the MPR Working Body should determine the membership of the team.<sup>831</sup> In another draft, this faction suggested that the government, together with the DPR, should establish the Constitutional Reform Team.<sup>832</sup> Either way, the PKB never seriously fought for this proposal and it failed.

Andi Mattalata (Golkar) proposed that the constitutional reform should be divided into long-term and short-term proposals.<sup>833</sup> The short-term proposals should be agreed in the 1999 MPR General Session, while the long-term proposals should be carried out either by the MPR Working Body, or by a “National Committee”.<sup>834</sup> Mattalata further proposed that this National Committee should consist of members of the MPR and constitutional experts.<sup>835</sup> However, Golkar never seriously pursued this proposal.

Next, the alternative constitution-making body came up in the first PAH III meeting which stated that if the 1999 MPR General Session could not finish the constitutional reform process, the Working Body or a “Special Commission” should become the constitution-making body and finished the reform.<sup>836</sup> Harun Kamil (FUG) rejected this proposal, by arguing that:

... it is better if we delete the proposal to establish this Special Commission. This term of Special Commission does not exist in the law ... I would argue that the Special Commission is, in fact, this MPR Working Body, this MPR Ad Hoc Committee.<sup>837</sup>

**Experts’ Position.** Harun Alrasid argued that rather than the MPR, it would be better if:

... a commission of constitutional amendment is established. This Commission will then carry out its duty within 7 months ... Then, in the next year MPR Session, the product of this Commission can be presented ... the MPR then can discuss the draft of Constitution which is prepared by this Commission of experts.<sup>838</sup>

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<sup>830</sup> Ibid.

<sup>831</sup> Ibid.

<sup>832</sup> Ibid.

<sup>833</sup> Minutes of the 1<sup>st</sup> meeting of the PAH III, 7 October 1999, 4.

<sup>834</sup> Ibid.

<sup>835</sup> Ibid.

<sup>836</sup> Ibid 48.

<sup>837</sup> Ibid 51.

<sup>838</sup> Minutes of the 6<sup>th</sup> meeting of the PAH III, 12 October 1999, 40.

At the same meeting, Soewoto Mulyosudarmo agreed that the MPR should be the constitution-making body for the First Amendment. For following amendments, however, he argued that a “state Commission” should be established.<sup>839</sup> He further suggested that this state Commission should be given full authority to make a new Constitution.<sup>840</sup>

The PAH III did not, in the end, adopt the views of Alrasid and Mulyosudarmo regarding alternatives to the MPR. Instead, the PAH III agreed that the MPR Working Body should continue preparing the draft of the next amendment of the 1945 Constitution. Thus the MPR promulgated an MPR Decree No. IX of 1999 on ‘the Authorization of the Working Body of the MPR to continue the amendment of the 1945 Constitution’. This decree stated as follows:

- To authorize the Working Body of the MPR to prepare a draft of amendment of the 1945 Constitution of the Republic Indonesia.
- The amendment draft shall be ready to be ratified in the MPR Annual Session on 18 August 2000.

#### **4. How Public Participation was Organized**

In the first meeting of the PAH III, some of its members raised the public participation issue. One of the PAH III members<sup>841</sup> argued that it would be better if part of the meetings were allocated to hear the public.<sup>842</sup> This member further argued that public hearings were necessary so that the people would not feel left behind.<sup>843</sup> At the same time, however, this member also disclosed a lack of commitment to the public involvement. He stated that, “this participation is just a formality. We already understand the substance”.<sup>844</sup>

Some members argued against the public participation based on time limitations.<sup>845</sup> Zoelva questioned the unclear format of the participation.<sup>846</sup> He further argued that it was difficult to decide which groups should be invited among so many different groups in the country.<sup>847</sup> He,

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<sup>839</sup> Ibid 44.

<sup>840</sup> Ibid.

<sup>841</sup> The minutes of meeting did not mention the name of this member.

<sup>842</sup> Minutes of the 1<sup>st</sup> meeting of the PAH III, 7 October 1999, 14.

<sup>843</sup> Ibid.

<sup>844</sup> Ibid.

<sup>845</sup> Ibid 14 — 16.

<sup>846</sup> Ibid 16.

<sup>847</sup> Ibid.



therefore, suggested that, the Committee should not invite any groups for hearings at all<sup>848</sup> but agreed that delegations from the public would be welcome, if they came during the Committee meetings.<sup>849</sup>

Yusuf Muhammad (PKB) supported Zoelva's argument. He argued that:

[w]e need input from the public ... This is urgently required to show our accountability as an institution which is concerned to its public aspirations. However, we have a time limitation. Therefore, if the public hearings are conducted, they will not have to be face-to-face meetings.<sup>850</sup>

In the end, the PAH III invited five experts to give their suggestions: Roeslan Abdul Gani, Ismail Suny, Harun Alrasid, Soewoto Mulyosudarmo and Sri Soemantri.<sup>851</sup> These experts, however, were not invited to the early meetings, but in the sixth and the seventh meetings of the PAH III. At that time, the First Amendment had already been drafted. Moreover, the seventh meeting was the last meeting of the PAH III. Under these circumstances, input from experts had little practical purpose and, indeed, the PAH III meetings never intensively discussed the experts' suggestions.

In quantity, public participation in the First Amendment discussions – organized by the MPR – was limited and was mostly indirect. There was no 'active and inclusive participation' as recommended by Saunders.<sup>852</sup> However, with only twelve effective days for debate, it was impossible to carry out comprehensive and wider public participation, even given the will to do so.

In regard to quality, however, public participation ran fairly well. Before and during the 1999 MPR General Session, participation took the form of huge public demand from the people, especially students, to amend the 1945 Constitution. Further, the transparency and openness of the MPR meetings played a crucial role. Most of the First Amendment discussions were

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<sup>848</sup> Ibid.

<sup>849</sup> Ibid.

<sup>850</sup> Ibid.

<sup>851</sup> Minutes of the 3<sup>rd</sup> meeting of the MPR Working Body, 14 October 1999, 18. Abdul Gani is a historian, while the rest are Constitutional law experts.

<sup>852</sup> Saunders, above n 166, 11.

open to the public.<sup>853</sup> Even some of the 1999 MPR General Session meetings were broadcast live on the TVRI (state-owned television channel) and the RRI (state-owned radio channel), as well as on some private televisions and radios.<sup>854</sup> In addition to the electronic media, printed media also covered the MPR meetings in detail, through special supplements.<sup>855</sup>

### C. The First Amendment: the Outcomes <sup>856</sup>

This section considers the outcome of the First Amendment discussions. Before proceeding, the section below first presents constitutional amendment recommendations both from civil society and the MPR factions. It then compares the two. I use this comparison to evaluate whether or not the MPR adequately dealt with public input in the First Amendment process.

#### 1. Similar Amendments Proposals

**Public Proposals.** Between 1998 and 1999, before the First Amendment took place, at least three civil society groups prepared constitutional amendment proposals.<sup>857</sup> They were *Kelompok Reformasi Hukum dan Perundang-undangan* (Legislation and Legal Reform Groups, KRHP); the University of Gadjah Mada (UGM); and *Masyarakat Transparasi Indonesia* (Indonesian Transparency Society, MTI).

At least five similar recommendations were proposed by these societies namely: (i) amending and not renewing the 1945 Constitution; (ii) restricting presidential powers; (iii) empowering the MPR, the DPR; the Supreme Court, and the BPK; (iv) adopting decentralization; and (v) strengthening human rights provisions.<sup>858</sup>

The KRHP and UGM also proposed: (i) to maintain the preamble and amend only the body and the elucidation; and (ii) to maintain the form of unitary state. The UGM and the MTI proposed:

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<sup>853</sup> National Democratic Institute, above n 768, 15.

<sup>854</sup> Ibid.

<sup>855</sup> Ibid 16.

<sup>856</sup> All articles in this section, except mentioned otherwise, refer to the First Amendment of the 1945 Constitution.

<sup>857</sup> Yusuf and Basalim, above n 6, 72 — 81.

<sup>858</sup> Ibid. See also Matrik dan Analisis Rekomendasi Perubahan UUD 1945 (1999) Masyarakat Transparansi Indonesia <<http://www.transparansi.or.id/kajian/kajian10/matriks.html>> at 5 October 2003; Mahfud MD, above n 534, 112 — 131.

(i) to liquidate the DPA (*Dewan Pertimbangan Agung*, Supreme Advisory Council); and (ii) to follow the United States amendment model.<sup>859</sup>

**The MPR Factions' Proposal.** In the First Amendment discussion, MPR factions proposed mostly similar recommendations to those just described. In the early stages of the discussions, they intended to amend almost all of the articles in relation to state institutions. For example, Mattalata (Golkar) proposed that the amendment cover two issues:

... first, the restriction of presidential authority, and second, the empowerment of state institutions which represent the people and control the government. These institutions are the MPR, the DPR, the BPK, the Supreme Court and the Attorney General...<sup>860</sup>

Zoelva (PBB) argued that the First Amendment should review all articles related to not only the institutions mentioned by Mattalata but also the DPA.<sup>861</sup> He further proposed that the First Amendment also incorporate other issues including: general elections, the Bank of Indonesia, a Bill of Rights, the relationship between the centre and periphery, ministers of state, national defense and security, the Indonesian territory and the status of the elucidation.<sup>862</sup>

At the 7 October meeting, the PAH III agreed to give priority to seven issues, which covered 20 Articles.<sup>863</sup> These issues were as follows: (i) the empowerment of the MPR; (ii) the restriction of presidential powers (iii) a review of the DPA's position; (iv) the empowerment of the DPR; (v) the empowerment of the BPK; (vi) the empowerment of the Supreme Court; and (vii) the provision of positions of Bank of Indonesia Governor, Attorney General and Chief of Staff of the TNI in the 1945 Constitution.<sup>864</sup>

The discussions of these priorities continued until 10 October, when the PAH III realized that it had insufficient time to finish the First Amendment. The PAH III then agreed to make a "super priority"<sup>865</sup> which covered two issues: the limitation of presidential powers and the

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<sup>859</sup> Ibid.

<sup>860</sup> Minutes of the 1<sup>st</sup> meeting of the PAH III, 7 October 1999, 3 — 4.

<sup>861</sup> Ibid 7.

<sup>862</sup> Ibid.

<sup>863</sup> National Democratic Institute, above n 768, 18.

<sup>864</sup> Yusuf and Basalim, above n 6, 144 — 145.

<sup>865</sup> Minutes of the 4<sup>th</sup> meeting of the PAH III, 10 October 1999, 20.

empowerment of the DPR.<sup>866</sup> In the end, only these two issues were promulgated as the First Amendment.

**Mostly Similar.** Comparing the public and MPR factions' amendment proposals (Table 6) makes it clear that almost all positions of the two were similar. In fact, the factions adopted the majority of the recommendations of the public where differences arose this was generally not because of different opinions, but because the MPR had not decided the issues yet. Examples of these unresolved cases applied to the form of the unitary state, the position of the DPA and human rights issues.

**Table 6 Comparison between the Amendment Proposals from Society and the MPR** <sup>867</sup>

Issues	KRHP	UGM	MTI	MPR
Maintaining the preamble and amending the body and elucidation	Yes	Yes	Yes	Yes
Maintaining the unitary state	Yes	Yes	N/A	Not intensively discussed yet
Amendment or renewal	Amendment	Amendment	Amendment	Amendment
The United States amendment model	N/A	Combination the US & French	Yes	Yes
Restricting Presidential Powers	Yes	Yes	Yes	Yes
Empowering the powers of the MPR, DPR, Supreme Court and BPK	Yes	Yes	Yes	Yes
The DPA	Restructurization	Liquidation	Liquidation	Discussed but was not decided yet
Adopting Decentralization concept	Yes	Yes	Yes	N/A
Completing Human Rights Provisions	Yes	Yes	Yes	Not intensively discussed yet

## 2. No to the President, Yes to the DPR

**No to President.** Past experience with Soekarno's and Soeharto's authoritarian regimes strongly influenced the output of the First Amendment.<sup>868</sup> In the 2<sup>nd</sup> meeting of the PAH III, Yusuf expressly argued that the 1945 'executive-heavy' Constitution was the root of the

<sup>866</sup> Yusuf and Basalim, above n 6, 147 — 149.

<sup>867</sup> Ibid 72 — 81. See also Masyarakat Transparansi Indonesia, above n 858; Mahfud, above n 628, 112 — 131; and Minutes of Meeting of the First Amendment Discussions.

<sup>868</sup> Tri Agung Kristanto, 'Amandemen Undang-undang Dasar 1945: Semangat Membatasi Kekuasaan Presiden', *Kompas*, October 20, 1999.

authoritarian New Order political system, therefore, the powers of the President needed to be restricted.<sup>869</sup> Similarly, Abdul Gani argued that:

... the executive should not dominate the legislature. The executive should not dominate the judiciary ... The priority of this amendment is to empower the MPR and the DPR .... It means ... if the DPR's powers are insufficient, they should be increased; if the presidential powers are too great, they must be limited.<sup>870</sup>

The MPR 1999 General Session produced amendments to nine of the 1945 Constitution's 37 Articles. Nearly all of the amendments empowered the DPR and limited presidential powers.<sup>871</sup>

**Shifting Legislative Power.** The amendments of Article 5, 20 and 21 are clear examples of a power transfer from the President to the DPR. Before the amendment, Article 5 (1) had stipulated that the President held 'the power to make statutes in agreement with the DPR'. This was changed to the effect that the President was merely entitled 'to submit Bills to the DPR', an entitlement which the President should share with every member of the DPR (Article 21). Further, the DPR would take over the legislative authority from the President. The new Article 20 stipulated that the DPR 'holds the power to make statutes'. Nonetheless, a procedure was stipulated for ratifying bills, involving the approval of both the President and the DPR (Article 20 (2), (3) and (4)).

**Table 7            The Shifting of Legislative Power from the President to the DPR**

Articles	Original	First Amendment
<b>5(1)</b>	The President shall hold the power to make statutes in agreement with the DPR.	The President has the right to submit Bills to the DPR.
<b>20(1)</b>	Every law shall require the approval of the DPR.	The DPR shall have the power to make laws.
<b>21(1)</b>	The members of the DPR have the right to submit a bill.	Unchanged.

<sup>869</sup> Minutes of the 2<sup>nd</sup> meeting of the PAH III, 8 October 1999, 36.

<sup>870</sup> Minutes of the 7<sup>th</sup> meeting of the PAH III, 13 October 1999, 26.

<sup>871</sup> They are Articles 5; 7; 9; 13(2) and (3); 14(1) and (2); 15; 17(2) and (3); 20(1), (2), (3) and (4); and 21.

This legislative power transfer was overwhelmingly agreed upon but some challenges remained. For example, Subekti argued that:

I totally understand that the spirit of this amendment ... is to empower the DPR, but ... are the DPR's members ready to have this legislative power? This power cannot be taken lightly. It needs ... not only qualified human resources but also an enormous budget.<sup>872</sup>

Likewise, Mulyosudarmo argued that:

[i]t is strange that pursuant to Article 20 the DPR holds the legislative power ... By changing the setting like this, the DPR will be busy making bills ... Therefore, [the original article] which provides the approval mechanism to the DPR is good enough to control the executive.<sup>873</sup>

I would argue against Subekti and Mulyosudarmo. The shifting of legislative power is correct. It places the legislative power where it is supposed to be, in the legislative body. The concern about the DPR members' capacity to make bills is not a valid argument. Expert staff members should be provided to support members of the Parliament.

**Limitation on Presidential Term.** Learning from the long authoritarian presidencies of both Soeharto and Soekarno, the MPR inserted into the Constitution a safeguard stating that the President and the Vice-President could be re-elected to the same office for only one further term (Article 7). This meant the MPR reaffirmed MPR Decree No. XIII of 1998 on Limitation of the President and Vice-President's Terms.<sup>874</sup>

It can be argued that the authoritarian nature of Soekarno and Soeharto presidencies was largely due to their length. Limiting the presidential term was therefore an important reform. It removed one of the main authoritarian characteristics from the 1945 Constitution. Therefore, I share Lindsey's opinion that, "more than any other, this amendment was a clear statement of political transition from authoritarianism".<sup>875</sup>

**Limitation on Presidential Judicial Powers.** The First Amendment also limited the President's judicial power and gave the DPR more influence in judicial issues. Amendment of

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<sup>872</sup> Minutes of the 7<sup>th</sup> meeting of the PAH III, 13 October 1999, 14.

<sup>873</sup> Minutes of the 6<sup>th</sup> meeting of the PAH III, 12 October 1999, 43 — 44.

<sup>874</sup> Article 1 of MPR Decree No. XIII of 1998 on Limitation of President and Vice-President Term.

Article 14(2) stipulated that the President should listen to the DPR's advice before granting amnesties and abolitions. Further, amendment Article 14(1) required the President to consult to the Supreme Court before granting pardons and restorations of rights.

**Limitation on the Presidential Diplomatic Powers.** The First Amendment also limited the President's diplomatic power, and gave the DPR more control in appointing ambassadors and consuls and receiving foreign ambassadors. This presidential power should be conducted 'having regard to the advice of the DPR' (Article 13(2) and (3)). A particular case between Indonesia and Australia strongly influenced the drafting of this amendment. In 1995, the Australian government objected to the appointment of HBL Mantiri as Indonesia's ambassador to Australia, on the ground that he had supported the TNI's actions in Santa Cruz massacre in East Timor, on 12 November 1991.<sup>876</sup> Mustafa pointed out that:

... our nominated ambassador to Australia was rejected ... by ... some parties [in the Parliament of Australia]. That is why, I think it would be wiser if in receiving another country's ambassador, [the President] should also hear the DPR's consideration.<sup>877</sup>

Another amendment related to previous events is the altered provisions on the swearing-in ceremony of the President and Vice President (Article 9). This amendment was inspired by Habibie's oath, which was witnessed by the Supreme Court in the Merdeka Palace, because the MPR could not assemble. The amendment which limited by law the presidential power to grant honors and medals was also triggered by Habibie's actions (Article 15) in granting honors to many of his supporters in August 1999.<sup>878</sup>

**Attempt to Limit the Presidential Cabinet Appointment.** There was also an attempt to limit the President's power to appoint his or her cabinet. Asnawi Latief (PDU) proposed that in appointing ministers, the President should consult to the DPR consideration.<sup>879</sup> This proposal failed. Amin Aryoso (PDIP) argued that the PAH III should avoid moving from an executive-heavy Constitution to a legislature-heavy Constitution.<sup>880</sup> In addition, the commitment of the

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<sup>875</sup> Lindsey, above n 99, 249.

<sup>876</sup> 'Setelah Kosong Lima Bulan', *Garda*, 16 — 23 December 1995.

<sup>877</sup> Minutes of the 5<sup>th</sup> meeting of the PAH III, 11 October 1999, 12.

<sup>878</sup> The limitation of this presidential power to confer state honor by law was also proposed by the University of Gadjah Mada and the Indonesian Transparency Community.

<sup>879</sup> Minutes of the 5<sup>th</sup> meeting of the PAH III, 11 October 1999, 40.

<sup>880</sup> Minutes of the 7<sup>th</sup> meeting of the PAH III, 13 October 1999, 4.

other members of the PAH III to strengthen presidential system blocked Latief's proposal.

Subekti argued that:

... we must remember that ministers are Presidents' assistants. Therefore ... it should be the President who has the full authority to decide who his assistants are ... Because we are now applying a multi-party system, if the DPR's advice should be considered, then political considerations will be stronger than professional considerations. This is not right.<sup>881</sup>

Similarly, Khofifah Indar Parawansa (PKB) warned that:

I appreciate that we have the spirit to empower the DPR, but I think we have to be wiser ... If the President's powers are too limited, I think it will also be unfair ... I am afraid that we will actually bind ourselves.<sup>882</sup>

**Conclusion.** For the radicals, who believed that the authoritarian 1945 Constitution had to be totally renewed, the First Amendment was far from satisfying. Wall Paragon, for example, argued that it was half-hearted.<sup>883</sup> I would argue, however, that the amendment succeeded in de-mystifying a Constitution which had been considered 'sacred' for decades.<sup>884</sup> Before 1998, changing the Constitution was unthinkable: it would have been regarded as treacherous or subversive.<sup>885</sup> Further, given the strong symbolic value of the Constitution, and with only twelve working days to arrive at a First Amendment, this Amendment was about as good an outcome as anyone could have hoped for.

One thing is clear though, that the First Amendment was an incomplete constitutional reform. It has to be recognized as only the beginning of constitutional changes that should have been completed in the 2000 MPR Annual Session.<sup>886</sup> The next chapter will discuss whether the MPR could have met this schedule or not.

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<sup>881</sup> Ibid 38.

<sup>882</sup> Ibid 20.

<sup>883</sup> Wall Paragon, 'Amandemen UUD 1945 yang Setengah Hati', *Suara Pembaruan*, 5 November 1999.

<sup>884</sup> Yusuf and Basalim, above n 6, 222.

<sup>885</sup> Endi M. Bayuni, 'Finally, Indonesia's Own First Amendment', *The Jakarta Post*, December 27, 1999.

<sup>886</sup> Lindsey, above n 99, 250.



## **Chapter Five**

### **The Second Amendment: Further Reforms, Continued Delays**

This chapter describes the process and the outcome of the Second Amendment of the 1945 Constitution. It is divided into three sections. Section A considers the situational background of the Second Amendment, from the ratification of the First Amendment in October 1999 until the MPR Annual Session on August 2000, to show that the constitutional reform took place in the midst of a crisis. Section B describes the constitution-making process of the Second Amendment in order to demonstrate that the MPR faced significant delay in its schedule and failed to fulfill its own plan to complete the amendment in 2000. Finally, section C outlines the resulting amendment which further reforms the 1945 Constitution, particularly by adopting impressive human rights protections.

#### **A. The Background: the Shaky Situation**

As well as ratifying the First Amendment and electing Abdurrahman Wahid as the President and Megawati Soekarnoputri as the Vice President, the November 1999 MPR General Session decided that the MPR would hold annual sessions from 2000.<sup>887</sup> These sessions would enable the MPR to continue the amendment of the 1945 Constitution, which had not finished in 1999.<sup>888</sup> The 2000 MPR Annual Session was held on 7 – 18 August 2000. The MPR, therefore, had a longer period (from November 1999 to August 2000) to prepare the Second Amendment than it had had for the First Amendment.

#### **1. Political Conflicts**

The nine months, from November 1999 to August 2000, were dominated by confrontation between President Wahid and the Parliament.<sup>889</sup> The increased power of the DPR after the First Amendment contributed to this conflict between Wahid and the Parliament. The 2000 Annual Session, therefore, opened in an “atmosphere of political tension”.<sup>890</sup> As a minority President, supported by less than 11 per cent of the PKB seats in the DPR, Wahid had to form

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<sup>887</sup> Article 57 of the MPR Decree No. I of 1999 on Standing Order.

<sup>888</sup> National Democratic Institute, above n 30, 1.

<sup>889</sup> *Ibid.*

a 'rainbow' cabinet, and initially managed to secure political support.<sup>891</sup> However, the harmony of the cabinet did not last long. In November 1999, only one month after the formation of the cabinet, Wahid sacked the Coordinating Minister for Social Welfare, Hamzah Haz, the chair of the PPP.<sup>892</sup> In late February 2000, Wahid removed General Wiranto from his post as Coordinating Minister for Security. Then, in April 2000, Wahid fired Laksamana Sukardi (PDIP) and Jusuf Kalla (Golkar) from their posts, as Minister for Investment and state Industries and Minister for Trade and Industry respectively.<sup>893</sup>

Because the PDIP, Golkar and the PPP held the majority of seats in the DPR (331 out of 500),<sup>894</sup> the firing of their senior party figures, Sukardi, Kalla, and Haz put Wahid's administration in jeopardy. In fact, it was probably the members of these parties who made up the 332 DPR members who demanded that Wahid should explain the reasons behind the removal of Sukardi and Kalla. This opened the possibility of impeaching President Wahid in the 2000 MPR Annual Session.<sup>895</sup>

The 2000 Annual Session was, therefore, overshadowed by the political bargaining between President Wahid and parties in the Parliament.<sup>896</sup> Six major factions of the MPR — Golkar, the PDIP, the PPP, the *Reformasi*, the PBB and the PDU — recommended that Wahid should continue as the head of state and that Vice President Megawati should be made the Prime Minister.<sup>897</sup> Mahfud argued that this proposal breached the 1945 Constitution which did not recognize the parliamentary system<sup>898</sup> but, in the end, Wahid agreed to assign Megawati some technical roles without handing over his presidential authority.<sup>899</sup> Manan argued that this assignment did not breach the Constitution.<sup>900</sup> His reasoning was that the Vice President:

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<sup>890</sup> Ibid.

<sup>891</sup> R. William Liddle, 'Indonesia in 2000: A Shaky Start for Democracy' (2001) 41:1 *Asian Survey* 208.

<sup>892</sup> Ibid 209.

<sup>893</sup> Ibid.

<sup>894</sup> See Table 3 above.

<sup>895</sup> National Democratic Institute, above n 30, 1.

<sup>896</sup> Kawamura, above n 661, 37.

<sup>897</sup> 'Abdurrahman Wahid Digiring hanya untuk jadi kepala Negara', *Kompas*, 9 August 2000.

<sup>898</sup> 'Wapres akan Laksanakan Tugas Pemerintahan', *Kompas*, 10 August 2000.

<sup>899</sup> Article 1 of Presidential Decree No. 121 of 2000 on the Assignment from the President to the Vice President to Handle the Daily Government Duties.

<sup>900</sup> Bagir Manan, 'Membagi Pekerjaan bukan Wewenang', *Tempo* (Jakarta) No. 25/XXIX/21 – 27 August 2000.

... would be responsible for assisting the President by heading the government administration, but the absolute administration executive power — both in the fields of the state and the government — would remain with the President.<sup>901</sup>

## 2. Social Conflicts

In addition to the President-parliament conflict, another major problem in 1999-2000 was the relationship between the center and the regions. The separatism issue increased as armed movements continued to fight for independence, particularly in Aceh and Papua. Other areas such as Maluku, Poso (Central Sulawesi), Kupang and Lombok were afflicted by widespread inter-communal conflicts.<sup>902</sup> In February 2000, it was estimated that, as a result of the conflicts, 300,000 Indonesians had become refugees.<sup>903</sup>

## 3. Economic Crisis

In 1999, during Wahid's first year administration, the Indonesian economic crisis continued and became another issue that the administration failed to address properly.<sup>904</sup> Although economic growth was better in 1999 than 1997 and 1998, inflation was still running at nearly 10% and the *Rupiah* continued to depreciate, dropping gradually from Rp 7,000 to nearly Rp 10,000 per US dollar.<sup>905</sup> In mid-2000, corporate debts almost amounted to around US\$ 120 billion, 57% of Indonesia's GDP.<sup>906</sup>

**Closing.** It was in the shadow of all of these political, social and economic problems that Indonesia discussed, drafted and ratified the Second Amendment. Clearly these problems were a challenge to the constitutional reform agenda. On the other hand, as discussed in Chapter Two, crises during a transition from authoritarian rule can actually be a golden opportunity to reform a Constitution. The following section will focus how the MPR responded to such an opportunity.

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<sup>901</sup> Ibid.

<sup>902</sup> Ibid 215. See also International Crisis Group, *Indonesia's Crisis: Chronic but not Acute*, ICG Indonesia Report No. 2 (2000) 17 — 21; Mieke Kooistra, *Indonesia: Regional Conflicts and State of Terror*, Minority Rights Group International Report (2001); Anthony L. Smith, 'Indonesia: One State, Many States, Chaotic State' (Paper presented at the Forum on Regional Strategic and Political Developments, 25 July 2001).

<sup>903</sup> International Crisis Group, above n 902, 20.

<sup>904</sup> Liddle, above n 891, 216 — 217.

<sup>905</sup> Ibid 218.

<sup>906</sup> Jason P. Abbot, 'Fall from Grace: The Political Economy of Indonesian Decay and Decline' (Paper presented at the Global Constitution of 'Failed states': The Consequences of A New Imperialism, University of Sussex, 18 — 20 April 2001).

## **B. The Second Amendment: the Process**

This section elaborates the amendment process in four divisions: (i) when the constitution-making should occur; (ii) how the constitution-making was conducted (iii) who the constitution-making body was to be; and (iv) how the public participation was organized.

### **1. When the Constitution-Making should occur**

#### **a. Timeline of the Discussions**

The MPR Second Amendment discussions were conducted by reviewing chapter-by-chapter of the 1945 Constitution. The discussions were conducted in four stages (Table 8).

- First, the MPR formed a Working Body which prepared all of the materials for the 2000 MPR Annual Session; this body then formed three ad hoc committees.<sup>907</sup>
- Second, one of the committees, the Ad Hoc Committee I (*Panitia Ad Hoc I* or PAH I or the Committee), was made responsible for preparing amendment drafts. The PAH I worked from the end of November 1999 until early August 2000.
- Third, Commission A was formed during the 2000 Annual Session to further discuss the draft of the Second Amendment prepared by the Committee.
- Fourth, on 18 August 2000, in the ninth Plenary Meeting of the Annual Session, the MPR ratified the Second Amendment.<sup>908</sup>

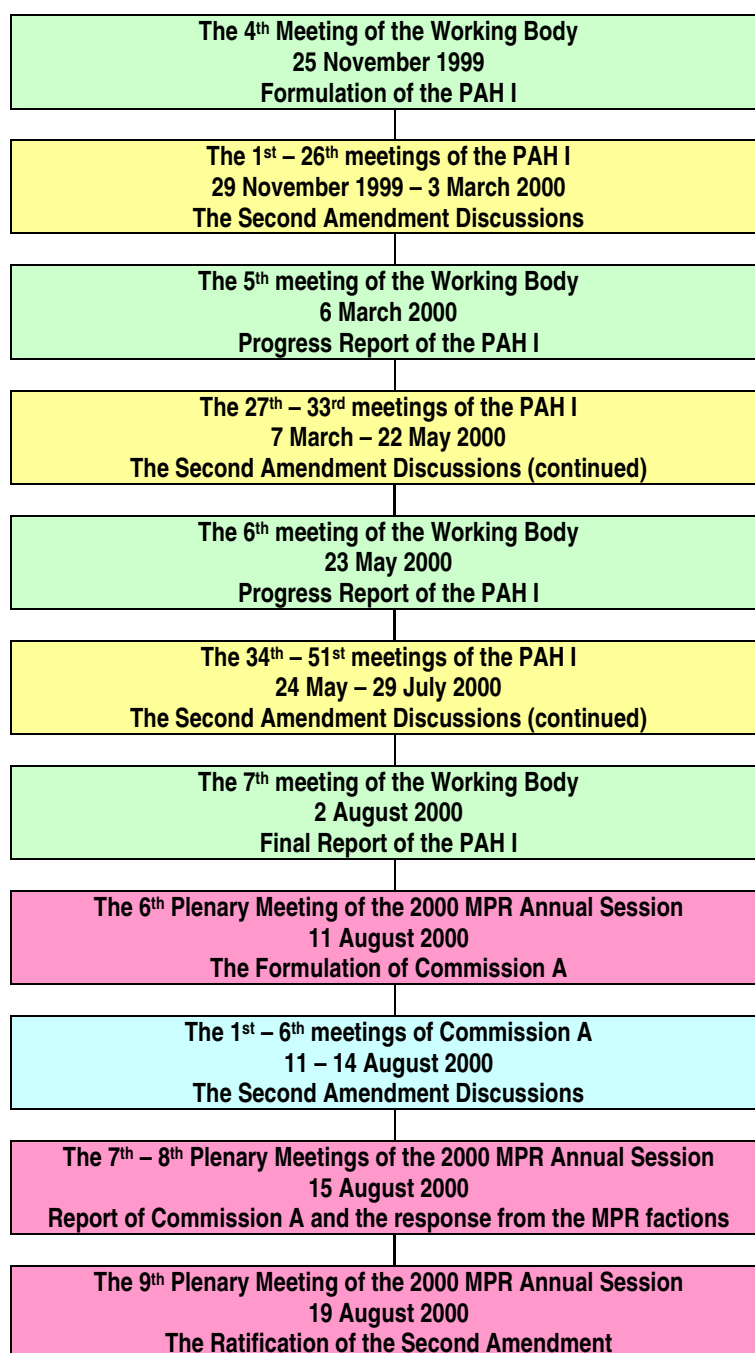
The Working Body, the PAH I and the Commission A of the MPR 2000 Annual session had 90, 44 and 227 members respectively. In each of this body the eleven factions were represented in proportion with the number of their seats in the MPR.

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<sup>907</sup> Minutes of the 4<sup>th</sup> meeting of the Working Body, 25 November 1999.

<sup>908</sup> The Working Body, the PAH I and the Commission A of the MPR 2000 Annual session had 90, 44 and 227 members respectively. In each of this body the eleven factions were represented in proportion with the number of their seats in the MPR.

**Table 8 Proceedings of the MPR's Second Amendment Discussions**



Source: Extracted from Minutes of Meetings of the MPR's Second Amendment Discussions

In the end of its meeting, PAH I submitted a comprehensive Second Amendment draft to the Working Body.<sup>909</sup> The draft contained revisions to each of the 16 chapters of the original 1945 Constitution and added 5 new chapters.<sup>910</sup> Table 10 in Section C below outlines the 21 chapters reviewed by the PAH I. The 2000 MPR Annual Session, however, failed to discuss and ratify the comprehensive draft. The following section deals with this MPR's failure.

## **b. The MPR's Changing Schedule**

The 1999 MPR General Session had resolved that the amendment process should be continued in the 2000 MPR Annual Session, and be completed on 18 August 2000. As already mentioned in Chapter Four, this date was chosen because it was the 55<sup>th</sup> birthday of the 1945 Constitution. Yet the MPR failed to follow its own instruction. The PDIP argued that not all of the amendment proposals prepared by PAH I should be ratified in 2000.<sup>911</sup> Hobbes Sinaga (PDIP) argued that the ratification should be of the agreed proposals and ratification of other proposed articles should be postponed.<sup>912</sup> Similarly, the TNI-Polri argued that the undecided proposals needed to be submitted for the following 2001 MPR Annual Session, rather than they were wholly promulgated in 2000.<sup>913</sup>

In contrast, Hamdan Zoelva (PBB) argued that:

... it is a waste of time if we do not ratify all of the proposals of the amendment at this [2000] annual session. If we do not amend and ratify the Constitution at this time, there will be no amendment at all, even if the condition is more stable. The lessons from other countries show that, the amendment of constitutions may only be carried out during political upheaval, as is happening now.<sup>914</sup>

However, as time was running out for the 2000 MPR Annual Session, all of the factions finally agreed to pass MPR Decree Number IX of 2000 which extended the previous deadline of constitutional amendment from August 2000 to 2002. The Decree set up a new schedule that:

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<sup>909</sup> Ellis, above n 662, 128.

<sup>910</sup> National Democratic Institute, above n 30, 3. See Table 10.

<sup>911</sup> Minutes of the 5<sup>th</sup> Plenary Meeting, 10 August 2000.

<sup>912</sup> Minutes of the 2<sup>nd</sup> meeting of the Commission A, 11 August 2000.

<sup>913</sup> Minutes of the 5<sup>th</sup> (continued) Plenary Meeting, 10 August 2000.

<sup>914</sup> Ibid.

[t]he amendment draft must be ready to be discussed and ratified by the MPR at the 2002 MPR Annual Session, at the latest.<sup>915</sup>

### c. The Public's Position

*The Jakarta Post* identified 20 non-governmental organizations that called for the postponement of the amendment process<sup>916</sup> mainly because they lacked confidence in the amendment process led by the MPR. Syafi'i Ma'arif, now the chair of Muhammadiyah,<sup>917</sup> argued that the MPR was not serious in dealing with the amendment draft.<sup>918</sup> Ma'arif referred to some sensitive articles, such as the relation between the state and Islam, and argued that "It is better if we delay the amendment because we need more time to prepare. We must not play games with the fate of the nation".<sup>919</sup>

Mahfud argued that the amendment draft was unsystematic and 'mostly overlapped', and therefore, opposed ratifying the whole draft in the 2000 annual session.<sup>920</sup> Likewise, Asshidique also argued that the ratification of articles which contain alternatives should be adjourned to the following MPR annual session.<sup>921</sup> For him, the postponement was necessary to avoid potential disharmony among articles.<sup>922</sup>

This MPR's decision to postpone the amendment process prolonged the debates in the MPR. The following section deals with the details of how the Second Amendment draft was debated from November 1999 to August 2000.

## 2. How the Constitution-Making was Conducted

This section will elaborate four issues in turn: (i) the agreement to maintain the preamble, the presidential system and the unitary state; (ii) the choice between amending and renewing the Constitution; (iii) the conflict between the conservative and progressive faction in the MPR; and (iv) the contamination of short-term political interests.

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<sup>915</sup> Article 3 of MPR Decree No. IX of 1999 on the Authorization of the Working Body of the MPR to prepare the Amendment Draft of the 1945 Constitution.

<sup>916</sup> 'Military Faction Seek Delay of Amendment', *Indonesian Observer*, 10 August 2000.

<sup>917</sup> Muhammadiyah is Indonesia's second largest Islamic organization movement. It was established in 1912 as an institutional expression of the Indonesian modernist movement. The organization is well-known for its involvement in providing education and basic health care for Muslims.

<sup>918</sup> *Military faction seek Delay of Amendment*, above n 916.

<sup>919</sup> *Ibid.*

<sup>920</sup> 'Konstruksi Perubahan UUD 1945 Kacau', *Kompas*, 14 August 2000.

<sup>921</sup> *Ibid.*

<sup>922</sup> *Ibid.*

### a. Preserving the Preamble, the Unitary State and the Presidential System

At the third meeting of the PAH I, the PDIP faction claimed that, in the 1999 MPR General Session, all of the factions had agreed to maintain three fundamental aspects of the existing system: the preamble of the 1945 Constitution, the unitary state and the presidential system.<sup>923</sup> This claim was untrue: while all the factions had agreed on preserving the preamble, there were differences of opinion with regard to the presidential system and the unitary state.<sup>924</sup>

In the 4<sup>th</sup> meeting of the PAH I, A.M. Luthfi (*Reformasi*) proposed a federal state to replace the unitary state.<sup>925</sup> In support to this proposal, Patrialis Akbar (*Reformasi*) put the following argument:

... the centralized system had triggered injustice. The current threat of disintegration is due to such injustice. Therefore, the development of decentralized system is urgently needed ... in this regard the *Reformasi* faction supports the idea of federalism ... We, however, object to any separation or independence movement.<sup>926</sup>

In addition, Zoelva indicated that the PBB faction was willing to discuss the possibility of a federal state.<sup>927</sup> He argued that:

... although personally I agree with a unitary state, the discussion of federalism should not be closed ... We should not decide the issue in this forum without hearing what the regions' views. They might be in favor of a federal state.<sup>928</sup>

Despite these differences, Jacob Tobing (PDIP, the Chair of the PAH I) persisted in claiming that the Committee had agreed on these three questions. At most of the public hearings held

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<sup>923</sup> Minutes of the 3<sup>rd</sup> meeting of the PAH I, 6 December 1999.

<sup>924</sup> Blair A. King, *Constitutional Tinkering – The Search for Consensus is taking Time Inside Indonesia* (2001) Inside Indonesia, <<http://insideindonesia.org/edit65/blair.htm>> at 4 October 2003.

<sup>925</sup> Minutes of the 4<sup>th</sup> meeting of the PAH I, 7 December 1999.

<sup>926</sup> Minutes of the 6<sup>th</sup> meeting of the PAH I, 10 December 1999.

<sup>927</sup> Minutes of the 5<sup>th</sup> meeting the PAH I, 9 December 1999. This was different to Zoelva's earlier position. At the First Amendment Discussions, Zoelva argued that the unitary state should not be amended. Above n 823.

<sup>928</sup> Minutes of the 8<sup>th</sup> meeting of the PAH I, 14 December 1999.



by the Committee, he chaired the meetings<sup>929</sup> and opened each of them with statement that the Committee had agreed to preserve these three issues.<sup>930</sup>

Although Tobing's claim was unsubstantiated, none of the Committee members openly disagreed. It could be argued, therefore, that they implicitly agreed with Tobing. Furthermore, at the hearings, neither the experts nor the general public strongly objected to the idea of preserving the preamble, the unitary state and the presidential system. Indeed, Manan proposed an article stipulating that the preamble could not be amended.<sup>931</sup>

Yet no factions presented convincing reasons as to why the preamble, the unitary state and the presidential system should not be amended. PDIP, which was in favor of the preservation, was vague about its reasons. With regard to the preamble, the PDIP repeated the argument it had put in the First Amendment discussions, that the preamble contained the state philosophy, the *Pancasila*.<sup>932</sup> This argument reaffirmed the nationalist-secular faction position, of rejecting an Islamic state. The PDIP's basic argument, in favor of the unitary state, was merely based on the third principle of the *Pancasila* of 'the unity of Indonesia'.<sup>933</sup> As for maintaining the presidential system, the PDIP presented no supporting argument at all. (In fact, as Ellis has pointed out, there was no explanation as to what the presidential system was).<sup>934</sup>

There are historical reasons supporting the opposition to the making of changes of these three key aspects of the 1945 Constitution. Behind the policy to preserve the preamble was the unresolved debate in the *Konstituante* in 1956-1959, over whether Indonesia should be a *Pancasila* or Islamic state.<sup>935</sup> The unstable politics during the period of parliamentary system in the 1950s had made the presidential system preferable and had made both the concept of, and even the term, 'parliamentary system' unacceptable.<sup>936</sup> Similarly, the memory of the failed

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<sup>929</sup> Tobing chaired the meetings with Slamet Effendy Yusuf of Golkar and Harun Kamil of Functional Groups Representatives interchangeably. Unlike Tobing, neither Yusuf nor Kamil claimed that the Committee had agreed on the three issues.

<sup>930</sup> Minutes of the 4<sup>th</sup>, 17<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>, 22<sup>nd</sup>, 24<sup>th</sup>, 25<sup>th</sup> and 29<sup>th</sup> meetings of the PAH I, 7 December 1999 – 9 March 2000.

<sup>931</sup> Minutes of the 9<sup>th</sup> meeting of the PAH I, 16 December 1999.

<sup>932</sup> Minutes of the 3<sup>rd</sup> meeting of the PAH I, 6 December 1999.

<sup>933</sup> *Ibid.*

<sup>934</sup> Andrew Ellis, 'Constitutional Reform and the 2004 Election', unpublished paper, February 2003.

<sup>935</sup> Nasution, above n 14, 51 — 130.

<sup>936</sup> Ellis, above n 934.

federal system under the short-lived 1949 Constitution contributed to the consensus of unacceptability of a federal state.<sup>937</sup>

This agreement – to maintain the preamble, the unitary state and the presidential system – strengthened the MPR's intention to amend the 1945 Constitution instead of drafting an entirely new Constitution.<sup>938</sup> However the following section will demonstrate how the intention came to be undermined.

### **b. Not a Totally New Constitution, but a Total Rewrite of the Old Constitution**

Despite the fact that in the 1999 General Session the MPR had agreed to merely amend the 1945 Constitution, the movement for a new Constitution strengthened during the Second Amendment discussions.

**Public Position.** Alrasid argued that rather than amending part of the Constitution, the MPR should establish a 'Constitutional Renewal Commission' which would totally amend the 1945 Constitution.<sup>939</sup> Alrasid agreed, however, that the preamble of the Constitution should be maintained.<sup>940</sup> Similarly, Bambang Widjojanto, who was the chair of the YLBHI,<sup>941</sup> called for a renewal arguing that:

[i]f the method is an amendment ... that is fine, as long as the final result is a renewed Constitution ... [The process] could amend the Constitution step-by-step, based on the possibility and the urgency, but overall these amendments must be very significant.<sup>942</sup>

**The MPR's Position.** Theo L. Sambuaga (Golkar) suggested that the constitutional reform approach should be comprehensive and not just an article-by-article amendment.<sup>943</sup> Gregorius Seto Haryanto (PDKB) pointed out that, although the people did not openly object to the decision in favor of amendment, the "reality shows that people's submissions from all levels of

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<sup>937</sup> Ibid.

<sup>938</sup> King, above n 924.

<sup>939</sup> Harun Alrasid, 'Menuju UUD 2000', *Tempo*, 25 — 31 October 1999.

<sup>940</sup> Ibid.

<sup>941</sup> YLBHI is the abbreviation of *Yayasan Lembaga Bantuan Hukum Indonesia* or Foundation of the Indonesian Legal Aid Institut, one of Indonesian most influential NGOs.

<sup>942</sup> Minutes of the 17<sup>th</sup> meeting of the PAH I, 21 February 2000.

<sup>943</sup> Minutes of the 8<sup>th</sup> meeting of the PAH I, 14 December 1999.

the society covered very many articles. It is recommended that almost all articles be altered and tens of new articles be added<sup>944</sup>.

Indeed, as mentioned earlier, the amendment draft prepared by the PAH I was extremely comprehensive.<sup>945</sup> The proposals contained 21 Chapters which revised each of the 16 chapters of the original 1945 Constitution and added 5 new chapters.<sup>946</sup> Such comprehensive proposals were inconsistent with the American amendment method, which had been previously agreed on in the First Amendment discussions. Arief Biki (FUG) commented that:

... in the United States each amendment only related to one issue .... We are drafting an amendment which will revise 60% of our Constitution ... my question is what is the reason behind this 60% amendment?<sup>947</sup>

These comprehensive proposals also worried some conservative groups. Budi Harsono of the TNI and Polri faction argued that:

... there is an intention to totally revise the 1945 Constitution. This is reflected in the more than 70 Articles prepared. This comprehensive revision needs to be watched and considered carefully, particularly because the intention has emerged in the midst of a social instability and crises.<sup>948</sup>

There were some indications that, during the Second Amendment discussions, the question of whether the 1945 Constitution should be renewed or amended was intentionally left unanswered. For example, when responding to the progress report of the PAH I, Amien Rais, the Speaker of the MPR and the Working Body, concluded, from the comprehensive amendment proposals prepared by the Committee, that there was a strong will to totally renew the Constitution.<sup>949</sup> In response to this, Tobing (PDIP) argued that there was no firm intention to totally change the Constitution, however, he further added that the amendment would be an ongoing process and only time would tell what the final result would be.<sup>950</sup> Similarly, when Subekti argued that the Committee should firmly decide either to make a new Constitution or only amend part of the document, Tobing's direct response was non-committal. He simply

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<sup>944</sup> Minutes of the 2<sup>nd</sup> meeting of the Commission A, 11 August 2000.

<sup>945</sup> Ellis, above n 662, 128.

<sup>946</sup> National Democratic Institute, above n 30, 3. See Table 10.

<sup>947</sup> Minutes of the 5<sup>th</sup> (continued) meeting of the Commission A, 13 August 2000.

<sup>948</sup> Minutes of the 5<sup>th</sup> (continued) the Plenary Meeting, 10 August 2000.

<sup>949</sup> Minutes of the 5 meeting of the Working Body, 6 March 2000.

mentioned that the Committee would stick with its plan – but without clarifying what the plan was.<sup>951</sup>

Tobing's attitude was closely related to the concern of PDIP to avoid an Islamic state on the one hand, and to respond to the strong pressure from the society to totally amend the 1945 Constitution, on the other hand. He stated that:

[a] total change of the Constitution cannot be avoided, but it should reflect the preamble in its articles. The MPR should, however, preserve matters that were approved by the founders, including matters in relation to religion and the state.<sup>952</sup>

### c. Conservative Versus Progressive Groups

The concern of the Islamic state contributed to the postponement of ratification of several Second Amendment drafts. Yusuf (Golkar faction) complained that conservative forces obstructed the MPR from ratifying the comprehensive amendment draft which had been agreed earlier by the PAH I.<sup>953</sup> At the 8<sup>th</sup> plenary meeting of the Annual Session, Simon Patrice (Golkar) argued that:

[t]he Golkar party declares our deepest regret that ... the amendment of the 1945 Constitution is not optimal ... Unfortunately, the ratification of some articles, which are important to democratization, ... must be delayed.<sup>954</sup>

Likewise, M. S. Kaban (PBB) argued that:

... unfortunately, at this first annual session, the amendment of the 1945 Constitution has not yet fully been achieved. Articles and paragraphs which should be amended are untouchable. There is an impression that the amendment process is intentionally created to be more difficult.<sup>955</sup>

Neither the Golkar nor the PBB factions expressly mentioned who the 'conservative factions' were. Both King and the NDI, however, claim that the nationalist factions – the PDIP and TNI-

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<sup>950</sup> 'Diusulkan Pencabutan Tap MPR Pertanggungjawaban Soeharto', *Kompas*, 7 March 2000.

<sup>951</sup> Ibid.

<sup>952</sup> 'Diakui ada Politicking dalam Pembahasan Amandemen UUD 1945', *Kompas*, 24 June 2000.

<sup>953</sup> Ibid.

<sup>954</sup> Minutes of the 8<sup>th</sup> (continued) Plenary Meeting, 15 August 2000.

<sup>955</sup> Minutes of the 8<sup>th</sup> Plenary Meeting, 15 August 2000.

Polri – led the conservative camp.<sup>956</sup> These two factions, together, held 223 of the 695 seats in the MPR.<sup>957</sup> This number was just short of 9 votes needed to block all of amendment proposals, because pursuant to Article 37 of the 1945 Constitution, the presence of two-thirds of the members of the MPR were required to ratify an amendment proposal, as mentioned. Unsurprisingly, therefore, the conservative position of the PDIP and the TNI-Polri factions, to conduct the constitutional debate “in a slow and cautious manner”, contributed to the delay of the Second Amendment making process.<sup>958</sup>

The PDIP, the largest factions, argued that the amendment discussions should focus on the agreed draft and should not concentrate on the articles which still contained alternatives.<sup>959</sup> The PDIP repeated its old argument that authoritarianism during the New Order was more because of the ruler than the Constitution, and that therefore, the decision to totally amend the 1945 Constitution was an unwise one.<sup>960</sup> Similarly, the TNI-Polri faction argued that the amendment draft could change the constitutional system of the country, and therefore, the draft should be discussed carefully.<sup>961</sup> Hari Sabarno (TNI-Polri) argued that, “I think we should not rush to amend the 1945 Constitution at this stage, because we need to look more closely at the draft. After all we hold this session every year”.<sup>962</sup> This military faction further argued that:

... the intention to totally revise the 1945 Constitution should be carefully considered by this commission ... We do not want to create a new conflict between the people who support the intention and those who disagree with such a drastic amendment.<sup>963</sup>

Zoelva (PBB) responded that the anxiety of the PDIP and the TNI-Polri factions regarding the draft of the Second Amendment was unnecessary.<sup>964</sup> Similarly, Mattalata (Golkar) argued that:

[w]e agree that the draft of the amendment should be carefully discussed ... The careful deliberation, however, does not mean that we should slow in anticipating the progressive development. The careful discussion does not mean that we should be late in solving our problems.<sup>965</sup>

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<sup>956</sup> King, above n 924.

<sup>957</sup> Ibid.

<sup>958</sup> King, above n 924.

<sup>959</sup> Minutes of the 2<sup>nd</sup> meeting of the Commission A, 11 August 2000.

<sup>960</sup> Minutes of the 5<sup>th</sup> meeting of the Commission A, 13 August 2000.

<sup>961</sup> Minutes of the 5<sup>th</sup> (continued) Plenary Meeting, 10 August 2000.

<sup>962</sup> *Military faction seek Delay of Amendment*, above n 916.

<sup>963</sup> Minutes of the 2<sup>nd</sup> meeting of the Commission A, 11 August 2000.

<sup>964</sup> Minutes of the 5<sup>th</sup> (continued) of the plenary meeting, 10 August 2000.

<sup>965</sup> Minutes of the 5<sup>th</sup> meeting of the Commission A, 13 August 2000.

In the 2000 MPR Annual Session, the conservative factions successfully used the absence of effective procedure to discuss the amendment proposal.<sup>966</sup> An effort to solve this problem through line by line drafting in the meetings of the Commission A (with over 200 members) failed -- unsurprisingly.<sup>967</sup> As the Commission A had only four days to debate the comprehensive 21 chapters prepared by the PAH I, the strong effort of the progressive groups to accelerate the process, and finish the whole amendment in the 2000 MPR Annual Session, soon became a 'mission impossible'.

#### **d. Short-Term Political Interests**

Lindsey describes political interests (*kepentingan politik*) in the MPR during the constitution-making process as “political power games [which] dominate policy and law-making, displacing genuine concern for the nation’s welfare”.<sup>968</sup> In drafting a Constitution, political interests are unavoidable.<sup>969</sup> Especially if the constitution-making body is a Parliament, which consists of representation of political parties, bargaining is a *conditio sine qua non*. Every party obviously has its own political agenda. As elaborated in Chapter Two, Elster argues that constitution-making body which also serves as a Parliament will have its political parties’ interest which will affect the constitution-making outcome.<sup>970</sup> However, what happened during the Second Amendment discussions was not solely a party fighting for its long-term political interests. Some of the discussions were contaminated by political intrigues which influenced the quality of amendment proposals. Kamil (FUG) warned that:

[w]e must discuss this amendment without taking into account short-term political interests ... These interests would contaminate our amendment proposals. We, therefore, would not be able to produce the best amendment proposal. Many letters addressed to the PAH I question our ability to amend the Constitution. Let us answer these hesitations with evidence that we can prepare the amendment solely for the sake of our nation.<sup>971</sup>

**Politicization Article 8.** Despite this warning, short-term interests remained. One of the most significant was the proposal to amend Article 8 of the 1945 Constitution which originally

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<sup>966</sup> National Democratic Institute, above n 30, 4.

<sup>967</sup> Ibid 4 — 5.

<sup>968</sup> Lindsey, above n 99, 273.

<sup>969</sup> Ibid 276.

<sup>970</sup> Elster, above n 69, 380.

<sup>971</sup> Minutes of the 31<sup>st</sup> meeting of the PAH I, 15 May 2000.

stipulated 'Should the President die, resign or be unable to perform his duties during his term of office, he shall be succeeded by the Vice-President until the expiry of his term of office'. Golkar and PAN proposed an amendment to this article and argued that the Vice President could not automatically replace the President if the latter was incapacitated.<sup>972</sup> Akbar (*Reformasi*) argued that:

[i]f the Vice President automatically replaces the President when the President becomes incapacitated, it may raise the question of presidential legitimacy ... Further, the Vice President may not be capable to be President, because he or she had been chosen as Vice President and not as President ...<sup>973</sup>

The PDIP complained that the proposal was motivated by short-term political interest in order to prevent Megawati from replacing Wahid if he became permanently incapacitated.<sup>974</sup> Referring to the proposal, Tobing admitted that the amendment process had been politicized.<sup>975</sup> Tri Agung Kristanto of *Kompas* argued that although the issue may be presented in many different ways, ordinary people easily understand that some MPR members did not want Megawati to become the chief executive.<sup>976</sup>

Manan opposed the proposal and argued that "It's not fair if an amendment to the article is demanded because certain politicians do not like Megawati".<sup>977</sup> In line with Manan's view, Yusril Ihza Mahendra argued that, in all republic states, whenever the President is incapacitated, the Vice President automatically replaces him or her.<sup>978</sup> It was only because of these objections that the proposal to amend Article 8 was finally withdrawn from the amendment draft of the PAH I.<sup>979</sup>

**Seats reserved for the military.** Another example of short-term interests concerned the reservation of seats for the military in the MPR. The amendment proposal of Article II of the Transitional Provisions of the Constitution stipulated that:

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<sup>972</sup> 'Menangkal Mega, Menyiasati UUD', *TEMPO*, No. 01/XXIX/6, March 12, 2000. See also Ade Alawi, 'Mengempiskan Ban Serep', *Media Indonesia*, 26 March 2000.

<sup>973</sup> Minutes of the 6<sup>th</sup> meeting of the PAH I, 10 December 1999.

<sup>974</sup> 'Jacob Tobing: Ada Agenda Tersembunyi', *Media Indonesia*, 26 March 2000.

<sup>975</sup> *Diakui ada Politicking dalam Pembahasan Amandemen UUD 1945*, above n 952.

<sup>976</sup> Tri Agung Kristanto, 'Amandemen dalam Suatu Kepentingan Politik', *Kompas*, 8 August 2000.

<sup>977</sup> 'Scholar Opposes Presidential Ruling Amendment', *The Jakarta Post*, March 8, 2000. See also 'Sri Soemantri: Amandemen Konstitusi bermuansa Politis', *Suara Pembaruan*, 16 August 2000.

<sup>978</sup> Kristanto, above n 976.

<sup>979</sup> *Ibid.*

The additional members of the MPR ... are the representatives of the Indonesian National Army.<sup>980</sup>

The coalition of non-governmental organizations condemned the above proposal and warned that it would prolong the application of the *dwifungsi* doctrine.<sup>981</sup> Mukhtie Fajar argued that by providing the reserved article in the Constitution, the proposal strengthened the legal authority for the *dwifungsi*, which had previously merely been based on regulations subordinate to the Constitution.<sup>982</sup> The proposal, therefore, betrayed critical part of the reform agenda: ending the role of the military in politics.<sup>983</sup> In the end, this proposal was one of the drafts which was adjourned and further discussed in the Third and Fourth Amendment discussions.

**Closing.** This section on the conduct of the Second Amendment debates demonstrates that the MPR failed to carry out a democratic constitution-making process. The fact that the process was slow, and the contamination of short-term political interests were the two factors which decrease the legitimacy of the MPR as the constitution-making body, as the next section shows.

### 3. Who the Constitution-Making Body was to be

Challenges to the role of the MPR as a constitution-making body increased during the Second Amendment discussions. Disappointment with the way the MPR prepared the amendment draft and the outcome of the Second Amendment contributed to the force of the challenges.

#### a. The MPR's Position

In the 50<sup>th</sup> meeting of the PAH I, Ali Masykur Musa (PKB) suggested that the PAH I should be open to any suggestion from the public, including the idea to form a National Constitutional Drafting Committee.<sup>984</sup> His suggestion was not welcomed by the other Committee members. Soedijarto (FUG) argued that because the legal authority of the MPR as constitution-making body was fixed in the 1945 Constitution, any suggestion to create another constitution-making

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<sup>980</sup> Anonymous, UUD 1945 setelah Amandemen Kedua tahun 2000 (2000) 59.

<sup>981</sup> 'Amandemen UUD '45 ' Set Back', *Media Indonesia*, 4 August 2000.

<sup>982</sup> 'Materi Amandemen UUD 1945 Mencerminkan Kemunduran', *Kompas*, 27 July 2000.

<sup>983</sup> 'Amandemen UUD 1945 tidak Konsisten dengan Tuntutan Reformasi', *Suara Pembaruan*, 27 July 2000.



body was unconstitutional.<sup>985</sup> Kamil shared Soedijarto's view.<sup>986</sup> Kamil warned that this idea was very dangerous, because it looked like a response to popular opinion but was actually inconsistent with the Constitution.<sup>987</sup> Kamil, therefore, argued that the MPR should uniformly reject the idea and retain the MPR as the constitution-making body.<sup>988</sup> This MPR's rejection was somewhat ironic. If the MPR had been prepared to accept the idea of the constitutional drafting committee, the amendment procedure would have been able to be changed.

**PDIP's Proposal.** During the 2000 Annual Session, however, the solidity of the MPR factions started to break down. At the 2<sup>nd</sup> plenary meeting, the PDIP suggested that the Annual Session should consider establishing an expert commission, which would conduct an academic review of the amendment proposals.<sup>989</sup> Similarly, at the 2<sup>nd</sup> meeting of Commission A, the KKI recommended that the 2000 Annual Session should establish an expert commission which would arrange wide ranging public involvement in amending the 1945 Constitution.<sup>990</sup> Haryanto suggested that the MPR form a state commission which should comprise experts and non-partisan public figures.<sup>991</sup>

... it is appropriate for the respected MPR to serve the people and it should not stubbornly to keep its constitutional authority which, is merely legalistic-formalistic. In the end, the sovereignty is in the hands of the people.<sup>992</sup>

Permadi (PDIP), however, limited the authority of the proposed expert commission as a constitution-making body.<sup>993</sup> He suggested, rather than being an independent body, the expert commission should only discuss the amendment proposals prepared by the PAH I, and submit its recommendations to the MPR, which would retain the sole power to ratify the amendment proposal.<sup>994</sup>

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<sup>984</sup> Minutes of the 50<sup>th</sup> meeting of the PAH I, 3 July 2000.

<sup>985</sup> Ibid.

<sup>986</sup> Ibid.

<sup>987</sup> Ibid.

<sup>988</sup> Ibid.

<sup>989</sup> Minutes of the 5<sup>th</sup> Plenary Meeting, 10 August 2000.

<sup>990</sup> Minutes of the 2<sup>nd</sup> meeting of Commission A, 11 August 2000.

<sup>991</sup> Ibid.

<sup>992</sup> Minutes of the 8<sup>th</sup> Plenary Meeting, 15 August 2000.

<sup>993</sup> Minutes of the 8<sup>th</sup> (continued) Plenary Meeting, 15 August 2000.

<sup>994</sup> Ibid.

**A Real Proposal?** Despite the stronger arguments to establish an expert commission, the fact that the PDIP, the KKI and the PDKB suggested the commission during the 2000 Annual Session – and not prior to the Session – indicated that the proposal was politically motivated. These three factions were concerned with the stronger pressures to totally amend the 1945 Constitution.<sup>995</sup> As three parties opposing to the Jakarta Charter, they were concerned with the increased discussions of the possibility of amending Article 29 of the Constitution.<sup>996</sup> For the three parties, therefore, the proposal to form an expert commission was more as an alternative plan if amendment by the MPR failed to satisfy their political agenda. For the PDIP, in particular, the proposal was a strategy to slow down the amendment process.

At the end of the 2000 Annual Session, the idea to establish an expert commission simply disappeared. The MPR unanimously passed MPR Decree No. IX of 2000 which prolonged the authority of the MPR's Working Body to prepare the amendment. Article 1 of the decree authorized:

... the Working Body of the MPR of the Republic of Indonesia to prepare a draft of amendment of the 1945 Constitution of the Republic Indonesia.<sup>997</sup>

## **b. Public Position**

Despite acknowledging that the MPR had the constitutional authority to be a constitution-making body, some experts and non-governmental groups argued that an expert commission should be created. Ma'arif argued that the Amendment of the 1945 Constitution must be delivered to experts who would really understand legal problems pertaining to the form of government and various other related matters.<sup>998</sup> The National Discussion Forum argued that it was too risky to give full authority to the MPR to amend the Constitution.<sup>999</sup> The forum urged that a National Constitutional Drafting Committee, which consisted of experts and public figures, should be formed.<sup>1000</sup> The forum further argued that the Amendments to date, ratified

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<sup>995</sup> Minutes of the 2<sup>nd</sup> meeting of Commission A, 11 August 2000.

<sup>996</sup> Ibid.

<sup>997</sup> Article 1 of MPR Decree No. IX of 2000 on the Authorization of the Working Body of the MPR to prepare the Amendment Draft of the 1945 Constitution.

<sup>998</sup> 'MPR tidak Serious', *Kompas*, 7 August 2000.

<sup>999</sup> 'Forum Rembuk Nasional', *Kompas*, 2 July 2000.

<sup>1000</sup> Ibid.

by the 2000 MPR Annual Session, should have been declared as a temporary Constitution.<sup>1001</sup> Then, within a specific time allocated, the National Committee would prepare a new amendment draft, conduct a wide-ranging public participation and produce a 'permanent Constitution'.<sup>1002</sup> This proposal was inspired by the South African experience which applied an Interim Constitution to start its constitutional reform.

The short-term political interests contaminating the Second Amendment discussions were among the reasons for the increasing pressures for an expert commission to replace the MPR. The Editorial of the *Jakarta Post* argued that:

... the piecemeal approach to the amendment, and the strong vested interest that accompanied the drafting and the debate, call for a complete review on how the nation should approach the issue. For a document that affects the lives of more than 210 million people, the process of constitutional amendment is too precious to be left entirely in the hands of people whose interests are dictated by the politics of today ... the MPR would do a great service to the nation if it appoints a new committee of experts that will look at the entire issue ...<sup>1003</sup>

Mulyosudarmo pointed out that the infiltration of short-term political interests was possible because there was no clear concept of the amendment.<sup>1004</sup> The backgrounds of the MPR members – they were politicians and not as constitutional experts – was a factor which resulted in the amendment draft having been approached from a political perspective with a lack of theoretical foundations.<sup>1005</sup>

**Closing.** This section on 'who the constitution-making body was' demonstrates that the strong upstream legitimacy of the MPR was decreasing because the way it carried out the amendment process was dissatisfied the public's expectation. One of the shortcomings of the MPR's work was the way it arranged public participation, as the next section shows.

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<sup>1001</sup> Ibid.

<sup>1002</sup> Ibid.

<sup>1003</sup> 'Editorial: Constitutional Crisis?', *The Jakarta Post*, 9 August 2000.

<sup>1004</sup> Kristanto, above n 976.

<sup>1005</sup> Ibid.

#### 4. How the Public Participation was organized

The Second Amendment discussions involved more people than those of the First Amendment. One of the factors which enabled this wider participation was the longer time allocated for the Second Amendment discussions. In addition, the PAH I realized that the public involvement was essential to increase the legitimacy of the amendment. Sambuaga (Golkar) argued that:

... we should maximize the public hearings ... Our provincial consultation meetings should also be optimized to hear what the people's will is ... We should not restrict the meetings with any procedural or technical matters ... Only after the public meetings can the drafting process begin.<sup>1006</sup>

Similarly, Abdul Khaliq Ahmad (PKB) argued that:

... the amendment of the 1945 Constitution ... must absorb as much as possible of the aspirations of the people. This inclusive absorption is necessary because the 1945 Constitution, as the Constitution of the nation, is the reflection of the will and the struggle of the people of Indonesia.<sup>1007</sup>

Based on these arguments, from December until May 2000, the PAH I conducted expert meetings, provincial consultation meetings, international study missions and seminars.<sup>1008</sup>

**Table 9 Public Participation during the Second Amendment**

No.	Activities	Numbers
1.	Hearings with state Institutions	7
2.	Provincial consultations	27
3.	Hearings with universities	10
4.	Consultations with experts	20
5.	Hearings with non-governmental organizations	25
6.	Hearings with professional organizations	4
7.	Hearings with religious organizations	7
8.	Individual submissions	100
9.	International comparative studies	21 countries
10.	Seminars	6

Source: Extracted from the progress report of the PAH I at the 6<sup>th</sup> meeting of the Working Body, 23 May 2000; and the final report of the PAH I at the 7<sup>th</sup> meeting of the body, 2 August 2000.

<sup>1006</sup> Minutes of the 8<sup>th</sup> meeting of the PAH I, 14 December 1999.

<sup>1007</sup> Minutes of the 2<sup>nd</sup> meeting of the Commission A, 11 August 2000.

<sup>1008</sup> National Democratic Institute, above n 30, 2.

**Public Criticism.** Despite this wider public involvement, the inclusivity of the participation remained questionable. Widjojanto criticized the participation as exclusive and monopolized by the MPR.<sup>1009</sup> He questioned the bias toward the city participation organized by the PAH I, and contrasted this participation with the more inclusive participation managed by the Constitutional Drafting Assembly of Thailand, which had reached many people in rural areas.<sup>1010</sup>

I share Widjojanto's opinion. Table 9 demonstrates that the public participations arranged by the PAH I were actually not a 'real' public participation programs. There were no effective programs which directly involve the ordinary people. In fact, the programs were very exclusive for limited people or institutions. The hearings with the state institutions, universities, non-governmental organizations, professionals, religious organizations were obvious examples of these elitist programs. The same occurred in the case of the provincial consultations and seminars which neither invited nor were attended by ordinary people. Further, the international comparative studies programs were not public participation program. These programs gave information to the members of the PAH I – who participated in the program – but gave no discernable benefit for the people. Moreover, as demonstrated below the international study mission was actually a bad program. From Table 9, therefore, only the individual submissions gave ordinary people a chance to be directly involve in the constitution-making process. The submissions, however, were the initiative of the people and not an active program arranged by the PAH I.

**First Shortcoming.** Further, there were three other shortcomings in the method of participation coordinated by the PAH I. First, the participation was not properly scheduled in advance. The decision to set up an international study mission, for example, was only made after the Committee learned that it still had money left over from the budget of the 1999 MPR General Session. The urgency and *bona fides* of the mission was therefore questionable.

There are some indications that the intention of the mission was not merely to study the constitutional systems of the countries visited. Frans H. Matrutty (PDIP) argued that the

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<sup>1009</sup> Minutes of the 17<sup>th</sup> meeting of the PAH I, 21 February 2000.

<sup>1010</sup> Ibid.

mission was urgent because the balance of the budget “must be used”.<sup>1011</sup> Further, although it was not carried out in the end, there was a plan to include the wives of the Committee members in the mission.<sup>1012</sup>

The decision to visit 21 countries was another questionable issue.<sup>1013</sup> The desire of all 44 members of the Committee to participate was the main reason why so many countries were chosen.<sup>1014</sup> Subekti questioned the need to visit so many countries. She argued that if the mission was to be conducted, it should be limited to a few countries relevant to specific constitutional issues needing to be studied.<sup>1015</sup> Mattalata urged the Committee to specify the issues that needed to be studied before choosing the countries to be visited.<sup>1016</sup> In the end, however, the Committee decided to ignore the concerns of Subekti and Mattalata and visit all 21 countries, without stating clear reasons for why they were chosen.

Moreover, the need for the study mission is questionable, since no comprehensive report was ever presented. When asked by Hatta Mustafa (Golkar) whether the members of the Committee should report the result of the mission, Tobing replied that a report should be made but would not be discussed.<sup>1017</sup>

**Second Shortcoming.** The second shortcoming of the public participation method was the very limited form of media campaign used by the PAH I to inform the public on the progress of the Second Amendment discussions. No television or radio programs, newsletters, telephone hotlines or other means were set up to update the people on the amendment process, as had been the case in South Africa and Thailand.<sup>1018</sup> Any news the public received about the amendment process was due more to media initiatives than to a well-planned strategy of public involvement managed by the Committee.

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<sup>1011</sup> Minutes of the 12<sup>th</sup> meeting of the PAH I, 11 February 2000.

<sup>1012</sup> Ibid.

<sup>1013</sup> Minutes of the 6<sup>th</sup> meeting of the Working Body, 23 May 2000. The members of the PAH I were divided into 9 groups. Each group visited 2 or three countries. The 21 countries were: Iran, Russia, Malaysia, the Philippines, South Africa, the People Republic of China, Japan, South Korea, the United States of America, Canada, Egypt, the United Kingdom, Greece, Germany, Italy, Netherlands, Spain, France, Denmark, Hungary and Sweden.

<sup>1014</sup> Minutes of the 12<sup>th</sup> meeting of the PAH I, 11 February 2000.

<sup>1015</sup> Minutes of the 13<sup>th</sup> meeting of the PAH I, 15 February 2000.

<sup>1016</sup> Ibid.

<sup>1017</sup> Minutes of the 31<sup>st</sup> meeting of the PAH I, 15 May 2000.

<sup>1018</sup> Murray, above n 349, 107.

**Third Shortcoming.** Third, as a result of the inadequate public participation program, there was discontinuity between the amendment discussions conducted by the PAH I and the people's understanding of them. One of the reasons for this discontinuity was that the Committee failed to arrange a specific time period for public feedback on the amendment draft.<sup>1019</sup> Only one period of consultation was organized before the constitutional draft was submitted to the 2000 MPR Annual Session. This was different to South Africa, which published two different constitutional drafts for public feedback before making the final draft.<sup>1020</sup>

The amendment proposals were published in the media, at the last minute prior to the 2000 MPR Annual Session, which was obviously too late.<sup>1021</sup> The proposal could not be altered any further. The resulting absence of feedback from the public weakened the legitimacy of the amendment proposals. For Mahfud, the PAH I was not serious about absorbing the ideas from the consultation meetings.<sup>1022</sup> This was indicated by the fact that only a limited number of people knew about the meetings, and that the Committee did not publish its final amendment draft.<sup>1023</sup> Widjojanto complained that:

I have evidence that the leader of the PAH I refused to make the final draft of the amendment of the 1945 Constitution [available for public comment]. This is not right. The people have the right to know and their feedback should be heard.<sup>1024</sup>

**The MPR's Excuse.** In responding to the above critiques, Subekti admitted that one of the reasons for the strong criticism of the Committee's performance was the minimal information given to the public.<sup>1025</sup> As a result, the critics were not well informed of what the Committee had done.<sup>1026</sup> Subekti said:

... lately the mass media has reported that some groups had criticized the amendment process carried out by the PAH I. [These criticisms] are due to discontinuous information between what happened in the Committee and what was heard outside this MPR building ... I suggest that the leaders of the Committee hold an official press conference to inform the public of what has been done by the Committee.<sup>1027</sup>

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<sup>1019</sup> Kristanto, above n 976.

<sup>1020</sup> Commonwealth Human Rights Initiative, above n 247, 20.

<sup>1021</sup> Kristanto, above n 976.

<sup>1022</sup> 'Pembahasan Amandemen UUD 1945 tidak Transparan', *Kompas*, 26 July 2000.

<sup>1023</sup> *Ibid.*

<sup>1024</sup> Kristanto, above n 976.

<sup>1025</sup> Minutes of the 31<sup>st</sup> meeting of the PAH I, 15 May 2000.

<sup>1026</sup> *Ibid.*

<sup>1027</sup> Minutes of the 50<sup>th</sup> meeting of the PAH I, 3 July 2000.

Subekti, however, denied the allegations that the Committee's work lacked transparency and claimed that the nation-wide consultations and public hearings were more than enough to show the Committee's commitment to involve the people in amending the Constitution.<sup>1028</sup> Yusuf even replied that the protesting groups did not understand the nature of the Committee's job, and simply ignored the work the Committee had done.<sup>1029</sup>

Subekti and Yusuf's excuses were inappropriate. They could not simply argue that it was the people's mistake if they did not know the amendment process developments because the discussions were open to the public.<sup>1030</sup> For a complex topic such as the Constitution, the Committee should have been more innovative in arranging comprehensive public participation. Moreover, as has been pointed out by Saunders, follow-up is crucial.<sup>1031</sup> If the Committee had arranged a strategic plan for public feedback, the information gap would have been minimized and the public involvement could have been more real. The NDI argues that:

[t]he Constitution gives effect to the sovereignty of the people, and there is now no reason why the people cannot widely and directly be involved in the debate. The extent of the openness of the MPR to encouraging and promoting that process will help determine whether consensus develops on constitutional changes over the next one or two years.<sup>1032</sup>

There was a proposal from the PDIP that the MPR should wait for public feedback before finalizing the whole Second Amendment draft.<sup>1033</sup> The stated intention of this proposal, however, was questionable for three reasons. First, PDIP limited the feedback of the people only to issues which were not agreed to by the MPR.<sup>1034</sup> Second, the proposal was presented at the last stage of the Second Amendment discussions, during the 2000 MPR Annual Session. Third, it could be argued, therefore, that the proposal was related to PDIP strategy of delaying the making process of the Second Amendment.

**Closing.** This section on public participation demonstrates that the MPR failed to arrange an inclusive and active public participation. Despite the longer period available, when compared to

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<sup>1028</sup> 'Has the MPR absorbed People's wishes?', *The Jakarta Post*, 12 August 2000.

<sup>1029</sup> *Ibid.*

<sup>1030</sup> *Ibid.*

<sup>1031</sup> Above n 370.

<sup>1032</sup> National Democratic Institute, above n 30, 18.

<sup>1033</sup> Minutes of the 2<sup>nd</sup> meeting of the Commission A, 11 August 2000.



the First Amendment discussions, the MPR was merely able to conduct exclusive and limited participation programs. This limited participation will affect the legitimacy of the Second Amendment in the eyes of the public. The next section will outline the outcomes of the Second Amendment in more detail.

### C. The Second Amendment: the Outcomes <sup>1035</sup>

In the 2000 MPR Annual Session, the Commission A prioritized the discussions of the 21 chapters prepared by the PAH I based on the level of difficulty: from proposals which were fully agreed to, to the proposals which consisted of alternatives or major differences.<sup>1036</sup> Yet the prioritization “proved overly ambitious”.<sup>1037</sup> Within the four days, or twenty-one effective hours available to Commission A, only twelve chapters were debated, and of these twelve, only seven chapters were finally ratified.

**Table 10 The Status of Proposed Chapters during the Commission A Meetings**

No.	Chapters	Status
1.	The Regional Governments	Ratified as 2 <sup>nd</sup> Amendment
2.	The Territory of the state	Ratified as 2 <sup>nd</sup> Amendment
3.	Citizens and Inhabitants	Ratified as 2 <sup>nd</sup> Amendment
4.	Human Rights	Ratified as 2 <sup>nd</sup> Amendment
5.	The DPR	Ratified as 2 <sup>nd</sup> Amendment
6.	National Defense and Security	Ratified as 2 <sup>nd</sup> Amendment
7.	The Flag, the Language, the state Emblem and the National Anthem	Ratified as 2 <sup>nd</sup> Amendment
8.	The Judicial Power	discussed but not agreed
9.	The DPD <sup>1038</sup>	discussed but not agreed
10.	The Election	discussed but not agreed
11.	Finance	discussed but not agreed
12.	The BPK	discussed but not agreed
13.	Form of the state and Sovereignty	not discussed
14.	The MPR	not discussed
15.	The Executive Power	not discussed
16.	The DPA	not discussed

<sup>1034</sup> Ibid.

<sup>1035</sup> All articles in this section, except mentioned otherwise, refer to the Second Amendment of the 1945 Constitution.

<sup>1036</sup> Minutes of 3<sup>rd</sup> meeting of the Commission A, 12 August 2000.

<sup>1037</sup> National Democratic Institute, above n 30, 3.

<sup>1038</sup> DPD is the abbreviation of *Dewan Perwakilan Daerah* or Regional Representatives Council.

17.	The Minister of state	not discussed
18.	Economy and Social Welfare	not discussed
19.	Education and Culture	not discussed
20.	Religion	not discussed
21.	Amendments to the Constitution	not discussed

The unratified chapters will be further discussed in Chapters Six and Seven, as some were, ultimately, ratified as part of the Third and Fourth Amendments of the 1945 Constitution. The following section will merely focus on the matters that formed part of the Second Amendment, particularly the chapters which are closely related to building a more democratic political system. In doing so, I adopt the classification of the NDI which divides the Second Amendment into four main themes: (1) the decentralization of power to the regions; (2) the Bill of Rights; (3) the Separation of Powers and checks and balances; and (4) civil-military relations.<sup>1039</sup>

## 1. The Regional Governments: No to Centralization

Under the New Order, Indonesia was a highly centralized political and economic system. This system contributed to the control of political powers and economic resources by the political elite in Jakarta, in particular, the Soeharto family.<sup>1040</sup> It was one of the pillars of franchised corruption of the New Order, in which Soeharto was the 'head franchisor'.<sup>1041</sup> Following the fall of Soeharto, therefore, the decentralization of power to the regions was one of the main demands of reform.<sup>1042</sup>

The transitional administration of President Habibie responded by passing Law No. 22 of 1999 on Regional Governments. It also passed Law No. 25 of 1999 on the Financial Balance between the Central and Regional Governments.<sup>1043</sup> These two laws introduced the policy of 'wide-ranging regional autonomy', with special arrangements for Aceh, Papua and East Timor. For the latter the policy became irrelevant after its independence following the 30 August 1999 referendum.<sup>1044</sup>

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<sup>1039</sup> National Democratic Institute, above n 30, 5.

<sup>1040</sup> Lindsey, above n 99, 255.

<sup>1041</sup> Ibid.

<sup>1042</sup> Ibid.

<sup>1043</sup> National Democratic Institute, above n 30, 11.

<sup>1044</sup> Ibid 11.

The two laws failed to satisfy the regions for two reasons. First, as argued by Lindsey, the laws were vague in defining the concept of autonomy.<sup>1045</sup> Second, for some regions the decentralization granted on the laws was insecure: it was just a 'gift' from the central government which could be revoked at any time.<sup>1046</sup> In order to make it more difficult to reverse decentralization, therefore, the pressure to provide a constitutional guarantee for the decentralization strengthened.<sup>1047</sup>

**The Discussions in the MPR.** At the 36<sup>th</sup> meeting of the PAH I, Ali Hardi Kiai Demak (PPP) argued that bad experiences under Soeharto had created unbalanced economic distribution between centre and regions.<sup>1048</sup> At the 3<sup>rd</sup> meeting of Commission A, when the amendment of Article 18 on the Regional Governments was specifically discussed, the decentralization policy was unanimously agreed to.<sup>1049</sup> The original Article 18, which only consisted of one paragraph, was amended to become Articles 18, 18A and 18B, with 11 paragraphs in total. Lindsey argues that these Articles mirror the spirit of the Law Number 22 on Regional Government.<sup>1050</sup>

## **2. Bill of Rights: No to Human Rights Violations**

Those in favor of human rights argued that more protection of human rights was urgently needed to prevent the sort of violations that had happened during Soeharto's authoritarian rule.<sup>1051</sup> Harianto argued that, although the MPR had promulgated its Decree No. XVII of 1998 on human rights and Habibie's government had issued Law No. 39 of 1999 also on human rights, constitutional protection was still needed.<sup>1052</sup>

The opposing groups argued that the adoption of human rights was unnecessary.<sup>1053</sup> Muhammad Ali (PDIP) argued that the protection provided in the law and MPR decree on human rights was more than enough.<sup>1054</sup> In supporting Ali, Siti Hartarti Murdaya of the

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<sup>1045</sup> Lindsey, above n 99, 256.

<sup>1046</sup> Ibid.

<sup>1047</sup> Ibid.

<sup>1048</sup> Minutes of the 36<sup>th</sup> meeting of the PAH I, 29 May 2000.

<sup>1049</sup> Minutes of 3 (continued) meeting of the Commission A, 12 August 2000.

<sup>1050</sup> Lindsey, above n 99, 256.

<sup>1051</sup> Minutes of 3 (continued) meeting of the Commission A, 12 August 2000..

<sup>1052</sup> Ibid.

<sup>1053</sup> Ibid.

<sup>1054</sup> Ibid.

Functional Group Representatives argued that a comprehensive proposal on human rights might destroy the special character and the spirit of 1945, the year of Indonesia's independence – without elaborating what she meant by 'character' and 'spirit'.<sup>1055</sup> Murdaya argued that:

... we do not need to follow other countries ... This human rights chapter is too detailed and overlaps. Many of the provisions can just be incorporated in an MPR decree, statute and – in more detail – in Government Regulation.<sup>1056</sup>

**Impressive Amendment.** Despite these differences, the MPR finally agreed to incorporate new provisions on human rights in Articles 28A to 28J of Chapter XA. This Chapter, like the MPR decree and statute on human rights, was substantially drawn from the Universal Declaration of Human Rights (UDHR).<sup>1057</sup> It covers:

- the right to life;
- the right to family and procreation;
- the right to self-betterment;
- the right to justice;
- freedom of religion, speech, education, employment, citizenship, place of residence, association and expression;
- freedom of information;
- personal security;
- the right of well-being, including social security and health provision;
- the right to personal property;
- the right to seek political asylum;
- 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 the 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.<sup>1058</sup>

**Controversy over Retrospective Legislation.** Incorporated in Chapter XA is Article 28I(1) which stipulates that:

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<sup>1055</sup> Ibid.

<sup>1056</sup> Ibid.

<sup>1057</sup> National Democratic Institute, above n 30, 13.

... the right not to be prosecuted under retrospective laws is a basic human right that that cannot be diminished under any circumstances.

This provision is quite similar to Article 11(2) of the UDHR<sup>1059</sup> which states that:

[n]o one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence under a national or international law, at the time when it was committed.

For Clarke, the phrase ‘cannot be diminished under any circumstances’ is the cause of controversy surrounding Article 28I(1). It may make the “right against retrospective prosecution absolute”.<sup>1060</sup> Amnesty International described how the Article might be used as a ‘backdoor’ for perpetrators for past atrocities.<sup>1061</sup> For human rights activists, therefore, this Article was a political dilemma.<sup>1062</sup> On the one hand, it protected an important human right, on the other hand, the provision could become a major barrier to the prosecution of the past human rights violations.<sup>1063</sup>

**The interests of Military and Golkar.** One theory to explain the inclusion of Article 28I(1) is the role of the military to maintain the impunity it enjoyed under Soeharto.<sup>1064</sup> Lindsey points out that the prohibition against retrospective prosecution makes it more difficult to prosecute the armed forces responsible for human rights abuses, especially over the quarter century of East Timor’s history with Indonesia.<sup>1065</sup>

Referring to a report made by Slobodan Lekic, an Associated Press journalist, Clarke points out that some members of the MPR admitted that they had been intimidated by some hard-line generals who had threatened that, unless the non-retrospectivity provision was passed, the military would provoke violence in Aceh, Maluku or West Papua.<sup>1066</sup> Clarke acknowledges

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<sup>1058</sup> Ibid 14.

<sup>1059</sup> Ibid 13.

<sup>1060</sup> Ross Clarke, ‘Retrospectivity and the Constitutional Validity of the Bali Bombing and East Timor Trials’ (2003) 5:2 *Australian Journal of Asian Law* 4.

<sup>1061</sup> Amnesty International, *Indonesia: Retroactivity Amendment Regressive to Human Rights* (2000) <<http://web.amnesty.org/library/index/ENGASA210332000>> at 22 December 2003.

<sup>1062</sup> National Democratic Institute, above n 30, 13.

<sup>1063</sup> Clarke, above n 1060, 3.

<sup>1064</sup> Ibid 6.

<sup>1065</sup> Lindsey, above n 99, 254 — 255.

<sup>1066</sup> Clarke, above n 1060, 6.

however that there is no strong evidence which supports the accuracy of the report, and therefore, confirms this military influence theory.<sup>1067</sup>

Another theory is the influence of Golkar. The intention of Yusuf (Golkar) to amend the human rights chapter was very strong. In a leader meeting of Commission A, Yusuf thumped the table and forced the discussion to continue overnight.<sup>1068</sup> The meeting was the only Second Amendment discussion that ended at 4 am.<sup>1069</sup> Yusuf argues that one of the reasons behind his insistence on finishing the amendment was to avoid an outcome where the Second Amendment is merely about the flag and the national anthem.<sup>1070</sup> Yusuf persists in arguing that there was no influence from his faction in drafting the non-retrospectivity Article.<sup>1071</sup> He rejects the allegations of several human rights activists who claimed that the Article was ‘sneaked through’ by Golkar to provide impunity for past human rights violations which had mostly been committed by Golkar members.<sup>1072</sup> Yusuf even argues that the response from the activists was ‘strange’. This was because not only the Article had been drawn from the UDHR but also it had previously been incorporated in the Article 37 of the Declaration of Human Rights of MPR Decree No. XVII of 1998, and Article 4 of Law No 39 of 1999 also on human rights.<sup>1073</sup>

Regardless of the lack of strong evidence of the military’s interest and Yusuf’s defense, as described above, the minutes of the 43<sup>rd</sup> meeting of the PAH I shown that it was only Golkar and the TNI-Polri factions that, in the first place, proposed the non-retrospectivity Article.<sup>1074</sup> Although there was no clear reason as to why these two factions proposed the Article, it would not have been just a mere coincidence that both factions have been closely linked to human rights violations during Soeharto’s authoritarian regime.

**A Far-reaching Oversight.** Despite human rights having been debated until 4 am, there was insufficient discussion on the non-retrospectivity Article. From the time this Article was first proposed in June, until it was agreed in August, none of the other factions in the MPR opposed

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<sup>1067</sup> Ibid 6 — 7.

<sup>1068</sup> Interview with Slamet Effendy Yusuf, the Vice Chairperson of the PAH I, 19 June 2003.

<sup>1069</sup> Ibid.

<sup>1070</sup> Ibid.

<sup>1071</sup> Ibid.

<sup>1072</sup> Ibid.

<sup>1073</sup> Ibid.

<sup>1074</sup> Minutes of meeting of the 43<sup>rd</sup> meeting of the PAH I, 13 June 2000.

the non-retrospectivity draft proposed by Golkar and the military factions. The two-month period was simply not enough time for the MPR members to consider an amendment which would have had a significant impact on the trial of human rights violators.

The International Crisis Group (ICG) points out that the members had also been preoccupied with the political maneuvers surrounding an attempt to impeach President Wahid.<sup>1075</sup> The lack of awareness of the members of the MPR of the crucial issue of retrospectivity is revealed in an interview between *the Jakarta Post* and Joko Susilo (*Reformasi*). Susilo stated that the non-retrospectivity proposal was never suggested in the PAH I meeting and might have been introduced in a private meeting.<sup>1076</sup> This was incorrect because, as mentioned above, Golkar and the TNI proposed the clause in the 43<sup>rd</sup> meeting of PAH I in June.<sup>1077</sup>

If the members of the MPR themselves were unaware of the draft of Article 28I(1), it was not surprising that the people's response to the clause came very late, after the amendment already had been agreed to by the MPR. When approached about the issue by Munir of *Kontras*,<sup>1078</sup> Amien Rais conceded that he was not really aware of the legal consequences of the Article 28I(1).<sup>1079</sup> Rais further admitted that the "amendment was an oversight that went unnoticed by many legislators".<sup>1080</sup> Moreover, Rais argued those who were assigned to discuss the amendment were not knowledgeable about human rights issues, and therefore, failed to warn the other MPR members of the consequences of the clause.<sup>1081</sup>

In response to Rais, *Kontras* argued that:

[t]he MPR members cannot say they lack knowledge of human rights affairs or are not aware of the clause's impact. The article was deliberately made so as to benefit certain people. This is all about protecting the political position of the military.<sup>1082</sup>

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<sup>1075</sup> International Crisis Group, Indonesia: Impunity versus Accountability for Gross Human Rights Violations, ICG Asia Report No 12 (2001) 16.

<sup>1076</sup> 'Past Rights Crimes may Get Protection under Constitution', *The Jakarta Post*, 18 August 2000.

<sup>1077</sup> Minutes of meeting of the 43<sup>rd</sup> meeting of the PAH I, 13 June 2000.

<sup>1078</sup> *Kontras* is the abbreviation of *Komisi untuk Orang Hilang dan Korban Tindak Kekerasan*, the Commission for Missing Persons and Victims of Violence.

<sup>1079</sup> 'A Far-Reaching Oversight', *The Jakarta Post*, 21 August 2000.

<sup>1080</sup> *Ibid.*

<sup>1081</sup> *Ibid.*

<sup>1082</sup> James Conachy, *Indonesian Parliamentary Session Marked by Collaboration between "Reformers" and Soeharto's Golkar* (2000) World Socialist Web Site <<http://www.wsws.org/articles/2000/aug2000/mpr-a24.shtml>> at 19 September 2001.

### 3. National Defense and Security: Mixed Results on the Role of the Military in Politics

In the New Order era, the military went beyond its usual role in security and defense matters by reason of the *dwifungsi* doctrine. One of the key items on the post-Soeharto reform agenda was, therefore, to end military involvement in daily politics. The NDI argues, however, that the 2000 Annual Session results were mixed in this regard.<sup>1083</sup> This mix is shown in the output of the Second Amendment and MPR Decree No. VII of 2000 on the Role of the TNI and Polri.

**Yes to the Military.** On the one hand, the 2000 Annual Sessions showed a resurgence of political influence on the part of the military and the tendency of civilian politicians to continue looking for military support.<sup>1084</sup> There was an attempt to incorporate a constitutional foundation for the military representation in the MPR, although it ultimately was not approved. The draft amendment to Article 2(1) of the 1945 Constitution stated that:

The MPR shall consist of the members of the DPR and the DPD, who shall be elected in general elections, augmented by representation of specific community groups which because of their roles and functions shall not use their voting rights. (Emphasis added).

The above 'specific community groups' directly referred to the members of the TNI-Polri, which according to Articles 5(2) and 10 (2) of MPR Decree No. VII of 2000, 'shall not be entitled to vote or be elected to public office'. Todung Mulya Lubis argued that the attempt to provide military representation went too far.<sup>1085</sup> Lubis further argues that:

[a] proposed amendment that will allow the representation of the TNI and Polri in the MPR under the Constitution ... contradicts public aspirations, who want the MPR to be free from unelected representatives, either from the TNI, the police force or social groups, by 2004.<sup>1086</sup>

During the Second Amendment discussions, the PBB faction was the only one which expressly argued that the intervention of the military in politics should be ended immediately.<sup>1087</sup> During the approval process of MPR Decree No. VII of 2000, Hartono Mardjono (PBB) and Ghazali

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<sup>1083</sup> National Democratic Institute, above n 30, 5.

<sup>1084</sup> Ibid.

<sup>1085</sup> 'Writing TNI into Constitution Goes too Far', *The Jakarta Post*, 11 August 2000.

<sup>1086</sup> Ibid.

<sup>1087</sup> Minutes of the 5<sup>th</sup> (continued) Plenary Meeting, 10 August 2000.



Abas Adan (PPP) interrupted.<sup>1088</sup> They objected to the MPR's decision to maintain the presence of the military faction in the MPR.<sup>1089</sup> Mardjono argued that:

[i]n maintaining the dignity of the MPR as the country's highest institution in carrying out the nation's mandate, and especially the dignity of student and reform fighters, I demand the presence of TNI-Polri end in 2004.<sup>1090</sup>

In the end, however, none of the eleven factions disagreed to the continued presence of the TNI-Polri.<sup>1091</sup> Articles 5 and 10 of MPR Decree No. VII of 2000 provided that the military would retain their MPR representation until 2009, at the latest. The NDI argues that this military representation was a "significant step backward" from earlier consensus among all major political parties to end the TNI and Polri membership in the legislative bodies by 2004.<sup>1092</sup>

**No to the Military.** On the other hand, the 2000 MPR Annual Session succeeded in laying down a constitutional foundation in which the members of the DPR and DPRD's will become fully elected, thus ending the appointment of the military representatives to these bodies.<sup>1093</sup> Another important development was that both the amendment to Chapter XII on Defense and Security of the 1945 Constitution, and Decree No. VII of 2000, draws an important distinction between external and internal defense. External defense, which is the responsibility of the TNI, is defined as 'the task of defending, protecting and preserving the unity and sovereignty of the state'.<sup>1094</sup> Internal defense, which is the responsibility of the Polri, is defined as 'the task of protecting, sheltering and serving the community, and upholding the law'.<sup>1095</sup> This clear distinction further strengthened the separation between the TNI and the Polri.<sup>1096</sup>

The MPR Decree No. VII of 2000 further dismantled the *dwifungsi* doctrine.<sup>1097</sup> It adopted a new mechanism for appointing and dismissing the TNI commander and Polri Chief, which now

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<sup>1088</sup> Minutes of the 9<sup>th</sup> Plenary Meeting, 18 August 2000.

<sup>1089</sup> *Ibid.*

<sup>1090</sup> *Ibid.*

<sup>1091</sup> 'TNI-Polri tetap di MPR hingga tahun 2009', *Kompas*, 14 August 2000.

<sup>1092</sup> National Democratic, above n 30, 6.

<sup>1093</sup> Article 19(1) of the 1945 Constitution.

<sup>1094</sup> Article 30(4) of the 1945 Constitution and Article 2 of MPR Decree No. VII of 2000.

<sup>1095</sup> Article 30(5) of the 1945 Constitution, and Articles 6 of MPR Decree No. VII of 2000.

<sup>1096</sup> National Democratic, above n 30, 6.

<sup>1097</sup> Lindsey, above n 99, 252.

required DPR approval rather than being just the President's prerogative.<sup>1098</sup> The jurisdiction of the military court, which had previously routinely whitewashed military violence, was limited to breaches of the Military Code rather than any offence involving members of the military, as in the past.<sup>1099</sup> The decree also stipulated that the armed forces (police fully, and military partly) would now be subject to the civil and criminal jurisdiction of the General Court.<sup>1100</sup>

#### **4. Further Amendment to the Powers of the DPR**

The Second Amendment further clarifies the powers of the DPR and limits the power of the President.

As mentioned earlier, the amendment to Article 19 of the 1945 Constitution established that the DPR would become a fully elected body. For the NDI, the end of military and police representation in the DPR clarified the separation of the executive and legislative branches.<sup>1101</sup>

An amendment to Article 20(5) further strengthened the legislative power of the DPR, which had already been increased by the First Amendment.<sup>1102</sup> The new amendment stipulates that if the DPR and President jointly agree on legislation and the President fails to sign it within 30 days, the legislation automatically becomes law. This provision is necessary to prevent a President from changing his or her mind and veto a Bill after earlier agreeing to it. This, however, does not mean that the Indonesian President does not have a veto right. Article 22(2) of the First Amendment requires every Bill to be discussed and to be agreed to by both the DPR and President. This presidential consent is basically the 'veto right' of the President but once consent is given, the President cannot withdraw it by refusing later to sign the Bill into law: in 30 days it becomes law anyway.

Further, the incorporation of Article 20A clarifies the DPR powers to include 'legislative, budgetary and supervisory functions'.<sup>1103</sup> The Article provides that the DPR should hold

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<sup>1098</sup> Articles 3 (3) and 7 (3) of MPR Decree No. VII of 2000.

<sup>1099</sup> Article 4 of the MPR Decree No. VII of 2000.

<sup>1100</sup> Articles 4 and 7 (4) of the MPR Decree No. VII of 2000.

<sup>1101</sup> National Democratic, above n 30, 8.

<sup>1102</sup> Lindsey, above n 99, 250.

<sup>1103</sup> Article 20A (1) of the 1945 Constitution.

interpellation, investigation and opinion rights.<sup>1104</sup> In addition, the DPR members have the right to submit questions, deliver convey suggestion and opinions, and present views with immunity.<sup>1105</sup>

Kawamura argues that the above amendments were intended to further strengthen the powers of the legislature and rectify the Soeharto period's power bias in favor of the executive branch.<sup>1106</sup> The NDI argues that the clarification of the DPR's powers and rights helps to strengthen the principles of separation of powers and checks and balances.<sup>1107</sup>

**Conclusion.** This chapter argues that the process of the amendment faced some basic problems. Because of their objection to an Islamic state and their fears that the debate was leading that way, the nationalist groups in the MPR slowed down the process, and forced the MPR to postpone the finalization of the amendments from 2000 to 2002. The process was also troubled by short-term political interests that compromised the integrity of the process. This ineffective and contaminated process meant that the legitimacy of the MPR as the constitution-making body was questioned, and the push to establish an expert commission strengthened.

Despite this problematic process, the outcomes of the Second Amendment continued the reform process of the 1945 Constitution. One of the achievements was the protection of human rights which is far more impressive than the limited protections contained in the original 1945 Constitution.

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<sup>1104</sup> Article 20A (2) of the 1945 Constitution.

<sup>1105</sup> Article 20A (3) of the 1945 Constitution.

<sup>1106</sup> Koichi Kawamura, 'Toward a Modern Constitution: The Second Amendment of the 1945 Constitution', (2000) 63 *Ajiken World Trends* 3.

<sup>1107</sup> National Democratic Institute, above n 30, 8.

## **Chapter Six**

### **The Third Amendment: Important Reforms, Crucial Delays**

This chapter describes the process and the outcome of the Third Amendment of the 1945 Constitution. It is divided into three sections. Section A outlines the situational background of the Third Amendment to show that the Third Amendment discussions were dominated by the conflict between President Wahid and the Parliament. Section B describes the constitution-making process of the Third Amendment and discusses – among others – the increase in public skepticism about the MPR as constitution-making body, as well as the continued problem of limited public participation. Section C, however, argues that the resulting amendments were important steps in the continuing to reform the 1945 Constitution, especially the strengthening of presidential system; the adoption of provisions on election; and the establishment of the DPD (Regional Representative Council), Constitutional Court and Judicial Commission. It also considers further delays in the debate over the second round presidential election and proposal to introduce the Jakarta Charter to the Constitution.

#### **A. The Background: Abdurrahman Wahid's Impeachment**

The Third Amendment discussions were interrupted by political conflict, between President Wahid and the DPR and MPR. The compromise which had emerged in the 2000 MPR Annual Session between Wahid and his opponents – that Vice President Megawati being given a bigger role in daily administration,<sup>1108</sup> was soon abandoned. The breakdown began with Wahid's decision to replace his rainbow cabinet, and establish an 'all the President's Men' cabinet.<sup>1109</sup> This new cabinet lacked party representation. Golkar and the PPP had one position each, while the PDIP and PAN were excluded entirely.<sup>1110</sup> Clearly, Megawati as the Chair of the PDIP did not have much influence on the formation of the cabinet, and she noticeably absented herself when it was announced.<sup>1111</sup>

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<sup>1108</sup> Article 1 of Presidential Decree No. 121 of 2000 on the Assignment from the President to the Vice President to Handle the Daily Government Duties.

<sup>1109</sup> 'All the Wahid's Men' *Tempo* (Jakarta) No. 26/XXIX, 28 August – 3 September 2000.

<sup>1110</sup> Liddle, above n 891, 210.

<sup>1111</sup> 'Megawati Tak Hadiri Pengumuman Kabinet', *Kompas*, 24 August 2000.

On 28 August 2000, five days after the announcement of the new cabinet, the DPR voted 307 to 3, with 45 abstentions, to establish a special Committee to investigate the fraudulent withdrawal of Rp 35 billion from a state Logistic Agency (Bulog) by Wahid's masseur, and the disposition of US\$ 2 million donated by Sultan Hassanal Bolkiah of Brunei. These two financial scandals were known respectively as Bulog-gate and Brunei-gate.<sup>1112</sup> The vote showed that President Wahid had lost DPR support. It further showed that Wahid's reshuffled cabinet disappointed the parties in the DPR. In fact, in retrospect, the impeachment process of President Wahid began with this vote.

As the process to impeach Wahid continued, the constitutional debates as to its legal standing emerged. The following section elaborates on these in detail.

## 1. The Legal Authority for Presidential Impeachment

The word 'impeachment' – or the like – did not appear anywhere in the body of the 1945 Constitution. Therefore, Harun Alrasid, President Wahid's constitutional law adviser, argues that the Indonesian constitutional system did not recognize impeachment.<sup>1113</sup>

The supporters of impeachment based their arguments on the elucidation of the Constitution. This elucidation provided that, if the DPR believed the President had truly breached the *haluan negara* (state policy), as stipulated either by the Constitution or by the MPR, it could call the MPR to a special session, in order to ask the President to account for his or her actions.<sup>1114</sup> Yet there was no provision, in any part of the Constitution, which expressly mentioned that the consequence of the special session would be presidential removal.

More specific regulation on the procedure for impeaching a President was set out in two MPR Decrees. Article 4 of MPR Decree No. III of 1978 on the Position and Working Relations of High state Institutions, stipulated that the MPR had the power to remove the President for a "clear violation of state policy" before his or her term expired. Article 4e of MPR Decree No. II of 1999 on Standing Order, added violation of the Constitution as an additional ground for dismissal.

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<sup>1112</sup> 'DPR Setuju Gunakan Hak Angket', *Kompas*, 29 August 2000.

<sup>1113</sup> Harun Alrasid, 'Mungkinkah Presiden diturunkan di Tengah Jalan', *Tempo* (Jakarta) No. 19/XXIX, 10 – 16 July 2001.

**Impeachment Procedure.** Article 7 of MPR Decree No. III of 1978 stipulated the impeachment procedure. It required two successive memoranda of censure be issued by the DPR. The first memorandum warned the President of the alleged violations. If, after three months, the President had not responded satisfactorily to it, the second memorandum would be sent. If, after a further month, the President still had not responded satisfactorily, the MPR would hold a Special Session to consider the memoranda and any reply from the President. This session would then decide whether or not the President should be dismissed.

These Indonesian impeachment procedures were unconvincing, especially when compared to the impeachment in the United States. They were four differences between the two procedures. Table 11 shows these differences.

**Table 11 Indonesia and the United States Impeachment Procedures**

No.	Categories	Indonesia's Impeachment procedure (Before the Third Amendment)	The United States Impeachment Procedure
1.	Legal basis	Generally mentioned in the elucidation of the Constitution, and was mostly stipulated in an MPR Decree.	Stipulated in the Constitution.
2.	Reasons	More political than legal. This was if the President truly breached the state policy and Constitution.	More criminal. That is if the President is convicted of 'treason, bribery, or other high crimes and misdemeanors'.
3.	Judicial Branch	Not involved in the process.	Involved. The Chief Justice of the Supreme Court presides over the impeachment trial in the Senate.
4.	Voting requirement	Easier. A simple majority vote, which rejects the accountability speech, could impeach a President.	More difficult. Only an absolute majority vote in the Congress can impeach a President.

Alrasid questions this account of the Indonesian removal procedure, arguing that the MPR decrees breached the Constitution and the procedure was therefore illegal.<sup>1115</sup> He argues that the impeachment procedure should have been in the Constitution, and not in the form of an

<sup>1114</sup> Section VII of the Elucidation on Government System of the 1945 Constitution.

MPR Decree which he called a *haram* (illegitimate) form of legislation.<sup>1116</sup> I disagree with Alrasid. Although it is right that impeachment procedures are better provided for in the Constitution, this does not mean that the procedure in the MPR decree was unconstitutional. In fact, Nasution argues that the MPR's procedures were a valid attempt to complete the Constitution.<sup>1117</sup>

With regard to the legitimacy of an MPR decree I therefore share the opinion of the NDI which argues that the Indonesian constitutional practice has always acknowledged that MPR Decrees which could regulate and elaborate upon constitutional matters, including presidential impeachment.<sup>1118</sup> In line with the NDI, Lindsey argues that:

[b]ecause the MPR is sovereign and its power is virtually unlimited, it has the final say on how the Constitution is interpreted and it clearly claims the power of dismissal pursuant to that instrument. If it purports to exercise such a power, it is hard to see how this could be resisted through any legal mechanism.<sup>1119</sup>

Moreover, in 1967, there was a precedent when the MPR impeached President Soekarno, after he had given a speech which the then MPRS found “fell short of fulfilling the expectation of the people”.<sup>1120</sup> For Lindsey, this episode clearly demonstrated that a presidency was effectively a gift of the MPR, and so it could shorten the presidency, in response to an inadequate accountability speech.<sup>1121</sup>

## 2. The Process of President Wahid's Impeachment

After having been formed in late August 2000, the DPR's Special Committee conducted hearings to investigate President Wahid's involvement in both Bulog-gate and Brunei-gate. At the end of January, in its report to a plenary meeting of the DPR, the Committee concluded that it was ‘reasonable to suspect’ that the President had been involved in both corruption

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<sup>1115</sup> Interview with Harun Alrasid, Professor of Constitutional Law at the University of Indonesia, 14 July 2003.

<sup>1116</sup> Ibid.

<sup>1117</sup> Adnan Buyung Nasution, ‘Sebuah Landasan yang Tak Tertulis’, *Tempo*, No. 12/XXX, 21 – 27 May 2001.

<sup>1118</sup> National Democratic Institute, *Indonesia's Change of President and Prospect for Constitutional Reform: A Report on the July 2001 Special Session of the People's Consultative Assembly and the Presidential Impeachment Process* (2001), 10.

<sup>1119</sup> Tim Lindsey, *Constitutional Law and the Presidential Crisis in Jakarta: Some Preliminary Observations*, <[http://www.law.unimelb.edu.au/alc/wip/Constitutional\\_crisis.html](http://www.law.unimelb.edu.au/alc/wip/Constitutional_crisis.html)> at 14 June 2002.

<sup>1120</sup> Ibid.

<sup>1121</sup> Ibid.

scandals.<sup>1122</sup> The report was followed by the DPR's first memorandum issued on 1<sup>st</sup> February 2001.

**The DPR's Memoranda.** The DPR voted 393 to 4 to issue the First Memorandum.<sup>1123</sup> This voting followed the walkout of 48 members of the PKB.<sup>1124</sup> The memorandum accused the President of violating: (1) Article 9 of the 1945 Constitution on the oath of office, and (2) MPR Decree No. XI of 1998 on the Implementation of Clean Government and Eradication of the KKN.<sup>1125</sup>

On 28 March 2001, in formally responding to the First Memorandum, President Wahid continued to question the impeachment process, arguing that the Special Committee was acting illegally.<sup>1126</sup> For Wahid, the Committee breached the presidential character of the 1945 Constitution, by taking some parliamentary-style steps which might have lead to a vote of no-confidence.<sup>1127</sup>

On 30 April 2001, in response to President Wahid's questioning, the DPR voted to issue the Second Memorandum. Of the 457 members of the DPR who were present, 363 voted for it, 52 opposed it and 42 abstained.<sup>1128</sup> In his formal response, President Wahid argued that the Second Memorandum "failed to specify what pledge of office" he had violated.<sup>1129</sup> Baharuddin Lopa, who was Wahid's Minister of Justice, argued that the DPR's memoranda focused more on the President's policy, and consequently, could not be the basis of a presidential removal.<sup>1130</sup> Moreover, on 28 May 2001, the Attorney General formally cleared President Wahid of any involvement in either Bulog-gate or Brunei-gate.<sup>1131</sup>

On 30 May 2001, however, the DPR plenary meeting decided that the President's response to the Second Memorandum was unsatisfactory. Therefore, it officially requested an MPR Special

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<sup>1122</sup> 'Laporan Hasil Kerja Pansus Diterima', *Kompas*, 30 January 2001.

<sup>1123</sup> International Crisis Group, *Indonesia's Presidential Crisis*, 21 February 2001, 1.

<sup>1124</sup> 'DPR sampaikan Memorandum', *Kompas*, 2 February 2001.

<sup>1125</sup> *Ibid.*

<sup>1126</sup> National Democratic Institute, above n 1118, 12.

<sup>1127</sup> International Crisis Group, above n 1123, 2.

<sup>1128</sup> 'Presiden diberi Waktu selama Satu Bulan', *Kompas*, 1 May 2001.

<sup>1129</sup> National Democratic Institute, above n 1118, 13.

<sup>1130</sup> Baharuddin Lopa and Arifin P. Soerya Atmadja, 'Konstitusi dan Memorandum', *Tempo*, No. 10/XXX, 7 – 13 May 2001.

<sup>1131</sup> National Democratic Institute, above n 1118, 7.



Session.<sup>1132</sup> The decision was reached through an overwhelming vote of 365 to 4 with 39 abstentions.<sup>1133</sup> The meeting stated:

[t]he DPR of the Republic of Indonesia declares that President Abdurrahman Wahid has not heeded the second memorandum of the DPR and, as such, in accordance with Article 7 paragraph 4 of the MPR Decree No. III of 1978, the DPR requests the MPR to convene a special session to ask President Abdurrahman Wahid for his accountability.<sup>1134</sup>

Pursuant to Article 33(3) of MPR Decree No. II of 2000 on Standing Orders, a Working Body of the MPR should prepare a Special Session within at least two months. The Session was, therefore, scheduled for 1<sup>st</sup> August 2001.

**The Chief of Polri Appointment.** Prior to this date, in relation to the appointment of the Chief of the Polri, a new conflict between President Wahid and the DPR arose. On the appointment of General Chaeruddin Ismail, who replaced General Bimantoro, the DPR argued that Wahid had breached Article 7(3) of MPR Decree No. VII of 2000, by failing to obtain DPR approval.<sup>1135</sup> Wahid's defense was that the Article was not yet effective, because it should have been further regulated in a statute. The defense was incorrect. Article 12 of the MPR Decree clearly stipulated that the Decree was effective, since it had been passed on 18 August 2000. The new conflict led the MPR leaders to consider bringing forward the MPR Special Session.<sup>1136</sup>

In response, President Wahid threatened to declare a state of emergency. He ignored protests from the DPR and appointed General Chaeruddin Ismail as Acting Chief of the Polri.<sup>1137</sup> Predictably, the MPR formally moved forward the opening of the Special Session.

The MPR Special Session, therefore, opened on 21 July 2001. Ellis argues that this session, having been moved forward, violated the MPR Decree which required two months notice.<sup>1138</sup> In contrast, Lindsey argues that, as an institution which was constitutionally expressed to have

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<sup>1132</sup> 'Sidang Istimewa MPR meminta Pertanggungjawaban Presiden', *Kompas*, 31 May 2001.

<sup>1133</sup> *Ibid.*

<sup>1134</sup> Van Zorge Report, *The Final Countdown* <[http://www.vanzorgereport.com/report/popup/index.cfm?fa=ShowReport&pk\\_rpt\\_id=315&CFID=315606&CFTOKEN=71680888](http://www.vanzorgereport.com/report/popup/index.cfm?fa=ShowReport&pk_rpt_id=315&CFID=315606&CFTOKEN=71680888)> at 3 October 2003.

<sup>1135</sup> National Democratic Institute, above n 1118, 10.

<sup>1136</sup> 'MPR Team Agrees to Hold Snap Session if Necessary', *The Jakarta Post*, 10 July 2001.

<sup>1137</sup> At this stage, Wahid still tried to play nominally within the rules. He appointed General Ismail as an 'Acting' Chief, instead of a 'Definitive' Chief of Polri.

<sup>1138</sup> Ellis, above n 662, 137.

unlimited power, the MPR could amend its own procedure.<sup>1139</sup> This means, if the MPR was convened earlier than the two month requirement, the “irregularity could certainly be ratified”.<sup>1140</sup>

**The President’s Emergency Declaration.** For Wahid, however, the new schedule was further evidence that the Session was illegal, and therefore, he refused to give his accountability speech as invited by the MPR.<sup>1141</sup> Instead of giving the speech on 23 July, Wahid announced that he was declaring a state of civil emergency. In the form of a *Maklumat*, the President declared:

1. the dissolving of the MPR and DPR of the Republic of Indonesia.
2. the returning of the sovereignty to the people and the taking of action to establish an electoral commission to prepare a general election within one year.
3. the rescuing of the total reform movement from the New Order faction by dissolving the Golkar party while awaiting the Supreme Court’s decision.

In response to a request from the DPR, the Supreme Court issued an advisory opinion that the *Maklumat* was unconstitutional.<sup>1142</sup> According to this opinion: the President did not have the power to suspend the MPR and the DPR; the holding of an election was a question for the legislature; and the possible suspension of Golkar was a matter for the courts.<sup>1143</sup>

Based on the elucidation of the Constitution, Lindsey argues that the Constitution was “clear on the MPR’s absolute superiority to the President”.<sup>1144</sup> With regard to the DPR, the elucidation stipulated that, ‘The DPR is in a strong position. It cannot be dissolved by the President, unlike its position in a parliamentary system’. Lindsey, therefore, concludes that:

[n]o law of any sort exists purporting to give the President the right to dissolve the MPR and there is no precedent for him to do so. The only conclusion to be drawn is therefore that President lacks the power to dissolve the MPR.<sup>1145</sup>

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<sup>1139</sup> Lindsey, above n 1119.

<sup>1140</sup> Ibid.

<sup>1141</sup> National Democratic Institute, above n 1118, 14 — 15.

<sup>1142</sup> Letter of Chief Justice of the Supreme Court No. 2 of 2001.

<sup>1143</sup> National Democratic Institute, above n 1118, 16.

<sup>1144</sup> Lindsey, above n 1119.

<sup>1145</sup> Ibid.

On 23 July 2001, the MPR, therefore, overwhelmingly voted to reject the validity of the *Maklumat*, by 599 votes to 0, with 2 abstentions.<sup>1146</sup> Moreover, the MPR used the *Maklumat* as the legal ground for the impeachment of President Wahid. Without challenge, the MPR voted 591 to 0 to pass the MPR Decree No. II of 2001, on the removal of President Wahid.<sup>1147</sup> Article 1 of the Decree stipulated that:

President Abdurrahman Wahid's absence and refusal to give an accountability speech before the 2001 MPR Special Session, and his declaration of the *Maklumat*, on 23 July 2001, truly breached the *haluan negara* (state policy).

**The Ground of Wahid's Impeachment.** The decree shows that the MPR did not ultimately base the impeachment on Bulog-gate and Brunei-gate. President Wahid complained about this continually changing ground of impeachment. The first memorandum of the DPR was based on the two financial scandals, while the second was more on the policy failures of the government and Wahid's ineffective leadership.<sup>1148</sup> Although the NDI argues that the rules did not prevent the MPR from changing its grounds for action as the impeachment process progressed,<sup>1149</sup> I am of the opinion that the different ground opened the question of the validity of Wahid's removal. The changing of grounds indicated that the impeachment procedures might be easily politicized. In any case, unsatisfactory impeachment procedures strengthened the urgency of constitutional reform, as considered in the following section.

### 3. The Need for Constitutional Reform

Wahid's impeachment process made it clear that the debates between the President and the Parliament came from different interpretations of the 1945 Constitution. The Constitution failed to establish clear impeachment procedures.<sup>1150</sup>

Wahid argued that the MPR could not remove a President, as Indonesia was according to him, based on presidential system. However, Wahid might have forgotten that he was elected by the MPR and not directly by the people, as he would have been in a purely presidential system. It

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<sup>1146</sup> National Democratic Institute, above n 1118, 16.

<sup>1147</sup> Ibid 17.

<sup>1148</sup> International Crisis Group, above n 1123, 4.

<sup>1149</sup> National Democratic Institute, above n 1118, 20.

<sup>1150</sup> Van Zorge Report, *Constitutional Warfare* (2001) <[http://www.vanzorgereport.com/report/popup/index.cfm?fa=ShowReport&pk\\_rpt\\_id=13&CFID=315606&CFTOKEN=71680888](http://www.vanzorgereport.com/report/popup/index.cfm?fa=ShowReport&pk_rpt_id=13&CFID=315606&CFTOKEN=71680888)> at 3 October 2003.

was this mixed system as embodied in the Constitution, with its many interpretative loopholes, which contributed to the long and confused conflict between Wahid and the Parliament.

For J. Soedjati Djiwandono, the lessons from the tug-of-war between the legislative bodies and the executive were the extent to which, “the 1945 Constitution contradicts democratic principles”.<sup>1151</sup> Djiwandono argues that the creation of the MPR as “the supreme governing body” was another fundamental defect of the Constitution.<sup>1152</sup> Once elected, the MPR had unlimited power for five years. In the case of Wahid’s removal, the MPR constitutionally used its power to decide that Wahid had ‘truly breached the state policy’, and was therefore impeachable.

The problem was made worse because of the absence of a mechanism for judicial authority that could resolve the constitutional vagueness.<sup>1153</sup> The Supreme Court had no power of constitutional review. As a result, different constitutional interpretations were simply left unresolved. The MPR was the sole judge of the constitutionality of its own acts.<sup>1154</sup>

Wahid’s removal, therefore, strengthened the necessity of constitutional reform<sup>1155</sup> and, indeed, in response the Third Amendment stipulates better impeachment procedures; limits the powers of the MPR; and forms a Constitutional Court which has the power of constitutional review.

## **B. The Third Amendment: the Process**

Unlike the First and Second Amendment discussions, the question of when the constitution-making should occur was not debated in the Third Amendment. The MPR was trying to finish the amendment by 2002 as agreed on the 2000 Annual Session. This section, therefore, only considers three issues: (i) how the constitution-making was conducted; (ii) who the constitution-making body was to be; (iii) and how public participation was organized.

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<sup>1151</sup> J. Soedjati Djiwandono, ‘Lessons from Special Session: Constitutional Change Urgent’, *The Jakarta Post*, 26 July 2001.

<sup>1152</sup> *Ibid.*

<sup>1153</sup> National Democratic Institute, above n 1118, 10.

<sup>1154</sup> *Ibid.*

<sup>1155</sup> *Ibid.* 24.

## 1. How the Constitution-Making was conducted

As with the First and the Second Amendments, the Third Amendment debates were conducted in four stages (Table 12).

- First, the MPR Working Body prepared materials for the 2001 MPR Annual Session; this body then formed three ad hoc committees.
- Second, one of the committees, the Ad Hoc Committee I (*Panitia Ad Hoc I* or PAH I of 2001 or the Committee), was made responsible for continuing the amendment of the Constitution.<sup>1156</sup> The Committee worked from September 2000 until October 2001. Its findings were then presented to the Working Body for the 2001 Annual Session.
- Third, Commission A was formed during the 2001 Annual Session, to further discuss the draft of the Third Amendment prepared by the Committee.
- Fourth, on 9 November 2001, in the seventh plenary meeting of the Annual Session, the MPR ratified the Third Amendment.

The members of the Working Body were the same as in the previous year, while the PAH I and Commission A had 47 and 162 members respectively. In each of these bodies, the eleven factions of the MPR were represented in proportion according to the number of their seats in the MPR.

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<sup>1156</sup> Section two of the MPR Working Body Decision No. 4 of 1999 on the Formulation of the Ad Hoc Committee of the MPR Working Body.

**Table 12 The Proceedings of the MPR's Third Amendment Discussions**



Source: Extracted from Minutes of Meetings of the MPR's Third Amendment Discussions

From September 2000 to November 2001, the Third Amendment discussions were colored by four issues, some of which were continued from the previous amendment discussions. These issues were: (i) the five basic agreements and the Jakarta Charter; (ii) the choice to amend or renew the Constitution; (iii) the policy of avoiding voting; (iv) the contamination of short term political interest; and (v) the movement to reject the amendment process. These issues are hereby elaborated in turn.

#### **a. Five Basic Agreements and the Jakarta Charter**

Despite strong opposition from the public to the First and Second Amendments, the MPR agreed that neither of the two amendments would be reconsidered.<sup>1157</sup> Further, the five basic agreements behind the First and Second Amendments were reaffirmed by the PAH I of the Third Amendment. These agreements involved the decision to:

- preserve the preamble of the Constitution;
- maintain the unitary state of the Republic of Indonesia;
- keep the presidential system government;
- insert the important provisions in the elucidation into the body text of the Constitution;
- and
- process the amendments through addendum.<sup>1158</sup>

Some nationalist factions (the PDIP, the TNI-Polri, and the PDKB) were far committed to keeping these five agreements, particularly in maintaining the preamble and the unitary state. The TNI-Polri faction admitted that it had no objections to the Third Amendment draft, provided that it did not oppose the principle of a united and integrated republic, and it did not affect the *Pancasila*.<sup>1159</sup> Likewise, the PDIP preferred keeping certain old values of the 1945 Constitution: the concept of a united Indonesian republic and the *Pancasila*.<sup>1160</sup>

These statements to guard the *Pancasila* were a response to a growing movement to adopt the Jakarta Charter in the Constitution, during the Third Amendment discussions. In November

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<sup>1157</sup> Ellis, above n 662, 136.

<sup>1158</sup> Minutes of 5<sup>th</sup> meeting of the PAH I, 7 December 2000, 195 — 196.

<sup>1159</sup> 'KPU harapkan Sidang Tahunan MPR Rampungkan Tiga Hal', *Kompas*, 30 October 2001.

<sup>1160</sup> 'PDIP menyetujui Pemilihan Presiden Langsung dalam Dua Tahap', *Kompas*, 31 October 2001.

2001, Endriartono Sutarto, who was the Army Chief of Staff, warned certain elements of the nation against inserting the Jakarta Charter into the 1945 Constitution.<sup>1161</sup> Sutarto argued that:

[i]f all elements of this nation view the Jakarta Charter as inappropriate for insertion into the 1945 Constitution, due to the fact that our nation consists of various religions and ethnic backgrounds, then, as long as the people stick to that united stance, no groups or elements can force their will to insert it to the Constitution.<sup>1162</sup>

In the same line, the PDKB, which was a Christian party, argued that the preamble of the Constitution should not be amended, and should be further elaborated in Articles of the Constitution.<sup>1163</sup>

The Amendment of the preamble, and amendment of Articles {to make them} inconsistent with the preamble, are a breach of the social contract of the birth of the Republic of Indonesia, and consequently, would end the Unitary state of the Republic of Indonesia.<sup>1164</sup>

Although it did not specifically mention it, it was understood that the PDKB referred to the amendment proposal to insert the 'seven words' of Jakarta Charter into Article 29(1) on religion.

Both the five basic agreements and the concern about the possible adoption of the Jakarta Charter into the Constitution strengthened the MPR's position on amending but not making a new Constitution. However, during the Third Amendment discussions, the pressure from civil society to have a brand-new Constitution increased, as the next section shows.

## **b. An Old but Totally Renewed Constitution?**

**The MPR's Position.** As was the case with the First and Second Amendments, the MPR's members were firm in saying that the MPR was merely amending the 1945 Constitution. The Expert Team of the PAH I, however, was of the opinion that the MPR was moving toward making a new Constitution. Ismail Suny argued that, in the case of the First and Second Amendments, the term 'addendum' was no longer correct.<sup>1165</sup> The scope did not only limited to

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<sup>1161</sup> 'Army Chief Warns of Jakarta Charter Dispute', *The Jakarta Post*, 1 November 2001.

<sup>1162</sup> *Ibid.*

<sup>1163</sup> Minutes of the 5<sup>th</sup> Plenary Meeting, 4 November 2001, 78.

<sup>1164</sup> *Ibid.*

<sup>1165</sup> Minutes of 11<sup>th</sup> meeting of the PAH I, in the Second Book Volume 3A, 20 March 2001, 4.



one issue as it should be for an amendment. Instead the scope of the First and Second Amendments – and the proposals for the Third Amendments – covered many constitutional issues. Suny, therefore, proposed the making of a new Constitution. Similarly, Maswadi Rauf argued that:

I do not think the First and Second Amendments are addendums. They adopted new Articles, added new thoughts, revised the structure of the chapters, and further added new chapters. Therefore, we would rewrite our Constitution.<sup>1166</sup>

In response to Suny and Rauf, Tobing replied that he also thought that the term ‘addendum’ was not suitable for describing the process of the amendment.<sup>1167</sup> However, he added that as this process had, in fact, already taken place, he suggested continuing the process without being annoyed with the use of this term.<sup>1168</sup>

Mulyosudarmo proposed the use of the term ‘renewal’ instead of the term ‘rewriting’.<sup>1169</sup> He argued that because the amendment kept some original articles, restructured some old-amended articles, added brand-new articles and finally, consolidated all articles, the term ‘renewal’ was more appropriate.<sup>1170</sup>

Indeed, the Expert Team actually proposed a new Constitution but in the old format. In commenting on the Expert Team’s proposal, Zoelva (PBB) argued that:

... observing the proposal prepared by the Expert Team, it is clear that the entire Body of the Constitution has been restructured. It is not only an amendment but a complete reworking. Therefore, it could be considered as the amendment of the entire Body of the 1945 Constitution.

**Public Position.** The pressure to have a new Constitution grew. The “New Constitution Civil Society Movement” organized a campaign to pressure the legislators. Articles on the urgency of a new Constitution were published in many newspapers.<sup>1171</sup>

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<sup>1166</sup> Ibid 8.

<sup>1167</sup> Ibid 25.

<sup>1168</sup> Ibid.

<sup>1169</sup> Minutes of 13<sup>th</sup> meeting of the PAH I, in the Second Book Volume 3A, 24 April 2001, 150.

<sup>1170</sup> Ibid.

<sup>1171</sup> Some of the articles were: Smita Noto Susanto, ‘Komisi untuk Konstitusi Baru’, *Suara Karya*, 26 April 2001; Todung Mulya Lubis, ‘Konstitusi Baru, Sekali Lagi’, *Sinar Harapan*, 24 June 2001; Uli Parulian Sihombing, ‘Konstitusi Baru: Agenda Utama’,

In November 2001, at the last moment of the Third Amendment discussions, Eddy O.S. Hiariej argued that the MPR should introduce a new Constitution.<sup>1172</sup> Hiariej referred to Article 2 Paragraph 2 of the Additional Provisions of the 1945 Constitution, which stated, 'Within six months after the MPR has been set up, the MPR shall sit in order to determine the Constitution'.<sup>1173</sup> For Hiariej, 'to determine the Constitution' clearly means making a new Constitution. Likewise, Todung Mulya Lubis argued that, "what we need is not merely an amendment of the Constitution but its total reform".<sup>1174</sup> Lubis argued that Indonesia needed a new social contract which gave more guarantees for a separation of powers, check and balances, human rights and the supremacy of law and social justice.<sup>1175</sup>

**The MPR declaration.** Despite all suggestions from the Expert Team and the society, the MPR still firmly declared that it was only amending the Constitution, throughout the Third Amendment discussions. J.E. Sahetapy (PDIP), however, argued that the MPR appeared to amend all of the original Articles so it could not actually claim that it did not make a new Constitution.<sup>1176</sup>

### c. The Policy to Avoid Voting

As the discussions touched more crucial amendment proposals, agreement among the MPR factions was more difficult to reach. Yet the Third Amendment discussions showed that the MPR tried very hard to avoid voting.

Rais argued that, if voting was conducted for every Article to be amended, it would be long-winded affair which would drain everyone's energy.<sup>1177</sup> He also argued that, for fundamental constitutional matters, voting was not a wise decision mechanism.<sup>1178</sup> Although he did not clearly mention what the fundamental constitutional matter was, it could be predicted that Rais

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*Kompas*, 31 July 2001; Satya Arinanto, 'Merindukan Konstitusi Baru', *Koran Tempo*, 8 August 2001; Saldi Isra, 'Konstitusi Baru: Agenda Mendesak', *Republika*, 24 August 2001.

<sup>1172</sup> Eddy O.S. Hiariej, 'Constitutional Change not just MPR's Task', *The Jakarta Post*, 12 November 2001.

<sup>1173</sup> *Ibid.*

<sup>1174</sup> 'Constitution needs Total Reform', *The Jakarta Post*, 5 April 2001.

<sup>1175</sup> Todung Mulya Lubis, 'Reformasi Konstitusi', *Tempo*, No. 9/XXX, 30 April – 6 May 2001.

<sup>1176</sup> 'PAH I Terkesan Membuat Konstitusi Baru', *Suara Pembaruan*, 12 September 2001.

<sup>1177</sup> *KPU harapkan Sidang Tahunan MPR Rampungkan Tiga Hal*, above n 1159.

<sup>1178</sup> 'Disepakati, Pemilihan Presiden Langsung', *Kompas*, 1 November 2001.

was discussing the relation between state and religion and thus the issue of the adoption of the Jakarta Charter into the Constitution. For this sensitive issue, the MPR chose to avoid voting, postpone ratification and further deliberate the amendment proposal at the 2002 MPR Annual Session.<sup>1179</sup>

**Lack of Deadlock Mechanism.** Another reason behind the policy to avoid voting was the fear of constitutional deadlock like the one that was seen as ultimately destroying the *Konstituante* in 1959. If voting was conducted, but failed to fulfill the approval requirement set up in Article 37 of the Constitution, the whole constitutional reform process might be in jeopardy because the 1945 Constitution lacked mechanisms to resolve deadlock. The alternative of referendum, for example, as provided for Thailand and South Africa, was absent in Indonesia. This danger of constitutional deadlock was more apparent during the Fourth Amendment discussions. Chapter Seven considers this problem in more detail.

For J. Soedjati Djiwandono, the fact that the crucial proposals on religion and presidential election were adjourned was a blessing in disguise. He argued that:

... it is good that the session failed to reach agreement ... The present generation of leaders and politicians cannot be relied on to carry on the process of genuine reform. They are unwilling and unable to reform themselves, perhaps because of their vested of interests.<sup>1180</sup>

This issue on political interest is hereby elaborated.

#### **d. Short-Term Political Interests**

As the amendment discussions touched on political agenda proposals, such as presidential election, the short-term political interests were again apparent. Decision-making was not based solely on constitutional considerations, but was influenced by the political parties – or even personal – benefit. Therefore, the trade-off between amendment proposals was unavoidable. This section considers these short-term political interests during the Third Amendment discussion in details.

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<sup>1179</sup> Ibid.

<sup>1180</sup> J. Soedjati Djiwandono, 'MPR Annual Session not worth a Damn', *The Jakarta Post*, 12 November 2001.

## (1) Presidential Election

As part of the Third Amendment, the MPR approved a system of direct presidential election. It agreed that if a presidential candidate received over 50% of the popular vote, and no less than 20% of the votes in a majority of provinces, the candidate would be inaugurated.<sup>1181</sup> However, if none of the candidates fulfilled the requirements, the MPR factions were divided on what would then follow. The PDIP thought that, on the second round election, the MPR should then choose between the two candidates who received the biggest vote. Other factions believed, however, the second round should again be voted on by the people.

**The PDIP's Interest.** The position of the PDIP was influenced by the imminent 2004 presidential election. This party was not confident that, if the second round was left to the people, Megawati could win the election.<sup>1182</sup> The PDIP preference for the MPR holding the second round election was surprising. The party had had a bad experience when in the 1999 MPR General Session, Wahid defeated Megawati. I argue that the PDIP might have been worried about Megawati's capacity. If the people were to decide the second round election, she would have actively campaigned and been involved in serious debate with other presidential candidates. These activities might have seriously damaged Megawati's vote because of her propensity to silence in public forum.

**Golkar's Position.** Golkar was of the opinion that the second round election should have been left to the people without intervention from the MPR. This preference was also influenced by the imminent 2004 presidential election. Golkar had believed that, with its strong political infrastructures in the region, its presidential candidate would win a pure direct presidential election.<sup>1183</sup>

**The Trade-off between Golkar and the PDIP.** Yusuf (Golkar) disclosed that there was a trade-off amendment proposals between Golkar and the PDIP.<sup>1184</sup> Golkar advocated a pure direct presidential election and strong bicameralism. The PDIP, on the other hand, rejected both the pure direct presidential election and strong bicameralism. In a negotiation meeting,

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<sup>1181</sup> The Third Amendment, Article of 6A (3) of the 1945 Constitution.

<sup>1182</sup> 'Pertarungan Politik dalam Proses Amandemen UUD 1945' *Republika*, 21 December 2001. See also Kawamura, above n 661, 50.

<sup>1183</sup> *Pertarungan Politik dalam Proses Amandemen UUD 1945*, above 1182.

both parties agreed to trade-off the two issues. Golkar agreed with the PDIP that the second round of presidential election would be invested in the MPR; in exchange, the PDIP supported Golkar's proposal that the DPD (Regional Representative Council) would have some legislative powers, especially for bills related to regional issues.<sup>1185</sup>

As result of the trade-off, the Third Amendment finally agreed on the establishment of the DPD and its limited legislative powers, but failed to agree on the second round presidential election. The reason of this failure was Megawati own doubts. Bawazier of *Reformasi* revealed that, in the final lobby, Rais offered that he was ready to accept the PDIP's presidential election proposal.<sup>1186</sup> However, Megawati replied that she preferred to adjourn the matter for further deliberation in the 2002 MPR Annual Session.<sup>1187</sup>

## (2) The Composition of the MPR

Predictably, FUG and the TNI-Polri factions supported the amendment proposal that the MPR should be made up of the DPR, the DPD and non-elected groups' representatives.<sup>1188</sup> This support was based on their political interests that the proposal would allow FUG and the military faction to have seats in the MPR through the 'non-elected groups' clause.<sup>1189</sup>

Sutjipto (FUG) and Affandi (TNI-Polri) argued that the MPR should not only be represented by political parties, but also by functional representatives.<sup>1190</sup> Neither of FUG nor the TNI-Polri factions, however, proposed a comprehensive selection mechanism for the non-elected members. This mechanism was obviously necessary to avoid these functional representatives being used by the President, to prolong his or her political power as happened during Soeharto's rule.

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<sup>1184</sup> Interview with Slamet Effendy Yusuf, the Vice Chairperson of the PAH I, 19 June 2003.

<sup>1185</sup> 'Amandemen UUD Diwarnai Praktik Dagang Sapi', *Media Indonesia*, 7 November 2001.

<sup>1186</sup> Interview with Fuad Bawazier, member of PAH I, 18 June 2003.

<sup>1187</sup> Ibid.

<sup>1188</sup> National Democratic Institute, *The Fundamental Changes that Nobody Noticed: The MPR Annual Session, November 2001 (2002)* 8.

<sup>1189</sup> Kawamura, above n 661, 50.

<sup>1190</sup> Minutes of the 2<sup>nd</sup> meeting of Commission A, 5 November 2001, 58, 88 — 89.

### **(3) The Voting Requirement for Impeachment**

Another example of short-term political interest was an amendment proposal on the voting requirement for impeachment. After replacing President Wahid, the PDIP was afraid that Megawati would be easily impeached as had happened to Wahid. Therefore, the party advocated a more difficult voting requirement for impeachment, namely that the impeachment should be approved by both the DPR and MPR.

Specifically, the PDIP proposed that for the DPR to submit an impeachment process to the Constitutional Court, the support of at least two-thirds of the members of the DPR in a plenary meeting, attended by at least two-thirds of the total number of members of the DPR, should be required.<sup>1191</sup> At the final stage of the impeachment, the decision of the MPR to remove a President, 'must be made in a plenary meeting of the MPR attended by at least three-quarters of the total numbers and with the approval of at least two-third of the number of members present'.<sup>1192</sup> This impeachment voting requirement is the highest in voting threshold MPR procedure. It is even more difficult than the voting requirement to amend the Constitution.

#### **e. The Movement to Reject the Amendment**

A letter requesting the MPR's deferral of the Third Amendment was circulated during the 2001 Annual Session. A *Kompas* source revealed that the letter was signed by 220 members. The letter sought rejection of the establishment of the DPD (*Dewan Perwakilan Daerah*, Regional Representative's Council), which the signatories believed would damage the concept of a unitary state.<sup>1193</sup> Although the letter did not affect the Third Amendment ratification, it proved that some members of the MPR still rejected the very idea of amending the 1945 Constitution. The movement to reject the amendment became stronger during the Fourth Amendment discussions. Chapter Seven elaborates on this issue.

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<sup>1191</sup> Article 7B (3) of the Third Amendment.

<sup>1192</sup> Article 7B (7) of the Third Amendment.

<sup>1193</sup> 'Pasal-pasal Krusial didiskusikan tahun Depan', *Kompas*, 10 November 2001.

## 2. Who the Constitution-Making Body was to be

The pressure to have an alternative Constitution maker was greater during the Third Amendment debates. One event which strengthened doubts about the MPR as Constitution maker occurred during the first meeting of the 2001 MPR Annual Session, when a fight broke out on the floor and was broadcasted live by some national television stations.

### a. Investigation Committee on Constitution

In late January 2001, President Wahid stated that he would form a special committee to investigate the amendment of the 1945 Constitution.<sup>1194</sup> Wahid's intentions were questionable because he mentioned it at a moment of high tension between the President and the DPR. For Budyatna, this establishment was, in reality, little more than Wahid engaging in political bargaining with the MPR.<sup>1195</sup>

In any case, the MPR rejected Wahid's proposal. Tobing (PDIP) commented that if the Committee consisted of experts, it would be better if it was consolidated with the Expert Team.<sup>1196</sup> Yusuf (Golkar) argued that the word 'investigating' in the committee might mislead.<sup>1197</sup> It could be understood as a committee which would question the legality of the Constitution, and therefore, would not act as a constitution-making body. Yusuf argued that whatever was the meaning of the word, the authority to reform the Constitution remained with the MPR.<sup>1198</sup>

Wahid nonetheless issued Presidential Decree No. 47 of 2001 to establish the Investigation Committee. Article 2 of the decree mentioned that the Committee would, 'investigate, discuss and outline constitutional problem' and would, 'give its input to the MPR'. The Committee, however, never conducted any activities, due to the lack of financial resources, and quickly became irrelevant.<sup>1199</sup>

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<sup>1194</sup> 'Gus Dur to Appoint Expert to Study Amendment to the 1945 Constitution', *The Jakarta Post*, 19 January 2001.

<sup>1195</sup> 'Kental Beraroma Politik', *Suara Pembaruan*, 20 January 2001.

<sup>1196</sup> 'Sebaiknya diintegrasikan ke BP MPR', *Media Indonesia*, 10 January 2001.

<sup>1197</sup> 'Wewenang Mengubah, Menetapkan Konstitusi di Tangan MPR', *Suara Pembaruan*, 19 January 2001.

<sup>1198</sup> *Ibid.*

<sup>1199</sup> Interview with Harun Alrasid, Professor of Constitutional Law at the University of Indonesia, 14 July 2003.

## b. Expert Team

The establishment of the Expert Team was the response of the PAH I to public criticism of the MPR's performance in the First and Second Amendments.<sup>1200</sup> The team consisted of thirty experts and was divided into five fields: politics; law; economics; religion, social and culture; and education.<sup>1201</sup> The selection process of the Expert Team started when each faction presented experts names to the PAH I. In the first stage, the PAH I listed 90 names of experts.<sup>1202</sup> How the selection process was conducted was not so clear. Tobing stated that:

... the selection process was not a 'fit and proper' test ... not comparing one candidate to another, it is simply a process of reducing the numbers from 90 to 30, that's it.<sup>1203</sup>

The 'Civil Society Movement for a New Constitution', therefore, argued that the PAH I formed the Expert Team merely to rubber-stamp its amendment process.<sup>1204</sup> By doing so, the PAH I could claim that the amendment proposals had been academically reviewed.<sup>1205</sup> Indeed, there were some indicators that this was true. First, during the PAH I's meetings on the establishment of the Expert Team, many of the members emphasized that the Team was merely a supporting, *ad hoc*, complementary team.<sup>1206</sup> Second, Sahetapy (PDIP) argued that the Team should have been dismissed.<sup>1207</sup> For him, the Team merely quoted theories from text books which could simply have been read by the PAH I.<sup>1208</sup> Third, Tobing pointed out that the main guidance for amendment was the proposal prepared by the PAH I 2000 and attached to the MPR decree No. IX of 2000.<sup>1209</sup> This proposal contained some agreed Articles and disputed Articles, with alternatives.

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<sup>1200</sup> Minutes of 1<sup>st</sup> meeting of the Working Body, 5 September 2000, 9 — 57.

<sup>1201</sup> The 30 people were: Afan Gaffar, Bahtiar Effendy, Maswadi Rauf, Ramlan Surbakti, Riswandha Imawan, Dahlan Thaib, Hasyim Djalal, Ismail Suny, Jimly Asshiddiqie, Maria S.W. Sumardjono, Muchsan, Satya Arinanto, Sri Soemantri Martosoewgnjo, Soewoto Mulyosudarmo, Bambang Sudibyo, Dawam Rahardjo, Didik J. Rachbini, Mubyarto, Sri Adiningsih, Sri Mulyani, Syahrir, Azyumardi Azra, Eka Dharmaputera, Komarudin Hidayat, Nazaruddin Umar, Sardjono Jatiman, Willy Toisuta, Wuryadi and Jahja Umar. At the beginning of the Foruth Amendment discussions, however, Prof. Jatiman passed away. The Expert Team, therefore, only consisted of 29 members for the rest of its working period.

<sup>1202</sup> Minutes of the 7<sup>th</sup> meeting of the PAH I, 23 January 2001, 77 — 88.

<sup>1203</sup> Minutes of the 10<sup>th</sup> meeting of the PAH I, 7 March 2001, 180 — 181.

<sup>1204</sup> 'Assembly Working Group Blasted over Constitutional Amendments', *The Jakarta Post*, 22 March 2001.

<sup>1205</sup> *Ibid.*

<sup>1206</sup> Minutes of 5<sup>th</sup> meeting of the PAH I, 7 December 2000, 198 — 217.

<sup>1207</sup> Minutes of 23<sup>rd</sup> meeting of the PAH I, 3 September 2001, 129.

<sup>1208</sup> *Ibid.*

<sup>1209</sup> 'Tim Ahli Lebih Partisan dibanding PAH', *Koran Tempo*, 5 September 2001.



Bawazier (*Reformasi*) and Soewarno (PDIP) suggested that the PAH I 2001 should only discuss the 2000 proposal, which still contained alternatives. This meant the input of the Expert Team on the 2000 agreed articles should not be considered.<sup>1210</sup> Mulyosudarmo noted this limitation, saying that he had received the impression that the PAH I 2001 merely needed the Team to legitimize the PAH I 2000's proposal.<sup>1211</sup>

Fortunately, Sambuaga challenged the suggestion of Bawazier and Soewarno.<sup>1212</sup> Sambuaga argued that it was necessary for the PAH I 2001 to reconsider the whole 2000 proposal, in light of the input from the society and the Team.<sup>1213</sup> Most of the Articles of the Third Amendment, therefore, were a combination between the PAH I 2000 and the Expert Team's proposal, plus some brand-new Articles from the PAH I 2001. From the perspective of which of the Expert Team and the PAH I had more influence, the origin of the articles comprising the Third Amendment can be divided into seven categories (Table 13).

**Table 13 Origin of the Third Amendment Proposal**

No.	Came from	Numbers of proposal accepted	Percentage
1.	The Expert Team	5	9.8
2.	The Expert Team but modified by the PAH I 2001	10	19.6
3.	The Expert Team and the PAH I 2000	1	2
4.	The Expert Team and the PAH I 2000, modified by the PAH I 2001	19	37.2
5.	The PAH I 2000 but modified by the PAH I 2001	3	5.9
6.	The PAH I 2000	9	17.7
7.	The PAH I 2001	4	7.8

Source: Extracted from the PAH I 2000's proposal, the Expert Team's proposal and the Third Amendment of the 1945 Constitution.

<sup>1210</sup> Minutes of the 24<sup>th</sup> meeting of the PAH I, 5 September 2001, 257, 262.

<sup>1211</sup> Minutes of the 19<sup>th</sup> meeting of the PAH I, 29 May 2001, 165.

<sup>1212</sup> Minutes of the 24<sup>th</sup> meeting of the PAH I, 5 September 2001, 266.

Table 13 lists from the most influential to the least influential amendment proposal by the Expert Team. It shows that only 9.8% of the Third Amendment outcomes solely came from the Team. For the radical groups, which opposed the MPR as Constitution maker, the accepted proposals from the Expert Team were not sufficient. The Civil Society Movement for a New Constitution, therefore, argued that the amendment process should be taken over by an independent Constitutional Commission.

### **c. Constitutional Commission**

The issue regarding the Constitutional Commission gained momentum on 16 August 2001, when President Megawati stressed the importance of a special commission to take charge of amending the Constitution. Megawati stated that the constitutional reform should be, “crystallized and drafted comprehensively, systematically and professionally by a Constitutional Commission, to be then reviewed and endorsed by the MPR”.<sup>1214</sup>

Megawati’s suggestion was a surprise, because she was known to be quite conservative on the amendment issue.<sup>1215</sup> The PDIP had never mentioned the Commission in any of the previous amendment meetings in the MPR.<sup>1216</sup> Sutjipto, who was the General Secretary of the PDIP, revealed that the suggestion had not come from the party.<sup>1217</sup> Tobing (PDIP) differed on this issue saying that Megawati’s proposal had come from the PDIP.<sup>1218</sup>

#### **(1) The PDIP’s Constitutional Commission: Was it Real?**

During the 23<sup>rd</sup> meeting of the PAH I, when the PDIP formally submitted its proposal to establish a Constitutional Commission, all of the other ten factions attacked the proposal.<sup>1219</sup>

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<sup>1213</sup> Ibid.

<sup>1214</sup> Megawati Soekarnoputri’s State-of-the-Nation Address, 16 August 2001, the translation is by Jakarta Post.

<sup>1215</sup> ‘Komisi Konstitusi seharusnya diusulkan Fraksi PDI Perjuangan’, *Kompas*, 31 August 2001.

<sup>1216</sup> ‘Pembentukan Komisi Konstitusi Terancam Gagal’, *Kompas*, 30 August 2001.

<sup>1217</sup> ‘PDIP Mempelajari Pembentukan Komisi Konstitusi’, *Kompas*, 1 September 2001.

<sup>1218</sup> ‘MPR to Set Up Team to Amend Constitution’, *The Jakarta Post*, 23 August 2001.

<sup>1219</sup> Minutes of the 23<sup>rd</sup> (continued) meeting of the PAH I, 4 September 2001, 166 — 7.

For Bawazier (*Reformasi*) the proposal was the PDIP's way of buying time to delay the amendment process.<sup>1220</sup> Soedijarto (FUG) stated that:

[t]he PDIP's proposal on the Constitutional Commission was astounding ... I recommend that the PAH I should carry on its works without an interruption of the kind. Please, convey to the President that the establishment of a Constitutional Commission amounts to the same as non-recognition of the Constitution ...<sup>1221</sup>

Soedijarto further argued that establishing a Constitutional Commission contradicted the multi-party agreement to merely amend the Constitution. For him, a country which forms a commission intends to make a totally new Constitution.<sup>1222</sup>

However, after the PDIP had submitted a complete proposal, it was clear that the commission intended by the PDIP would not have such a strong authority (see Table 14). The commission's authority was not significantly different to that of the Expert Team.<sup>1223</sup> By proposing that the President should nominate the members of the commission, Megawati and the PDIP intended to control the Constitutional Commission.<sup>1224</sup> By doing so, the President could then influence crucial amendment proposals which might affect her position, such as the impeachment procedure.<sup>1225</sup>

## **(2) The Proposals of Constitutional Commission from the PPP, PKB and Golkar**

As the 2001 Annual Session approached, the PPP and PKB started to promote the Constitutional Commission. When the PPP unexpectedly submitted its proposal, Pataniari Siahhan (PDIP) complained that the PPP was just trying to steal the limelight.<sup>1226</sup> It was not clear what the agenda behind the PPP's proposal was. However, as it had been submitted very close to the 2001 Annual session, it might have been an effort of the PPP to attract the public's sympathy or attention. The PKB's proposal was also submitted close to the 2001 Session. However, the PKB revealed a clearer reason. It was disappointed with the process of the amendment. Yusuf Muhammad argued that:

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<sup>1220</sup> 'F-PDIP Usulkan Komisi Konstitusi', *Kompas*, 4 September 2001.

<sup>1221</sup> Minutes of the 23<sup>rd</sup> meeting of the PAH I, 3 September 2001, 98 — 100.

<sup>1222</sup> *Ibid* 99 — 100.

<sup>1223</sup> Minutes of 23<sup>rd</sup> (continued) meeting of the PAH I, 4 September 2001, 167 — 73.

<sup>1224</sup> *Ibid*.

<sup>1225</sup> *Ibid*.

<sup>1226</sup> Minutes of the 4<sup>th</sup> meeting of the Working Body, 2 October 2001, 193.

[t]he amendment discussions are half-hearted ... They are driven by short term interests. Therefore, we recommend that a new method ... which widely involves public participation, should be adopted ... The PKB hereby proposes a Constitutional Commission.<sup>1227</sup>

Golkar was the last party to propose its Constitutional Commission. It submitted the proposal during the 2001 session. Golkar named its commission the National Committee for Amendment of the 1945 Constitution.<sup>1228</sup> Because the proposal was made so late, it was questionable whether Golkar really meant to propose the Committee, or whether it was actually just trying to impress the public.

The proposals on Constitutional Commission of some factions in the MPR and from the Coalition for a New Constitution were very different (Table 14). The NDI argues that because of the extreme differences of this proposal, the Commission failed to be established.<sup>1229</sup>

**MPR Remains the Constitution-Making Body.** Finally, the 2001 MPR Annual Session rejected the establishment of the Constitutional Commission. The different proposals for a Commission were blamed.<sup>1230</sup> The 2001 Session decided that the Working Body should again be responsible for preparing further amendment.

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<sup>1227</sup> Ibid 195.

<sup>1228</sup> Minutes of the 5<sup>th</sup> (continued) Plenary Meeting, 4 November 2001, 200.

<sup>1229</sup> Ellis, above n 662, 144.

<sup>1230</sup> Minutes of the 6<sup>th</sup> Plenary meeting of the 2001 MPR Annual Session, 8 November 2001, 324 – 5.

**Table 14 The Proposals on Constitutional Commission in the 2001 MPR Annual Sessions**

No.		PDIP	Golkar	PPP	PKB	Coalition for A New Constitution
1.	<b>Name</b>	Constitutional Commission	National Committee for the Amendment of the 1945 Constitution	Constitutional Commission	Constitutional Commission	Constitutional Commission
2.	<b>The role</b>	Helping the MPR in amending the Constitution	Amending the Constitution if the MPR failed	Amending the Constitution	Amending the Constitution	Amending the Constitution and conducting wider public participation
3.	<b>Membership</b>	Nominated by the President and selected by the Working Body of the MPR. From experts and province's representatives	Open recruitment, selected by the Working Body. MPR: 30 people Expert: 15 NGO and society: 10 Provinces: 30 (selected by the each DPRD) TOTAL: 85	50 people, consists of experts and province's representatives. No MPR members.	MPR: 25 Experts: 20 Society: 20 Provinces: 34 TOTAL: 99	No members from the MPR
4.	<b>Output</b>	Not a new Constitution. Submitted to the MPR for consideration	MPR could only accept or reject the output. If the MPR rejected the constitutional draft, a referendum should have been conducted.	MPR could only accept or reject the output. If the MPR rejected the constitutional draft, a referendum should have been conducted.	Might be a new Constitution	A new Constitution. MPR could only accept or reject the output. If the MPR rejected the constitutional draft, a referendum should have been conducted.
5.	<b>Timing</b>	2001-2002	2001-2002	2001-2002	2001-2002	2001-2002

Source: Extracted from minutes of meeting of the 2001 MPR Annual Session.

### 3. How the Public Participation was Organized

In the early stages of its meetings the PAH I visited some provinces. These visits, however, were to inform the public of the result of amendments, rather than to ask for input into the Third Amendment. During the visits, the PAH I realized that many of the people were not aware that the Constitution had already been amended twice. Pataniari Siahaan (PDIP) pointed out that not only the people, but many MPR members, as well, did not know the substance of the First and Second Amendments.<sup>1231</sup>

Although it then realized the importance of wider public involvement, the PAH I disappointingly scheduled public participation merely the last minutes of the Third Amendment discussion. Lukman Hakim Saifuddin (PPP) questioned the preparation for the hearings.<sup>1232</sup> He pointed out that:

... we will conduct the hearings in the regions from 3 to 9 October, they will begin the day after tomorrow. I do not know how prepared we are. What should we do? Who will we meet? What are our job descriptions ... This is not only a matter of technicality ... for me, the most substantial thing is the mechanism of the hearings. I think this mechanism will affect the quality of the hearings.<sup>1233</sup>

The effectiveness of the public participation programs was, therefore, questionable. There was no complete report as to what the public input was and after conducting the hearings, it was clear that the PAH I was not serious in considering the input. This was indicated by many members of the PAH I who did not attend the Committee's meetings.<sup>1234</sup> One of the members of the PAH I admitted that the participation program was not serious. It was conducted merely to spend the MPR's budget.<sup>1235</sup> The member disclosed that:

[i]t is actually all about money. By organizing the participation programs, there is a 'legitimate' reason to distribute the money. It is fairer. Everybody can have his share.<sup>1236</sup>

In the PAH I's final report, Tobing listed that the Committee only conducted three seminars and hearings in nine provinces.<sup>1237</sup> According to Saifuddin, these hearings were not well organized.

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<sup>1231</sup> Minutes of 1<sup>st</sup> meeting of the PAH I, 6 September 2000, 20.

<sup>1232</sup> Minutes of 37<sup>th</sup> meeting of the PAH I, 1 October 2001, 81.

<sup>1233</sup> Ibid.

<sup>1234</sup> 'Mengendur, Semangat Bahas Amandemen Ketiga UUD', *Suara Pembaruan*, 11 October 2001.

<sup>1235</sup> Ibid.

## C. The Third Amendment: The Outcomes <sup>1238</sup>

For Kawamura, the Third Amendment succeeded in strengthening the democratic character of the 1945 Constitution.<sup>1239</sup> Similarly, Ellis argues that the Third Amendment was a “fundamental change in the institutions of Indonesia”.<sup>1240</sup> Ellis further argues that:

The Third Amendment marks the basic decision to change Indonesia from a state with a single all-powerful highest institution of state to become a state with constitutional checks and balances.<sup>1241</sup>

The following section outlines the important changes in the Third Amendment.

### 1. Important Reforms Articles

#### a. The Law State

The stipulation that Indonesia is a state ‘ruled by law’ (*negara hukum* or *rechtsstaat*) was previously found in the elucidation of the Constitution. The Third Amendment strengthens this declaration by adopting it into Article 1(3).

#### b. Limiting the MPR’s powers

The Third Amendment shows that the MPR was willing to reduce its own power. This was not predicted by many and came as a surprise to most. It was suspected that the MPR would seek to retain its position as a supreme and powerful parliament, retaining the power it had exercised in removing President Wahid. The fact that the MPR limited its own power, through the amendment it made itself, demonstrated that a constitution-making body could also reform itself through a constitution-making process, provided there was a strong pressure from the public.

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<sup>1236</sup> Ibid.

<sup>1237</sup> Minutes of the 5<sup>th</sup> meeting of the Working Body, 23 October 2001, 235.

<sup>1238</sup> All Articles in this section, except mentioned otherwise, refer to the Third Amendment of the 1945 Constitution.

<sup>1239</sup> Kawamura, above n 661, 48 — 50.

<sup>1240</sup> Ellis, above n 662, 140.

<sup>1241</sup> Ibid.

## **(1) Sovereignty of the People**

The Third Amendment ends the MPR's position as the supreme Parliament which monopolized and exercised the sovereignty of the people. It marked the end of the doctrine of MPR supremacy. This doctrine stipulated in the elucidation of the Constitution that, "the MPR is the highest authority in the conduct of state affairs ... [it] is the manifestation of the people who hold the sovereignty of the state" and that "since the MPR is vested with sovereignty of the state, its power is unlimited". The Third Amendment reversed this, taking sovereignty from the MPR and stipulating that "Sovereignty is in the hands of the people and is exercised in accordance with the Constitution".<sup>1242</sup> This provision was firstly proposed by Soewoto Mulyosudarmo, a member of the Expert Team and is one of the rare examples of this Team directly affecting the amendment process.<sup>1243</sup>

## **(2) The Authority of the MPR**

The Third Amendment reduces the authority of the MPR. Its power to elect the President and Vice President is, for example, removed. Consequently, the MPR's power to set the GBHN, which the President had been obliged to implement and be responsible for, is also removed. The President is given the power to arrange his or her own agenda. However, the MPR retains the power to amend and ratify the Constitution.<sup>1244</sup>

### **c. Strengthening the Presidential System**

#### **(1) Direct Presidential Election**

Another radical change was the adoption of a direct presidential election mechanism.<sup>1245</sup> The President and Vice President are, 'elected as a pair directly by the people'.<sup>1246</sup> Political parties or their coalitions, which participate in general elections, propose the Presidential and Vice Presidential candidates.<sup>1247</sup> The candidate who wins more than 50% of the vote, and at least

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<sup>1242</sup> Article 1(2).

<sup>1243</sup> Interview with Sri Soemantri, Professor of Constitutional Law at the University of Padjajaran, 30 June 2003.

<sup>1244</sup> Article 3(1).

<sup>1245</sup> Lindsey, above n 99, 259.

<sup>1246</sup> Article 6A (1).

<sup>1247</sup> Article 6A (2).



20% of the votes in more than half of the provinces, is the elected President and vice President.<sup>1248</sup>

## **(2) Impeachment Procedure**

The procedure to impeach the President was clarified. The grounds of the removal include: 'treason, corruption, bribery, other high crimes, misdemeanors or proven to no longer fulfill the requirements of the office' of the presidency.<sup>1249</sup> The process is now not only political, involving the DPR and the MPR, but also legal, involving a newly created Constitutional Court.<sup>1250</sup> The voting requirement to impeach the President is set up to be more difficult from the previous simple majority to absolute majority. This is to be attended by at least three-quarters of the total number of members, and with the approval of at least two-thirds of the MPR members present.<sup>1251</sup>

## **(3) DPR non-dissolution**

The Third Amendment stipulated, 'the President may not suspend and/or dissolve the DPR'.<sup>1252</sup> Quite similar provision actually existed in the elucidation of the Constitution. However, neither the PAH I 2000, nor the Expert Team, proposed such a provision to be adopted in the body of the Constitution. The proposal on non-dissolution of the DPR was only submitted – and finally agreed – after Wahid had attempted unsuccessfully to force the dissolution of the DPR in his *Maklumat*.

## **(4) Vacant Vice Presidency**

A new stipulation was adopted in the case where the position of Vice President falls vacant. The MPR is to, 'hold a session within sixty days to elect a Vice President from two candidates proposed by the President'.<sup>1253</sup>

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<sup>1248</sup> Article 6A (3).

<sup>1249</sup> Article 7A.

<sup>1250</sup> Article 7B.

<sup>1251</sup> Article 7B (7).

<sup>1252</sup> Article 7C.

#### **d. The Establishment of the DPD**

A new-chapter VIIA on the DPD (*Dewan Perwakilan Daerah*, Regional Representative's Council) is a further reform of the legislature. The DPD members act as "senator" and are to be elected from each province, through a general election.<sup>1254</sup> The DPD may 'submit to the DPR' and

participate in the discussion of bills that relate to regional autonomy; the relationship between the centre and the regions; the management of natural resources and other economic resources; and the fiscal balance between the centre and the regions.<sup>1255</sup>

The DPD also has the right to, 'submit its advice to the DPR regarding bills concerning the state Budget and bills concerning taxes, education and religion'.<sup>1256</sup> Further, the DPD has the authority to supervise the implementation of law in any of these fields, and to submit the results of its supervision to the DPR, for consideration and further action.<sup>1257</sup>

#### **e. Reforming the Electoral Process**

A new chapter 22E on general elections was adopted. An election is scheduled every five years, to elect members of the DPR; the DPD; the President and Vice President; and the DPRD.<sup>1258</sup> The participants for the election of the members of the DPR and the members of the DPRD are political parties,<sup>1259</sup> and the participants in elections for the DPD are individuals.<sup>1260</sup> The election is to be organized by the KPU which is to have a, 'national, permanent and independent character'.<sup>1261</sup>

#### **f. Reforming the BPK**

The Third Amendment deals with the BPK (*Badan Pemeriksa Keuangan*, State Audit Body) in a new separate chapter. The BPK was redefined as a constitutional agency which is free and

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<sup>1253</sup> Article 8(2).

<sup>1254</sup> Article 22C (1).

<sup>1255</sup> Article 22D (1) (2).

<sup>1256</sup> Article 22D (2).

<sup>1257</sup> Article 22D (3).

<sup>1258</sup> Article 22E (1) (2).

<sup>1259</sup> Article 22E (3).

<sup>1260</sup> Article 22E (4).

<sup>1261</sup> Article 22E (5).

independent.<sup>1262</sup> The BPK is based in the capital of the nation and has representation in every province.<sup>1263</sup> The results of any investigation are submitted to the DPR, the DPD and DPRD, rather than simply to the DPR, as happened in the past.<sup>1264</sup> The members are chosen by the DPR with the consideration of the DPD, and are formally appointed by the President. The BPK leadership is elected by and from the members.<sup>1265</sup>

## **g. Reforming the Judicial System**

### **(1) Judicial Independence**

The independence of the judiciary was formalized and this basic principle was moved forward from its previous place in the elucidation. The judiciary was to be implemented by a Supreme Court and by a Constitutional Court.<sup>1266</sup> The Chief and Deputy Justices of the Supreme Court and Constitutional Court were elected by and from the justices of each court respectively.<sup>1267</sup>

### **(2) Establishment of a Constitutional Court**

A new institution, the Constitutional Court, was established at the same level as the Supreme Court. The Constitutional Court had the authority to, 'try a case at the first and final level' and had

the final power of decision in reviewing law against the Constitution, determining disputes over the authorities of state institutions...deciding over dissolution of a political party, and deciding disputes over the results of general elections.<sup>1268</sup>

In addition, the Constitutional Court is obliged to give its legal opinion in an impeachment process.<sup>1269</sup> The Constitutional Court has nine persons who are, 'confirmed in office by the President, of whom three shall be nominated by the Supreme Court, three nominated by the DPR, and three nominated by the President'.<sup>1270</sup>

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<sup>1262</sup> Article 23E (1).

<sup>1263</sup> Article 23G.

<sup>1264</sup> Article 23E (2).

<sup>1265</sup> Article 23F (1) (2).

<sup>1266</sup> Article 24.

<sup>1267</sup> Articles 24(4) and 24C (4).

<sup>1268</sup> Article 24C (1).

<sup>1269</sup> Article 24C (2).

<sup>1270</sup> Article 24C (3).

### **(3) Establishment of a Judicial Commission**

Another new institution, the Judicial Commission, possesses the authority to, ‘propose candidates for appointment as justices of the Supreme Court’ and to, ‘maintain and ensure the honor, dignity and behavior of judges’.<sup>1271</sup> To carry out such an important role, the members of the Commission are persons of integrity with a character that is not dishonorable.<sup>1272</sup> The members of the Commission are ‘appointed and dismissed by the President with the approval of the DPR’.<sup>1273</sup>

## **2. The Delay of Crucial Amendment Proposals**

Beside ratifying the fundamental constitutional change through the Third Amendment, the MPR also delayed some crucial amendment proposals, as hereby elaborated.

### **a. The Composition of the MPR**

Although all of the factions agreed to restructure the MPR, no consensus was reached on the question of functional groups (Article 2(1)). It was still unclear as to whether the future MPR was to consist of elected members (the DPR and the DPD), and the non-elected members (FUG and the TNI-Polri), or whether the MPR only consisted of the elected members.

### **b. The Second Round of Presidential Elections**

While agreeing in principle to direct presidential elections, all factions maintained their stance toward a second round election being needed. The choice was whether the MPR or the people should have had the authority to choose between the two best presidential candidates. As a result of the postponement of Paragraph (4), Article 6A of the Third Amendment only contained paragraphs (1), (2), (3) and (5), leaving it incomplete.

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<sup>1271</sup> Article 24B (1).

<sup>1272</sup> Article 24B (2).

<sup>1273</sup> Article 24B (3).

### **c. Simultaneously Vacant Positions of the President and Vice President**

As to the situation where the positions of both President and Vice President fell vacant simultaneously, two alternatives were still on the table. One proposed that the Speakers of the MPR and the DPR become the President and Vice President, respectively. The other proposed that the presidency would be undertaken by the triumvirate of the foreign minister, home minister and defense minister. This was not resolved during the Third Amendment debates.

### **d. The Issue of Jakarta Charter**

The most sensitive constitutional issue – on the question of whether the ‘seven words’ of the Jakarta Charter should be adopted in to the Constitution – remained unresolved. Chapters Seven and Eight further elaborate this issue.

**Conclusion.** The NDI argues that the amendment was a critical moment, in institutional reforming in Indonesia.<sup>1274</sup> It applauds the reform of the MPR, and argues that:

[t]he Third Amendment to the 1945 Constitution marks the decision to change Indonesia from a state with an all-powerful highest institution of state (the MPR) to become a state with constitutional checks and balances.

On the other hand, because of the crucial delays on proposals -- such as the adoption of the Jakarta Charter and the second round presidential election – the Third Amendment might have become constitutional time bomb. There was no guarantee that these issues would be resolved in the 2002 Session. Consequently, Indonesia could have been trapped in a very dangerous constitutional crisis. For example, if the proposal on the second round presidential election had been deadlocked in 2002, there would have been no constitutional solution if none of the presidential candidates won a majority on the first round election.

The Fourth Amendment discussions and the 2002 MPR Annual Session were, therefore, very important for Indonesian constitutional reform. The following chapter discusses whether the MPR succeeded in defusing the constitutional time bomb left by the Third Amendment.

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<sup>1274</sup> National Democratic Institute, above n 1188, 1.

## **Chapter Seven**

### **The Fourth Amendment: Constitutional Crisis or Constitutional Reform?**

This chapter describes the process and outcome of the Fourth Amendment of the 1945 Constitution, the final amendment so far. The chapter is divided into three sections. Section A describes the political background of the Fourth Amendment. It focuses on the possibility of constitutional crisis because of an increased likelihood of stronger deadlock. Section B discusses the constitution-making process of the Fourth Amendment, which again focused on the issues of how the constitution-making should be conducted and who the constitution-making body was to be. Section C outlines the resulting amendment which 'completed' the reformation of the 1945 Constitution.

#### **A. The Background: Towards a Constitutional Crisis?**

##### **1. Crucial Amendment**

In 2002, the MPR was scheduled to ratify the Fourth Amendment. This amendment dealt with crucial proposals, such as: Article 2(1), on the composition of the MPR and Article 6A (4), on the second round presidential election. These proposals were urgently required, to form the constitutional basis of the 2004 election. The fate of four electoral bills (political parties, structure and position of the parliament, parliamentary election, and presidential election) were hanging in the balance, pending the outcome of the Fourth Amendment discussions.<sup>1275</sup> If the MPR had not reached an agreement, then the nation would have found itself in a constitutional crisis that would have jeopardized the chances of the 2004 election ever taking place. The outcome of Fourth Amendment was therefore critical because "it could either mark the beginning of the end of the democratic process that began in 1998, or the beginning of the end of the authoritarian system that began in 1959".<sup>1276</sup>

Further, the Fourth Amendment discussions would also decide on the fate of a sensitive amendment proposal of Article 29(1), on relation between state and Islam. Together with the amendment proposals of Articles 2(1) and 6A (4), these three provisions were the most

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<sup>1275</sup> 'Fate of Crucial Bills Depends on Amendment Process', *The Jakarta Post*, 6 August 2002.

<sup>1276</sup> 'The Beginning of the End', *The Jakarta Post*, 1 August 2002.

contentious Articles in the Fourth Amendment draft. The draft of these three Articles still contained alternatives. Table 15 shows these alternatives.

**Table 15 Alternatives on Articles 2(1), 6A (4) and 29(1)**

No.	Article	Alternative 1	Alternative 2	Alternative 3
1.	2(1)	MPR consists of members of the DPR and the DPD elected through general elections, plus interest groups elected by the DPR as regulated further by law.	MPR consists of members of the DPR and the DPD elected through general elections as regulated further by law.	N/A
2.	6A (4)	In the event that no President and vice President is elected, the MPR elects the President and vice President from the two pairs of presidential and vice presidential candidates gaining the most votes.	In the event that no President and vice President is elected, the people elects the President and vice President from the two pairs of presidential and vice presidential candidates gaining the most votes.	N/A
3.	29(1)	The state is based on one Supreme God. ( <i>original provision</i> )	The state is based on one Supreme God with the obligation to carry out <i>syariah</i> for adherents of Islam.	The state is based on one Supreme God with the obligation for adherents to practice their religions ( <i>Reformasi faction</i> ).

The position of the factions on the above three articles would affect the success or failure of the Fourth Amendment. If there had been no strong pressure to finish the constitutional reform, the conservative groups in the MPR might have been united to block the Fourth Amendment ratification. The coalition of the PDIP, FUG and TNI-Polri, for example, would have 284 seats of the MPR. These seats were more than one-third of the total MPR members, which were 695. Therefore, according to the approval requirements in Article 37 of the 1945 Constitution, the PDIP – FUG – TNI-Polri factions had enough votes to block any Fourth Amendment proposal.

The coalition was possible because the PDIP was the only party which was against the second round presidential election being put to the people in an election. On the other hand, FUG was

the only faction which rejected the proposal that the MPR consist only of the DPR and the DPD (Regional Representatives' Council). If these two parties had united, they would have been able to refuse all of the Fourth Amendment proposals.

## 2. The Voices For and Against Amendment

With pressure on the MPR growing to ratify the Fourth Amendment, voices for and against the amendments began to be strongly heard in public.<sup>1277</sup>

### a. Public Position

**The pro amendment movements.** The strongest advocate of the amendment agenda was the 'Coalition for a New Constitution' group. This group, however, criticized the process and the outcome as being undemocratic.<sup>1278</sup> It argued that, rather than just amending the 1945 Constitution, a new Constitution should be formulated.<sup>1279</sup> Specifically, the Coalition proposed that a new constitution-making body formed outside the MPR – a Constitutional Commission.<sup>1280</sup>

**The Anti-amendment Movement.** On the other hand, there were at least three groups which called for a halt to the amendment process: (1) the Constitutional Scientific Analysis Forum; (2) the Armed Forces Veterans Association (Pepabri); and (3) the University of Bung Karno and the Indonesian National Forum.

The Constitutional Scientific Analysis Forum, and Pepabri, rejected the constitutional reform on the basis that it had deviated from its original course, and therefore had to be stopped.<sup>1281</sup> Try Soetrisno, the Chairperson of the Pepabri, stated:

... it would be best if our time, money and energy were focused on a review of the legal system. The Constitution is flexible enough, it does not need to be amended.<sup>1282</sup>

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<sup>1277</sup> Ibid.

<sup>1278</sup> NGO Coalition for a New Constitution, *Critical Review and Recommendations on Amendment to the 1945 Constitution* (2002) 1 – 12.

<sup>1279</sup> Ibid 12.

<sup>1280</sup> Ibid.

<sup>1281</sup> 'Serahkan Perubahan UUD kepada Komisi Konstitusi', *Kompas*, 11 April 2002.



Further Pepabri argued that, the amendment should be halted on the grounds that it had sparked polemics which had threatened national unity.<sup>1283</sup> Syaiful Sulun stated that the establishment of the DPD, in addition to the DPR, meant that Indonesia adopted a bicameral system. For him, the establishment of the DPD was a dangerous deviation from the principle of the Unitary state of the Republic of Indonesia, as it could lead to federalism.<sup>1284</sup> Further, there was a suspicion that the amendment was a western plot, led by the United States. Sulun said that, “we cannot apply American rules here”.<sup>1285</sup> He insisted that the amendment had to be based on national character and warned the MPR against creating a new Constitution.<sup>1286</sup>

Likewise, the University of Bung Karno and Indonesian National Forum, which were both chaired by Rachmawati Soekarnoputri, President Megawati’s sister, also totally rejected the amendment.<sup>1287</sup> Rachmawati, however, did not clearly explain the reasons behind this rejection. It might have been related to the fact that Soekarno, her father was one of the main figures behind the drafting of the 1945 Constitution.

In addition, another group emerged known as the *Kelompok Maklumat Bersama untuk Keselamatan Bangsa* (Joint Declaration for National Salvation). This group comprised academics (Sri Soemantri, Adnan Buyung Nasution, Rizal Ramli, Sudjana Syafei), religious leaders (Syafii Maarif, Muslim Abdurrahman, Solahudin Wahid), and it also included General Wiranto and some military supporters. This group sought the establishment of an independent commission that would take responsibility for continuing the Fourth Amendment process and it submitted a declaration to this effect to the Speaker of the MPR on 30 July 2002. This group lacked adequate support in the MPR, however, and its proposal was not adopted.<sup>1288</sup>

**Minister of Defense’s opinion.** Matori Abdul Djaliil, then the Minister of Defense, appealed to the MPR to stop the amendment process, until such a time when the situation was ‘more conducive’.<sup>1289</sup> He argued that the debate between pro and con amendment movements might

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<sup>1282</sup> Ibid.

<sup>1283</sup> ‘Megawati Calls for Minor Amendment’, *The Jakarta Post*, 15 May 2002.

<sup>1284</sup> ‘Constitutional Amendment Main Focus at Session’, *The Jakarta Post*, 1 August 2002.

<sup>1285</sup> Ibid.

<sup>1286</sup> Ibid.

<sup>1287</sup> ‘Perubahan UUD 1945 harus menghindari Potensi Disintegrasi’, *Kompas*, 19 April 2002.

<sup>1288</sup> **To be completed, Kompas 31 July 2002.**

<sup>1289</sup> ‘MPR harus Hormati Keputusannya Sendiri’, *Kompas*, 15 April 2002

create political conflicts.<sup>1290</sup> Although Djalil based his argument on the possible conflict, the Minister was actually concerned with the direction in which the amendments were heading.<sup>1291</sup> He argued that, from the articles which were being proposed, the MPR might entirely renew the 1945 Constitution.<sup>1292</sup>

## b. The MPR's Position

**The Anti-amendment.** The efforts to stop the Fourth Amendment came from inside the MPR as well. At least 199 of the 695 MPR members signed a petition urging the MPR to stop the constitutional reform. Most of these members had previously rejected the establishment of the DPD during Third Amendment ratification in the 2001 MPR Annual Session.<sup>1293</sup> They argued that the proposed changes have “gone too far” and called for keeping the original 1945 Constitution.<sup>1294</sup> However, they failed to provide a clear explanation as to which changes they were talking about. Informally, this movement named itself the ‘Parliamentary Conscience Movement’. Amin Aryoso (PDIP), who was the Vice-Chairperson of the PAH III which prepared the First Amendment, was one of the key leaders in this movement.

**Mixed Signals from TNI-Polri.** After the retired generals (Pepabri) and the Minister of Defense firmly demanded a stop to constitutional reform, the military faction in the MPR sent a mixed signal. I Ketut Astawa (TNI-Polri) stated that his faction supported the amendment by upholding the nation's values.<sup>1295</sup> Although he did not expressly mention what the values were, predictably, Astawa referred to the *Pancasila* and Article 29 on relation between state and Islam.<sup>1296</sup> On the other hand, a more conservative signal was sent by military headquarters as the 2002 MPR Annual Session approached. The TNI Chief General Endriartono Sutarto argued that the amendment process had deviated from its original purpose, he stated:

[a]mending the 1945 Constitution should not be seen as an effort to establish a new Constitution as there are some principles that cannot be changed radically, including the

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<sup>1290</sup> ‘Matori Favors Putting Off the Amendments’, *The Jakarta Post*, 14 April 2002.

<sup>1291</sup> *Ibid.*

<sup>1292</sup> *Ibid.*

<sup>1293</sup> Above n 1193.

<sup>1294</sup> Bambang Widjojanto, ‘Parliament and Constitutional Crisis’, *Tempo*, 30 April – 6 May 2002.

<sup>1295</sup> ‘Fraksi TNI/Polri siap Antisipasi Deadlock’, *Kompas*, 18 April 2002.

<sup>1296</sup> *Ibid.*

concept of the unitary Republic of Indonesia and the obligation of the state to respect plurality among religions adherents.<sup>1297</sup>

One can read many things into the TNI's stance, made public right on the eve of the 2002 Session. Mulya Lubis warned of a possible constitutional vacuum should the political parties not agree to proceed with the Fourth Amendment process. This would allow the military to force the President to reinstate the original 1945 Constitution.<sup>1298</sup> Alrasid was of the opinion that the military had no right to interfere with the ongoing political process in the MPR. For Alrasid, the TNI-Polri faction should stick to its security and defense roles.<sup>1299</sup> He argued that:

[a]s part of the executive power, the military and the police are under the President. They should only follow orders issued by the President, and not dictate the MPR's performance ... They also should not influence the President to issue a decree should the amendment process become deadlocked due to political differences among the parties.<sup>1300</sup>

**The Dual Stance of the PDIP.** It was disturbing that the anti-amendment movements in the MPR were mobilized by many members of the PDIP. It proved that this party was internally split on the constitutional reform agenda: while Aryoso and some other senior party leaders were campaigning for discontinuing the amendment process, other party legislators prepared the Fourth Amendment, including Tobing, who chaired the PAH I.<sup>1301</sup> This division in the PDIP was an indicator that the party was not really in support of the constitutional reform. In one of the PDIP meetings, Megawati stated:

[i]f I were only the Chairperson of the PDIP I would give an instruction to reject the amendment. But because of I am also the President, I must also protect all political forces.<sup>1302</sup>

Likewise, Sutjipto, who was the Secretary General of the PDIP, stated:

[f]rom the beginning we had stated that if possible we should not amend the Constitution, but the party decided to follow the democratic process and support the amendment.<sup>1303</sup>

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<sup>1297</sup> 'Military, Police Call for Return to 1945 Constitution', *The Jakarta Post*, 31 July 2002.

<sup>1298</sup> 'Todung Warns of Constitutional Vacuum', *The Jakarta Post*, 1 August 2002.

<sup>1299</sup> *Military, Police call for return to 1945 Constitution*, above n 1297.

<sup>1300</sup> *Ibid.*

<sup>1301</sup> 'Politicians Demand Amendment Delay', *The Jakarta Post*, 16 July 2002.

<sup>1302</sup> 'Bulls Eye on a Decree', *Tempo*, 6 – 12 August 2002.

<sup>1303</sup> 'Constitutional Amendment Must Go Ahead as Planned', *The Jakarta Post*, 10 April 2002.

These statements from the two party leaders show that the PDIP still took a conservative stance concerning the constitutional amendments. This stance encouraged the anti-amendment camp in the PDIP. They felt that they held a 'trump card': Megawati's blessing. Therefore, Aryoso and the other PDIP members actively interrupted the Fourth Amendment discussions in the 2002 Session. In the 1<sup>st</sup> meeting of Commission A, which was responsible for the amendment, conflict among the PDIP members became open.<sup>1304</sup> Although Tobing had been formally proposed by the PDIP faction as Chairperson of the Commission, Marah Simon Muhammad Syah (PDIP) refused to accept him.<sup>1305</sup> Indeed, Ellis and Yudhini note that, during the Commission A discussions, there was actually a challenge by 14 members of the Commission from the PDIP to the nomination of Tobing, despite the fact that Tobing was finally chosen as the Chair of the Commission A.<sup>1306</sup>

**The Middle Position of MPR?** The leaders of the MPR realized that, on the one hand, there were some groups which wanted the process of constitutional reform to be stopped altogether. On the other hand, there were groups in society which demanded the drafting of a completely new Constitution.<sup>1307</sup> Amien Rais, the Speaker of the MPR, claimed that:

[w]hat is being done by the [MPR] members is a manifestation of the expectation of everyone. It is in the middle of the extreme opinions.<sup>1308</sup>

Rais rejected any attempt to block the amendment. He argued that, if the amendment of the Constitution had failed to materialize, it would have been a setback to the reform movement and might have led to a constitutional crisis.<sup>1309</sup> Rais further argued that:

I hope that those parties who aspire to stop the amendments will review their position and start thinking in a clearer way. The interests of the nation should not be sacrificed in favor of short-term political passions.<sup>1310</sup>

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<sup>1304</sup> Minutes of the 1<sup>st</sup> meeting of the Commission A, 4 August 2002, 6 – 63.

<sup>1305</sup> Ibid 21.

<sup>1306</sup> Andrew Ellis and Etsi Yudhini (National Democratic Institute), *Indonesia's New State Institutions: The Constitution Completed, Now for the Detail* (2002).

<sup>1307</sup> 'Backroom Deals May Spoil Amendment Process', *The Jakarta Post*, 17 May 2002.

<sup>1308</sup> Ibid.

<sup>1309</sup> Constitutional Amendment must Go Ahead as Planned, above n 1303.

<sup>1310</sup> 'Jangan Hentikan Amandemen UUD 1945', *Kompas*, 17 April 2002.

In addition, Rais pointed out that the anti-amendment movement was possibly triggered by fear that the amendment could lead to the establishment of an Islamic state.<sup>1311</sup> For Rais, this fear was baseless because the MPR had already agreed to preserve the preamble, and therefore, chose the *Pancasila* as the state ideology rather than Islam.<sup>1312</sup>

Although Rais did not mention any groups, but in reality the TNI-Polri and PDIP were the two factions who were most concern about the prospect, however remote, of an Islamic state issue. The TNI Chief General Soetarto pointed out that the state should, “respect plurality among religions adherents”.<sup>1313</sup> The PDIP had the same view: Roy BB Janis pointed out that although his party had no objections to amending the Constitution, three provisions should be preserved: the preamble, the state ideology of *Pancasila*; and Article 29.<sup>1314</sup> Megawati confirmed this by saying that the amendment process should be continued but the preamble, which comprises the *Pancasila*, should be preserved.<sup>1315</sup>

### 3. Presidential Decree

The movements for and against the amendment, together with the TNI-Polri and PDIP’s unclear stance toward the constitutional reform, created fear of the potential deadlock in the Fourth Amendment ratification process.

**Presidential Decree.** As suggested earlier, if the Fourth Amendment had become deadlocked, the country would have then plunged into a constitutional crisis, and there would have been no election in 2004.<sup>1316</sup> This would have created problems because Megawati’s term was to end in October 2004. Under such a critical condition, it was possible that President Megawati might issue a Decree to reapply the original 1945 Constitution. The same sort of Decree was issued by President Soekarno, Megawati’s father, when in 1959 the *Konstituante* faced a possible deadlock.

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<sup>1311</sup> ‘Amien Rais: Membatalkan Hasil Amandemen adalah Subversi’, *Forum*, 14 April 2002.

<sup>1312</sup> *Ibid.*

<sup>1313</sup> Military, Police Call for Return to 1945 Constitution, above n 1297.

<sup>1314</sup> ‘Amendment Process in Danger of Failing’, *The Jakarta Post*, 17 April 2002.

<sup>1315</sup> *Megawati Calls for Minor Amendment*, above n 1283.

<sup>1316</sup> Richel Langit, *Indonesia’s Constitutional Reform in Jeopardy* (2002) Asia Times Online, <<http://www.atimes.com/se-asia/DD23Ae04.html>> at 17 September 2002.

If issued, a Decree of this sort would be a death blow for constitutional reform. It would not only have blocked the Fourth Amendment ratification, but it would have also nullified all three previous amendments. Therefore, Anhar Gonggong strongly opposed this idea. He argued that if a Decree were issued, it would not have been a good political lesson<sup>1317</sup> and would confirm a bad precedent: every time the country failed to settle a political problem, a President would issue a Decree.<sup>1318</sup>

The possible deadlock overshadowed the preparation of the Fourth Amendment, from late 2001 to August 2002. The following section discusses how the Fourth Amendment draft developed and was finally ratified.

## **B. The Fourth Amendment: the Process**

### **1. When the Constitution-Making should occur**

**The MPR's Plan to Change the Schedule.** In 2000, the MPR decided to finish the whole amendment process in 2002, at the latest.<sup>1319</sup> With the uncertainty surrounding the Fourth Amendment ratification was at its height, there were discussions about changing the 2002 deadline. Rambe Kamarulzaman (Golkar) argued that, if the amendments had not completed in 2002, they would have continued in the 2003 MPR Annual Session.<sup>1320</sup> Although the Fourth Amendment was finally ratified in 2002, this intention to change the deadline is, of course, further evidence that the MPR was very loose in their attitude to deadline for amendment. At the outset the MPR agreed to finish the amendment in August 18, 2000. The 2002 deadline was the second, much extended, deadline set up by the MPR.

**Public Position.** The 'Coalition for a New Constitution' disagreed with the MPR's plan to postpone the Fourth Amendment ratification from 2002 to 2003.<sup>1321</sup> It urged the MPR to complete the amendment by the 2002 deadline.<sup>1322</sup> The Coalition proposed, however, that,

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<sup>1317</sup> *MPR harus Hormati Keputusannya Sendiri*, above n 1289.

<sup>1318</sup> *Ibid.*

<sup>1319</sup> Article 3 of MPR Decree No. IX of 1999 on the Authorization of the Working Body of the MPR to prepare the Amendment Draft of the 1945 Constitution.

<sup>1320</sup> 'Perpanjangan Sidang Tahunan MPR hingga 2003 merupakan Langkah Antisipasi MPR', *Kompas*, 6 June 2002.

<sup>1321</sup> Interview with Mochtar Pabottingi, member of the Coalition for a New Constitution, 15 July 2003.

<sup>1322</sup> *Ibid.*

when the Fourth Amendment was complete, the four amendments should be further reformed by an independent Constitutional Commission.<sup>1323</sup>

Along the same lines, the Indonesian Political Science Association argued that, even though the Fourth Amendment had been successfully ratified, the amendments should become a transitional Constitution. The Association further argued that the result of the amendments were inconsistent and were tainted with the vested interests of political parties.<sup>1324</sup> They showed signs of “developing without direction, arbitrarily, and even partially”.<sup>1325</sup> The Association, therefore, proposed that the amendments should be further reformed by an independent Constitutional Commission.<sup>1326</sup>

**Time Line for Discussions.** As in the case of the previous three amendments, the Fourth Amendment discussions were conducted in four stages (Table 16):

- First, the MPR Working Body prepared all of the materials for the 2002 MPR Annual Session. This body formed three ad hoc committees.
- Second, one of the committees, the Ad Hoc Committee I (PAH I), was made responsible for continuing the amendment of the Constitution.<sup>1327</sup>
- Third, Commission A was formed during the 2002 Session to further discuss the draft of the Fourth Amendment prepared by the PAH I.
- Fourth, on 10 August 2002, in the 6<sup>th</sup> (continued) plenary meeting of the 2002 Session, the MPR ratified the Fourth Amendment.

The total members of the Working Body were ninety, while the PAH I and Commission A had 48 and 243 members, respectively. In each of these bodies, the twelve factions of the MPR were represented in proportion to the number of their seats in the MPR. The number of the factions increased from eleven to twelve, due to the establishment of the Regional Representative faction, at the end of the 2001 MPR Annual Session.

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<sup>1323</sup> Interview with Todung Mulya Lubis, member of the Coalition for a New Constitution, 18 July 2003.

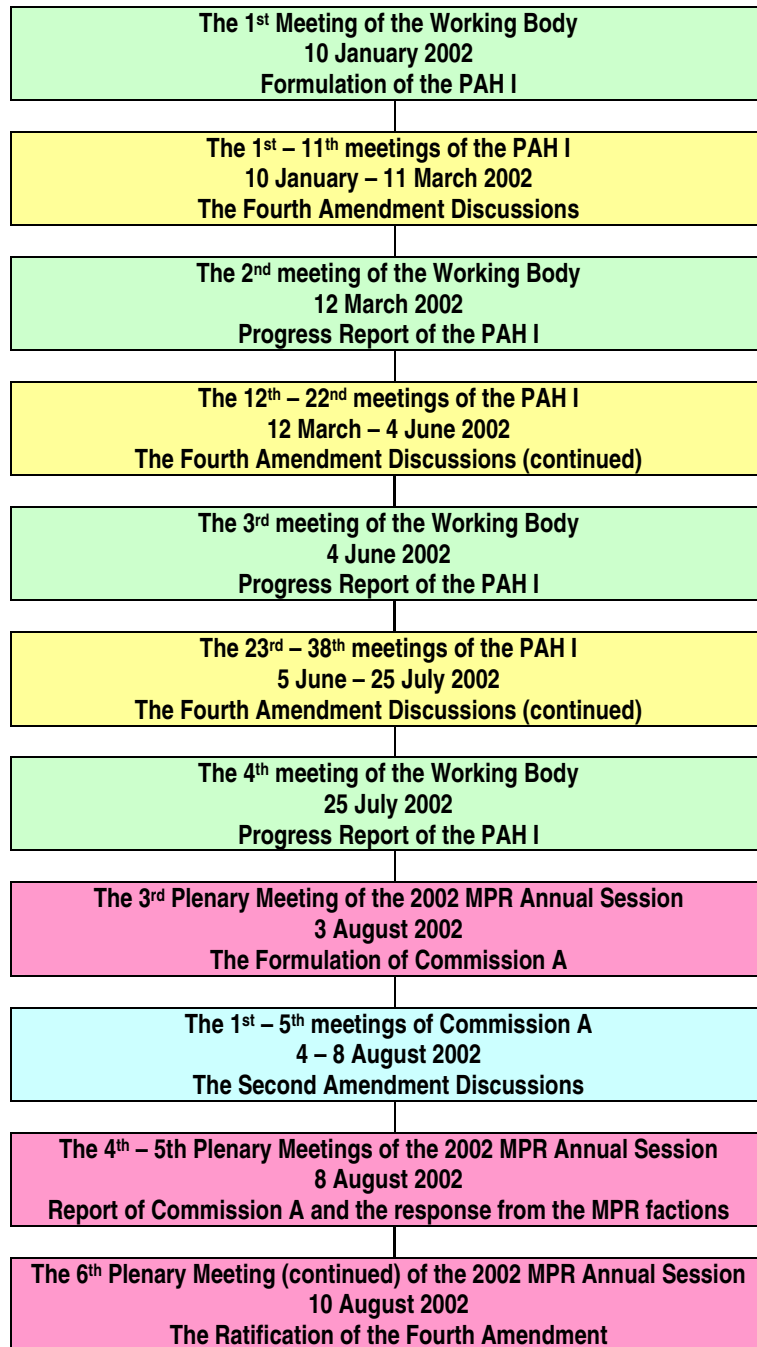
<sup>1324</sup> ‘Political Scientists Call for Transitional Constitution’, *The Jakarta Post*, 1 August 2002.

<sup>1325</sup> Ibid.

<sup>1326</sup> Ibid.

<sup>1327</sup> Section two of the MPR Working Body Decision No. 4 of 1999 on the Formulation of the Ad Hoc Committee of the MPR Working Body.

**Table 16 The Proceedings of the MPR's Fourth Amendment Discussions**



Source: Extracted from Minutes of Meetings of the MPR's Fourth Amendment Discussions



## 2. How the Constitution-Making was conducted

The Fourth Amendment discussions were colored by three issues, some of which had been inherited from the previous amendment discussions: (i) whether to amend or renew the Constitution; (ii) whether to have open or closed meetings of the MPR; and (iii) contamination by short term political interests.

### a. Four Amendments, One New Constitution?

**Public Position.** Despite the amendment process having taken place over more than three years since 1999, in 2002, the idea of writing a totally new Constitution arose again during the Fourth Amendment discussions. The Coalition for a New Constitution supported this movement to write a new Constitution. It had started the campaign in 2000, and up to 2002, the Coalition had persistently argued that amending the 1945 Constitution was not enough. It was unhappy with the amendments made by the MPR. It argued that both the process and the outcome of the amendments were not democratic.<sup>1328</sup>

The society, however, was divided in supporting the new Constitution idea. For example, Sabam Siagian questioned whether the transition from Soeharto was a conducive time for writing a new Constitution.<sup>1329</sup> Siagian recalled the difficult conditions surrounding the *Konstituante* (Constituent Assembly) in 1956-1959. The *Konstituante*, which was responsible for writing a new Constitution, could not reach an agreement, due to clear differences regarding the foundation of the state.<sup>1330</sup> At that time, the country was weakened by a serious regional revolt. Based on a relatively similar situation (given the recent loss of East Timor and rebellions in Aceh and Papua) Siagian doubted whether Indonesia, after Soeharto, “with a sluggish economy and raised poverty line” was strong enough to cope with the intense experience of drafting a new Constitution.<sup>1331</sup>

**The MPR’s Position.** During the Fourth Amendment meetings, the factions in the PAH I kept declaring their agreement to merely amend the Constitution. In reality, however, the MPR could not hide the fact that they had long since abandoned the ‘merely with the amendment’ concept.

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<sup>1328</sup> NGO Coalition for a New Constitution, above n 1278, 1 – 12.

<sup>1329</sup> Sabam Siagian, ‘Hope in 2002’, *The Jakarta Post*, 31 December 2001.

<sup>1330</sup> *Ibid.*

When discussing the proposal for new transitional provisions to deal with transition to the new dispensation created by the amendments without creating legal vacuum, Asshidiqie argued that the necessity of the provision demonstrated that the MPR had made a new Constitution.<sup>1332</sup>

Further evidence that the MPR was not consistent in its approach to the amendments concept is found in the close relation between the previous amendments and the Fourth Amendment. Each constitutional amendment was supposed to be independent, but they were, in fact interdependent. This was mentioned several times by the leaders of the MPR. Amien Rais, the chair, stated for example:

... in relation to the continuation of **one packet constitutional reform**, we have to complete the last amendment, the Fourth Amendment. This amendment has a very strategic role **to conclude** the constitutional amendments **as well as to finalize** the constitutional reform.<sup>1333</sup> [Emphasis added].

Tobing, who was the Chair of the PAH I, pointed out that this Ad Hoc Committee:

... in finishing the amendment draft of the 1945 Constitution, had been using a comprehensive approach. By doing so, the First, Second, Third and the current Fourth Amendment draft are considered as **a united amendment which is systemic, connected and comprehensive** in order to regulate the life of the state.<sup>1334</sup> [Emphasis added].

Yusuf, vice chair of the PAH I, stated:

[w]e are in the final stages. We passed the First Amendment in 1999, the Second in 2000 and the Third last year. Now, we are in the fourth stage. **This latest amendment is one in a series.**<sup>1335</sup> [Emphasis added].

The CSIS Team, evaluating the previous three amendments of the 1945 Constitution, concludes that what happened was not, in fact, amendment. Although it is still named the 1945 Constitution, the substance of the document has been completely changed.<sup>1336</sup>

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<sup>1331</sup> Ibid.

<sup>1332</sup> Minutes of the 34<sup>th</sup> meeting of the PAH I, 27 June 2002, 272.

<sup>1333</sup> Minutes of the 3<sup>rd</sup> meeting of the Working Body, 4 June 2002, 163.

<sup>1334</sup> Minutes of the 4<sup>th</sup> meeting of the Working Body, 25 July 2002, 241.

<sup>1335</sup> Van Zorge Report, *Golkar Was Not A 'Ruling Party', But A 'Ruler's Party'* (2002) <[http://www.vanzorgereport.com/report/popup/index.cfm?fa=ShowReport&pk\\_rpt\\_id=412&CFID=315606&CFTOKEN=71680888](http://www.vanzorgereport.com/report/popup/index.cfm?fa=ShowReport&pk_rpt_id=412&CFID=315606&CFTOKEN=71680888)> at 3 October 2003.

<sup>1336</sup> The CSIS Team, 'Catatan Kritis Terhadap Proses Amandemen UUD 1945', (2002) 1 *Analisis CSIS* 23.

## b. The Transparency of the MPR Meetings

In all of the amendment processes, the MPR had two types of meetings: open and closed discussions. Throughout the preparation of the Fourth Amendment, the formal and informal closed meetings were conducted more often than the previous amendments. The agreement in the MPR to avoid voting was one of the factors which had highlighted the necessity of closed meetings. If during these meetings no agreement had been reached, there would have been no other alternative but to hold a vote in the MPR session and thus would consequently have opened a wider possibility of constitutional deadlock.

Although the choice of closed meetings was a reasonable strategy to prevent deadlock, it was widely criticized by the public. The Coalition for a New Constitution complained that because of the 'closed door' agreements, the majority of the members of the MPR had not been engaged in the decision-making process.<sup>1337</sup> Roberts wrote that the MPR took no votes in the plenary meeting because the sensitive articles had been decided by "consensus": that is through deals that were worked out behind the scenes.<sup>1338</sup> For Roberts, therefore, the quality of the constitutional amendments was undermined by the fact that most of the deliberations had been kept out of the public eyes.<sup>1339</sup>

Despite the criticism, the closed meeting contributed to the success of the Fourth Amendment ratification. It allowed the factions in the MPR to be more open toward the alternatives in the amendment drafts. For Yusuf (Golkar), the negotiation meeting was more effective in reaching the agreement. He pointed out that:

[i]t seems that there is a strong will among factions [to reach an agreement]. Although the discussion in the PAH I is moving very slowly, the negotiation meetings show that each faction is more open [to give and take]. Therefore, [agreement] will be reached easier.<sup>1340</sup>

**The PDIP and Golkar.** One example of a successful closed meeting was the negotiation between the PDIP and Golkar, before the 2002 MPR Annual Session. The two largest factions

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<sup>1337</sup> NGO Coalition for a New Constitution, above n 1278, 2.

<sup>1338</sup> John Roberts, *Indonesian Parliament Puts a Democratic Gloss on an Autocratic Constitution* (2002) World Socialist Web Site <<http://www.wsws.org/articles/2002/aug2002/indo-a27.shtml>> at 12 January 2003.

<sup>1339</sup> *Ibid.*

<sup>1340</sup> 'Pemilihan Putaran Kedua Langsung dikembalikan ke Rakyat', *Kompas*, 12 July 2002.

agreed in a backroom deal that the deadlock must be avoided.<sup>1341</sup> Further, Golkar succeeded in persuading the PDIP to hand over the second round of presidential elections to the public, instead of to the MPR.<sup>1342</sup> Both parties further agreed on two other crucial issues. On the composition of the MPR, they agreed to eliminate the non-elected members, and to dissolve the DPA (the Supreme Advisory Council).<sup>1343</sup>

**The Moslem-based Parties.** The meeting between the two nationalist factions triggered a counter meeting among Moslem-based parties: the PBB, PPP, PAN, PKB and PK.<sup>1344</sup> They agreed to support alternative revision 3 of Article 31 which stated:

The national education system should be aimed at improving people's religious faith and devoutness and their character as well as sharpening their minds'.

However, the parties were divided on the alternatives in Article 29(1). The PKB, PAN and PK supported the alternative three which stated that

The state is based on one Supreme God with the obligation for adherents to practice their religions.

Meanwhile, the PPP and PBB continued to support the second alternative, which was to insert the 'seven words' of the Jakarta charter – on the application of *syariah*, Islamic law – into Article 29(1).<sup>1345</sup>

**The Trade-off between Article 29(1) and Article 31.** The Moslem-based parties meeting was an embryo of the agreement to maintain the original Article 29(1), without inserting the 'seven words' of the Jakarta Charter. Later, in a negotiation meeting of the Commission A, in exchange for the above alternative of Article 31 being ratified, the PPP, PBB and PDU agreed to withdraw their proposal to insert the *syariah* (Islamic law) into Article 29(1).<sup>1346</sup> Yet the three parties requested, however, that the withdrawal not be revealed to the open meeting of the Commission A. Ali Hardi Kiai Demak (PPP) stated the official withdrawal would be postponed

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<sup>1341</sup> Ibid.

<sup>1342</sup> Ibid.

<sup>1343</sup> Ibid.

<sup>1344</sup> 'Muslim Politicians Meet to Counter Nationalist Alliance', *The Jakarta Post*, 16 July 2002.

<sup>1345</sup> Ibid.

<sup>1346</sup> Minutes of a negotiation meeting of Commission A, 7 August 2002, 105 — 113.

until the last minute of the MPR's Plenary Meeting.<sup>1347</sup> This was because the Islamic parties felt the need to show to their constituents that they had been fighting for the Islamic law throughout the amendment process.

Riswandha Imawan criticized these trade-off. He accused some parties of taking hostage particular articles in the Constitution for reasons of pure self-interests.<sup>1348</sup> Imawan argued FUG had taken hostages the drafts of Articles 31 and 16 (on the DPA) in a trade-off to maintain their existence in the MPR.<sup>1349</sup> He also argued the Islamic parties had taken Article 29 hostage in a bid to make nationalist parties lower their bargaining position in some of the Fourth Amendment proposals.<sup>1350</sup>

**Closed Discussions and Political 'Horse Trading'.** The reaching of a consensus through closed meetings between parties was not entirely appreciated. Many were concerned about possible 'horse-trading' masked behind the consensus, as was the norm under Soeharto.<sup>1351</sup> In commenting on consensus reached between the PDIP and Golkar during the 2002 debates, the editorial of the *Jakarta Post* pointed out its concerns that:

[w]hatever concessions were made ... the public have been excluded from the process ... [the] leaders are encouraging a dumbing-down process through their backroom dealings and cattle-trading practices.<sup>1352</sup>

Unfortunately, there were no meeting minutes which recorded the discussions between the two parties. This meeting was informally conducted outside the MPR agenda. It was therefore difficult to prove that there was 'horse trading' between the two parties. Nevertheless, another editorial of the *Jakarta Post* claimed that:

[n]o doubt some horses were traded between the political factions, particularly the one with the most clout, on the way to reaching a compromise. We will probably be hearing about what exactly these factions compromise or gave up in the near future.<sup>1353</sup>

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<sup>1347</sup> Ibid 108.

<sup>1348</sup> 'Bargaining for a Final Price at the MPR's Annual Session', *The Jakarta Post*, 6 August 2002.

<sup>1349</sup> Ibid.

<sup>1350</sup> Ibid.

<sup>1351</sup> 'Megawati dan Hamzah Haz Sepakat tidak Ada Voting', *Kompas*, 13 July 2002.

<sup>1352</sup> 'Political Dumbing-Down', *The Jakarta Post*, 18 July 2002.

<sup>1353</sup> 'The Halfway Reform' *The Jakarta Post*, 12 August 2002.

In relation to the 'horse trading', the following section elaborates on how some of the short-term political interests colored the Fourth Amendment discussions.

### c. Short-Term Political Interests

Although the following amendment proposals were never adopted, they show how, in drafting the amendment, some factions in the MPR were motivated strongly by their short-term political interests.

#### (1) Direct Presidential Election

In the event that a second round presidential election is needed, the MPR factions were divided between whether the MPR or the people who should elect the President. The PDIP and TNI-Polri supported election by the MPR. This alternative was questioned on the ground that the final decision would be taken by a small group of the MPR, and the legitimacy questions would appear if the MPR's decision overturned the first round presidential election outcome.<sup>1354</sup> On the other hand, Golkar, the PPP, PKB and PAN back a second round election by the people. This alternative was questioned on the grounds of cost and possible security implications.<sup>1355</sup>

**Interest of the PDIP.** At the beginning of the Fourth Amendment discussions, the PDIP seemed to believe that Megawati would stand a better chance to make back-door deals with the MPR members in the 2004 presidential elections than if she went to the public.<sup>1356</sup> In the end, however, the PDIP agreed to support the alternative proposal, that is, that the second round election would be voted on by the people. Ellis and Yudhini note that the PDIP's change of position raised public questions as to what it had received in exchange.<sup>1357</sup> For Meilono Soewondo (PDIP), the reason behind this changed position was merely that the PDIP was finally the only party which supported the MPR retaining the role in the election of a President. The party, therefore, came under considerable pressure, both from the other factions and the public, to change its position.<sup>1358</sup>

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<sup>1354</sup> Ellis and Yudhini, above n 1306.

<sup>1355</sup> Ibid.

<sup>1356</sup> 'PDI Perjuangan Lacks Confidence', *The Jakarta Post*, 8 July 2002.

<sup>1357</sup> Ellis and Yudhini, above n 1306.

<sup>1358</sup> Van Zorge Report, *Anything In Parliament Is Tradable* (2002) <[http://www.vanzorgereport.com/report/popup/index.cfm?fa=ShowReport&pk\\_rpt\\_id=450&CFID=315606&CFTOKEN=71680888](http://www.vanzorgereport.com/report/popup/index.cfm?fa=ShowReport&pk_rpt_id=450&CFID=315606&CFTOKEN=71680888)> at 3 October 2003.

From inside the MPR, Golkar played a major role in changing the PDIP's stance. Yet Golkar's support for the second round direct election arose mainly because of its calculation that its candidate had better chance to win the battle.<sup>1359</sup> From outside the MPR, the Cetro (Centre for Electoral Reform) advocated a systematic campaign to support direct election. Saifuddin (PPP) of the PAH I acknowledged that Cetro's campaign had a strong influence on the adoption of the direct election option.<sup>1360</sup>

**Golkar's Presidential Election Proposal.** During the Fourth Amendment discussions, Golkar offered a new provision in relation to the direct presidential elections. Mattalata (Golkar) proposed that only the largest and second largest political parties, or a coalition of political parties, may nominate a presidential candidate.<sup>1361</sup> Golkar argued that the proposal was an alternative, to avoid the deadlock of second round presidential elections. Since Golkar came second in the 1999 general election, one might suspect that the proposal was Golkar's attempt to limit its competitors and win the 2004 presidential elections. Predictably, this proposal was met with suspicion by the other factions. Patrialis Akbar (*Reformasi*) argued that the proposal discriminated against the smaller parties, and contradicted the direct presidential election principle.<sup>1362</sup>

## (2) The Composition of the MPR

On the issue of the composition of the MPR, most factions agreed to the amendment proposal that, beginning in 2004, all political representatives must be elected. This would be the case whether they were to sit in the DPR or the DPD. This would also mean that, after the 2004 election, there would be no more automatic seats allocated to the non-elected representatives. This proposal was strongly rejected by FUG, for fear that they would lose their seats in the MPR. In the previous amendment discussions, TNI-Polri had also objected to the proposal, because it would shut them out of the MPR.<sup>1363</sup>

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<sup>1359</sup> 'Political Interests Threaten Amendment of the Constitution', *The Jakarta Post*, 30 July 2002.

<sup>1360</sup> Interview with Lukman Hakim Saifuddin, member of the PAH I, 20 June 2003.

<sup>1361</sup> Minutes of the 33<sup>rd</sup> meeting of the PAH I, 25 June 2002, 175.

<sup>1362</sup> *Ibid* 187.

<sup>1363</sup> Kawamura, above n 661, 50.

**The Position of FUG.** Concerning the composition of the MPR, FUG was the only faction which defended its own existence, in the midst of opposition from the other factions.<sup>1364</sup> FUG consistently proposed what was named the "bicameral plus" system, i.e. the DPR, DPD and the delegates group (FUG). Siswono Yudo Husodo, for example, was of the opinion that the MPR's composition still needed FUG representation. FUG members should be elected from the community groups which were difficult to represent in the MPR through a general election process.<sup>1365</sup>

Harun Kamil, one of the members of the PAH I from FUG, stated:

... we believe that a democratic Indonesian constitutional system should encompass representation off all people. [Therefore], we will not withdraw, we will fight and vote at the plenary meeting.<sup>1366</sup>

FUG kept its promise. It pushed the MPR to vote between the two alternatives for the composition of the MPR (Article 2(1)). Out of the 600 members who attended the session, 475 supported the exclusion of the non-elected members of the MPR, 122 were against and 3 abstained.<sup>1367</sup> The PDIP was divided, with 80 votes for exclusion and 64 for retention. This vote was the only one which took place in the whole amendment ratification process, from the First to the Fourth Amendments.

**Position of the TNI-Polri.** Based on the MPR Decree No. VII of 2000 on the Role of the TNI-Polri, the military faction were to forfeit their seats in the DPR by 2004, but would retain the seats in the MPR until at least 2009. However, in 2002, this position no longer held: all now depended on the Fourth Amendment outcome. If the MPR's composition would only consist of elected members of the DPR and DPD, there could be no more 'free' seats for the TNI-Polri in the MPR (and DPR). This meant the Decree No. VII of 2000 was abandoned and the military be excluded from the legislature, effective from the formulation of the new MPR to be formed by the 2004 election.

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<sup>1364</sup> Minutes of the 2<sup>nd</sup> meeting of the Commission A, 5 August 2002, 150—200.

<sup>1365</sup> 'FUG Terancam Hilang dari MPR', *Kompas*, 6 August 2002).

<sup>1366</sup> *Ibid.*

<sup>1367</sup> Minutes of the 6<sup>th</sup> (continued) Plenary Meeting, 10 August 2002, 825.



In the 2002 MPR Annual Session, the military faction changed its position, which was previously the same position as FUG's. Its new position followed the majority factions to eliminate the non-elected parliament members.<sup>1368</sup> Agus Widjojo (the TNI-Polri) saw this:

... a logical consequence of the TNI's new paradigm, which includes voluntarily exiting the political arena ... The military and the police are being returned to their fundamental duties ... our presence in the MPR is no longer relevant.<sup>1369</sup>

The special moment occurred in one of the Commission A meetings. Slamet Supriyadi, a Spokesperson for the TNI-Polri faction, invited applause when he stated:

[t]he TNI and Polri ... have decided to return to their professional roles, as tools of state defense and security. We will not be involved in politics. In doing so, we do not ask for any compensation to sit in the MPR ... With all sincerity and awareness, we have decided to leave the MPR.<sup>1370</sup>

Not everybody saw the TNI-Polri bowing out of politics as a positive sign. There were questions. The editorial of the *Jakarta Post* wrote:

[p]erhaps, it would have been a futile exercise for the TNI to have put up a fight when it was clear that the majority opinion was for the military to end its political privileges. Perhaps, this was a sign of the genuine desire on the part of the TNI to reform itself.<sup>1371</sup>

The questioning of the sincerity of the TNI's decision was understandable. Initially, there had been a plan to insert a transitional clause in the Fourth Amendment to allow the TNI-Polri's presence in the MPR until 2009, in line with the MPR Decree No. VII of 2000. This was dropped in one of the last meetings of the PAH I 2002. I Ketut Astawa (TNI-Polri) stated that the military faction withdrew the military transitional clause on the basis that the Constitution should not regulate something which was only temporarily valid.<sup>1372</sup> Ellis and Yudhini argue that the real reason was the TNI-Polri realized that the powers of the MPR after the amendment were limited. Therefore, the small numbers of military in the MPR would have been, 'more of liability as a focus of unpopularity'.<sup>1373</sup>

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<sup>1368</sup> Political Interests Threaten Amendment of the Constitution, above n 1359.

<sup>1369</sup> Van Zorge report, *Our Presence In The MPR Is No Longer Relevant* (2002) <[http://www.vanzorgereport.com/report/popup/index.cfm?fa=ShowReport&pk\\_rpt\\_id=463&CFID=315606&CFTOKEN=71680888](http://www.vanzorgereport.com/report/popup/index.cfm?fa=ShowReport&pk_rpt_id=463&CFID=315606&CFTOKEN=71680888)> at 3 October 2003.

<sup>1370</sup> Minutes of the 2<sup>nd</sup> meeting of the Commission A, 5 August 2002, 196.

<sup>1371</sup> A Graceful Exit', *The Jakarta Post*, 13 August 2002.

<sup>1372</sup> Minutes of the 32<sup>nd</sup> meeting of the PAH I, 24 June 2002, 65 — 66.

<sup>1373</sup> Ellis and Yudhini, above n 1306.

### 3. Who the Constitution-Making body was to be

The debates on whether a Constitutional Commission should be established resurfaced during the Fourth Amendment discussions. In fact, compared to the previous amendment discussions, the debates were now more extensive. The Coalition for a New Constitution (the lead proponent of the Commission) worked together with the media to, once again advocate the establishment of the commission.

#### a. The Pro Commission Movement

The movement for the Constitutional Commission could be divided into two, very different groups. The first group consisted of those who had supported the idea, starting from the previous amendments. These included the Coalition for A New Constitution and some constitutional law and political experts. The second group was those who proposed the commission in the last stage of the Fourth Amendment discussions. These were the groups which previously demanded that the amendment proposal be stopped, groups coordinated by Amin Aryoso and Pepabri headed by Tri Soetrisno.

Widjojanto of the Coalition argued that the commission should be established, because the MPR had failed to carry out the constitutional reform in a democratic way. Widjojanto further argued that the failure was because the MPR itself was part of the problem. That is why he said, “those to be reformed cannot reform themselves, the reformers should come from the outsiders”.<sup>1374</sup> The coalition called for an independent commission with full authority to draw up a new Constitution, whereby the MPR’s endorsement would merely be a formality. Further the Coalition stated that:

[t]he process and results of the ongoing amendment to the Constitution are in violation of the spirit of reform. A Constitutional Commission is a must and the MPR has to endorse it in the 2002 Annual Session.<sup>1375</sup>

The Coalition’s position was echoed by the Alumni of Gadjah Mada University (Kagama), and the Indonesian Political Science Association (AIPI).<sup>1376</sup> The Kagama proposed that the establishment of the commission should be inserted into Article 37 of the Constitution, on the amendment procedure.<sup>1377</sup>

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<sup>1374</sup> Minutes of the 7<sup>th</sup> meeting of the PAH I, 27 February 2002, 442.

<sup>1375</sup> ‘Constitutional Commission is a Must’, *The Jakarta Post*, 1 August 2002.

<sup>1376</sup> ‘MPR Terus didesak Bentuk Komisi Konstitusi’, *Kompas*, 7 August 2002.

<sup>1377</sup> *Ibid.*

**Position of the TNI-Polri Faction.** In the last stage of the Fourth Amendment discussions, the military faction suddenly proposed a Constitutional Commission. The TNI-Polri faction was of the opinion that the constitutional amendment should not be continued by the MPR. The amendments needed further substance harmonization, and therefore, a commission was needed.<sup>1378</sup> Ellis and Yudhini argue that the military position was the result of strong pressure brought by retired generals to stop the amendment process. This could have been achieved by establishing the Constitutional Commission which would reapply the original 1945 Constitution.<sup>1379</sup>

**The MPR's Position.** In the Fourth Amendment discussions, there were proposals to establish a Constitutional Commission from the TNI-Polri, PKB, FUG, Golkar, PDIP and PPP. These factions offered different timetables for the establishment of the commission, and differed on the Commission form and powers (see Table 17).<sup>1380</sup>

The MPR, however, agreed to reject a proposal to establish an independent Constitutional Commission to draft a new Constitution. The MPR limited the power of the Commission to simply synchronize the amendments made by the MPR. It also rejected demand from the reform groups, to give the Commission a degree of independence, by formalizing its role in the Constitution.

In the end of the 2002 Annual Session, the MPR issued a Decree No. 1 of 2002, on the Establishment of the Constitutional Commission which gave the authority to the MPR Working Body to establish the Commission. The Body would be given a year to complete the assignment. It would decide the form of the Commission, and submit the results to the 2003 MPR Annual Session. Pursuant to the MPR Decree, the Commission was merely authorized to do comprehensive research on the amendments of the Constitution.<sup>1381</sup>

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<sup>1378</sup> 'Tiga Fraksi Besar Desak Bahas Komisi Konstitusi', *Kompas*, 5 August 2002.

<sup>1379</sup> Ellis and Yudhini, above n 1306.

<sup>1380</sup> 'Factions Prevaricate, Agree to Constitutional Commission', *The Jakarta Post*, 8 August 2002.

<sup>1381</sup> 'Komisi Konstitusi dikukuhkan', *Kompas*, 9 August 2002.

**Table 17 The Proposals on Constitutional Commission in the 2002 MPR Annual Session**

	<b>Coalition for a New Constitution</b>	<b>PDIP</b>	<b>PKB</b>	<b>Golkar</b>	<b>PPP</b>	<b>TNI-Polri</b>	<b>FUG</b>
<b>Name</b>	Constitutional Commission	Constitutional Commission	Constitutional Commission	National Committee of Amendment of the 1945 Constitution	Constitutional Commission	Constitutional Commission	Constitutional Commission
<b>Power</b>	Full authority to make a new Constitution	Full authority to synchronize the 1945 Constitution	Full authority to synchronize and reform the 1 <sup>st</sup> -4 <sup>th</sup> amendments of the 1945 Constitution	Full authority to reform the 1 <sup>st</sup> -4 <sup>th</sup> Amendments of the 1945 Constitution	To amend the 1945 Constitution	To rewrite the 1945 Constitution	To harmonize and reform the 1 <sup>st</sup> -4 <sup>th</sup> amendments of the 1945 Constitution
<b>Total Members</b>	99	99	99	90	Unclear	73	Unclear
<b>Membership Representation</b>	60 regional 39 experts considering gender representations	22 legislatives 22 executives 22 Judiciary 11 Regional 11 Social Groups 11 Experts	32 Regional 20 Experts 17 Religious 20 Public figures 10 Women	30 MPR 30 Regional 20 Experts 10 Public figures	Regional Experts Religious leaders Women	30 Regional 10 Bureaucrats 21 NGOs, Experts 12 MPR Factions	1/3 MPR members 2/3 Experts/society
<b>Characteristics</b>	Independent	Partisan	Independent	Partisan	Unclear	Partisan	Partisan
<b>Legal basis</b>	Insert in Articles 3 and 37 of the 1945 Constitution	MPR Decree	MPR Decree or the Additional Provision of the 1945 Constitution	MPR Decree	MPR Decree	Inserted to the Additional Provision of the 1945 Constitution	MPR Decree
<b>Working Period</b>	2002-2003	2002-2005	2002-2003	Before 2004	Unclear	2002-2003	After 2002, the Fourth Amendment
<b>Output</b>	Ratified by the MPR If rejected, referendum	Reported to the MPR	Ratified by the MPR If rejected, referendum	Ratified by the MPR If rejected, referendum	Ratified by the MPR	Ratified by the MPR If rejected, referendum	Unclear

Source: Extracted from Cetro's Notes and Proposals of Each Faction.

## **b. A ‘constitutional commission’, but not a ‘Constitutional Commission’**

The 2002 MPR Decree on the establishment of Constitutional Commission was not issued willingly by the MPR, but it was a reluctant response to the strong pressure from the public. Unsurprisingly, the MPR limited the power of the Commission. In an interview with the Van Zorge Report, Tobing revealed:

[i]f you examine the MPR Decree on the Constitutional Commission carefully, you will see that this commission is neither mentioned in a [sic] name, nor given any specific characteristics. The words used to describe it are actually written in lower case; it could, therefore, have been formed as a state committee, an adjustment commission, or a panel of experts. The constitutional commission was designed to be subordinate to the MPR process.<sup>1382</sup>

Badjeber (PPP) revealed that this MPR decree was an attempt to accommodate those who were against the establishment of the Commission and those who required an independent Constitutional Commission, without conceding real power.<sup>1383</sup> Lukman Hakim Saifuddin (PPP) argued that the Commission could not be given stronger authority, because it could be used by the anti-amendment faction, to stop the constitutional reform agenda.<sup>1384</sup> Happy Bone Zulkarnaen (Golkar) pointed out that the 2002 MPR decree was a compromise between the MPR factions. If the Commission had had to be adopted in the Constitution, there would not have been any Constitutional Commission at all.<sup>1385</sup>

## **c. The Coalition: the MPR’s Cheating**

In response to the 2002 MPR decree on the Constitutional Commission, the Coalition for a New Constitution accused the MPR of cheating. Widjojanto tore up a copy of the draft of the MPR decree on the establishment of the commission and shouted that:

Such a proposal is indecent! It is totally wrong! It is unthinkable that they have the heart to fool the public by offering this kind of commission. They are manipulative.<sup>1386</sup>

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<sup>1382</sup> Van Zorge Report, *Most People Didn’t Realize What Was Happening Until It Was Too Late* (2002) <[http://www.vanzorgereport.com/report/popup/index.cfm?fa=ShowReport&pk\\_rpt\\_id=462&CFID=315606&CFTOKEN=71680888](http://www.vanzorgereport.com/report/popup/index.cfm?fa=ShowReport&pk_rpt_id=462&CFID=315606&CFTOKEN=71680888)> at 3 October 2003.

<sup>1383</sup> ‘Sharia Last Point of Contention in Constitutional Amendments’, *The Jakarta Post*, 10 August 2002.

<sup>1384</sup> Minutes of the 4 meeting of the Commission A, 7 August 2002, 487 — 488.

<sup>1385</sup> *Komisi Konstitusi dikukuhkan*, above n 1381.

<sup>1386</sup> ‘MPR Accused of Cheating on Reform Demands’, *The Jakarta Post*, 10 August 2002.

Rizal Mallarangeng criticized Widjojanto's action. Although he agreed that the amendments were still problematic, Mallarangeng argued that the MPR's effort should be appreciated. He further argued that the MPR had made a Constitution which could be used as the institutional backbone for a better democratic transition.<sup>1387</sup>

#### **d. The TNI-Polri's Hidden Agenda?**

The TNI-Polri argued that the draft of the MPR Decree on the Constitutional Commission was a document full of uncertainties. Therefore, at the very last moment in the Fourth Amendment ratification process, the TNI-Polri proposed to emphasize the legal basis of the Commission, in the Additional Articles of the Constitution. The proposed article was:

The First, Second, Third and Fourth Amendments of the 1945 Constitution shall be effective, since they are promulgated until 2004, for the basis of the general election; and will be reviewed by a commission established by the MPR in 2002. The commission shall report its work to the MPR formed as a result of the 2004 election.<sup>1388</sup>

The ratification process was heated because of this military proposal. There was a possibility that the proposal could block the Fourth Amendment ratification, and led the process to a constitutional deadlock. The situation was therefore very critical. AM Fatwa (*Reformasi*) accused the TNI-Polri of having a hidden agenda.<sup>1389</sup> He challenged the military faction to reveal that agenda. Similarly, Husni Thamrin, one of the Vice Chairs of the MPR, emotionally stated:

I am sorry, I have to say this. This might be a bit emotional, but there must be something behind this. The TNI-Polri should disclose what is hidden behind its proposal. What is going to happen after 2004? We have to be frank. We are all leaders. If we are imprisoned because of this we are ready. So, there is nothing to fear. Even if we have to die, now is the time.<sup>1390</sup>

Slamet Supriyadi of the representative of the TNI-Police, however, was silent on these accusations.

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<sup>1387</sup> Rizal Mallarangeng, 'Kaum Aktivistis Keabablasan', *Tempo*, 20 – 26 August 2002.

<sup>1388</sup> Minutes of closed meeting between the leaders of the MPR and the leaders of the factions, 10 August 2002, 269 – 270.

<sup>1389</sup> *Ibid* 284.

Considering the critical situation, Arifin Panigoro (PDIP) proposed that:

[b]ecause this is a very serious problem, we should continue this negotiation until 4 am, or 5 am. We should dismiss the current plenary meeting. Then, we have to reschedule one or two days extension [of the Annual Session]. If we want to be really serious, lets discuss it for 24 hours without any sleep. We just have to be here. All of us have to sit here. Nobody is allowed to leave until this problem is resolved.<sup>1391</sup>

The closed negotiation meeting ended without any agreement. Fortunately, the midnight plenary meeting ended with relief after the TNI-Polri finally withdrew its proposal, without giving any clear reason. Agus Widjojo (TNI-Polri) stated that there was an instruction from the Chief-of-Staff of the Military, but he did not clarify the reason behind the instruction. Widjojo only stated that the TNI-Polri realized that its proposal was rejected by most of the factions in the MPR and that, therefore, it was wiser to withdraw the proposal.<sup>1392</sup> Whatever the reason, the decision paved the way for a smoother Fourth Amendment ratification. The session closed with all of the MPR members singing the national anthem and praying to God for the success of the ratification.<sup>1393</sup>

#### **4. How the Public Participation was organized**

Compared to the previous amendments, in the Fourth Amendment process public participation was better. It was only in the Fourth Amendment preparation that the public was given a wider chance to give their feedback to the amendment draft.<sup>1394</sup> This was possible because public participation programs were held before and after the PAH I meetings. The schedule of the PAH I showed that the public hearings were conducted from 29 January to 6 March 2002.<sup>1395</sup> They were followed by a deliberation process, from 13 March to 23 May 2002.<sup>1396</sup> Then, before the final draft of the Fourth Amendment was discussed, from 5 June to 24 July 2002, second public hearings were conducted in some provinces.

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<sup>1390</sup> Ibid 281 — 282.

<sup>1391</sup> Ibid 279 — 280.

<sup>1392</sup> 'Ada Telepon dari Cilangkap', *Koran Tempo*, 12 August 2002.

<sup>1393</sup> Ellis and Yudhini, above n 1306.

<sup>1394</sup> Minutes of the 3<sup>rd</sup> meeting of the Working Body, 4 June 2002, 175.

<sup>1395</sup> Minutes of the 2<sup>nd</sup> meeting of the Working Body, 12 March 2002, 111.

<sup>1396</sup> Ibid.

Table 18 shows the summary of participants in the public participation meetings. In addition to these meetings, the PAH I received 127 letters from various organizations and individuals.<sup>1397</sup>

**Table 18      The Summary of Public Participations in the Fourth Amendment** <sup>1398</sup>

No.	Participants	Numbers
1.	Government Institutions	17
2.	Universities	33
3.	Research Centres	11
4.	Experts	12
5.	Non-governmental Organizations	32
6.	Religious Organizations	10
7.	Professional Organizations	10
	<b>TOTAL</b>	<b>125</b>

The better arrangement of public participation program was the response of the PAH I to the critics from the civil society, over the public involvement in the previous amendments. Agun Gunandjar Sudarsa (Golkar) suggested:

... the Fourth Amendment deliberations should be more open, allowing wider public involvement. We should be more proactive to visit and invite various society elements to be involved in the discussions ... [therefore], the program to absorb public aspirations should be more systematic ... in so doing, the Fourth Amendment would truly involve the people.<sup>1399</sup>

Yusuf (Golkar) reminded the members of the PAH I that the public participation was not just a formality. Yusuf urged the members to seriously consider popular inputs.<sup>1400</sup> He stressed that the report of public participation program should be made seriously, so that it could stand as evidence that the program was for real.<sup>1401</sup>

**Critics from the Public.** Regardless of the broadened scope of the participation program, the critics remained. For some, the range of participation was still limited. An editorial in the *Jakarta Post* stated:

<sup>1397</sup> Minutes of the 4<sup>th</sup> meeting of the Working Body, 25 July 2002, 232.

<sup>1398</sup> Ibid.

<sup>1399</sup> Minutes of the 3<sup>rd</sup> meeting of the PAH I, 28 January 2003, 111.

<sup>1400</sup> Minutes of the 12<sup>th</sup> meeting of the PAH I, 19 March 2002, 50.

<sup>1401</sup> Ibid.



... that the amendments were enacted with little public participation, and therefore reflect more the interests of the major political factions in securing their places after 2004.<sup>1402</sup>

The CSIS (Centre for Strategic and International Studies) Team argued that the public participation was still elitist.<sup>1403</sup> By referring to the schedule of the PAH I, the team argued that the time allocated for public hearings was very limited, especially compared to the longer time assigned for the closed negotiation meetings.<sup>1404</sup> Similarly, the Coalition for a New Constitution argued that:

[p]ublic participation has been only symbolic since most input from public has not been considered or accommodated in discussions throughout the amendment process. All final decisions remain in the hands of the few members [of the MPR] ... Likewise the public hearings performed ... in the regions have been made of one-way communication and for the most part has involved [very limited] people.<sup>1405</sup>

In order to ensure more extensive public participation, the coalition proposed the establishment of an independent Constitutional Commission. It argued that, the Thailand, South Africa and Philippines, commissions had succeeded in arranging effective participation.<sup>1406</sup> It should be noted, however, in the South African case, there was no Constitutional Commission. It was its parliament, the democratically elected National Assembly and the Senate, which had become the Constitutional Assembly.<sup>1407</sup> It was this assembly which had successfully arranged the participation.

## **C. The Fourth Amendment: the Outcomes** <sup>1408</sup>

### **1. The Amended Articles**

#### **a. The Composition of the MPR**

The amended Article 2(1) of the 1945 Constitution stipulates that the MPR would consist of two chambers, the DPR and the DPD. The amendment completes the establishment of the DPD

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<sup>1402</sup> *The Halfway Reform*, above n 1353.

<sup>1403</sup> The CSIS Team, above n 1336, 23.

<sup>1404</sup> *Ibid.*

<sup>1405</sup> NGO Coalition for a New Constitution, above n 1278, 2.

<sup>1406</sup> 'Getting Nation's Reform Back on Track', *The Jakarta Post*, 22 July 2002.

<sup>1407</sup> Section 68(1) of the Interim Constitution.

<sup>1408</sup> All articles in this section, except mentioned otherwise, refer to the Fourth Amendment of the 1945 Constitution.

which previously had been adopted in the Third Amendment. This changed the composition of the MPR which had formerly consisted of the elected DPR, plus appointed members from various functional groups, including the military faction. These appointed members would be dismissed after the 2004 general election.

Lindsey appraised the abolishment of the appointed members as a 'very significant reform'.<sup>1409</sup> He, however, argued that some basic problems remained. There were questions in relation to the limited power of the DPD, especially when compared to the DPR. The membership relationship between the DPD, DPR and MPR was also vague.<sup>1410</sup> Chapter Eight further elaborates on this problem.

### **b. The Second Round Presidential Election**

After it was postponed and debated for more than one year, the second round presidential election draft was finally agreed on by unanimous vote. Article 6A (4) stipulates that if none of the candidates receive 50 percent + 1 of the votes cast, as well as at least 20 percent of the vote in half the provinces, then a second direct election will be held between the two highest-scoring candidates.

Lindsey praises this amendment for preventing the political horse trading which characterized the selection of the presidents under the old system, when the President was elected by the MPR.<sup>1411</sup> He also argues that this direct presidential election in the first and second elections is further evidence of the MPR voluntarily reforming its on power.<sup>1412</sup>

Related to these issues, Article 8(3) clarifies that in the event that both the position of President and Vice President are vacant, the country will be governed by a troika of the Foreign Minister, the Minister of Internal Affairs and the Defense Minister. This will be a temporary government until the MPR can assemble to select new leaders to fill the balance of the term from candidates 'proposed by the political parties or groups of political parties whose Presidential

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<sup>1409</sup> Lindsey, above n 99, 267.

<sup>1410</sup> Ibid 267 — 268.

<sup>1411</sup> Ibid 267.

<sup>1412</sup> Ibid.

and Vice Presidential candidate pairs received the first and second highest number of votes in the previous general election’.

### **c. The Liquidation of the DPA**

Through intensive debates along the amendment process, the MPR finally agreed to end the existence of the DPA (*Dewan Pertimbangan Agung*, Supreme Advisory Council). The original chapter on the DPA was deleted. Although the function of providing counsel for the President remains, this advisory council no longer stands on an equal position with the presidency and the legislature. Instead, it will only be part of the executive. For Lindsey the reduced position of the DPA is necessary for the Council ‘never fulfilled its intended role’, being ‘moribund’.<sup>1413</sup> Lindsey argues that, in the past, the DPA was used to accommodate senior officers or generals who were too old to be active in the government but were considered as Soeharto loyalists.<sup>1414</sup>

### **d. The Currency and the Central Bank**

After long technical debates, the MPR finally agreed to avoid mentioning the word ‘Rupiah’, in the Constitution. Article 23B states, ‘The forms and denominations of the currency shall be regulated by law’. This flexibility provision was adopted in order to anticipate future scenarios involving the Asian countries having the same policy to form a regional currency, such as the ‘Euro’ in Europe. Similarly, the MPR avoided using the word ‘Bank Indonesia’ for identifying the central bank. The Bank, however, enjoys a greater constitutional protection as Article 23D explicitly mentions that the Bank should be independent in nature. However, the provision does not clarify the meaning of ‘independent’, as it only states that further details will be regulated by statute.

### **e. The Education and Culture**

Most of the paragraphs in Articles 31 on education are symbolic. Article 31(4), for example, stipulates that 20% of state and regional budgets should be devoted to education. Ellis argues that this provision appears to be merely figurative, because there is no clear sanction which

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<sup>1413</sup> Ibid 269.

<sup>1414</sup> Ibid.

can be applied against the government, regional authorities and/or the DPR if the budgets do not comply with this.<sup>1415</sup> Boediono, who was the Minister of Finance, argued that:

[t]he 20% specified in the Constitution is too binding, especially in the current financial problem that we are facing. We all, I think, agree that the education should be our priority. However, I do not think inserting an exact number into the Constitution is a good idea.<sup>1416</sup>

In addition, Article 31(2) states that 'The government shall develop and maintain a national system of education that increases faith, God-consciousness and noble conduct, in the course of educating the people, which is regulated by law'. In the last minute of the Fourth Amendment discussions, this paragraph was traded off by the PPP, PBB and PDU in exchange for the withdrawal of the 'seven words' of the Jakarta Charter from the draft of Article 29(1).

Article 32 stipulates that the state should respect the national culture of Indonesia and respect the regional languages as a national cultural treasure.

#### **f. The Compromised Economic Provision**

One of the hottest fundamental debates is related to the economic system. In the Third Amendment discussions, this debate could not be resolved. It caused Mubiyarto, one of the members of the Expert Team, to withdraw from the Team.<sup>1417</sup> The amended Article 33 now retains the three original paragraphs including the reference to 'common endeavor based upon the principles of family system'. It adds further paragraphs relating to natural resources and economic democracy.

For Susanti, the debates over Article 33 were driven by competing ideas of neo-liberalism and socialism. Susanti concludes that the neo-liberalism faction lost the battle, in symbolic terms at least. Although the neo-liberalism supporters in the Expert Team outnumbered the supporters of socialism, the MPR rejected the draft of the expert team which deleted state control over important sectors and introduced the market economy.<sup>1418</sup> Susanti agrees that the additional paragraphs 4 and 5 of the Article confirm social justice and prepare the Indonesian economy to

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<sup>1415</sup> Ellis, above n 662, 146.

<sup>1416</sup> Minutes of the 5<sup>th</sup> meeting of the PAH I, 25 February 2002, 275.

<sup>1417</sup> Ellis and Yudhini, above 1306.

<sup>1418</sup> Susanti, above n 697, 84 — 85.

face globalization.<sup>1419</sup> Ellis and Yudhini argue, however, that the compromise formula on the economy resulted in “the final text being perhaps a vague expression of discontent toward capitalist globalization”.<sup>1420</sup> Either way the outcome was inclusive.

### **g. Procedure to Amend the Constitution**

Article 37 paragraphs (1) to (4) stipulate that to amend the Constitution requires a petition by one-third of the members of the MPR, and requires the support of over half its total membership, with two thirds of the members present. This new procedure is easier than the original one which required the support of two thirds of the membership, out of the two thirds of the members present.

**Non-amendable Provision.** On other hand, the results of a negotiation conducted by the Commission A contained a surprise with regard to Article 37(5).<sup>1421</sup> The amended formula is, ‘The form of the Unitary state of the Republic of Indonesia may not be amended’. This is a change from the draft formula which stipulated that the unitary state could be amended through referendum. Nurdiati Akma (*Reformasi*) argued that the non-amendable provision clearly opposed democratic principles as it dictated the next generation.<sup>1422</sup> Saifuddin (PPP) argued that the MPR would face huge opposition from society in relation to the non-amendable provision. People would ask why the MPR sought to restrain of the next generation’s aspirations.<sup>1423</sup>

**The Preamble instead.** Moh. Asikin (*Reformasi*) stated it should be the preamble which is non-amendable as it contains the declaration of independence.<sup>1424</sup> Commenting on this statement, Tobing explained that the preamble was not marked for change. Amendment would only be made in the text of the Constitution.<sup>1425</sup>

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<sup>1419</sup> Ibid 85.

<sup>1420</sup> Ellis and Yudhini, above n 1306.

<sup>1421</sup> Minutes of closed meeting of Commission A, 7 August 2002, 72 – 85.

<sup>1422</sup> Minutes of 4<sup>th</sup> meeting (continued) of the Commission A, 8 August 2002, 540 – 541.

<sup>1423</sup> Minutes of the 31<sup>st</sup> meeting of the PAH I, 20 June 2002, 41.

<sup>1424</sup> Minutes of 4<sup>th</sup> meeting (continued) of the Commission A, 8 August 2002, 539 – 540.

<sup>1425</sup> *Komisi Konstitusi dikukuhkan*, above n 1381.

## **h. Transitional and Additional Provisions**

Articles I and II of the transitional provisions stipulate that all regulations and state bodies should continue to function until the new ones are in place. Article III requires the establishment of the Constitutional Court at the latest by 17 August 2003.

In the Additional provisions, Article I gives the MPR the power to review the legal statutes of all of its decrees. While Article II declares that the elucidation is no longer in effect, it does not mention the term 'elucidation' at all. It states, 'With the finalization of this amendment of the Constitution, the 1945 Constitution of the Republic of Indonesia is comprised of the preamble and the Articles.' This wording was proposed by Jimly Asshidiqie, to avoid controversy on the status of the elucidation.<sup>1426</sup> Asshidiqie argued that rather than explicitly mentioning that the elucidation is deleted, it is better to mention that the Constitution only consists of the preamble and the body of Articles. In this way, those who question the legality of the elucidation in the first place, and might therefore argue that it cannot be deleted as it was never included, will have no reason to dispute the new provision.<sup>1427</sup>

## **2. The Important Rejected Proposal: Article 29**

Lindsey correctly argues that:

[a]s important as the amendments that were passed, was one that was not passed. By an overwhelming majority, the MPR rejected the proposal that Article 29 be amended to make the practice of Islamic law or *syariah* ...<sup>1428</sup>

The proposal to re-insert the 'seven words' of the Jakarta Charter was put forward at the very beginning of the amendment process in 1999. It became stronger and peaked during the Fourth Amendment discussions. However only three Islamic factions – the PPP, PBB and PDU – supported this proposal, making it unlikely that the Jakarta Charter would be introduced.

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<sup>1426</sup> Minutes of the 6<sup>th</sup> meeting of the PAH I, 26 February 2002, 359.

<sup>1427</sup> Ibid.

<sup>1428</sup> Lindsey, above n 99, 270.

**Public Position.** The general public did not support the proposal either. The Department of Religious Affairs argued that the original Article 29 should be preserved for three reasons: first, because it was the result of a national consensus among the founders; second, because it serves as a unifying factor for the country and if it were changed, the country might disintegrate; third, because it acts as the compromise among all the religions in the country.<sup>1429</sup> Indeed, in the early discussions of the 2002 PAH I, Hatta Mustafa (FUD) warned that the original Article 29 is the main pillar of the integration of the state. For the sake of the unity of the state, therefore, it should be preserved.<sup>1430</sup> Mustafa stated that he had heard that the North Sulawesi, Central Kalimantan, East Nusa Tenggara, Bali and Papua – all areas with relatively high Christians population, except for Bali which mostly Hindus – would ask for independence if the article were changed.<sup>1431</sup>

Predictably, the Indonesian Communion of Churches (PGI) stated that it would reject the proposal to insert the Jakarta Charter into the Constitution.<sup>1432</sup> More interesting, perhaps, the country's largest Islamic organizations, the *Nahdlatul Ulama* (NU)<sup>1433</sup> and Muhammadiyah, were also against the proposal. Hasyim Muzadi, now the chair of the NU, argued that the amendment outcome should avoid the possibility of disintegration.<sup>1434</sup> Muzadi further argued that:

I can observe the nation's values ... which may not be changed, including the foundation of the state ... We are not capable stemming a fight that will certainly follow if [Article 29] is changed. It will almost certainly instigate a clash between the far right and the far left.<sup>1435</sup>

Abdurrahman Wahid, an influential religious leader as well as the former President, argued that the inclusion of the Jakarta Charter phrase into the Constitution is:

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<sup>1429</sup> Minutes of the 6<sup>th</sup> meeting of the PAH I, 26 February 2002, 359.

<sup>1430</sup> Minutes of 17<sup>th</sup> meeting of the PAH I, 21 March 2002, 328 — 329.

<sup>1431</sup> Ibid.

<sup>1432</sup> *Serahkan Perubahan UUD kepada Komisi Konstitusi*, above n 1281.

<sup>1433</sup> Association of Islamic Scholars. This is a traditionalist Moslem organization established in 1926. It is the country's largest Moslem organization, even may be in the world. The members of *Nahdlatul Ulama* is estimated to be around 40 million people.

<sup>1434</sup> *Perubahan UUD 1945 harus menghindari Potensi Disintegrasi*, above n 1287.

<sup>1435</sup> Ibid.

... contradictory to the preamble of the Constitution. The Preamble and original Article 29 put people on the same footing, for all citizens. But by adopting this charter, that will give the Moslems advantage over the others, the others will be second class. So we have to avoid that.<sup>1436</sup>

Similarly, J. Soedjati Djwandono argued that:

[i]n the light of our diversity ... we can only continue to remain a united nation if we are bound by common universal human values ... the institution of the state is never established to implement any particular religious laws ... If [the MPR agreed to insert the Jakarta Charter], it would be the beginning ... of the disintegration of this nation.<sup>1437</sup>

**The MPR's Position.** Because of the extensive rejection both outside and within the MPR, the Jakarta Charter proposal was, as mentioned, finally withdrawn during the closed meeting of the Commission A.<sup>1438</sup> However, the withdrawal was kept secret until the very end of the ratification process of the Fourth Amendment. Some Islamic members of the MPR openly disagreed with the withdrawal. Hartono Mardjono declared he had not participated in the decision to keep the current Article 29.<sup>1439</sup> Similarly, Mutaminul'ula (*Reformas*) from the Justice Party stated that seven members of this party had also withdrawn from the decision-making process.<sup>1440</sup> Najib Ahjad (PBB) stated:

[t]his time we are in front of a great wall that cannot be penetrated, but we will not surrender ... We vow before God and the Moslem society that we will keep on fighting.<sup>1441</sup>

Syafriansyah (PPP) stated:

... as an Islamic party, the PPP will continue to fight for *syariah* in democratic ways, that is through the MPR as the constitution-making body. The PPP will continue to try to convince other factions to follow the *syariah* ...<sup>1442</sup>

Earlier, Hamzah Haz, the PPP Chair, had said the party would continue to fight for the inclusion of Islamic law in to the Constitution. He said, "for the PPP, the *syariah* will always be a

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<sup>1436</sup> 'INDONESIA: Proposed Constitutional Reforms under Fire', *Radio Australia*, Transcript, 2 August 2002.

<sup>1437</sup> 'MPR Annual Session 2002: Some Crucial Issues', *The Jakarta Post* (Jakarta) 9 August 2002.

<sup>1438</sup> Minutes of negotiation meeting of Commission A, 7 August 2002, 105 – 113.

<sup>1439</sup> Minutes of the 6<sup>th</sup> (continued) Plenary Meeting, 10 August 2002, 751.

<sup>1440</sup> *Ibid* 749.

<sup>1441</sup> *Ibid* 744.

<sup>1442</sup> *Ibid* 743.



demand”.<sup>1443</sup> Similarly, the PBB Chairperson, Yusril Ihza Mahendra, said that the party would “continue with the fight although we will be the only party maintaining the stance (for the inclusion of the Jakarta Charter phrase)”.<sup>1444</sup>

**Conclusion.** Amien Rais claimed that ratification of the Fourth Amendment of the Constitution was like making a giant leap in the future of the Indonesian nation.<sup>1445</sup> He stated that:

[w]ith passing the constitutional amendments, the MPR has reformed the Constitution ... with the amended Constitution, we are facing a new Indonesia ... which is more democratic and more advanced.<sup>1446</sup>

Likewise, the *Observer* praised the amendment.

Indonesia took its biggest step for almost 30 years ... on its often bumpy road towards democracy. The [MPR] kicked the once virtually omnipotent military out of the national assemblies and surrendered to the people its right to elect the President and vice-President.<sup>1447</sup>

Indeed, the ratification of the Fourth Amendment has saved Indonesia from a potential constitutional crisis and strengthened the constitutional reform. In this last amendment, the MPR has finally solved some of the crucial and sensitive constitutional issues by agreeing on the second presidential election and rejecting the insertion of ‘seven words’ of the Jakarta Charter into the Constitution.

The ‘giant step’ claim, however, needs to be tested. Chapter Eight evaluates the whole process and outcomes of the four amendments, and concludes whether the claim is valid or not.

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<sup>1443</sup> ‘PPP will Fight for Sharia Law, Hamzah says’ *The Jakarta Post*, 29 July 2002.

<sup>1444</sup> *Ibid.*

<sup>1445</sup> ‘Perubahan UUD 1945 Lompatan Besar’, *Kompas*, 12 August 2002.

<sup>1446</sup> *Ibid.*

<sup>1447</sup> ‘Indonesia Takes a Giant Step Down the Road to Democracy’, *The Observer*, 11 August 2002.

**PART FIVE:  
EVALUATION, RECOMMENDATIONS AND  
CONCLUSION**

## **Chapter Eight**

### **An Understandably Messy Process, More Democratic Outcomes**

The resulting Constitution falls firmly within a democratic form recognized worldwide. The conclusion is perhaps that the requirements of substance and the requirements of process do not always pull in the same direction, and there is a legitimate debate as to the balance between them.<sup>1448</sup>

This chapter evaluates the process and outcomes of all of the four amendments of the 1945 Constitution. It is divided into four sections. Section A focuses on the process of the amendments and argues that the process lacks what would usually be considered the key features of a democratic constitution-making process. Section B, however, argues that, considering the fact that the original 1945 Constitution was a heavily symbolic document for the country – chiefly because it contained the nationalist state ideology, the *Pancasila* - the messy process was unavoidable. Section C concentrates on the outcomes of the four amendments, and argues that the resulting amendments have succeeded in transforming the 1945 Constitution into a more democratic text, although it is still far from perfect. This last section also contains recommendations to further strengthen the system of checks and balances developed in the amended Constitution. Finally, section D presents the conclusion of this thesis.

#### **A. The Four Amendments: the Process**

In this section, I argue that the MPR failed to conduct a truly democratic constitution-making process in amending the 1945 Constitution. The section is divided into four parts: (i) *when* the constitution-making process should occur; (ii) *how* the constitution-making was conducted; (iii) *who* the constitution-making body was to be; and (iv) *how* the public participation was organized.

## 1. When the Constitution-Making should occur

### a. The Pre-Amendment Period

Formally, the MPR started the amendment process in 1999 and ended in 2002. However, the embryo of the amendments was born in the earlier period between Soeharto's forced resignation in May 1998 and the passing of the First Amendment in 1999,<sup>1449</sup> that is, during Habibie's presidency. This corresponds to Bonime-Blanc's concept of a 'pre-constitutional period': the period after the turning point from the authoritarian regime to the new transitional government and before the constitution-making process.<sup>1450</sup>

During this period, Habibie's administration set up popular initiatives such as better protection for human rights, release of political prisoners and reform of electoral laws. These initiatives contributed to the making of effective pre-amendment period. This is consistent with Bonime-Blanc's view. He argues that a limited pre-amendment period occurs if: (i) control of basic freedoms is not revoked; (ii) the process of illegalization of the most arbitrary authoritarian instruments is not in place; and (iii) the democratization of the electoral process does not succeed.<sup>1451</sup>

An example of Habibie's initiative to protect human rights was his revocation of Ministerial Regulation Number 01 of 1984 on Publication Licenses. This regulation had been previously used by Soeharto's government to prevent the media from criticizing him. It limited the discussion on sensitive political issues, including constitutional reform. The repeal of this regulation delivered much greater freedom to the press. It was this extensive media coverage which supported the distribution of information on the amendment process. For example, Widjojanto admitted that the support of the media helped the Coalition for a New Constitution to strongly advocate the idea of an independent Constitutional Commission.<sup>1452</sup>

Habibie's policy of releasing some political prisoners also supported the development of a conducive political environment for healthy constitutional discussions among factions in the

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<sup>1448</sup> Ellis and Yudhini, above n 1306.

<sup>1449</sup> Bonime-Blanc, above n 64, 139.

<sup>1450</sup> Ibid.

<sup>1451</sup> Ibid 140.

<sup>1452</sup> Interview with Bambang Widjojanto, member of the Coalition for a New Constitution, 15 July 2003.

MPR and elements of the society. The members of MPR were free to debate important constitutional issues without fear of being jailed, as they might have been under Soeharto's administration. This freedom stimulated dynamic discussions in the MPR throughout all four amendment debates.

Habibie's initiative in bringing forward the election from 2002 to 1999 was another important pre-amendment decision. As Saunders argues, an election early in a transitional period may be needed to refresh the mandate of the people if they have lost their trust in the state institutions of a previous authoritarian regime.<sup>1453</sup> In the Indonesian context, the 1999 General Election was crucial, as part of the preliminary requirement to build a legitimate MPR that could then amend the 1945 Constitution.

To prepare the 1999 General Election for the legislature, electoral reforms were conducted to create a complex multiparty system. Forty-eight parties participated in the Election, which was generally considered fair and just.<sup>1454</sup> This multiparty system contributed significantly to the variety and comprehensiveness of ideas during the four amendment discussions and wide ranging representations in the MPR increased the possibility of a consensual process taking place. Bonime-Blanc defines a consensual process as a constitution-making process which is more inclusive than a dissensual process.<sup>1455</sup> It requires the participation of all – or at least most – political groups.<sup>1456</sup> In Indonesia, at the end of the process, the amendment was a result of consensual process among all of the factions in the MPR. This political configuration of the MPR definitely affected the way the constitutional reform was carried out. This is consistent with Wheare's argument that constitutional reform not only depends on the legal provisions, but also on the configuration of political groups.<sup>1457</sup>

Despite a fair and just election process, the electoral victory of the three old parties of the New Order – the PDIP, Golkar and PPP – was not really a positive sign for the constitutional reform agenda. The PDIP was one of the most conservative factions in regard to amendment. Ellis argues, therefore, that the success of these parties temporarily put the debate on constitutional

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<sup>1453</sup> Saunders, above n 166, 6.

<sup>1454</sup> National Democratic Institute and the Carter Center, above n 755.

<sup>1455</sup> Bonime-Blanc, above n 64, 13.

<sup>1456</sup> *Ibid.*

<sup>1457</sup> Wheare, above n 75, 23.

reform “onto the back burner”.<sup>1458</sup> Yet, the fact that 77% of the MPR 1999 — 2002 members were new <sup>1459</sup> gave rise to hope that reform might still have a good chance.

### **b. The 1999 – 2002 Transitional Period: the Golden Moment**

The 1999 – 2002 constitutional amendments were conducted after Soeharto’s authoritarian regime collapsed in May 1998 amid rioting and economic crisis. They were therefore colored by political conflicts and economic crisis.<sup>1460</sup> In 1999, Soesilo Bambang Yudhoyono tried to challenge the amendment process arguing that a constitutional amendment in the midst of turmoil would only create problems.<sup>1461</sup> This kind of challenge, however, was not enough to stop the MPR and, despite all these difficulties, it decided to press ahead with constitutional reform.

The MPR’s decision was right. Although the transition created a difficult situation, it was a real opportunity to reform the Constitution, not least because during transition, public political euphoria can facilitate effective constitutional discussions. In Elster and McWhinney’s words a transitional period is a golden moment for constitutional reform.<sup>1462</sup>

### **c. The 1999 – 2002 Amendment Period: A Changing Schedule**

The MPR, however, did not complement its decision to carry out the constitutional amendment with a clear timetable. In fact, the amendment schedule set up by the MPR changed almost every year from 1999 to 2002. This is different to the experiences of both South Africa and Thailand. The South African Assembly had two years to prepare its amendment draft, while the Thai Constitutional Drafting Assembly was allocated 240 days to draft the new Constitution.<sup>1463</sup> These two constitution-making bodies were far more disciplined in their scheduling than Indonesia’s MPR.

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<sup>1458</sup> Ellis, above n 662, 125.

<sup>1459</sup> Suryadinata, above n 584, 119.

<sup>1460</sup> Above n 889 – 906.

<sup>1461</sup> *ABRI Supports Habibie, Rejects Presidium*, above n 781.

<sup>1462</sup> Elster, above n 69, 347, McWhinney, above n 111, 15.

<sup>1463</sup> Article 211 of the 1991 Constitution, Section 73 Subsection (1) of the Interim Constitution.

Originally, the MPR, through Decree No. IX of 1999 on the Authorization of the Working Body of the MPR to Continue the Amendment of the 1945 Constitution, stipulated that the amendment should be completed by 18 August 2000, at the latest.<sup>1464</sup> This gave the Working Body 10 months to prepare the amendment draft. In the 2000 MPR Annual Session, however, this deadline was not met. The MPR did not finish the amendment process but instead it issued MPR Decree No. IX of 2000 on the Authorization of the Working Body to prepare draft amendments to the 1945 Constitution. This 2000 decree stipulated that the draft amendments must be ready by the 2002 MPR Annual Session, at the latest.<sup>1465</sup> This gave the MPR another two years for the Working Body to prepare for debate on the draft amendments.

In its 2002 Annual Session, the MPR face a possible deadlock over the issues of how to conduct a second round presidential election and the adoption of the 'seven words' of the Jakarta Charter. There were calls from members to again delay the amendment from 2002 to the following year.<sup>1466</sup> In the end, however, three years later than scheduled, the Fourth (and, so far, final) Amendment was finally successfully ratified.

The MPR's tendency to frequently change its amendment schedule was exploited by some factions in the MPR as an excuse to slow the constitutional reform process. This was particularly obvious during the Second Amendment discussions. The conservative stance of the PDIP and TNI-Polri factions contributed to the slow progress of the Second Amendment discussions.<sup>1467</sup> This supports Arato's argument that the discipline of a specific time period is necessary in order to avoid delaying tactics by conservative groups.<sup>1468</sup>

More significantly, the continually-changing amendment schedule affected the whole amendment process, including the way the constitution-making was conducted. The following section now considers this issue in more detail.

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<sup>1464</sup> Article 2 of the MPR Decree No. IX of 1999.

<sup>1465</sup> Article 3 of the MPR Decree No. IX of 2000.

<sup>1466</sup> Perpanjangan Sidang Tahunan MPR hingga 2003 merupakan Langkah Antisipasi MPR, above n 1320.

<sup>1467</sup> King, above n 924.

<sup>1468</sup> Elster, above n 69, 395.

## 2. How the Constitution-Making was Conducted

### a. The 1945 Constitution as a Transitional Constitution

To start the constitutional reform process, one of the initial agreements in the MPR was to retain the 1945 Constitution as a ‘transitional Constitution’. In 1999, by choosing only to amend, rather than replace, the Constitution, the MPR effectively agreed that the 1945 Constitution was the “institutional and procedural framework within which the transition took place”.<sup>1469</sup> This was different to the case of South Africa, where it was decided to apply the 1994 Interim Constitution as its transitional Constitution before drafting its new Constitution.<sup>1470</sup> It was also different to Thailand, which amended Article 211 of the Thai 1991 Constitution on amendment procedure before it started drafting its new Constitution. The approach of South Africa and Thailand provided a more democratic constitution-making process with clearer guidelines on how the constitution-making should be conducted - and eventually produced more democratic people’s constitutions.

**No other Choice.** On the one hand, Indonesia’s decision to retain the Constitution was ironic, because the authoritarian 1945 Constitution was supposed to be the first target of reform. Liddle argues that:

[t]he positive role played by the 1945 Constitution in Indonesia’s democratic transition is an extraordinary irony of history, a striking instance of the way in which authoritarian institutions and ideologies can be turned against politicians who have spent decades fashioning them as instruments of autocratic power.<sup>1471</sup>

Likewise, I argue that Indonesia merely had:

... procedures to amend a Constitution based on the provisions available in the Constitution which, in fact, was the target of the amendment itself ... [and this] demonstrated the absurdity of the transitional constitutional reform in Indonesia.<sup>1472</sup>

On the other hand, Liddle also argues that the application of the 1945 Constitution as the legal basis during the transition from Soeharto’s authoritarian regime was not surprising<sup>1473</sup> and it, in

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<sup>1469</sup> Liddle, above n 30, 381.

<sup>1470</sup> Ramaphosa, above n 336, 79.

<sup>1471</sup> Liddle, above n 30, 23 — 24.

<sup>1472</sup> Indrayana, above n 183, 102.



fact, proved useful as a way of managing the extreme uncertainty that characterized the transition era.<sup>1474</sup> For Liddle, the Constitution was a guarantee for both the government and opposition forces:

[b]y maintaining a set of familiar rules in a time of great turmoil, the contestants for power could more easily predict and therefore respond appropriately to each other's behavior during the successive crises. They also were reasonably certain that they would not be arrested or killed.<sup>1475</sup>

Therefore, the decision to choose the 1945 Constitution as the transitional Constitution was because of Indonesia's limited choices. There were nationalist groups – including the military – in Indonesian politics which feared that a radical constitutional reform might lead to the preliminary stage of the establishment an Islamic state. For these groups, employing the 1945 Constitution as the 'transitional Constitution' was a sort of guarantee that a radical change would not took place.

Because of this fear of Islamic state of the part of dominant nationalist, the basic agreements reached by MPR members focused on retaining the nationalist symbolism in the 1945 Constitution.

#### **b. The Five Basic Agreements**

Unlike South Africa, which agreed on the thirty-four constitutional principles before starting its constitutional reform,<sup>1476</sup> Indonesia had no clear direction as to what the amendments should seek to achieve. The only direction which guided the MPR was the obvious need to change the Constitution an the five principles that the MPR members all agreed on:

- to preserve the preamble of the Constitution;
- to maintain the unitary state of the Republic of Indonesia;
- to keep the presidential system government;
- to insert the normative provisions then in the elucidation into the body text of the Constitution; and

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<sup>1473</sup> Liddle, above n 30, 374 — 375.

<sup>1474</sup> Ibid.

<sup>1475</sup> Ibid.

- to process the amendments through the form of 'addenda', without deleting the original text of the 1945 Constitution.

Not all of these five agreements were made before the First Amendment. Agreement on the unitary state, the presidential system and the insertion of some of the elucidation provisions was not reached until the Second Amendment discussions. The consensus on the 'addenda' approach was the consequence of the choice to amend the Constitution. The agreements on the unitary state and the presidential system were more a product of the intense symbolic value of the 1945 Constitution - there was actually never any intensive debate in the MPR on these two issues. The terms 'federal state' and the 'parliamentary system' were simply rejected because of historical reasons.<sup>1477</sup>

These five agreements, whatever their origins and timing, meant, however, that making a totally new Constitution was impossible, especially as the MPR refused to amend the preamble. The Preamble, with the *Pancasila* included within it, was the essential constitutional guarantee for the nationalist groups. If the preamble was amended, this group would not be satisfied, and would possibly reject the system established based on such an amendment. Yet, in reality, the agreement to merely amend, and not renew, the Constitution was not consistent.

### c. Four Amendments, a New Constitution

**Inconsistent Amendments.** It soon became clear that the claim that the MPR would only amend, but not renew the 1945 Constitution did not reflect reality. Anton Djawamaku concludes that the four amendments that were eventually passed were actually inconsistent with the 'mere amendment' concept itself.<sup>1478</sup> As Wheeler argues, one of the specific characteristics of a constitutional amendment is that it deals with a limited scope of constitutional issues.<sup>1479</sup> On the other hand, constitutional changes which cover the major portion of the Constitution are something more and are not usually described as amendments.<sup>1480</sup> In Indonesia, the four

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<sup>1476</sup> Murray, above n 349, 105.

<sup>1477</sup> Ellis, above n 934.

<sup>1478</sup> Anton Djawamaku, 'Problema Reformasi Konstitusi: Mengubah ataukah Mengganti UUD 1945', (2001) 4 *Analisis CSIS*, 461.

<sup>1479</sup> Wheeler, above n 104, 50.

<sup>1480</sup> *Ibid.*

amendments had ultimately dealt with a large range of issues, and changed almost the whole original 1945 Constitution.

Table 19 shows the structure of the 1945 Constitution before and after the four amendments. It demonstrates that most provisions of the 1945 Constitution were either amended or deleted. Therefore, the amendments were effectively a total revision of the 1945 Constitution. In other words, the amendments were an attempt to make a new Constitution by using a step-by-step amendment process.

**Table 19 The 1945 Constitution: before and after the Amendments**

	Before Amendment	After Amendment					% Unchanged
		Unchanged	Deleted	Amended	Added	Total	
<b>Chapters</b>	16	1	1	14	5	20	1/20= 5%
<b>Articles</b>	37	8	1	28	37	73	8/73= 11%
<b>Paragraphs</b>	65	29	2	34	131	194	29/194= 15%

Table 19 demonstrates that 95% of the chapters, 89% of the Articles and 85% of the paragraphs are either new or were alteration of the originals. Chapter XI, on Religion, is the only one which has not been changed. This again shows that the relationship between Islam and the state was one of the most sensitive issues dealt with during the amendment process.

Djawamaku argues that because the amendments have both quantitatively and qualitatively replaced the original 1945 Constitution, the constitutional amendments of 1999-2002 have actually delivered a new Constitution.<sup>1481</sup> He further argues that, because of this, there is no significant difference between the public aspiration of making a new Constitution, and the result of the amendments.<sup>1482</sup> Kawamura argues that, “the 1945 Constitution has almost no trace of its original form”.<sup>1483</sup>

The fact, that, whatever its rhetoric, the MPR had, in fact, made a new Constitution was also reflected in the media after the ratification of the Fourth Amendment.<sup>1484</sup> *Tempo Interaktif* wrote

<sup>1481</sup> Anton Djawamaku and M. Sudibjo, ‘Perubahan UUD 1945: Solusi atau Problema Konstitusi?’, (2002) 3 *Analisis CSIS* 291.

<sup>1482</sup> *Ibid.*

<sup>1483</sup> Kawamura, above n 661, 52.

<sup>1484</sup> ‘MPR Sesungguhnya Sahkan Konstitusi Baru’, *Kompas*, 19 August 2002; ‘HUT RI dengan Konstitusi Baru’, *Suara Pembaruan*, 16 August 2002.

that at the end of the 2002 MPR Annual Session, Indonesia faced a new constitutional era <sup>1485</sup> - Goenawan Mohamad even named the Constitution after the amendments as 'the 2002 Constitution' <sup>1486</sup> and Denny J.A. wrote an article welcoming a new Constitution, claiming that:

[a]lthough the post amendment Constitution still has the same name, the 1945 Constitution, we effectively have a new Constitution. <sup>1487</sup>

This thesis argues therefore that the four amendments were a step-by-step process to write a new Constitution, but without reopening the question of the national symbolism of the original 1945 Constitution: the rejection of Islamic state and the nationalist state ideology, the *Pancasila*. It was an evolutionary constitutional renewal. As Kelsen argues, it does not matter how fundamental alterations in the substance of a Constitution are, so long as the continuity of the legal system is not interrupted, a constitutional renewal should be classified as an evolutionary process. <sup>1488</sup>

This evolutionary process, however, happened by accident, not by design, as is explained in the following part.

#### **d. A Process by Accident not Design**

As Saunders argues, an agenda-setting stage should address the question of *what* the basic agreements on the constitutional reform actually are. <sup>1489</sup> Unfortunately, agenda setting during the Indonesian amendments was limited. The MPR failed to give detailed direction on what should be reformed. Even if there were five basic agreements, they were not made before the First Amendment, as they should have been, but were made later during the four amendment discussions.

Therefore, Asshidiqie criticized the amendment process for the absence of an academic draft to guide the process. <sup>1490</sup> For him, the paradigm was only found much later, when the MPR

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<sup>1485</sup> *Indonesia Memasuki Konstitusi Baru (2002)* Tempo Interaktif <<http://www.tempointeraktif.com/harian/fokus/115/2.1.6.id.html>> at 2 April 2003.

<sup>1486</sup> Goenawan Mohamad, 'Konstitusi 2002', *Tempo*, No. 26/XXXI 26 August – 1 September 2002.

<sup>1487</sup> Denny JA, 'Selamat Datang Konstitusi Baru', *Koran Tempo*, 13 August 2002.

<sup>1488</sup> Kelsen, above n 87, 117.

<sup>1489</sup> Saunders, above n 166, 5.

<sup>1490</sup> 'Seharusnya Dibuat Naskah Baru UUD 1945', *Kompas*, 2 July 2002.

became involved in the serious amendment discussions.<sup>1491</sup> Lubis agrees that the process was conducted without clear paradigm “without any clear concept, being ad hoc and partial in nature”.<sup>1492</sup>

Very late on the amendment process, in 2002, during the Fourth Amendment discussions, Happy Bone Zulkarnaen (Golkar) admitted this problem. He argued that:

... I think we do need an academic draft [for guiding the amendment process]. ... this draft consists of constitutional concepts. It also provides arguments as to why an amendment is needed, and what the reason is behind an amendment proposal.<sup>1493</sup>

Likewise, Frans H. Matrutty (PDIP) argued that:

[i]f we had the terms of reference of what the amendment should be, we would not be experiencing these difficulties ... Unfortunately, we do not have this guidance. We do not know what our limitations are ... or which parts we should amend. We have made a fatal mistake.<sup>1494</sup>

Tobing, the Chairperson of the PAH I of 2000—2002, admitted that the agenda setting for the amendment appeared to have been:

... by coincidence. Each member of the Committee (PAH I) had different goals. But after three years of intense negotiation and working together ... we had finally achieved the common goals that we had been fighting for together.<sup>1495</sup>

## e. The Political Interests

Many critics claimed that the four amendments had been introduced only in a patchy fashion, and many were products of short-term political interests in bad faith. Indeed, Lukman Hakim Saifuddin (PPP) admitted the more crucial the articles being discussed were, the stronger the vested interests involved.<sup>1496</sup> Lubis points out that:

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<sup>1491</sup> Ibid.

<sup>1492</sup> Todung Mulya Lubis, *The Urgency of Constitutional Reform* (2001) <[http://www.vanzorgereport.com/report/popup/index.cfm?fa=ShowReport&pk\\_rpt\\_id=16&CFID=315606&CFTOKEN=71680888](http://www.vanzorgereport.com/report/popup/index.cfm?fa=ShowReport&pk_rpt_id=16&CFID=315606&CFTOKEN=71680888)> at 3 October 2003.

<sup>1493</sup> Minutes of the 3<sup>rd</sup> Meeting of the Working Body, 4 June 2002, 198.

<sup>1494</sup> Minutes of the 32<sup>nd</sup> Meeting of the PAH I, 24 June 2002, 122.

<sup>1495</sup> Van Zorge Report, above 1382.

<sup>1496</sup> Interview with Lukman Hakim Saifuddin, member of the PAH I, 20 June 2003.

... in many aspects the amendments were an attempt at political accommodation of the various social and political pressures coming from certain political groups. In other words, what actually happened in the amendment process was political horse-trading.<sup>1497</sup>

Table 20 gives examples of the sort of proposals Lubis criticizes.

**Table 20 The Amendment and Political Interests**

No.	Amendment Proposals	The Interests	Status
1.	The Vice President cannot automatically replace the President if the latter is incapacitated. (Article 8).	To block the possibility of Vice President Megawati Soekarnoputri from replacing President Abdurrahman Wahid.	Rejected.
2.	The Non-retrospective clause (Article 28I).	There is an indication – albeit unconfirmed – that this clause was adopted to protect the military and Golkar from being accused of past human rights abuses.	Accepted (Second Amendment).
3.	The MPR composition shall consist of elected and non-elected members. The non-elected members are the representatives of the military. (Article 2 (1) and Article II of the Transitional Provision).	To enable the military (and other functional groups) to continue their existence in the MPR/DPR.	Rejected.
4.	More difficult voting requirements for impeachment.(Article 7B).	To avoid President Megawati being easily impeached, as had happened to President Wahid.	Accepted (Third Amendment).
5.	Second round presidential election shall be held by the MPR. (Article 6A)	To give Megawati a greater chance to win the election.	Rejected.
6.	Only the two biggest parties can nominate a presidential candidate. (Article 6A)	To give Golkar an advantage in the presidential elections. Golkar came second in the 1999 general elections.	Rejected.

As the above table shows, however, four out of the six amendment proposals were seen as contaminated by short-term political interests and therefore were rejected. The different political interests among the factions in the MPR, in fact, became an effective quality control system, because there was no single political faction which held an absolute majority in the MPR.

<sup>1497</sup> Lubis, above n 1492.

In addition, criticisms from outside the MPR were also effective in helping block most of short-term political interests. Public comment pressured some political parties to reconsider their positions. Without monitoring by the civil society groups, the political parties in the MPR might have been less restrained in proposing their political interests. In this way, public criticism played the role of external buffer to stop the constitutional amendments from being completely politicized.

It should be noted, however, that compared to South Africa's experience, Indonesia's amendment processes were significantly more vulnerable to bad faith manipulation by political interests. South Africa's ratification procedure included the examination of the amendment drafts before the Constitutional Court. The Court considered whether the drafts were consistent or not with the 34 constitutional principles agreed upon earlier. This examination process and the agreed constitutional principles were effective methods to prevent short-term political deals being inappropriately incorporated into South Africa's Constitution.<sup>1498</sup>

#### **f. Transparency**

Another issue which invited much criticism was the transparency of the process. The criticism did not relate to the meetings of the MPR, which were mostly open to the public but to the negotiation meetings, which were closed and in which were many of the crucial amendment proposals were agreed to. Gumay argues that they had a negative impact on the amendments.<sup>1499</sup> Likewise, Widjojanto points out that the meetings became the place where the parties 'traded off' the amendment proposals.<sup>1500</sup>

These arguments may well be true, but they need qualification. It is true that an amendment process should be transparent. It is also true that the public should have access to the process.<sup>1501</sup> However, it is not also true that negotiation meetings were unnecessary, even less that they should have been totally prohibited. The negotiation meetings were necessary to sometimes avoid a deadlock on difficult amendment proposals. Indeed, during the Third and

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<sup>1498</sup> Murray, above n 349, 120 — 121.

<sup>1499</sup> Interview with Hadar N. Gumay, the Deputy Executive Director of Centre for Electoral Reform, 24 July 2003.

<sup>1500</sup> Interview with Bambang Widjojanto, member of the Coalition for a New Constitution, 15 July 2003.

<sup>1501</sup> Commonwealth Human Rights Initiatives, above n 247, 13.

Fourth Amendment discussions, the closed meetings were more effective than open meetings in resolving these difficult proposals. The issue of the second round direct presidential election, and the amendment of Article 29, on the state and Islam were two highly contentious issues which were effectively and carefully settled behind closed doors.

On this issue, I share the opinion of Elster who argues that amendment debates should be balanced between publicity and secrecy.<sup>1502</sup> Elster argues that a closed meeting tends to improve the quality of discussion, because it makes it easier for a party to change its opinion, when persuaded of the truth of another party's view.<sup>1503</sup> On the other hand, a fully open discussion, while it "drives out any appearance or bargaining", encourages "stubbornness, overbidding, and grandstanding in ways that are incompatible with genuine discussions".<sup>1504</sup>

It should be noted, however, that in the Indonesian context a 'closed meeting' does not mean that the content of the discussions among the parties is not available to the public. Here, the term 'closed meeting' is a technical one, that is, during such meetings the media and the public are not present, however, the discussions are still recorded and the minutes are still available to the public. This record is important for the public to understand the reasons behind the agreement of an amendment proposal, particularly in any future debate on the same issues.

**Closing.** Indonesian post-Soeharto constitution-making process was conducted in an *ad hoc*, slow and patchy way. It took four years for the MPR to complete the constitutional amendments. Despite this, Indonesia finally has a new and more democratic Constitution, albeit one that maintains the provisions on the relationship between Islam and the state and which keep the old Preamble and thus preserve the national state ideology, the *Pancasila*.

### 3. Who the Constitution-Making Body was to be

The question of 'who the constitution-making body should be' overshadowed the four amendment processes. The role of the MPR was constantly challenged by the possibility of establishing a Constitutional Commission. During the first Amendment discussions, this

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<sup>1502</sup> Elster, above n 69, 395.

<sup>1503</sup> Ibid.

<sup>1504</sup> Ibid 388.



challenge was not so strong.<sup>1505</sup> It continued to grow, however, over the Second to Fourth Amendments debates.

In the end, the MPR could not resist the pressure from the public to establish a Commission. The Commission it established in 2003 after the four amendments were completed was, however, given only limited authority to 'review' the four amendments and submit its findings to the MPR. The following section considers why the MPR failed to win the people's trust in its capacity as a constitution-making body. It also considers why a Constitutional Commission failed to be established during the 1999 – 2002 constitution-making process, and why the 2003 Constitutional Commission established by the MPR was not a 'real' Constitutional Commission.

#### **a. The MPR**

As noted in Chapter Two, Elster argues that a Constitution will have strong legitimacy if the constitution-making body is democratically selected.<sup>1506</sup> At the beginning of the amendment processes, the legitimacy of the 1999-2004 MPR was strong. This was a consequence of the 1999 General Election being generally considered to be free and fair.<sup>1507</sup> The members of the MPR were mostly elected – except for the 38 members from TNI-Polri who were appointed: Lindsey points out that this MPR was “the first truly independent, elected parliament in Indonesian history”.<sup>1508</sup> The positive image of the election contributed to the strong mandate of the MPR to carry out constitutional reform.<sup>1509</sup>

So, for example, Hadar N. Gumay - who later became one of the leading critics of the MPR's performance in amending the 1945 Constitution – in 1999 confirmed his support for the MPR. Gumay argues that:

... in the early stages, we actually trusted in the process of the MPR, which was indeed in accordance with our Constitution, having the authority to amend [the Constitution].<sup>1510</sup>

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<sup>1505</sup> Yusuf and Basalim, above n 6, 97 — 98.

<sup>1506</sup> John Elster, Above n 269, 178.

<sup>1507</sup> National Democratic Institute and The Carter Center, above n 755, 1.

<sup>1508</sup> Lindsey, above n 99, 246.

<sup>1509</sup> Ibid.

<sup>1510</sup> Interview with Hadar N. Gumay, the Deputy Executive Director of Centre for Electoral Reform, 24 July 2003.

The MPR's legitimacy, however, became progressively weaker throughout the four amendment discussions. There were two reasons behind this: first, the way in which the MPR carried out the amendment was, for its critics, overshadowed by short-term political interests; and second, public disappointment at the performance of the DPR members. This second factor will now be discussed.

**The DPR's Negative Image.** The performance of the DPR directly influenced the image of the MPR. The public could not separate the two institutions, because all members of the DPR were automatically members of the MPR. Problems in the DPR therefore discredited the MPR too. One of the biggest problems was the absence of many members of the DPR during its important sessions. For example, in one debate, on the Bill on Money Laundering, although 309 members signed the attendance list, only 49 members physically attended the meeting.<sup>1511</sup> Predictably, a poll by *Kompas* recorded that 84% of the 845 respondents argued that the performance of the DPR members in addressing the country's problems, was unreliable.<sup>1512</sup> Further, 64% of the respondents stated that the attitude of the members of the DPR was not a good example of democracy in practice.<sup>1513</sup> In another *Kompas*' poll, 85% of the 830 respondents claimed that the DPR did not represent their interests.<sup>1514</sup>

This negative image of the DPR paralleled the weakening legitimacy of the political parties. In the three polls conducted by *Kompas* in 2000, 2001 and 2002, the image of the parties became progressively more negative in the public eyes. The 2000 poll showed that 41% of the respondents were satisfied with the performance of the DPR. This number, however, decreased to 19% in 2001 and then to 12% in 2002.<sup>1515</sup> This loss of trust was also reflected in the declining number of correspondence submitted to the DPR. In 2000, the DPR received 1,878 letters, 1,048 in 2001 and 725 letters in November 2002.<sup>1516</sup>

There was a public perception that the members of the DPR preferred to represent their party interests rather than the people. In addition, the assumption that many of the members were involved in 'money politics' (bribery and other corruption) contributed to a loss of trust of the

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<sup>1511</sup> 'Mangkirnya Demokrasi di Legislatif', *Kompas*, 1 April 2002.

<sup>1512</sup> Ibid.

<sup>1513</sup> Ibid.

<sup>1514</sup> 'Citra DPR Tidak Kunjung Membaik', *Kompas*, 10 June 2002.

<sup>1515</sup> 'Sebelah Mata bagi Partai Politik', *Kompas*, 8 April 2002.

people.<sup>1517</sup> The fact that 155 members of the DPR failed to report their wealth to the KPKPN<sup>1518</sup> further aggravated this.<sup>1519</sup> Benny K. Harman argued that the failure showed the weakness of commitment of the members and their political parties to combat corruption.<sup>1520</sup> Similarly, Syamsuddin Harris argued that the failure was:

... evidence of the moral decadence of the political elites. In fact, they do not have any morality at all. So, they have no right to hold any public office.<sup>1521</sup>

The lack of trust was even worse because the relationship between the DPR members and its constituents was a distant one. In another nationwide poll conducted by Taylor Nelson Sofres Indonesia, only 4% of the 3,580 respondents were able to name their representative.<sup>1522</sup> Another 9% could name a representative but not necessarily the constituency they came from. An astonishing 86% could not name even one single legislator.<sup>1523</sup>

This alienation could be partially explained by the members of the DPR having failed to establish effective communication with their constituents. The last poll claimed that the majority of the respondents stated that they had never been contacted by the members of the DPR whom they had elected to represent them.<sup>1524</sup> Even those who had been in contact with them stated that the initiative had come from them, rather than from the members of the DPR.<sup>1525</sup> Only 4% said they had been contacted by the members, whereas 87% said that they had never been contacted.<sup>1526</sup> Chozin Chumaidy (PPP) admitted that some members of the DPR had largely ignored their constituents, but shifted the blame for this neglect to the proportional electoral system.<sup>1527</sup> Smita Notosusanto has, however, disputed this, arguing that the ignorance was simply because of a lack of responsibility on the part of the members of the DPR.<sup>1528</sup>

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<sup>1516</sup> 'Menurun Drastis, Surat Pengaduan ke DPR', *Kompas*, 10 December 2002.

<sup>1517</sup> 'Wakil Rakyat jauh dari Rakyat', *Kompas*, 28 December 2002.

<sup>1518</sup> KPKPN is the abbreviation of *Komisi Pemeriksa Kekayaan Penyelenggara Negara* or Public Servants' Wealth Audit Commission.

<sup>1519</sup> '155 Anggota DPR/MPR belum Serahkan Daftar Kekayaan', *Kompas*, 23 August 2002.

<sup>1520</sup> Benny K. Harman, 'Memburu 155 Anggota MPR/DPR', *Kompas*, 26 August 2002.

<sup>1521</sup> 'Masyarakat bisa ajukan *Class Action*', *Kompas*, 26 August 2002.

<sup>1522</sup> Sekretariat Jenderal MPR/DPR RI, *Laporan Survei Opini Publik Nasional 2002*, May 2002, 25.

<sup>1523</sup> *Ibid.*

<sup>1524</sup> *Ibid* 24.

<sup>1525</sup> *Ibid.*

<sup>1526</sup> *Ibid.*

<sup>1527</sup> 'Legislators Admit to Having Ignored Their constituents', *The Jakarta Post*, 26 June 2002.

All of the above problems ultimately contributed to the negative assessment of the public on the DPR's performance. The same poll showed only 32% of the respondents were satisfied with the DPR's work. 52%, however, said they were unsatisfied.<sup>1529</sup> Although popular satisfaction with the performance of the MPR was greater (45% satisfied and 39% unsatisfied), negative assessments of the DPR inevitably affected popular assessments of the MPR as the constitution-making body. A *Kompas* in 2002, for example, poll suggested that 68% of the 815 respondents would prefer an independent Constitutional Commission to carry out the amendment process. Only 21% still trusted the MPR to reform the 1945 Constitution.<sup>1530</sup>

**The MPR's Achievement.** It should be noted that, in spite of the strong criticism of the MPR, no one can deny its achievement in ratifying the four amendments. Few predicted that the MPR, a body with "a justified reputation for party political in-fighting and horse trading"<sup>1531</sup> would ever succeed in achieving a majority decision to approve the amendment drafts.

One of the reasons behind the success of the MPR was its willingness to reduce its own power. For Ellis, the MPR has made an exceptional international precedent by agreeing to abandon its previously all-powerful status.<sup>1532</sup> The original Article 1(2) of the 1945 Constitution stated that MPR was the sole representative of the sovereignty of the people. This monopoly on sovereignty had become the legal basis for the MPR to be a supreme parliament. It was also the foundation for all other MPR powers including appointing and removing the President. Extraordinarily, this power was relinquished by the MPR by the Third Amendment of Article 1(2) which now stipulates that, "Sovereignty is in the hands of the people and is exercised in accordance with Constitution".

**Extensive Constitutional Debates.** According to Ellis, by its performance in reforming the 1945 Constitution, the MPR had transformed itself from a 'rubber stamp' parliament during the authoritarian New Order, to become an institution which debated in detail almost all

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<sup>1528</sup> Ibid.

<sup>1529</sup> Sekretariat Jenderal MPR/DPR RI, above n 1522, 20.

<sup>1530</sup> 'Dukungan Proses Amandemen UUD 1945 Memudar', *Kompas*, 1 July 2002. The Research and Development division of *Kompas* conducted the poll by asking 815 respondents who lived in Jakarta, Surabaya, Yogyakarta, Medan, Palembang, Samarinda, Manado and Makasar.

<sup>1531</sup> Lindsey, above n 99, 244.

<sup>1532</sup> Ellis, above n 934.

constitutional amendment proposals.<sup>1533</sup> Ellis further argues that the dynamic debates in the MPR involved a creative tension between political euphoria, after a transitional period of an authoritarian regime, and the right of its members to express different opinions.<sup>1534</sup> Ellis praises the process saying that “the four MPR sessions that have dealt with the constitutional review demonstrate development towards effective pluralist debate in the institutions of a democratic society”.<sup>1535</sup> Extensive constitutional debate obviously added to the quality of the amendments.

## **b. The Constitutional Commission**

As mentioned pressure to establish a Constitutional Commission strengthened over the course of the four amendment phases. The Coalition for a New Constitution was the pioneer advocate of such a body. In 2000, the Coalition only consisted of several non-governmental organizations. In 2001-2002, in order to have a wider representation, it brought a range of political and constitutional law experts and coalition worked hand-in-hand with the media to disseminate its commission proposal.<sup>1536</sup>

Yet, three factors made it difficult to establish the Commission in 1999-2002. First, the proposal to establish a Constitutional Commission failed because of the MPR’s formal position that it rejected a new Constitution. For the MPR, to replace the whole 1945 Constitution was impossible. The fear of a complete change of Constitution; the amendment of the preamble; the alteration of the state of ideology; and therefore, the possibility of establishment of an Islamic state made the mere notion of the new Constitution a nightmare for a majority of the MPR members. Therefore, Ellis argues that the Coalition made a mistake when it combined its demand for a Constitutional Commission with the demand for a new Constitution.<sup>1537</sup> If the coalition had not demanded a new Constitution, its proposal to establish the Commission might have been seriously discussed by the MPR.

Second, the establishment of a Commission had lost momentum. In other countries, Commissions were usually formed at the beginning of the constitutional reform process. For example, in Thailand, the Constitutional Drafting Assembly was established to start the 1996

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<sup>1533</sup> Ibid

<sup>1534</sup> Ibid.

<sup>1535</sup> Ibid.

<sup>1536</sup> Interview with Bambang Widjojanto, member of the Coalition for a New Constitution, 15 July 2003.

constitutional reform.<sup>1538</sup> In Indonesia, the strong legitimacy of the MPR made the idea to establish a Constitutional Commission unworkable during the First Amendment discussions. Alrasid argues that to establish a Constitutional Commission after the amendment had taken place was too late.<sup>1539</sup> In Kawamura's words, it is clear that the Commission had "lost its chance".<sup>1540</sup>

The late timing of the idea to establish the Commission made it an object of political bargaining, especially during the Fourth Amendment discussions. Some groups, both inside and outside the MPR, supported the Commission, but for a paradoxically very different reason: to *reject* the constitutional amendments. Permadi (PDIP) revealed that he would support a Constitutional Commission, but as a tool to reapply the original 1945 Constitution.<sup>1541</sup> This obviously directly threatened the original concept of a Constitutional Commission to reform the Constitution. During the 2002 MPR Annual session, therefore, six factions in the MPR found themselves rejecting the establishment of the Commission.<sup>1542</sup> So, for example, Lukman Hakim Saifuddin (PPP), who in the 2001 MPR Annual Session supported the Commission, worried in 2002 that the commission would annul the output of the four amendments.<sup>1543</sup>

The third reason why it was so difficult to establish the Commission was that although the pressure to form the Commission steadily increased from the Second to the Fourth amendment discussions, rejection from the MPR was also consistent. The proposal from the Coalition for a New Constitution to form the Constitutional Commission, without any members from the MPR, was unacceptable to most MPR members. As Ellis states, "It was unlikely that the MPR would accept a proposal to take the process almost fully out of their hands".<sup>1544</sup>

For Ellis, excluding all of members of the MPR from being members of the proposed Constitutional Commission to avoid political influence, was unrealistic. He argues that every Constitution mirrors political choices.<sup>1545</sup> He further argues that:

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<sup>1537</sup> Ibid 145.

<sup>1538</sup> Article 211 of the Thai Constitution of 1991.

<sup>1539</sup> 'Komisi Konstitusi tidak tepat dibentuk 2003', *Media Indonesia*, 10 August 2002.

<sup>1540</sup> Kawamura, above n 661, 53.

<sup>1541</sup> Interview with Permadi, member of the MPR/DPR from the PDIP, 19 June 2003.

<sup>1542</sup> 'Six Factions Reject Demand for Constitutional Commission', *The Jakarta Post*, 8 August 2002.

<sup>1543</sup> 'Komisi Konstitusi dikhawatirkan Anulir Hasil Amandemen', *Suara Pembaruan*, 7 August 2002.

<sup>1544</sup> Ellis, above n 662, 144.

<sup>1545</sup> Ibid.

[i]t is a mistake to believe that it is possible to ‘take the Constitution out of politics’ and hand it over completely to ‘independent’ experts: political judgments and choices are not only inevitable but an essential part of constitution-making.<sup>1546</sup>

### c. The Fake Constitutional Commission

Although the MPR finally issued a Decree to establish a Constitutional Commission, at the end of the 2002 MPR Annual Session, this Commission was far from what was expected. Tobing disclosed it was merely a political compromise to respond to the strong pressure from the public. He pointed out that the MPR merely established a ‘constitutional commission’ (with a lower case ‘c’s) but not a ‘Constitutional Commission’ (with capital letters).<sup>1547</sup> The authority of this ‘constitutional commission’, effectively set up in 2003, was designed to be very limited. I argue that:

[a] member of the MPR ... made the point that it was important to analyze all the commas and periods in the Constitution, and whether they were in the right place! Such limited authority will surely distort the exact meaning of a Constitutional Commission. Hence the commission is not deserving of its name; it is little more than a focus group to study the Constitution.<sup>1548</sup>

In addition to its very limited authority, the mandate of the Constitutional Commission was also very weak. It was subordinate not only to the MPR but also to the Working Body of the MPR.<sup>1549</sup> This means that the Commission would merely be a powerless assistant to the MPR. In this form, the Commission would have no power to design the structure of any new amendment.<sup>1550</sup> With such an inferior position, it was not difficult for the MPR to reject the Commission’s report, which thus became a useless document.<sup>1551</sup>

**Closing.** During the 1999-2002 constitution-making process, the MPR failed to maintain its initial strong legitimacy as a constitution-making body. The flawed process damaged the MPR’s reputation. On the other hand, the Constitutional Commission proposed by the public did not

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<sup>1546</sup> Ibid.

<sup>1547</sup> Van Zorge Report, above n 1382.

<sup>1548</sup> ‘Constitutional Commission not as big as Its name’, *The Jakarta Post*, 22 August 2003.

<sup>1549</sup> Ibid.

<sup>1550</sup> ‘Assembly Gears up to Establish Constitution Commission’, *The Jakarta Post*, 15 July 2003.

<sup>1551</sup> As at the date of writing of this thesis in February 2005, the MPR has never seriously considered the report submitted by the Constitutional Commission.

have sufficient political support to be established. In the end, however, continual criticism of the MPR and the pressures to establish a Constitutional Commission together created an effective public form of check and balance on the MPR as it went about reforming the 1945 Constitution.

#### **4. The Public Participation: Limited and badly Organized**

Public participation in the four amendments can be divided into two categories: the participation arranged by the MPR and that of the civil society (media and non-governmental organizations). The MPR failed to conduct comprehensive public participation and the participation it allowed was often partial and ad hoc. Fortunately, however, the civil society covered this shortcoming through active advocacy.

**MPR's Initiatives.** In the First Amendment, public participation arranged by the MPR was almost non-existent. The time limitation placed on the First Amendment discussions meant that participation could not be organized properly. During the Second Amendment discussions, the MPR was allowed a longer time for amending the Constitution and some of the time was used to involve the public in the amendment process and seminars and hearings were conducted.<sup>1552</sup> The members of the PAH I of 2000 visited 21 countries as part of a program called "international comparative studies". These studies, however, were more of a 'picnic' as, incredibly, there was no obligation for the members to make a comprehensive report after they had completed the visit.<sup>1553</sup> During the Third Amendment discussions, the MPR, responding to criticism from the civil society, formed an 'Expert Team', to help the amendment process. Yet most of this Team's recommendations were not adopted by the MPR.<sup>1554</sup> Lastly, during the Fourth Amendment discussions, public participation programs worked better than in the case of the previous amendments. It was only during this last amendment debate that the public had a wide opportunity to comment on the amendment proposals.<sup>1555</sup>

In short, the way that the MPR arranged the participation program continuously improved but did not leave the public sufficient time to discuss the amendment drafts. The MPR's seminars were mostly held in big hotels in metropolitan cities and people in rural areas - where most

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<sup>1552</sup> See Table 9.

<sup>1553</sup> Minutes of the 12<sup>th</sup> meeting of the PAH I, 11 February 2000.

<sup>1554</sup> See Table 13.

<sup>1555</sup> Minutes of the 3<sup>rd</sup> meeting of the Working Body, 4 June 2002, 175.



Indonesians live - had no opportunity to join the seminars. Compared to the public involvement in South Africa and Thailand, where hearings were held in rural areas, the MPR's programs failed to reach many people.

Further, the form of the media used by the MPR to inform the public about the amendments was also limited. There were no newsletters, television or radio programs or hotlines on the constitutional amendment, as had been provided in the South African case.<sup>1556</sup> Creative communication on the amendment drafts did not exist. This was different from the experience of South Africa, which had, for example, published human rights provisions in the form of a comic book.<sup>1557</sup> The only form of media developed by the MPR to inform the public was the MPR website. This, however, was only launched in 2001 – very late given that the amendment process had started in 1999. Moreover, a website would not be an effective form of media for the Indonesian public, most of whom have no access to the internet.

With these disorganized participation programs, and given the very limited information provided to the people, public involvement during the four amendments was insufficient. The public was treated more as an object of the amendment, rather than as a subject, despite it being supposedly the owner of the Constitution. Saunders's objective that the participation should be inclusive and active<sup>1558</sup> was, therefore, not achieved during the four amendment steps. There were no consultative activities that sought go beyond just educating a passive public.<sup>1559</sup> Indonesia was unsuccessful in mirroring the South African and Thai experiences of arranging public participation.

**Civil Society Initiatives.** Fortunately, the transitional period brought with it more open political conditions. This allowed more involvement from civil society to actively monitor the four amendment processes. The media should be applauded for actively reporting the amendment debates. In the MPR Sessions on the amendments, live broadcasting by the electronic media and special columns allocated by the printed media enabled viewers and readers to understand the amendment proposals. This media involvement transferred the amendment debates from the elite in the parliament building to the ordinary people on the street.

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<sup>1556</sup> Commonwealth Human Rights Initiative, above n 247, 19.

<sup>1557</sup> Ibid 20.

<sup>1558</sup> Saunders, above n 166, 11.

Among the NGOs, the Coalition for a New Constitution was the champion ‘sparring partner’ for the MPR. The NGO activists and political and constitutional law experts who joined the coalition played a significant role in coloring the amendment process and outcomes. Goenawan Mohamad comments that:

to produce a Constitution ... we need an extra-parliamentary movement that initiates and pushes for fresh ideas that are praiseworthy, something new, usually controversial, and inspiring.<sup>1560</sup>

Ali Masykur Musa acknowledged that, on the direct presidential election proposal, the intensive campaign of CETRO had influenced the decision of the MPR.<sup>1561</sup> Strong pressure from the coalition to establish an independent Constitutional Commission was also behind the intense debates on the Commission in the 2001 and 2002 MPR Annual Sessions. It was, likewise, the reason why at the end of 2002 the MPR finally issued a Decree on establishing the Commission, although the Decree gave the Commission very limited authority.<sup>1562</sup>

In sum, without the support of the media and the civil society, public participation in the four amendments would have mostly been very limited even then, the participation program was not fully successful. The MPR’s failure to arrange a comprehensive participation program has resulted in limited public acceptance of the four amendments. Further, the chance was missed for the public to acquire a greater sense of ownership of the Constitution<sup>1563</sup> through greater public consultation.

**Conclusion.** The Indonesian constitution-making process of 1999-2002 was not a truly democratic one. Some clear indications of the flawed process were the continually changing amendment schedule; contamination of the debate by some short-term political interests acting in bad faith; the MPR’s failure to win the people’s trust in its capacity as a constitution-making body; and limited and badly organized public participation.

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<sup>1559</sup> Rosen, above n 127, 294.

<sup>1560</sup> Goenawan Mohamad, ‘Konstitusi 2002’ (2002 Constitution), *Tempo*, 26 August – 1 September 2002.

<sup>1561</sup> Interview with Ali Masykur Musa, member of the PAH I, 23 July 2003.

<sup>1562</sup> Van Zorge Report, above n 1382.

<sup>1563</sup> Ihonvbere, above n 188, 346 — 347.

## B. An Unavoidably Messy Process

This section argues that one of the main reasons for the messy amendment process was because of fundamental perceptions of certain key aspects of the 1945 Constitution itself. Although this Constitution was widely and passionately criticized as undemocratic text, it was, and is still, seen by nationalist factions – including the military – as an important document which contains two crucial aspects for the survival of the country: the rejection of an Islamic state; and the imposition in its place of a nationalist state ideology, the *Pancasila*, contained in the preamble to the Constitution.

**Preserving the preamble.** Agreement to keep the preamble was, therefore, at the heart of all of the constitutional amendments. Andrew Ellis of the NDI argues that the preamble should be maintained as it is a “statement of principles of the nation and the legacy of the founding parents”.<sup>1564</sup> Tobing argues that:

... a Constitution should be based on ideas, and have an organizational structure. In this case, the idea is the preamble of the Constitution, and the structure is the country. Thus, any changes should be based on the preamble, which embodies the goals of sovereignty and welfare for the people.<sup>1565</sup>

As the leader of the nationalist camp, President Megawati of the PDIP was particularly keen to retain the preamble in its present form.<sup>1566</sup> She argued strongly that:

[t]he position to keep the preamble is non-negotiable. This Preamble does not merely consist of words, it mirrors the national spirit, soul and feelings of the founders and the freedom fighters.<sup>1567</sup>

The Preamble was thus more than just a symbolic text: it was a fundamental principle. Without the agreement to keep it, amendment would have been difficult if not perhaps impossible. Members of the MPR, especially from the nationalist faction, rejected the possibility of changing the preamble, saying it embraced what they believed to be the sacrosanct principles of the

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<sup>1564</sup> Andrew Ellis, *Reflection of the Forthcoming MPR Annual Session (2000)* <[http://www.vanzorgereport.com/report/popup/index.cfm?fa=ShowReport&pk\\_rpt\\_id=135&CFID=315606&CFTOKEN=71680888](http://www.vanzorgereport.com/report/popup/index.cfm?fa=ShowReport&pk_rpt_id=135&CFID=315606&CFTOKEN=71680888)> at 3 October 2003.

<sup>1565</sup> Van Zorge Report, above n 1382.

<sup>1566</sup> *Constitutional Change: The Charter Again*, Laksamana.net (2002) <<http://www.laksamana.net>> at 23 April 2002.

<sup>1567</sup> *Megawati dan Hamzah Haz Sepakat tidak Ada Voting*, above n 1351.

country: the *Pancasila* state ideology and the unitary state of the Republic of Indonesia.<sup>1568</sup> For them, the preamble should never be changed as it acknowledges the presence and urges the peaceful existence of diverse ethnic groups, cultures and religions in this country.<sup>1569</sup>

**The Nationalist and Islamic Political Streams.** The debate on maintaining the preamble again revealed two fundamental but different ideological groups in Indonesian politics: the nationalists and Islamic groups.<sup>1570</sup> In the 1999-2004 MPR, the nationalist groups consisted of the PDIP, TNI-Polri, Golkar, and PDKB (the Christian faction). The Islamic groups included the PPP, PBB and PDU, all strong advocates of the insertion of the 'seven words' of Jakarta Charter into the Constitution. The other four factions: the PKB, *Reformasi*, FUG and KKI, politically supported the stance of the nationalist groups, which rejected the Charter.

In fact, Irman G. Lanti argues that although there had been some changes in the political landscape after the 1999 elections, the basic Indonesian political streams remain unchanged.<sup>1571</sup> Likewise, Lindsey argues that despite having been independent for more than fifty years, and having enjoyed spectacular economic growth prior to the 1997 economic crisis, Indonesia's:

... basic political allegiances remain remarkably unchanged. They are still tightly structured around a characteristic combination of ethnic, religious and political loyalties that are historically little affected by political detail or particular political events.<sup>1572</sup>

The conflict between the two political streams, especially on the issue of the state and Islam, had been evident in the constitution-making process in 1945 and in the *Konstituante* of 1956-1959. Therefore, in the 1999-2002 amendment process, the nationalist faction was again afraid that the Islamic parties would use the momentum of constitutional reform to establish a preliminary constitutional basis for an Islamic state. This fear influenced almost all of the decision-making during the four amendment processes, including the decision to amend and not make a new Constitution, although in reality this amendment decision was inconsistent.

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<sup>1568</sup> 'Indonesia Needs to Rewrite Constitution: Coalition', *The Jakarta Post*, 6 August 2002.

<sup>1569</sup> 'Should We Amend or Replace the Basic Law', *The Jakarta Post*, 31 December 2001.

<sup>1570</sup> *Constitutional Change: The Charter Again*, above n 1566.

<sup>1571</sup> Irman G. Lanti, 'Back to the (Slightly Different) Future: Continuity and Change in Indonesian Politics' (Visiting Researchers Series No. 2, Institute of Southeast Asian Studies, 2001).

<sup>1572</sup> Lindsey, above n 99, 274.

The following paragraphs, however, argue that this inconsistency is understandable, or even necessary.

**Necessary Inconsistency.** As argued earlier in section A, the four amendments have effectively produced a new Constitution, but one that keeps the religious provisions and symbolism of the original 1945 Constitution. On the one hand, the outcome of this new Constitution is inconsistent with the amendment method declared by the MPR to reform the 1945 Constitution; on the other hand, I would argue that the step-by-step amendments were a safer way to renew the symbolic 1945 Constitution. If the goal of making a new Constitution was disclosed explicitly from the very beginning of the process, the constitutional reform would have failed because of strong reactions from the nationalist factions in the MPR.

While mostly acknowledging that the 1945 Constitution was vaguely worded, members of these nationalist factions were not prepared to have it discarded completely, more for emotional reasons than anything else.<sup>1573</sup> For them, replacing the 1945 Constitution would mean the 'death of the country'.<sup>1574</sup> The stronger rejection of constitutional amendment during the Fourth Amendment discussions, which might have led to a constitutional deadlock, was evidence that these nationalist factions had real power but that they realized too late that the amendment process had effectively produced a new Constitution. Tobing points out:

[t]o be honest most of the MPR members did not understand (the amendments). That is why many of them were startled when the changes were approved ... In many of the plenary meetings, nobody raised any real objections ... Many of them did not realize that.<sup>1575</sup>

Ellis argues that if the conservative groups had realized what was going on throughout the process, fundamental constitutional amendments might well have been deadlocked since the initial stages.<sup>1576</sup> This was because many PDIP members (the biggest faction in the MPR) were supporters of these conservative groups. Referring to these groups, Tobing pointed out that the resistance of some members of the PDIP to the amendments was for ideological reasons. He said:

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<sup>1573</sup> *Should We Amend or Replace the Basic Law*, above n 1569.

<sup>1574</sup> *Indonesia Needs to Rewrite Constitution: Coalition*, above n 1568.

<sup>1575</sup> Van Zorge Report, above n 1382.

<sup>1576</sup> Ellis, above n 934.

... for some members, the very structure of the original Constitution, which symbolized our struggle for freedom, was part of the ideology. With this in mind we have to be very careful ... the strongest resistance would come from within my own party (PDIP).<sup>1577</sup>

Tobing therefore argued that the declaration to amend rather than make a new Constitution was actually a strategy to secure the constitutional reform.<sup>1578</sup>

... the idea of amending the Constitution did not just arise suddenly – the intent and direction of the changes were set from the very beginning. We did it in stages, since we knew that if we tried to force these changes, the opposition would be much fiercer.<sup>1579</sup>

In this regard, the Indonesian situation was very different that of South Africa, Thailand and the Philippines. These countries were able to make completely new constitutions. The NDI argues that this is because in these three countries the previous Constitution had little or no credibility.<sup>1580</sup> The South African Constitution had been introduced by the apartheid regime; the Thai Constitution by the military; and the Philippines Constitution by former President Marcos. By contrast, in Indonesia, there are many who respect the 1945 Constitution as a symbol of Indonesia's independence.<sup>1581</sup> Goenawan Mohamad argues that:

[n]o matter what, we cannot make a completely new Constitution without dismissing the current parliament. We are not in a revolutionary phase. Indonesia is not like Thailand and South Africa in their early years after dictatorship. The 2002 Constitution<sup>1582</sup> was [drafted] following an election in which, with all its faults, we participated, and which we accepted.<sup>1583</sup>

Tobing, therefore, might have been right when he argued that:

... what we can do and must do is to optimize the opportunity brought forward by the amendment. To make use of the opportunity this country right now possesses, instead of wishing for something else, such as making a totally new Constitution, which had no

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<sup>1577</sup> Van Zorge Report, above n 1382.

<sup>1578</sup> Ibid.

<sup>1579</sup> Ibid.

<sup>1580</sup> National Democratic Institute, above n 1188, 7.

<sup>1581</sup> Ibid.

<sup>1582</sup> Mohammad names the 1945 Constitution after the four amendments as the 2002 Constitution.

<sup>1583</sup> Mohamad, above n 1486.

political consensus at all to begin with. What matters the most is the process and the substance, and not the formalities of the process and the result.<sup>1584</sup>

**The Compromise Political Interests is unavoidable.** Because the nationalist factions were afraid that radical change would have endangered the existence of the preamble and opened the possibility of the establishment of an Islamic state, the slow, patchy and tentative process marked by constant negotiation was unavoidable during the 1999-2002 amendment process conducted by the MPR. As Lindsey points out:

[c]ompromise, deal-making and uneven patchwork approach are thus inevitable, as democracy is negotiated clause by clause.<sup>1585</sup>

I share Lindsey's opinion and further argue that the political compromise has two sides: negative and positive. It can be negative when used to accommodate the short-term political interests of a strong party in a constitution-making body. On the other hand, it can be positive in accelerating the agreement between the different parties on difficult amendment proposals. Along the same lines, Goenawan Mohamad argues that:

[i]deas that are processed by people as a group cannot be kept "neat and round", but the "elongation" can be considered the product of a group, something owned by the group, and thus fitting to be upheld by the group ... through the compromise that brought about that "elongated" sentence, the Constitution was accepted and defended by all and, together with other compromises — particularly the matter of the Jakarta Charter — the Republic could be established.<sup>1586</sup>

Further Mohamad argues that the MPR was not merely a 'discussion room'. The MPR resembled more a market where ideas are "bargained for, and bought".<sup>1587</sup> In this process, a compromise between parties is unavoidable. Likewise, Ellis argues that the constitutional negotiations in Indonesia are:

... similar to most negotiations. Threats not to agree are traded in advance of the final decision-making meetings ... The biggest concessions may be made only in the last minute in marathon lobbying and drafting sessions.<sup>1588</sup>

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<sup>1584</sup> Jakob Tobing, 'Constitutional Amendments: A Brief Note on Indonesia's Case' (Paper presented at the International Symposium on "Constitutional and Human Rights in a Global Age: an Asia-Pacific Perspective", Canberra, 1<sup>st</sup> – 3<sup>rd</sup> December 2001, 3.

<sup>1585</sup> Ibid 276.

<sup>1586</sup> Goenawan Mohamad, above 1486.

<sup>1587</sup> Ibid.

<sup>1588</sup> Ellis, above n 662, 150.

This kind of last minute negotiation was evident during the Third and Fourth amendment discussions. The compromise in the negotiation meetings saved the constitutional reform agenda. If the negotiation meetings had failed to reach a compromise, a deadlock could have jeopardized the whole amendment process. Applauding the compromise at the end of the Fourth Amendment discussions, especially in relation to the rejection of the 'seven words' of the Jakarta Charter (the expanded implementation of *syariah*), the *Business Times* wrote:

... through consensus and horse-trading rather than outright voting, the changes pave the way for direct presidential election in 2004; force the powerful military out of Parliament, and, therefore, from frontline politics also by 2004; and reiterate the secular and ethnically diverse underpinnings of the nation's social fabric. To its credit, the ... MPR rejected calls for the inclusion of Islamic shariah law in the Constitution...<sup>1589</sup>

The urgency of the compromise is more significant, in relation to the last stage of the constitution-making process: approval. The difficulties of the approval process for the four amendments progressively increased as the substance of the amendment touched more crucial constitutional provisions. The First Amendment approval process was the easiest, while the Fourth Amendment ratification was the most difficult. In this most difficult approval process, the closed negotiation meetings, and compromise among the factions in the MPR, were unavoidable if the Fourth Amendment was to be ratified.

**Closing.** The constitutional reform process adopted in South Africa and Thailand was certainly a better model than the method adopted in Indonesia, if viewed in an abstract sense. However, neither of these countries faced the complex and explosive political issues of long-standing aspirations for an Islamic state and a history of half a century of political conflict between proponents of an Islamic state and supporters of the dominant ideology of a state based on non-Muslim nationalist principles. In the circumstances, the often-messy, uncertain and slow step-by-step process adopted in Indonesia was both a reasonable political compromise and perhaps the only way real change could be delivered to Indonesia's constitutional arrangements without major crisis.

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<sup>1589</sup> 'A New Chance to Get It Right in Indonesia', *Business Times* (Singapore), 13 August 2002.



## C. The Four Amendments: the Outcomes <sup>1590</sup>

This section evaluates the outcomes of the four amendments. The amended 1945 Constitution, is clearly a more democratic text than it was before the amendments. The provisions on the legislature, executive and judiciary and the provisions on Bill of Rights will be the focus of this evaluation to demonstrate that the amended Constitution allows for a clearer separation of powers and better protection for human rights than the original text. As discussed in Chapter Two, this is consistent with the notion that a democratic Constitution should, in particular, define how political power is efficiently controlled and how individual and societal rights are protected.

This section also compares the relevant constitutional provisions before and after the amendments and criticizes some shortcomings of the outcomes to show that further reform is still needed. Specifically, it outlines recommendations for further reform to the system of checks and balances.

### 1. Legislative Reform

#### a. Structural Reform

The four amendments have changed the structure of the parliament. The MPR, which had previously consisted of the DPR and additional functional groups - including the military - has changed to include the members of the DPR and the DPD (the Regional Representative Council).<sup>1591</sup> The members of the DPR represent political parties' interests, while the members of the DPD represent regional interests.<sup>1592</sup> Importantly, all members of the two chambers are now elected by the people. This has meant the end of the system of reserved seats for the military and other functional groups.

#### b. Functional Reform

**The MPR and Sovereignty.** A monumental change occurred when the Third Amendment stipulated that the 'sovereignty is in the hands of the people and is exercised in accordance

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<sup>1590</sup> All the Articles in this section, except otherwise mentioned, refer to the Articles in the 1945 Constitution. The clarification whether an article is the original (before amendment), or the First, Second, Third and Fourth Amendment will be clear from the footnote.

<sup>1591</sup> Article 2(1) of the Fourth Amendment.

<sup>1592</sup> Article 22C (1) *juncto* 22E (3) and (4).

with the Constitution'.<sup>1593</sup> This had the effect that the MPR is no longer the sole holder of sovereignty, is no longer the highest institution in the Republic and no longer holds unlimited powers.<sup>1594</sup>

The sovereignty amendment was followed by other functional reform of the MPR. Table 21 shows the MPR's power before and after the amendments. It demonstrates that the MPR now has more limited powers than it did to before the amendments. This highlights the fact that the MPR, as the constitution-making body, has been able to reform and limit its own powers.

**Table 21 The MPR: Before and After the Amendments**

<b>Provisions</b>	<b>Before the Amendments</b>	<b>After the Amendments</b>
<b>People's Sovereignty</b>	Monopolized by the MPR. <sup>1595</sup>	The MPR does not monopolize the sovereignty. Sovereignty shall be implemented in accordance with the Constitution. <sup>1596</sup>
<b>Position</b>	The highest state institution, with unlimited powers.	The MPR is one of several institutions, with limited powers.
<b>Presidential Election</b>	Elected by the MPR. <sup>1597</sup>	The MPR inaugurates the President and Vice President, who are directly elected by the people. <sup>1598</sup>
<b>The Broad Guidelines of state Policy (GBHN)</b>	Prepared by the MPR, the President should implement and account for implementation to the MPR. <sup>1599</sup>	The MPR does not have this authority.
<b>Constitutional amendment</b>	Amended and determined by the MPR. <sup>1600</sup>	The MPR still has these authorities. <sup>1601</sup> (although the amendment procedures has been changed).
<b>Presidential Impeachment</b>	Removed by the MPR. The procedure was not explicitly stipulated in the Constitution.	The MPR has the power to remove the President. This power is explicitly stipulated in detail in the Constitution. <sup>1602</sup>
<b>Vacant Presidency</b>	The Constitution was silent on this.	The MPR has the power to elect the President and/or Vice President, in the case that one or both of the positions become vacant. <sup>1603</sup>

<sup>1593</sup> Article 2(1) of the Third Amendment.

<sup>1594</sup> Komisi Konstitusi, 'Buku I: Naskah Akademik Kajian Komprehensif Komisi Konstitusi tentang Perubahan Undang-undang Dasar Negara Republik Indonesia Tahun 1945 (2004) 56.

<sup>1595</sup> Article 2 (1) of the 1945 Constitution.

<sup>1596</sup> Article 2 (1) of the Third Amendment.

<sup>1597</sup> Article 3 (2) of the 1945 Constitution.

<sup>1598</sup> Article 3 (2) of the Third Amendment.

<sup>1599</sup> Article 3 of the 1945 Constitution.

<sup>1600</sup> Articles 3 and 37 of the 1945 Constitution.

<sup>1601</sup> Articles 3 (1) and 37 of the Third and Fourth Amendments.

<sup>1602</sup> Articles 7A and 7B (5), (6) and (7) of the Third Amendment.

<sup>1603</sup> Article 8 (2) and (3) of the Third Amendment.

**DPR Reform.** Since the amendments, the DPR has become a very powerful legislative body. Isra argues that the amendments have, in fact, resulted in a 'supreme' DPR<sup>1604</sup> and the Constitution has thus shifted from being an executive-heavy Constitution to a DPR-heavy Constitution.<sup>1605</sup> I share Isra's opinion and would therefore modify the argument of the CSIS Team that the amendments have resulted in a legislative-heavy Constitution.<sup>1606</sup> The phrase 'legislative-heavy' assumes that both legislative bodies, the DPR *and* the DPD, have stronger powers than the other branches. The fact is, the DPD has far fewer legislative powers than the DPR.

Asshiddiqie points out to the DPR's involvement in the acceptance of foreign ambassadors<sup>1607</sup> as an example of how much more powerful the DPR has become since the amendments. He argues that this Article is not practical and breaches the international customs of diplomacy.<sup>1608</sup> Likewise, Falaakh points out that the requirement of DPR advice in appointing the ambassadors represents an unwarranted intervention of the legislative body in an executive matter.<sup>1609</sup> Further, with regard to receiving the foreign ambassadors, Falaakh argues that the DPR involvement is an intervention in matters relating to other countries.<sup>1610</sup> Asshiddiqie warns that this is an overreaction to the excessively powerful presidency under Soeharto and is dangerous, as it may cause a less-efficient diplomatic system.<sup>1611</sup> Indeed, as discussed in Chapter Four, the reason behind the DPR's role in receiving ambassadors was a reactive response to a particular incident between Indonesia and the Australian government rather than a considered policy change.<sup>1612</sup>

Table 22 shows how the DPR has shifted from a 'rubber stamp' to a 'supreme' organ of state.

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<sup>1604</sup> Saldi Isra, 'Penataan Lembaga Perwakilan Rakyat: Sistem Trikameral di Tengah Supremasi Dewan Perwakilan Rakyat' (2004) 1:1 *Jurnal Konstitusi* 128.

<sup>1605</sup> *Ibid.*

<sup>1606</sup> The CSIS Team, above n 1336, 260.

<sup>1607</sup> Article 13 (3) of the First Amendment.

<sup>1608</sup> Jimly Asshiddiqie, 'Telaah Akademis Atas Perubahan UUD 1945' (2001) 1:4 *Jurnal Demokrasi dan HAM*, 22.

<sup>1609</sup> Mohammad Fajrul Falaakh, *Presidensi dan Proses Legislasi Pasca Revisi Konstitusi (Parlementarisme Lewat Pintu Belakang?)*, (Paper presented at National Seminar on Meluruskan Jalan Reformasi, the University of Gadjah Mada, Yogyakarta, 25 – 27 September 2003) at <http://ugm.ac.id/seminar/reformasi/i-fajrullfalaakh.php> at 1 July 2004.

<sup>1610</sup> *Ibid.*

<sup>1611</sup> Jimly Asshiddiqie, 'Reformasi Menuju Indonesia Baru: Agenda Restrukturisasi Organisasi Negara, Pembaruan Hukum dan Masyarakat Madani' (Paper presented at the World Conference of the Indonesian Student Association, Chicago, 2000).

<sup>1612</sup> *Setelah Kosong Lima Bulan*, above n 876.

**Table 22 The DPR: Before and After the Amendments**

No.	Before	After
1.	The Constitution did not clearly stipulate that the DPR had the legislative, budgetary and supervisory functions.	Clearly stipulated. <sup>1613</sup>
2.	The Constitution did not stipulate that the DPR had the right of interpellation, the right to carry out inquiries and the right to express its opinion.	Stipulated. <sup>1614</sup>
3.	The Constitution did not stipulate that each of the members of the DPR had the right to submit questions, to convey suggestions and opinions, and a right of immunity.	Stipulated. <sup>1615</sup>
4.	The Constitution stipulated that the DPR's agreement was required to declare war, make peace and conclude treaties; and to promulgate a government regulation in lieu of law to become a statute.	Has similar powers. <sup>1616</sup>
5.	The Constitution did not stipulate that the DPR's agreement was required: to make an international agreement; to approve and confirm the candidate judges of the Supreme Court; to appoint and remove the members of the Judicial Commission.	Stipulated. <sup>1617</sup>
6.	The Constitution did not stipulate that the DPR's advice is required: to appoint ambassadors and receive ambassadors of other countries; and to grant amnesties and abolition.	Stipulated. <sup>1618</sup>
7.	The Constitution did not stipulate that the DPR selected the members of the state Audit Board, and three judges of the Constitutional Court.	Stipulated. <sup>1619</sup>
8.	The Constitution stipulated that the DPR received the report from the state Audit Board.	Has similar powers. <sup>1620</sup>
9.	The Constitution did not clearly stipulate the DPR's role in an impeachment process.	Clearly stipulated. <sup>1621</sup>
10.	The elucidation of the Constitution stipulated that the President could not dissolve the DPR .	Clearly stipulated in the body of the Constitution. <sup>1622</sup>

<sup>1613</sup> Article 20A (1) of the Second Amendment.

<sup>1614</sup> Article 20A (2) of the Second Amendment.

<sup>1615</sup> Article 20A (3) of the Second Amendment.

<sup>1616</sup> Articles 11 (1) and 22 of the 1945 Constitution.

<sup>1617</sup> Articles 11 (2), 24A (3) and 24B (3) of the Second and Third Amendments.

<sup>1618</sup> Articles 13 (2) (3) and 14 (2) of the First Amendment.

<sup>1619</sup> Article 23F (1) of the Third Amendment.

<sup>1620</sup> Article 23E (2) of the Third Amendment.

<sup>1621</sup> Articles 7A and 7B (1) (2) (3) (4) (5) of the Third Amendment.

<sup>1622</sup> Article 7C of the Third Amendment.

Another of the monumental achievements of the amendment process occurred when the First Amendment withdrew the power to make statutes from the President, and gave the power to the DPR. Manan argues that this amendment established clearer checks and balances between the President, as the executive body, and the DPR, as the legislative body.<sup>1623</sup> It also addressed the previous unsatisfactory situation, whereby the President had the stronger authority to make statutes. This concept had resulted in wide-spread abuse of powers under Soeharto's authoritarian regime.<sup>1624</sup> Nevertheless, the legislative role of the DPR remains vulnerable. All the Bills must be approved by both the President and the DPR through discussion to become law<sup>1625</sup> and the President retains an absolute veto power to reject any Bills at this discussion stage,<sup>1626</sup> although as explained later, once the President agrees he or she cannot later veto by refusing to sign a Bill: within 30 days it will become law regardless such a refusal (Article 20(5)).

**The Establishment of the DPD.** A further legislative reform was the establishment of a regional 'senate' (DPD). This new institution was intended to give regional communities a more active role in the governance, in line with the idea to apply the regional autonomy.<sup>1627</sup> The DPD, however, was given a very limited authority, especially when compared to the DPR. This is yet another example of compromise in the amendment process.

### c. Shortcomings

Throughout the amendment process, the idea of establishing a strong bicameral parliament was widely advocated. The idea was to establish a clearer checks and balances system in the parliament. This is consistent with Sartori's argument that:

[b]icameralism is upheld against unicameralism on the argument that two Houses are a safety valve, and that concentration off all legislative power in just one body is not only dangerous but also unwise: for two eyes are better than one.<sup>1628</sup>

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<sup>1623</sup> Bagir Manan, DPR, DPD dan MPR dalam UUD 1945 Baru (2003) 20 – 22.

<sup>1624</sup> Ibid 21.

<sup>1625</sup> Article 20 (2) (3) of the First Amendment.

<sup>1626</sup> Falaakh, above n 1609.

<sup>1627</sup> Ibid 53.

<sup>1628</sup> Sartori, above n 71, 184.

In the end, however, a strong bicameral parliament was not achieved as, for its opponents, it meant that Indonesia might effectively become a federal state, an option they strongly oppose for entrenched ideological reasons.<sup>1629</sup> Yusuf (Golkar) reveals that his party initially supported the proposal of a strong bicameral parliament. However, as part of a compromise with PDIP (many of the members of which opposed the proposal) Golkar agreed to adopt a 'soft' bicameral system.<sup>1630</sup>

As a result, the DPD now lacks strong legislative powers.<sup>1631</sup> It can only submit Bills to the DPR and then participate in the discussion of Bills related to regional autonomy; central-region relations; the formation, expansion and merger of regions; the management of natural resources and other economic resources; and the financial balance between the central and the regions.<sup>1632</sup> The DPD can also advise the DPR on Bills on the state Budget, taxation, education and religion.<sup>1633</sup> However, it is not involved in the ratification process of any of these Bills. This is a matter solely for the DPR and the President.<sup>1634</sup> Further, the DPD has the authority to supervise the implementation of the laws of these matters, but does not have the authority to take further action. This action is a matter for the DPR, to which the DPD submits the results of its supervision.<sup>1635</sup> Consequently, Manan argues that the DPD is only a complementary, rather than supplementary, chamber to the DPR.<sup>1636</sup>

Another potential problem regarding the DPD is the absence in the amended 1945 Constitution of any detailed provisions regarding the DPD's rights and, in particular, the rights of its members. This is seen, for example, in the absence of any articles granting immunity to DPD members to match that enjoyed by members of the DPR.

**Not a Bicameral but a Tricameral Parliament.** Isra therefore argues that the amendments have not resulted in a bicameral parliament <sup>1637</sup> but have created a strange tricameral

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<sup>1629</sup> Bima Arya Sugiarto, 'Sidang Tahunan MPR 2002: Menuju Institusionalisasi, Menyelamatkan Transisi' (2002) 2 *Analisis CSIS*, 167 – 168.

<sup>1630</sup> Interview with Slamet Effendy Yusuf, the Vice Chairperson of the PAH I, 19 June 2003.

<sup>1631</sup> Denny Indrayana, 'Ancaman Tirani DPR', *Kompas*, 2 September 2002.

<sup>1632</sup> Article 22D (2) of the Third Amendment.

<sup>1633</sup> *Ibid.*

<sup>1634</sup> Article 20 of the First Amendment.

<sup>1635</sup> Article 22D of the Third Amendment.

<sup>1636</sup> Manan, above n 1623, 56.

<sup>1637</sup> The CSIS Team, above n 1403, 260.

parliament with the MPR, DPR and DPD as the three chambers.<sup>1638</sup> Likewise, Manan argues that the MPR is not a joint session of the DPR and the DPD,<sup>1639</sup> because it is not a combination of the DPR and DPD as institutions, but merely a combination of their members in a third institution,<sup>1640</sup> because the MPR still has its own powers, exclusive of those of the DPR and the DPD.<sup>1641</sup> Consequently, in reality, Indonesia now has three chambers – DPR, DPD and MPR – with tension in the distribution of real power among them, but with the DPR apparently dominant.

#### **d. Recommendations**

To address these shortcomings, it is important to further reform the constitutional structure and powers of the MPR, DPR and DPD. The DPD should be given stronger powers, compared to what it has under the current amendments. As is currently the case with the DPR, the DPD should be granted some rights to exercise its legislative powers, as well as immunity rights for its members. The MPR should then become merely a joint session of the two chambers, and not a separate institution. Only in this way can the idea of a strong bicameral system for Indonesian be clearly achieved. This would allow a stronger DPD to strengthen the new checks and balances system by preventing the DPR from being a virtually uncontrollable legislature.

## **2. Executive Reform**

### **a. Towards a Conventional Presidential System**

Ellis argues that, before the amendments, Indonesia's so-called presidential system was not 'presidential' in the sense the term is understood in the United States and the Philippines, because Indonesian presidents were not directly elected and could be discharged by MPR vote.<sup>1642</sup> Since the amendments, however, Indonesia has adopted this more 'conventional presidential system' model.<sup>1643</sup> It fits the characteristics set by Arendt Lijphart and Giovanni Sartori. Lijphart argues that a presidential system has three specific characteristics: (i) a single

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<sup>1638</sup> Isra, above n 1604, 129.

<sup>1639</sup> Manan, above n 1623, 75.

<sup>1640</sup> Article 2(1) of the Fourth Amendment.

<sup>1641</sup> Jimly Asshiddiqie, *Format Kelembagaan Negara dan Pergeseran Kekuasaan dalam UUD 1945* (2004) 14; Manan, above n 1623, 5, 55.

<sup>1642</sup> Ellis, above n 662, 119 — 120.

<sup>1643</sup> *Ibid* 152.

person, rather than collegiate, executive; (ii) an executive directly elected by the people; and (iii) a fixed tenure that cannot be discharged by a parliamentary vote.<sup>1644</sup> Sartori argues that a political system is presidential if the President: (i) is selected by a popular election; (ii) cannot be discharged by a parliamentary vote, during his or her tenure; and (iii) leads the government that he or she appoints.<sup>1645</sup>

Table 23 shows the Indonesian presidential system before and after the amendments.

**Table 23 The Presidential System: Before and After the Amendments**

Provisions	Before	After
<b>One Person or Collegiate</b>	One Person.	One person. <sup>1646</sup>
<b>Status</b>	Chief of Executive.	The same. <sup>1647</sup>
<b>Election Process</b>	Indirect, by the MPR.	Directly elected by the people. <sup>1648</sup>
<b>Tenure</b>	<ul style="list-style-type: none"> <li>▪ Unlimited, could be re-elected every 5 years.<sup>1649</sup></li> </ul>	<ul style="list-style-type: none"> <li>▪ Limited for a maximum two terms of 5 years.<sup>1650</sup></li> </ul>
	<ul style="list-style-type: none"> <li>▪ Not fixed, easily removed.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Fixed, not easily removed.<sup>1651</sup></li> </ul>
<b>Legislative Powers</b>	More dominant than the DPR.	Shares powers with the DPR and DPD.
<b>Appointment and removal Powers of high ranking state officials.</b>	Not clearly stipulated. In practice, these powers are, therefore, unlimited.	Limited.
<b>Impeachment Procedure:</b>		
<ul style="list-style-type: none"> <li>▪ <b>Legal Basis</b></li> </ul>	Generally mentioned in the elucidation of the Constitution, and was mostly stipulated in an MPR Decree.	Stipulated in the Constitution. <sup>1652</sup>
<ul style="list-style-type: none"> <li>▪ <b>Reasons</b></li> </ul>	More political than legal: if the President 'truly breached' state policy and the Constitution.	More criminal. That is if the President is convicted of 'treason, corruption, other high crimes or misdemeanors, or proven to no longer fulfill the

<sup>1644</sup> Arendt Lijphart, *Pattern of Democracy* (1999) 116 — 142.

<sup>1645</sup> Sartori, above 71, 84.

<sup>1646</sup> Article 4 of the 1945 Constitution.

<sup>1647</sup> Article 4(1) of the 1945 Constitution.

<sup>1648</sup> Article 6A of the Third and Fourth Amendments.

<sup>1649</sup> Article 7 of the 1945 Constitution.

<sup>1650</sup> Article 7 of the First Amendment.

<sup>1651</sup> Articles 7, 7A and 7B of the First and Third Amendments.

<sup>1652</sup> Articles 7A and 7B of the Third Amendment.



		requirements of the office of President'. <sup>1653</sup>
▪ <b>Judicial Branch</b>	Not involved in the process.	Involved. The Constitutional Court shall investigate, try and decide on a recommendation by the DPR that the President should be impeached. <sup>1654</sup>
▪ <b>Requirement</b>	Easier. A simple majority vote, which rejects the accountability speech, could impeach a President.	More difficult. The process requires the decision-making in the DPR, Constitutional Court and MPR. Only an absolute majority vote in the DPR, a guilty decision in the Court and another absolute majority vote in the MPR can impeach a President. <sup>1655</sup>

**Executive Powers.** Table 23 demonstrates that Indonesia now enjoys a better system of checks and balances on presidential powers. Although the direct presidential election strengthens the legitimacy of the President, this does not mean that the power of President will be unlimited. The President's removal and appointment power of high ranking state officials is better regulated. For example, under the original 1945 Constitution, there were no provisions on how the members of the MPR, DPR, BPK and Supreme Court Judges were to be elected or appointed. Consequently, President Soeharto managed to choose loyalists as members of these institutions. These "President's men" contributed to a general absence of institutional controls over the President for most of the New Order period. The amendments directly addressed these problems. Now, for example:

- the members of MPR, DPR and DPD shall be elected by the people;<sup>1656</sup>
- the members of BPK shall be chosen by the DPR, taking into consideration the advice of the DPD, and approved by the President;<sup>1657</sup> and
- the names of candidates for appointment as a justice of the Supreme Court shall be submitted by the Judicial Commission to the DPR and then be confirmed by the President.

<sup>1658</sup>

**Legislative Powers.** The legislative power, which was previously mainly dominated by the President, has now shifted to become a power of the DPR,<sup>1659</sup> with little participation by the

<sup>1653</sup> Article 7A of the Third Amendment.

<sup>1654</sup> Article 7B of the Third Amendment.

<sup>1655</sup> Article 7B of the Third Amendment.

<sup>1656</sup> Article 2(1) of the Fourth Amendment.

<sup>1657</sup> Article 23F (1) of the Third Amendment.

<sup>1658</sup> Article 24A (3) of the Third Amendment.

DPD (as mentioned). The President, however, still has a significant legislative power. Bills are discussed and must be assented to by both the DPR and President at this stage.<sup>1660</sup> This Presidential consent requirement is basically the 'veto right' for the President. This right is stronger than the veto right of the President of the United States. In Indonesia, if the President rejects a Bill there is no mechanism by which the DPR and/or the DPD can overrule such a rejection. However, if the President does give assent at this stage he or she may not later change his or her mind and refuse to sign the Bill into law. Article 20(5) provides that a Bill agreed upon by both the President and DPR will become law in 30 days, in such circumstances. To strengthen the system of checks and balances, however, the President's legislative powers should therefore be further reformed by being reduced or limited by giving the DPR and DPD an American-style right to counter veto a discussion stage refusal by the President. The section below that deals with recommendations will address this reform.

**Judicial Powers.** As to the judicial branch, the potential for Presidential intervention has been reduced by the amendments. For example, the President's power to grant pardons and restoration of rights is now limited by the Supreme Court's advice; the President's power to grant amnesties and abolition is restricted by the DPR's advice;<sup>1661</sup> the President is only granted the power to appoint and remove members of the Judicial Commission, with the agreement of the DPR;<sup>1662</sup> the President has only limited power in confirming Supreme Court's judges because the names of candidates must be previously submitted by the Judicial Commission to the DPR for approval; and the President has to share the power to appoint the nine judges of Constitutional Court with the DPR and Supreme Court, each of which has the authority to appoint three judges.<sup>1663</sup>

**Impeachment.** The impeachment process created by the amendments is much more detailed than before. The current Indonesian procedure is similar to that of the United States. Table 23 and Table 11, on impeachment, demonstrate this similarity. In terms of the reasons for impeachment, Indonesia has adopted almost the same criteria as the United States, with only 'corruption' added as an additional ground.

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<sup>1659</sup> Article 5(1) and 20 (1) (5) of the First Amendment.

<sup>1660</sup> Article 20(2) (3) of the First Amendment.

<sup>1661</sup> Article 14(1) (2) of the First Amendment.

<sup>1662</sup> Article 24B (3) of the Third Amendment.

<sup>1663</sup> Article 24C (3) of the Third Amendment.

## b. Shortcomings

There are two political compromises which have resulted in shortcomings in relation to the executive branch and both relate to the election of the President. The first relates to the requirements for becoming a presidential candidate. The Constitution stipulates that a presidential candidate “must be mentally and physically able to carry out the duties and obligations of the President and Vice-President”.<sup>1664</sup> This requirement was closely related to the blindness of Abdurrahman Wahid. In the amendment debates, the original proposal required mental and physical ‘health’. In the end, the factions in the MPR finally agreed to change the word ‘health’ to ‘ability’ but this ‘ability’ requirement is ambiguous, and tends to discriminate against people with disability. The disqualification of Abdurrahman Wahid as a candidate in the 2004 Presidential election by the Electoral Commission is a clear example of this.

The second shortcoming is the monopoly held by political parties in proposing presidential candidates.<sup>1665</sup> This provision blocks the possibility of independent presidential candidates and weakens the idea of a ‘direct’ presidential election, because candidates must first be approved by a party. Further, the provision is another example of the political bias of the constitution-making body (MPR), most members of which came from political parties themselves.

## c. Recommendations

**Further limitation of Presidential Legislative Powers.** As discussed above, the current constitutional provisions enable the President to block any Bills which he or she does not support. The DPR and DPD, as the legislative bodies, do not have a mechanism to overrule this presidential ‘veto right’. To strengthen the system of checks and balances, it is crucial, therefore, to grant the DPR and DPD an American-style right to counter-veto a discussion stage refusal by the President.

**Presidential candidacy requirements.** To avoid discrimination, the mental and physical ability requirements should be removed. Indonesia should consider only mentioning common

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<sup>1664</sup> Article 6(1) of the Third Amendment.

<sup>1665</sup> Article 6A (2) of the Third Amendment.

requirements such as citizenship and minimum age, as stipulated in the United States' and the Philippines' constitutions.<sup>1666</sup>

**Independent Presidential Candidate.** Independent presidential candidates should be given the opportunity to run for the presidency. The monopoly of political parties over the nomination of a presidential candidate should be ended. This is essential to strengthen participatory democracy.<sup>1667</sup>

### 3. Judicial Reform

#### a. Structural Reform

There are two main judicial reforms: first, in addition to Article 1(3) of the Third Amendment, which expressly stipulates that Indonesia is a state based on Law,<sup>1668</sup> the Third Amendment further strengthens judicial reform by explicitly inserting the 'independence of the judiciary' principle into the Constitution.<sup>1669</sup> This principle had previously only been stipulated in the elucidation of the Constitution and not in the text.

Second, compared to the executive and legislative bodies, the structural reforms to the judiciary are more comprehensive. The Third Amendment established two new institutions: the Constitutional Court and Judicial Commission. The Court has an equal position to the Supreme Court, but with a different jurisdiction. The decision to form a new court is a better solution than giving the new judicial powers to the Supreme Court, given the acute corruption problems in the Supreme and existing lower level courts. As Lindsey points out, concern about the integrity of existing courts was, in fact, one of the key reasons for the establishment of the new Court.<sup>1670</sup>

Table 24 shows the judicial branch before and after the amendments.

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<sup>1666</sup> Article II Section 1 of the United States America and Article VII Section 2 of the Philippines' Constitution.

<sup>1667</sup> Komisi Konstitusi, above n 1594, 51.

<sup>1668</sup> Article 1(3) of the Third Amendment.

<sup>1669</sup> Article 24(1) of the Third Amendment.

<sup>1670</sup> Lindsey, above n 99, 261.

**Table 24 The Judiciary: Before and After the Amendments**

	<b>Before</b>	<b>After</b>
<b>Independence</b>	Stipulated in the elucidation.	Stipulated in the body of the Constitution. <sup>1671</sup>
<b>Institutions</b>	The Supreme Court and its lower level courts.	The Supreme Court, lower level courts, Constitutional Court and Judicial Commission. <sup>1672</sup>
<b>Judicial review of a statute</b>	Non-existent.	Performed by the Constitutional Court. <sup>1673</sup>
<b>Dispute settlement between state institutions</b>	Non-existent.	Performed by the Constitutional Court. <sup>1674</sup>
<b>Political parties dissolution procedure</b>	Non-existent.	Performed by the Constitutional Court. <sup>1675</sup>
<b>Dispute settlement of general elections results</b>	Non-existent.	Performed by the Constitutional Court. <sup>1676</sup>
<b>Involvement in the impeachment</b>	Non-existent.	Performed by the Constitutional Court. <sup>1677</sup>
<b>Appointment and removal of judges</b>	Unclear, in practice was monopolized by the President.	<ul style="list-style-type: none"> <li>▪ For the judges of the Supreme Court, this is a matter for the Judicial Commission, the DPR and President.<sup>1678</sup></li> <li>▪ For the Constitutional Court, this is a matter for the President, DPR and Supreme Court.<sup>1679</sup></li> </ul>

**b. Judicial Review**

The constitutional powers given to the Constitutional Court significantly contribute to the system of checks and balances. Lindsey argues that:

<sup>1671</sup> Article 24(1) of the Third Amendment.

<sup>1672</sup> Articles 24(2) and 24B of the Third Amendment.

<sup>1673</sup> Article 24C (1) of the Third Amendment.

<sup>1674</sup> Ibid.

<sup>1675</sup> Ibid.

<sup>1676</sup> Ibid.

<sup>1677</sup> Article 24C (2) of the Third Amendment.

<sup>1678</sup> Article 24A (3) (4) of the Third Amendment.

<sup>1679</sup> Article 24C (3) of the Third Amendment.

... the new Constitutional Court has the potential to radically transform the Indonesian judicial and legislative relationship and create a new check on the conduct of lawmakers and the presidency.<sup>1680</sup>

One of the crucial powers newly granted is judicial review of statute, something which was non-existent prior to the Third Amendment. Indeed, within one year of its establishment in 2003, the Constitutional Court had “won a reputation for competence and independence” through its exercise of this new power.<sup>1681</sup>

**Communists’ Decision.** One of the new Court’s most significant decisions related to the question of the status of former communists. The Court ruled that Article 60g of Law No. 12 of 2003, on legislative elections, was repugnant to the Constitution, which guarantees equality before the law and equal rights for all citizens.<sup>1682</sup> The Article stipulated that, “members of the outlawed Indonesian Communist Party (PKI), including its mass organizations, or individuals who are either directly or indirectly involved in the G30S/PKI<sup>1683</sup> movement or other outlawed organization” are barred from becoming legislators at all levels of state administration. The *Jakarta Post* applauded the striking down of this provision, arguing that, “a milestone has been laid in Indonesia’s contemporary history that could well have far-reaching implications for the future of democracy in this country”.<sup>1684</sup>

**Prospectivity Decision.** However, it is important to note that the litigants in the communists’ case still could not be elected in the 2004 elections, despite the Court’s ruling. This is because the Court also ruled that its decision could only apply prospectively, and therefore could not apply to the litigants who actually won the decision. The Court relied on Article 58 of the Law No. 24 of 2003, on the Constitutional Court which provided that a, “ ... statute that is being reviewed by the Constitutional Court remains in force, before there is a decision that declares that the statute conflicts with the Constitution”.

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<sup>1680</sup> Lindsey, above n 99, 261.

<sup>1681</sup> Tim Lindsey, Simon Butt and Ross Clarke, ‘Review is not a Release’, *The Australian*, 27 July 2004.

<sup>1682</sup> Mahkamah Konstitusi, Putusan Perkara Nomor 011-017/PUU-I/2003, 28 – 32.

<sup>1683</sup> This is a reference to the so called *Gerakan 30 September* (30 September Movement) and the PKI (*Partai Komunis Indonesia*, Indonesian Communist Party), both alleged to have launched a supposed coup attempt on 30 September 1965. This incident was followed with mass killings and jailing of leftists by military and Islamic organizations. It also led to Soeharto’s rise to power. The widely accepted allegations of PKI involvement have, however, been openly questioned, especially, since the fall of Soeharto.

<sup>1684</sup> ‘PKI One Barrier Removed’, *The Jakarta Post*, 26 February 2004.

This prospective decision applies to all of the Court's decisions, including an important later decision related to the Bali bombings in 2002. In the case of Masykur Abdul Kadir, one of the persons accused of the bombings, the Court ruled that the Law No 16 of 2002, which retrospectively applied the Law No. 15 on Terrorism to the Bali bombing case, was unconstitutional. The Court decided that Law No. 16 was thus in conflict with Article 28I of the Second Amendment, which expressly stipulates that the, "right not to be prosecuted under retrospective laws are basic human rights that may not be interfered with under any circumstances at all".

In commenting on this Kadir's case, Lindsey and Butt question the policy of exclusive prospective implementation of decisions.<sup>1685</sup> They agree with the Court's decision on 28(1), as unpalatable as it might be, calling it, "a reasonable finding to make", as a matter of law.<sup>1686</sup> However, they argue that only applying that decision prospectively (as still occurs in some civil law countries) creates an absurd situation. It means that a litigant can never receive the benefit of winning his or her case, and so there would be no point for him or her to try his or her case. Judicial review may thus rendered largely useless by this ruling.<sup>1687</sup>

### c. Recommendation

**Judicial Review's decision.** Judicial review of statute gives the Constitutional Court a power to control the legislative powers of the DPR, President and the DPD. However, in practice, the Court's decision to apply its decision only prospectively will significantly reduce the effectiveness of this review power. This prospective decision policy should therefore be changed. A decision of the Constitution Court should annul an unconstitutional law, starting from the moment it was promulgated. This should be clearly stipulated in the Law on the Constitutional Court or even in the Constitution itself.

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<sup>1685</sup> Tim Lindsey and Simon Butt, 'Independence of the Judiciary at Stake, not the Bali Bombers' Fate', *The Sydney Morning Herald*, 30 July 2004; Tim Lindsey and Simon Butt, 'Indonesian Judiciary in Constitutional Crisis (Parts 1 and 2)', *The Jakarta Post*, 6 – 7 August 2004.

<sup>1686</sup> Lindsey, But and Clarke, above n 1681.

## 4. Human Rights Reform

### a. Impressive Reform

The original 1945 Constitution lacked sufficient human rights provisions.<sup>1688</sup> This was one of the biggest shortcomings addressed through the amendments. Kawamura, for example, argues that:

[i]f Indonesia intends to become a democratic state, establishment of constitutional guarantee of human rights and freedom as inalienable rights of human beings certainly is one of the top priority tasks.<sup>1689</sup>

Indeed after the Second Amendment, the human rights protections were more impressive, on paper at least. Clarke argues that the amendment on the Bill of Rights is “the first meaningful protection of human rights in Indonesia’s 1945 Constitution”.<sup>1690</sup> Clarke further argues that the amendment represents “a radical shift in Indonesia’s constitutional philosophy from essentially authoritarian to a more liberal-democratic model”.<sup>1691</sup> Similarly, Lindsey argues that the long and impressive Chapter XA on Human Rights succeeds in shifting the original 1945 Constitution from a document which guaranteed few human rights, to one which, in a formal sense at least, provides more extensive human rights protection than do many developed states.<sup>1692</sup>

### b. Shortcomings

There are, however, two shortcomings in the human rights provisions. The first is relatively minor, in relation to duplication of provisions: for example, both Articles 27(1) and 28D (1) stipulate equality before the law.<sup>1693</sup> The second, however, is a major shortcoming. It relates another aspects of Article 28I (1) (the non-retrospectivity provision), discussed earlier.<sup>1694</sup>

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<sup>1687</sup> Lindsey and Butt, above n 1685.

<sup>1688</sup> Susanti, above n 697, 3.

<sup>1689</sup> Kawamura, above 1106, 2.

<sup>1690</sup> Clarke, above n 1060, 3.

<sup>1691</sup> Ibid.

<sup>1692</sup> Lindsey, above n 99, 254.

<sup>1693</sup> Komisi Konstitusi, above n 1594, 90.

<sup>1694</sup> This non-retrospective provision has been discussed in detail in Chapter Five.



**Non-retrospectivity.** The problem is not the non-retrospectivity provision itself. Despite being widely debated, the notion of a law not being applied retrospectively has been adopted in many countries and is a norm of international law, although with qualifications.<sup>1695</sup> For example, at the level of a Constitution, Article I Section 8 of the Constitution of the United States stipulates that, “No Bill of Attainder or ex post facto Law shall be passed”. The problem for Indonesia is that the Second Amendment stipulates that the non-retrospectivity provision “may not be interfered with under any circumstances at all”.<sup>1696</sup> This is against international norms, which are usually read by Courts as gratifying retrospectivity prohibitions. Clarke, for example, argues that, “[the] most established exception to the principle of non-retrospectivity is crimes against humanity”.<sup>1697</sup> This exception cannot apply in Indonesia as the Constitution now stands and this has serious implications for human rights prosecutions in relation to abuses committed, for example, under the New Order by the military.

### c. Recommendations

Because of these two shortcomings, further reform of the Bill of Rights provisions is needed. First, the duplication of the human rights provisions should be fixed; second, the non-retrospectivity provision phrase (“may not be interfered with under any circumstances at all”) should be deleted. This deletion does not mean that the principle of non-retrospectivity is not recognized under the Constitution. It simply allows for exception in special cases, such as crimes against humanity.

## 5. The Nationalism v. Islamic State Constitutional Debates

Chapter XI, Article 29 of the 1945 Constitution, on Religion, was the only chapter which was not altered by the 1999-2002 constitutional reforms. The rejection of the proposal to insert the ‘seven words’ of the Jakarta Charter into Article 29(1) was more evidence that the debates on nationalism and Islamic state are sensitive and crucial issues in Indonesian constitutional history. The 1999-2002 constitutional debates on the insertion of the Jakarta Charter, in fact, repeated the same debates which had taken place in 1945 and 1956-1959. From these three debates the outcome has always been maintaining the preamble (*Pancasila*) and rejection of

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<sup>1695</sup> Clarke, above n 1060, 8 – 14.

<sup>1696</sup> Article 28l (1) of the Second Amendment.

<sup>1697</sup> Clarke, above n 1060, 11.

the insertion of *syariah* into the Constitution. This same outcome is a strong evidence that the demands to maintain the nationalist state ideology *Pancasila* and Article 29 as they currently stand is the preferred option of the majority of social groups in Indonesia.

The possibility that both the preamble (*Pancasila*) and Article 29 should be entrenched in their current forms to try to resolve the difficult relationship between Islam and state should therefore be given careful consideration. This would mean that the preamble and Article 29 should explicitly be identified as non-amendable provisions. This kind of provision is legitimate from a constitutional law perspective. For example, in France, the form of Republic “shall not be the object of an amendment”.<sup>1698</sup> In Indonesia, the Fourth Amendment has stipulated that the form of the unitary state may not be amended.<sup>1699</sup>

**Conclusion.** It is clear that much remains to be done. However, the basic conditions are in place to make the constitutional system work.<sup>1700</sup> The *Jakarta Post* has stated that whatever shortcomings one finds in the four amendments, “they still stand a better chance than the original text in sparing Indonesia from being plunged back into darkness once again”.<sup>1701</sup> Ellis and Yudhini argue that the, “complete package of amendment is consistent and is good enough”.<sup>1702</sup> In commenting on the process and the outcome, Lindsey argues that:

... despite all the difficulties, progress is being made: the 1945 Constitution after the Fourth Amendment has many shortcomings but it is an incomparably better document ... historically few countries have ever managed to adopt constitutional reforms as effective as Indonesia’s purely through parliamentary debate.

Lindsey further argues that, in a country denied constitutional debate for the last four decades, perhaps the messy process is necessary to build a national understanding.<sup>1703</sup> Hopefully, this ‘muddling through’,<sup>1704</sup> in its search for a more effective Constitution, will guide Indonesia’s transition to becoming an even more democratic country.

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<sup>1698</sup> Article 89 of the France Constitution.

<sup>1699</sup> Article 37(5) of the Fourth Amendment.

<sup>1700</sup> Ellis, above n 934.

<sup>1701</sup> *The Beginning of the End*, above n 1276.

<sup>1702</sup> Ellis and Yudhini, above n 1306.

<sup>1703</sup> Lindsey, above n 99, 276 — 277.

<sup>1704</sup> *Ibid.*

## D. Conclusion

The four constitutional amendments that were passed from 1999-2002 were reforms carried out in the troubled transition from Soeharto's authoritarian regime. As with other transitional constitutional processes in other countries, the turbulent political climate colored the amendment process in Indonesia. At the same time, the transition was a golden opportunity for Indonesia to de-mystify the symbolic text of the 1945 Constitution. The First Amendment in 1999 was the initial success which 'opened up' the authoritarian document and made possible for further amendments.

Compared to other constitution-making processes (in particular South Africa and Thailand) the 1999-2002 constitutional reform in Indonesia lacked several key features of a democratic constitution-making process: the amendment schedule constantly changed; there was no clear plan or objective; short-term political interests contaminated the amendment proposals; the MPR failed to win the people's trust in its capacity as a constitution-making body; and public participation arranged by the MPR was limited and badly organized.

However, after having decades of no debate on the amendment of the Constitution, flaws in the process were unavoidable. Despite the 1945 Constitution being understood as an authoritarian document, it was still considered to be the source of a guarantee of two fundamental elements of the Indonesian state: (i) the rejection of an Islamic state; and (ii) the imposition in its place of a nationalist state ideology, the *Pancasila*, contained in the preamble of the Constitution. Therefore, the MPR's agreement to maintain the preamble was the key consensus which made the amendment process possible.

Notwithstanding the agreement to keep the preamble, the Islamic factions kept fighting for the insertion of the 'seven words' of the Jakarta Charter into Article 29 of the Constitution, that is, for an expanded application of *syariah*. This was understood by the nationalist groups as an initial step towards establishing an Islamic state, something that the nationalist groups (including the military) saw, and still see, as non-negotiable. This tension between the nationalist and Islamic groups consequently led to a slow, patchy and tentative process marked by constant negotiation and deal-making.

In the end, the insertion of the 'seven words' of the Jakarta Charter was rejected, just as it was during the constitutional debates of 1945 and 1956-1959. There was a key difference however: in 1945 the rejection was as a result of Mohammad Hatta's intervention, while in 1956-1959 it was as a result of the intervention of Soekarno's 5 July 1959 Presidential Decree. In 1999-2002 the rejection of the 'seven words' of the Jakarta Charter was agreed upon during the final minutes of the 2002 MPR Annual Session, without intervention from outside the Parliament. This was, therefore, the first Indonesian experience of addressing this longstanding and very sensitive issue in a more democratic way.

Further, despite the often-chaotic amendment process, Indonesia has effectively produced a new Constitution. Evolutionary step-by-step amendment has at last ended the temporary character of Indonesia's previous constitutions. The amended 1945 Constitution is the first Indonesian Constitution which does not explicitly mention that it is a provisional Constitution. Additionally, at the end of the process, the four amendments has created a far more democratic Constitution. In particular, the amendments established a clearer separation of powers between the executive, legislature and judiciary; and far more impressive human rights protections.

One reason that the new Constitution is better is because the euphoric transitional period from Soeharto provided a setting that encouraged open constitutional debates in the MPR and allowed public participation in these debates, despite serious flaws in the MPR's system for public engagement. Wide media coverage and active advocacy by non-governmental organizations became a sort of public control system which prevented the amendment outcome from being overly politicized by the politicians in the MPR.

Yet the MPR as a political institution could not be immune from political interests. On the one hand, compromise among the factions in the MPR saved the amendment process from a possible deadlock; on the other hand, the compromise has created shortcomings in the amended Constitution. This thesis has, therefore, presented recommendations to strengthen the system of checks and balances, for example: the empowerment of the DPD. It also proposes that to resolve the difficult relationship between Islam and the state - for the immediate future at least - the preamble and Article 29 should be made as a non-amendable and 'entrenched'.

Finally, from Indonesia's experience, beside observing the general characteristics of constitution-making process in transition, scholars should note how the symbolic value of the 1945 Constitution strongly overshadowed the way the constitutional reform took place. Despite a process that was different to democratic processes in other countries, Indonesia's slow, patchy and tentative process managed to lead the country to a more democratic Constitution and contribute significantly to Indonesia's transition from overt authoritarianism. As *The Asia Times* wrote after the ratification of the Fourth Amendment in 2002:

[t]he process may have been messy and circuitous, but Indonesia's adoption of constitutional amendments underline how, in the end, the ... country remains very much on the transitional, if bumpy, road to democracy.<sup>1705</sup>

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<sup>1705</sup> 'Indonesia: A Step on Democracy's Bumpy Road', *The Asia Times*, 14 August 2002.

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# Appendices

## Appendix 1: The 1945 Constitution, Before and After the Four Amendments.<sup>1706</sup>

THE 1945 CONSTITUTION OF THE REPUBLIC OF INDONESIA, BEFORE AMENDMENT	THE 1945 CONSTITUTION OF THE REPUBLIC OF INDONESIA, AS AMENDED BY THE FIRST, SECOND, THIRD AND FOURTH AMENDMENTS <sup>1707</sup>
<p><b>THE PREAMBLE TO THE CONSTITUTION</b></p>	<p><b>THE PREAMBLE TO THE CONSTITUTION</b></p>
<p>Whereas freedom is the inalienable right of all nations, colonialism must be abolished in this world as it is not in conformity with humanity and justice;</p> <p>And the moment of rejoicing has arrived in the struggle of the Indonesian freedom movement to guide the people safely and well to the threshold of the independence of the state of Indonesia which shall be free, united, sovereign, just and prosperous;</p> <p>By the grace of God Almighty and impelled by the noble desire to live a free national life, the people of Indonesia hereby declare their independence.</p> <p>Subsequent thereto, to form a government of the state of Indonesia which shall protect all the people of Indonesia and their entire native land, and in order to improve the public welfare, to advance the intellectual life of the people and to contribute to the establishment of a world order based on freedom, abiding peace and social justice, the national independence of Indonesia shall be formulated into a Constitution of the sovereign Republic of Indonesia which is based on the belief in the One and Only God, just and civilised humanity, the unity of Indonesia, democracy guided by the inner wisdom of deliberations amongst representatives and the realization of social justice for all of the people of Indonesia.</p>	<p><i>No change.</i></p>

<sup>1706</sup> This table is taken with some revisions from the Asian Law Center, University of Melbourne, <[http://www.law.unimelb.edu.au/alc/assets/1945\\_Indo\\_Constitution.pdf](http://www.law.unimelb.edu.au/alc/assets/1945_Indo_Constitution.pdf)> at 31 June 2004.

<sup>1707</sup> The symbols \*, \*\*, \*\*\*) and \*\*\*\*) indicate the First, Second, Third and Fourth Amendments, respectively.

## **Chapter I. Form of the state and Sovereignty**

### **Article 1**

1. The state of Indonesia shall be a unitary state which has the form of a republic.
2. Sovereignty shall be vested in the people and shall be exercised in full by the Majelis Permusyawaratan Rakyat.

## **Chapter II. The Majelis Permusyawaratan Rakyat**

### **Article 2**

1. The Majelis Permusyawaratan Rakyat shall consist of the members of the Dewan Perwakilan Rakyat augmented by the delegates from the regional territories and groups as provided for by statutory regulations.
2. The Majelis Permusyawaratan Rakyat shall meet at least once in every five years in the state capital.
3. All decisions of the Majelis Permusyawaratan Rakyat shall be taken by a majority vote.

### **Article 3**

The Majelis Permusyawaratan Rakyat shall determine the Constitution and the guide lines of the policy of state.

## **Chapter I. Form of the state and Sovereignty**

### **Article 1**

1. The state of Indonesia is a Unitary state which has the form of a Republic.
2. Sovereignty is in the hands of the people and is exercised in accordance with the Constitution. \*\*\*)
3. The Indonesian state is a state ruled by law (negara hukum). \*\*\*)

## **Chapter II. The Majelis Permusyawaratan Rakyat**

### **Article 2**

1. The Majelis Permusyawaratan (People's Consultative Assembly) shall consist of the members of the Dewan Perwakilan Rakyat (People's Representative Council) and the members of the Dewan Perwakilan Daerah (Regional Representative Council), who shall be chosen in general elections, and further regulated by law. \*\*\*\*)
2. The Majelis Permusyawaratan Rakyat shall meet at least once in every five years in the state capital. *(No change)*
3. All decisions of the Majelis Permusyawaratan Rakyat shall be taken by a majority vote. *(No change)*

### **Article 3**

1. The Majelis Permusyawaratan Rakyat shall amend and determine the Constitution. \*\*\*)
2. The Majelis Permusyawaratan Rakyat shall inaugurate the President and/or the Vice President. \*\*\*)
3. The Majelis Permusyawaratan Rakyat may only remove from office the President and/or the Vice President during their terms of office in accordance with the Constitution. \*\*\*)

**Chapter III. The Executive Power****Article 4**

1. The President of the Republic of Indonesia shall hold the power of government in accordance with the Constitution.
2. In exercising his duties, the President shall be assisted by a Vice-President.

**Article 5**

1. The President shall hold the power to make statutes in agreement with the Dewan Perwakilan Rakyat.
2. The President shall make government regulations to expedite the enforcement of laws.

**Article 6**

1. The President shall be a native Indonesian citizen.
2. The President and the Vice-President shall be elected by the Majelis Permusyawaratan Rakyat by a majority vote.

**Chapter III. The Executive Power****Article 4**

1. The President of the Republic of Indonesia shall hold the power of government in accordance with the Constitution. *(No Change)*
2. In exercising his duties, the President shall be assisted by a Vice-President. *(No Change)*

**Article 5**

1. The President has the right to submit Bills to the Dewan Perwakilan Rakyat. \*)
2. The President shall make government regulations to expedite the enforcement of laws. *(No Change)*

**Article 6**

1. Candidates for the President and the Vice President must have been Indonesian citizens since birth, must never have taken other citizenship of their own accord, must never have committed reason, and must be mentally and physically able to carry out the duties and obligations of the President and Vice-President. \*\*\*)
2. Further conditions for becoming President and Vice President shall be regulated by law. \*\*\*)

**Article 6A**

1. The President and the Vice President shall be elected as a pair directly by the people. \*\*\*)
2. The pairs of Presidential and Vice Presidential candidates shall be proposed by political parties or groups of political parties that participate in general elections, before the general elections are conducted. \*\*\*)
3. The Presidential and Vice Presidential candidate pair that receives more than fifty per cent of the number of votes in the general elections, and receives no less than twenty per cent of the votes in a province in a majority of

	<p>provinces, shall be appointed President and Vice President. ***)</p> <ol style="list-style-type: none"> <li>4. In the event that no Presidential and Vice Presidential candidate pair is elected, the people shall directly choose between the two candidate pairs that received the most number of votes in the general elections, and the pair that receives the highest number of votes shall be appointed President and Vice President. ****)</li> <li>5. Further procedures for conducting the election of the President and the Vice President shall be regulated by law. ***)</li> </ol>
<p><b>Article 7</b> The President and Vice-President shall hold office for a term of five years and shall be eligible for re-election.</p>	<p><b>Article 7</b> The President and Vice-President shall hold office for a term of five years, and shall be eligible for re-election to the same office for one further term. *)</p>
	<p><b>Article 7A</b> The President and/or the Vice President may be removed from office during their term by the Majelis Permusyawaratan Rakyat on the advice of the Dewan Perwakilan Rakyat, if they are either proven to have violated the law by engaging in treason, corruption, other high crimes or misdemeanors or, or proven to no longer fulfill the requirements of the office of President and/or Vice President. ***)</p>
	<p><b>Article 7B</b></p> <ol style="list-style-type: none"> <li>1. An advice to remove the President and/or Vice President from office may only be submitted by the Dewan Perwakilan Rakyat to the Majelis Perwakilan Rakyat if it has already requested the Constitutional Court to investigate, try, and decide on the opinion of the Dewan Perwakilan Rakyat that the President and/or the Vice President has violated the law by engaging in treason, corruption, bribery, another serious criminal offence, or disgraceful conduct, and/or the opinion that the President</li> </ol>

- and/or the Vice President no longer fulfill the requirements of the office of President and/or Vice President. \*\*\*)
2. The opinion of the Dewan Perwakilan Rakyat that the President and/or the Vice President have committed such violations of the law or no longer fulfill the requirements of the office of President and/or Vice President is in the course of carrying out the supervisory function of the Dewan Perwakilan Rakyat. \*\*\*)
  3. A request by the Dewan Perwakilan Rakyat to the Constitutional Court may only be submitted with the support of at least two-thirds of the number of members of the Dewan Perwakilan Rakyat present at a plenary meeting that is attended by at least two-thirds of the total number of members of the Dewan Perwakilan Rakyat. \*\*\*)
  4. The Constitutional Court is obliged to investigate, try and decide with the greatest possible justice and fairness on this opinion of the Dewan Perwakilan Rakyat no more than ninety days after the request of the Dewan Perwakilan Rakyat is received by the Constitutional Court. \*\*\*)
  5. If the Constitutional Court has decided that the President and/or the Vice President has been proven to have violated the law by engaging in treason, corruption, bribery, another serious criminal act, or disgraceful conduct, and/or it is proven that the President and/or the Vice President no longer fulfill the requirements of the office of President and/or Vice President, the Dewan Perwakilan Rakyat shall hold a plenary meeting to submit advice for the removal from office of the President and/or the Vice President to the Majelis Permusyawaratan Rakyat. \*\*\*)
  6. The Majelis Permusyawaratan Rakyat is obliged to hold a session to decide on this advice of the Dewan Perwakilan Rakyat no later than thirty

days after the Majelis Permusyawaratan Rakyat receives the advice. \*\*\*)

7. The decision of the Majelis Permusyawaratan Rakyat on the advice for the removal from office of the President and/or Vice President must be made in a plenary meeting of the Majelis Permusyawaratan Rakyat that is attended by at least threequarters of the total number of members and with the approval of at least two-thirds of the number of members present, after the President and/or Vice President has had an opportunity to provide an explanation in a plenary meeting of the Majelis Permusyawaratan Rakyat. \*\*\*)

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**Article 7C**

The President may not suspend and/or dissolve the Dewan Perwakilan Rakyat. \*\*\*)

**Article 8**

Should the President die, resign or be unable to perform his duties during his term of office, he shall be succeeded by the Vice-President until the expiry of his term of office.

**Article 8**

1. If the President should die, resign, be removed from office, or become unable to perform his or her duties during his or her term of office, then he or she shall be replaced by the Vice President for the remainder of the term. \*\*\*)
2. If the office of Vice President becomes vacant, the Majelis Permusyawaratan Rakyat shall hold a session within sixty days to elect a Vice President from two candidates proposed by the President. \*\*\*)
3. If the President and the Vice President should die, resign, be removed from office, or become unable to perform their duties during their term of office at the same time, the joint executors of presidential duties shall be the Minister for Foreign Affairs, the Minister for Internal Affairs, and the Minister of Defense. Within thirty days, the Majelis Permusyawaratan Rakyat must hold a session to elect a President and a Vice President from



two pairs of Presidential and Vice Presidential candidates proposed by the political parties or groups of political parties whose Presidential and Vice Presidential candidate pairs received the first and second highest number of votes in the previous general election, for the remainder of the current term of office. \*\*\*\*)

**Article 9**

Before assuming office, the President and the Vice-President shall take the oath of office according to their religions, or solemnly promise before the Majelis Permusyawaratan Rakyat or the Dewan Perwakilan Rakyat as follows:

**The President's (Vice-President's) Oath**

"In the name of God Almighty, I swear that I will perform the duties of the President (Vice-President) of the Republic of Indonesia to the best of my ability and as justly as possible, and that I will strictly observe the Constitution and consistently implement the law and regulations in the service of the country and the people."

**The President's (Vice-President's) Promise**

"I solemnly promise that I will perform the duties of the President (Vice-President) of the Republic of Indonesia to the best of my ability and as justly as possible, and that I will strictly observe the Constitution and consistently implement the law and regulations in the service of the country and the people."

**Article 9**

1. Before assuming office, the President and the Vice-President shall take the oath of office according to their religions, or solemnly promise before the Majelis Permusyawaratan Rakyat or the Dewan Perwakilan Rakyat as follows:

**The President's (Vice President's) Oath**

"In the name of God Almighty, I swear that I will perform the duties of the President (Vice-President) of the Republic of Indonesia to the best of my ability and as justly as possible, and that I will strictly observe the Constitution and consistently implement the law and regulations in the service of the country and the people."

**The President's (Vice President's) Promise**

"I solemnly promise that I will perform the duties of the President (Vice-President) of the Republic of Indonesia to the best of my ability and as justly as possible, and that I will strictly observe the Constitution and consistently implement the law and regulations in the service of the country and the people." \*)

2. If the Majelis Permusyawaratan Rakyat is unable to hold a session, the President and the Vice President shall swear according to their religion

	<p>or solemnly promise before the leadership of the Majelis Permusyawaratan Rakyat, witnessed by the leadership of the Supreme Court.*)</p>
<p><b>Article 10</b> The President is the Supreme Commander of the Army, the Navy and the Air Force.</p>	<p><b>Article 10</b> The President is the Supreme Commander of the Army, the Navy and the Air Force. <i>No Change</i>)</p>
<p><b>Article 11</b> In agreement with the Dewan Perwakilan Rakyat, the President declares war, makes peace and concludes treaties with other states.</p>	<p><b>Article 11</b></p> <ol style="list-style-type: none"> <li>1. In agreement with the Dewan Perwakilan Rakyat, the President declares war, makes peace and concludes treaties with other states. <i>No Change</i>)</li> <li>2. The President must have the agreement of the Dewan Perwakilan Rakyat in order to conclude other international treaties that have wide and profound effects on the life of the people relating to the financial burden of the state, and/or that necessitate the amendment or enactment of laws. <b>***</b>)</li> <li>3. Further stipulations concerning international treaties shall be regulated by law. <b>***</b>)</li> </ol>
<p><b>Article 12</b> The President declares the state of emergency. The conditions for such a declaration and the measures to deal with the emergency shall be governed by law.</p>	<p><b>Article 12</b> The President declares the state of emergency. The conditions for such a declaration and the measures to deal with the emergency shall be governed by law. <i>(No Change)</i></p>
<p><b>Article 13</b></p> <ol style="list-style-type: none"> <li>1. The President appoints ambassadors and consuls.</li> <li>2. The Presidents receives the credentials of foreign ambassadors.</li> </ol>	<p><b>Article 13</b></p> <ol style="list-style-type: none"> <li>1. The President appoints ambassadors and consuls. <i>(No Change)</i></li> <li>2. In appointing ambassadors, President shall have regard advice of the Dewan Perwakilan Rakyat. *)</li> <li>3. The President shall receive appointment of ambassadors other countries, having the advice of the Dewan Perwakilan Rakyat. *)</li> </ol>

**Article 14**

The President grants mercy, amnesty, pardon and restoration of rights.

**Article 14**

1. The President shall grant pardons and restoration of rights, having regard to the advice of the Supreme Court. \*)
2. The President shall grant amnesties and abolitions, having regard to the advice of the Dewan Perwakilan Rakyat. \*)

**Article 15**

The President grants titles, decorations and other distinctions of honor.

**Article 15**

The President shall grant titles, decorations and other distinctions of honor as provided for by law. \*)

**Chapter IV. The Supreme Advisory Council****Article 16**

1. The composition of the Supreme Advisory Council shall be regulated by law.
2. The Council has the duty to reply to questions raised by the President and has the right to submit recommendations to the government.

**Article 16**

The President shall form an advisory council, which has the task of providing advice and counsel to the President, to be further regulated by law. \*\*\*\*)

**Chapter IV. The Supreme Advisory Council**

*(Deleted) \*\*\*\*)*

**Chapter V. The Ministers of state****Article 17**

1. The President shall be assisted by the Ministers of state.
2. These Ministers shall be appointed and dismissed by the President.
3. These Ministers shall head the government departments.

**Chapter V. The Ministers of state****Article 17**

1. The President shall be assisted by Ministers of state. *(No Change)*
2. These Ministers shall be appointed and dismissed by the President. \*)
3. Each Minister shall hold a particular portfolio in government. \*)
4. The formation, modification and dissolution of the state Ministries shall be regulated by law. \*\*\*)

**Chapter VI. The Regional Governments****Article 18**

The division of the territory of Indonesia into large and small regions shall be regulated by

**Chapter VI. The Regional Governments****Article 18**

1. The Unitary state of the Republic of Indonesia shall be divided into

law in consideration of and with due regard to the principles of deliberation in the government system and the inherited rights of the Special Regions.

Provinces and these Provinces divided into Regencies (kabupaten) and Towns, and each of these Provinces, Regencies and Cities shall have Regional Governments, regulated by law. \*\*)

2. The Regional Governments of Provinces, Regencies and Towns shall themselves regulate and administer matters of government on the basis of autonomy and the duty of assistance. \*\*)
3. The Regional Governments of Provinces, Regencies and Towns shall have Regional People's Representative Councils (Dewan Perwakilan Rakyat Daerah) whose members are elected in general elections. \*\*)
4. Governors, Regents and Mayors shall be the respective heads of the Regional Governments of the Provinces, Regencies and Towns and shall be democratically elected. \*\*)
5. The Regional Governments shall implement autonomy to the fullest extent except in matters of government that are determined by law to be matters for the Central Government. \*\*)
6. The Regional Governments have the right to enact regional regulations and other regulations in order to implement autonomy and the duty of assistance. \*\*)
7. The structures and procedures for the administration of regional government shall be regulated by law. \*\*)

#### **Article 18A**

1. The relationship between the authority of the Central Government and that of the Regional Governments of Provinces, Regencies and Towns, or between the authority of the Provinces and that of the Regencies and Towns, shall be regulated by law, having regard to the uniqueness and diversity of the regions. \*\*)
2. The relationships of finance, public

services, and the utilization of natural resources and other resources between the Central Government and the Regional Governments shall be regulated and implemented justly and harmoniously in accordance with law. \*\*)

**Article 18B**

1. The state recognizes and respects particular Provincial Governments which have a special or unique status that is regulated by law. \*\*)
2. The state recognizes and respects the individual communities of traditional law and their traditional rights as long as they survive, and in accordance with the development of the community and the principle of the Unitary state of the Republic of Indonesia, as regulated by law. \*\*)

**Chapter VII. The Dewan Perwakilan Rakyat**

**Article 19**

1. The composition of the Dewan Perwakilan Rakyat shall be regulated by law.
2. The Dewan Perwakilan Rakyat shall meet at least once a year.

**Chapter VII. The Dewan Perwakilan Rakyat**

**Article 19**

1. The members of the Dewan Perwakilan Rakyat shall be elected in a general election.
2. The composition of the Dewan Perwakilan Rakyat shall be regulated by law.
3. The Dewan Perwakilan Rakyat shall meet at least once a year.

**Article 20**

1. Every law shall require the approval of the Dewan Perwakilan Rakyat.
2. Should a bill not obtain the approval of the Dewan Perwakilan Rakyat, the bill shall not be resubmitted during the same session of the Dewan Perwakilan Rakyat.

**Article 20**

1. The Dewan Perwakilan Rakyat shall have the power to make laws. \*)
2. Every Bill shall be discussed by the Dewan Perwakilan Rakyat and the President in order to reach mutual assent. \*)
3. If a Bill does not obtain mutual assent, the Bill shall not be resubmitted during the same session of the Dewan Perwakilan Rakyat. \*)
4. The President shall sign into law those Bills that have obtained mutual assent. \*)
5. In the event that a Bill that has

	<p>obtained mutual assent is not signed into law by the President within thirty days from the time it was mutually assented to, the Bill may legitimately become law and must be enacted as law. **)</p>
	<p><b>Article 20A</b></p> <ol style="list-style-type: none"> <li>1. The Dewan Perwakilan Rakyat shall have legislative, budgetary, and supervisory functions. **)</li> <li>2. In carrying out its functions, besides the rights provided for elsewhere in this Constitution, the Dewan Perwakilan Rakyat has the right of interpellation, the right of angket [that is, the right to carry out inquiries], and the right to express its opinion. **)</li> <li>3. Besides the rights provided for elsewhere in this Constitution, each member of the Dewan Perwakilan Rakyat has the right to submit questions, the right to convey suggestions and opinions and a right of immunity. **)</li> <li>4. Further stipulations concerning the rights of the Dewan Perwakilan Rakyat and the rights of the members of the Dewan Perwakilan Rakyat shall be regulated by law. **)</li> </ol>
<p><b>Article 21</b></p> <ol style="list-style-type: none"> <li>1. The members of the Dewan Perwakilan Rakyat have the right to submit a bill.</li> <li>2. Should such a bill not obtain the sanction of the President notwithstanding the approval of the Dewan Perwakilan Rakyat, the bill shall not be resubmitted during the same session of the Dewan.</li> </ol>	<p><b>Article 21</b></p> <p>The members of the Dewan Perwakilan Rakyat have the right to submit a bill. *)</p>
<p><b>Article 22</b></p> <ol style="list-style-type: none"> <li>1. In the event of a compelling emergency, the President has the right to issue government regulations in lieu of laws.</li> <li>2. Such regulations must obtain the assent of the Dewan Perwakilan Rakyat during its subsequent session.</li> </ol>	<p><b>Article 22</b></p> <ol style="list-style-type: none"> <li>1. In the event of a compelling emergency, the President has the right to issue government regulations in lieu of laws. (No Change)</li> <li>2. Such regulations must obtain the assent of the Dewan Perwakilan Rakyat during its subsequent session.</li> </ol>

<p>3. Where the approval of the Dewan is not obtained, the government regulations shall be revoked.</p>	<p>(No Change)</p> <p>3. Where the approval of the Dewan is not obtained, the government regulations shall be revoked. (No Change)</p>
	<p><b>Article 22A</b> Further stipulations concerning the procedures for the enactment of laws shall be regulated by law. **)</p>
	<p><b>Article 22B</b> The members of the Dewan Perwakilan Rakyat may be removed from office, in accordance with conditions and procedures provided by law. **)</p>
	<p><b>Chapter VIIA. The Dewan Perwakilan Daerah</b></p> <p><b>Article 22C</b></p> <ol style="list-style-type: none"> <li>1. The members of the Dewan Perwakilan Daerah are elected from each Province through general elections. ***)</li> <li>2. The members of the Dewan Perwakilan Daerah from each Province shall be of equal number, and the total number of members of the Dewan Perwakilan Daerah shall be no more than one-third of the members of the Dewan Perwakilan Rakyat. ***)</li> <li>3. The Dewan Perwakilan Daerah shall sit in session at least once a year. ***)</li> <li>4. The structure and position of the Dewan Perwakilan Daerah shall be regulated by law. ***)</li> </ol>
	<p><b>Article 22D</b></p> <ol style="list-style-type: none"> <li>1. The Dewan Perwakilan Daerah can submit Bills to the Dewan Perwakilan Rakyat that relate to regional autonomy; the relationship between the centre and the regions; the formation, development and inclusion of the regions; the management of natural resources and other economic resources; and the fiscal balance between the centre and the regions.</li> </ol>

- \*\*\*)
2. The Dewan Perwakilan Daerah participates in the discussion of Bills that relate to regional autonomy; the relationship between the centre and the regions; the formation, development and inclusion of the regions; the management of natural resources and other economic resources; and the fiscal balance between the centre and the regions; and it also submits its advice to the Dewan Perwakilan Rakyat regarding Bills concerning the state Budget and Bills concerning taxes, education and religion. \*\*\*)
  3. The Dewan Perwakilan Daerah may supervise the implementation of laws concerning: regional autonomy; the formation, development and inclusion of the regions; the relationship between the centre and the regions; the management of natural resources and other economic resources; the implementation of the state Budget; taxes; education; and religion; and to submit the results of its supervision to the Dewan Perwakilan Rakyat as material for consideration and further action. \*\*\*)
  4. The members of the Dewan Perwakilan Daerah may be removed from office in a manner that complies with conditions and procedures regulated by law. \*\*\*)

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## **Chapter VIIB. General Election**

### ***Article 22E***

1. General Elections shall be conducted in a direct, general, free, secret, honest and fair manner once every five years. \*\*\*)
2. General elections, shall be conducted to elect the members of the Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah, the President and Vice-President, and the Dewan Perwakilan Rakyat Daerah. \*\*\*)
3. The participants in the general



	<p>election for the election of the members of the Dewan Perwakilan Rakyat and the members of the Dewan Perwakilan Rakyat Daerah are political parties. ***)</p> <ol style="list-style-type: none"> <li>4. The participants in the general election for the election of the members of the Dewan Perwakilan Daerah are individuals. ***)</li> <li>5. The general elections shall be organized by a general election of a national, permanent, and independent character. ***)</li> <li>6. Further provisions regarding general elections shall be regulated by law. ***)</li> </ol>
<p><b>Chapter VIII. Finance</b></p> <p><b>Article 23</b></p> <ol style="list-style-type: none"> <li>1. The annual state budget shall be determined by law. In the event that the Dewan Perwakilan Rakyat does not approve a draft budget, the government shall adopt the budget of the preceding year.</li> <li>2. All government taxes shall be determined by law.</li> <li>3. The forms and denominations of the currency shall be determined by law.</li> <li>4. Other financial matters shall be regulated by law.</li> <li>5. In order to examine the accountability of the state finances, a state Audit Board shall be established by statutory regulation. The findings of the Board shall be reported to the Dewan Perwakilan Rakyat.</li> </ol>	<p><b>Chapter VIII. Finance</b></p> <p><b>Article 23</b></p> <ol style="list-style-type: none"> <li>1. The state Budget, as the realization of the management of the finances of the state, shall be determined each year by law and implemented openly and with accountability for the greatest prosperity of the people. ***)</li> <li>2. The state Budget Bill is submitted by the President to be discussed with the Dewan Perwakilan Rakyat and taking into consideration the advice of the Dewan Perwakilan Daerah. ***)</li> <li>3. If the Dewan Perwakilan Rakyat does not agree to the state Budget Bill submitted by the President, the Government shall adopt the state Budget of the preceding year. ***)</li> </ol>
	<p><b>Article 23A</b></p> <p>Taxes and other levies for the needs of the state that are compulsory in nature shall be regulated by law. ***)</p>
	<p><b>Article 23B</b></p> <p>The forms and denominations of the currency shall be regulated by law. ***)</p>
	<p><b>Article 23C</b></p> <p>Other matters relating to the finances of the</p>

	state shall be regulated by law. ***)
	<p><b>Article 23D</b></p> <p>The state possesses a central bank, the structure, position, authority, responsibilities, and independence of which are regulated by law. ****)</p>
	<p><b>Chapter VIII A. The state Audit Body</b></p> <p><b>Article 23E</b></p> <ol style="list-style-type: none"> <li>1. In order to review the management of and responsibility over the finances of the state, a free and independent Audit Body shall be formed. ***)</li> <li>2. The results of an audit of the finances of the state shall be submitted to the Dewan Perwakilan Rakyat, the Dewan Perwakilan Daerah, and the Dewan Perwakilan Rakyat Daerah, in accordance with their respective authority. ***)</li> <li>3. The results of such an audit shall be acted on by a representative body and/or another board in accordance with the law. ***)</li> </ol> <p><b>Article 23F</b></p> <ol style="list-style-type: none"> <li>1. The members of the Audit Body are chosen by the Dewan Perwakilan Rakyat, taking into consideration the advice of the Dewan Perwakilan Daerah, and approved by the President. ***)</li> <li>2. The Chairperson of the Audit Body shall be elected from and by its members. ***)</li> </ol>
	<p><b>Article 23G</b></p> <ol style="list-style-type: none"> <li>1. The Audit Body shall be located in the capital city, and have representative offices in each province. ***)</li> <li>2. Further provisions regarding the Audit Body shall be determined by law. ***)</li> </ol>
<b>Chapter IX. The Judicial Power</b>	<b>Chapter IX. The Judicial Power</b>
<p><b>Article 24</b></p> <ol style="list-style-type: none"> <li>1. The judicial power is exercised by a Supreme Court and other such courts of law as are provided for by law.</li> </ol>	<p><b>Article 24</b></p> <ol style="list-style-type: none"> <li>1. The judicial power is the independent power to maintain a system of courts with the objective of upholding law</li> </ol>

2. The composition and powers of these legal bodies shall be regulated by law.

- and justice. \*\*\*)
2. The judicial power is exercised by a Supreme Court and the courts below it in the respective environments of public courts, religious courts, military courts, administrative courts and by a Constitutional Court. \*\*\*)
  3. Other bodies with functions that relate to judicial power are regulated by law. \*\*\*)

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**Article 24A**

1. The Supreme Court has the authority to hear matters at the level of cassation, to review regulations that are below legislation against the legislation, and it has other authority as determined by law. \*\*\*)
2. Justices of the Supreme Court must possess integrity and irreproachable character and be just, professional, and have experience in the field of law. \*\*\*)
3. Candidates for Justices of the Supreme Court shall be submitted by the Judicial Commission to the Dewan Perwakilan Rakyat for approval and then be confirmed by the President. \*\*\*)
4. The Chief Justice and Deputy Chief Justice of the Supreme Court shall be elected from and by the Justices of the Supreme Court. \*\*\*)
5. The structure, position, membership and procedures of the Supreme Court and the legal bodies below it shall be regulated by law. \*\*\*)

**Article 24B**

1. An independent Judicial Commission shall have the authority to suggest the appointment of Justices of the Supreme Court and shall have further authority to protect and uphold the honor, dignity and the good behavior of judges. \*\*\*)
2. The members of the Judicial Commission must possess knowledge and experience in the field of law, integrity, and irreproachable

character. \*\*\*)

3. The members of the Judicial Commission are appointed and removed by the President with the agreement of the Dewan Perwakilan Rakyat. \*\*\*)
4. The structure, position and membership of the Judicial Commission shall be regulated by law. \*\*\*)

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**Article 24C**

1. The Constitutional Court has the authority to hear matters at the lowest and highest levels and to make final decisions in the review of legislation against the Constitution, the settlement of disputes regarding the authority of state bodies whose authority is given by the Constitution, the dissolution of political parties, and the settlement of disputes concerning the results of general elections. \*\*\*)
2. The Constitutional Court has the duty to adjudicate on the opinion of the Dewan Perwakilan Rakyat regarding allegations of misconduct by the President and/or the Vice President in accordance with the Constitution. \*\*\*)
3. The Constitutional Court is comprised of nine constitutional judges who are appointed by the President, of whom three are proposed by the Supreme Court, three by the Dewan Perwakilan Rakyat, and three by the President. \*\*\*)
4. The Chairperson and Vice Chairperson of the Constitutional Court are elected from and by the constitutional judges. \*\*\*)
5. Constitutional judges must possess integrity and irreproachable character, be just, be statespersons who fully understand the Constitution and administrative law, and must not hold government office. \*\*\*)
6. The appointment and removal of constitutional judges, the procedural rules of the Constitutional Court and other provisions regarding the

	Constitutional Court shall be regulated by law. ***)
<b>Article 25</b> The appointment and dismissal of judges shall be regulated by law.	<b>Article 25</b> The appointment and dismissal of judges shall be regulated by law. <i>(No Change)</i>
	<b>Chapter IXA. The Territory of the state</b>  <b>Article 25A</b> The Unitary state of the Republic of Indonesia is an archipelagic state which possesses territory, the demarcations and the rights of which are determined by law. **)
<b>Chapter X. The Citizens</b>	<b>Chapter X. Citizens and Inhabitants</b>
<b>Article 26</b> 1. Citizens are native Indonesian persons and persons of other nations who have acquired a legal status as citizens. 2. Conditions to acquire and other matters on citizenship shall be determined by law.	<b>Article 26</b> 1. Citizens are native Indonesian persons and persons of other nations who have acquired a legal status as citizens. <i>(No Change)</i> 2. Inhabitants are Indonesian citizens and foreign persons who reside in Indonesia. **) 3. Matters relating to citizens and inhabitants are regulated by law. **)
<b>Article 27</b> 1. All citizens have equal status before the law and in government and shall abide by the law and the government without any exception. 2. Every citizen has the right to work and to live in human dignity.	<b>Article 27</b> 1. All citizens have equal status before the law and in government and shall abide by the law and the government without any exception. <i>(No Change)</i> 2. Every citizen has the right to work and to live in human dignity. <i>(No Change)</i> 3. Every citizen has the right and duty to participate in the defense of the nation. **)
<b>Article 28</b> Freedom of association and assembly, of verbal and written expression and the like, shall be regulated by law.	<b>Article 28</b> Freedom of association and assembly, of verbal and written expression and the like, shall be regulated by law. <i>(No Change)</i>
	<b>Chapter XA. Human Rights</b>  <b>Article 28A</b> Each person has the right to live and has the right to defend their life and their living. **)

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**Article 28B**

1. Each person has the right to form a family and to continue their family line through legitimate marriage. \*\*)
  2. Each child has the right to viable life, growth and development, and to protection from violence and discrimination. \*\*)
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**Article 28C**

1. Each person has the right to develop themselves through the fulfillment of their basic needs, the right to education and to obtain benefit from science and technology, art and culture, in order to improve the quality of their life and the welfare of the human race. \*\*)
  2. Each person has the right to advance themselves in struggling to obtain their collective rights to develop their community, their people, and their nation. \*\*)
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**Article 28D**

1. Each person has the right to the recognition, the security, the protection and the certainty of just laws and equal treatment before the law. \*\*)
  2. Each person has the right to work and to receive just and appropriate rewards and treatment in their working relationships. \*\*)
  3. Each citizen has the right to obtain the same opportunities in government. \*\*)
  4. Each person has the right to citizenship. \*\*)
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**Article 28E**

1. Each person is free to profess their religion and to worship in accordance with their religion, to choose their education and training, their occupation, their citizenship, their place of residence within the territory of the state and to leave it and to

return to it. \*\*)

2. Each person has the freedom to possess convictions and beliefs, and to express their thoughts and attitudes in accordance with their conscience. \*\*)
3. Each person has the freedom to associate, gather, and express their opinions. \*\*)

**Article 28F**

Each person has the right to communicate and to obtain information in order to develop themselves and their social environment, and the right to seek out, obtain, possess, store, process, and transmit information using any means available. \*\*)

**Article 28G**

1. Each person has the right to the protection of themselves, their family, their honor, their dignity, the property that is in their control, and the right to feel safe and to be protected from the threats of fear from doing or not doing something that is a basic right. \*\*)
2. Each person has the right to be free from torture or treatment that lowers human dignity and has the right to obtain political asylum from other countries. \*\*)

**Article 28H**

1. Each person has the right to physical and spiritual welfare, to have a home, to have a good and healthy living environment and to obtain health services. \*\*)
2. Each person has the right to assistance and special treatment in order to gain the same opportunities and benefits in the attainment of equality and justice. \*\*)
3. Each person has the right to social security that allows their full personal development as a human being. \*\*)
4. Each person has the right to private property and this right may not be arbitrarily interfered with by anyone at all. \*\*)

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**Article 28I**

1. The right to live, the right not to be tortured, the right to freedom of thought and conscience, the right not to be enslaved, the right to be individually recognized by the law, and the right not to be prosecuted under retrospective laws are basic human rights that may not be interfered with under any circumstances at all. \*\*)
2. Each person has the right to be free from discriminatory treatment on any grounds and has the right to obtain protection from such discriminatory treatment. \*\*)
3. Cultural identity and the rights of traditional communities are respected in accordance with the continuing development of civilization over time. \*\*)
4. The protection, advancement, upholding and fulfillment of basic human rights is the responsibility of the state, especially the Government. \*\*)
5. In order to uphold and protect basic human rights in accordance with the principle of a democratic state ruled by laws, the implementation of human rights shall be guaranteed, regulated and provided for in regulations and legislation. \*\*)

**Article 28J**

1. Each person is obliged to respect the basic human rights of others in orderly life as a community, as a people, and as a nation. \*\*)
2. In the enjoyment of their rights and freedoms, each person is obliged to submit to the limits determined by law, with the sole purpose of guaranteeing recognition and respect for the rights of others and to fulfill the requirements of justice and taking into consideration morality, religious



values, security, and public order in a democratic community. \*\*)

## **Chapter XI. Religion**

### **Article 29**

1. The state shall be based upon the belief in the One and Only God.
2. The state guarantees all persons freedom of religion and freedom to worship according to their religion and belief.

## **Chapter XII. National Défense**

### **Article 30**

1. Every citizen has the right and duty to participate in the defense of the country.
2. The rules governing defense shall be regulated by law.

## **Chapter XI. Religion (*No Change*)**

### **Article 29**

1. The state shall be based upon the belief in the One and Only God.
2. The state guarantees all persons freedom of religion and freedom to worship according to their religion and belief.

## **Chapter XII. National Defense and Security**

### **Article 30**

1. Each citizen has the right and duty to participate in national defense and security. \*\*)
2. National defense and security is carried out through a system of universal people's defense and security by the Indonesian National Military and the state Police of the Republic of Indonesia, as the primary force, and the people, as supporting forces. \*\*)
3. The Indonesian National Military is comprised of the Army, the Navy, and the Air Force as instruments of the state with the task of defending, protecting and preserving the unity and sovereignty of the state. \*\*)
4. The state Police of the Republic of Indonesia is an instrument of the state that safeguards the security and order of the community, with the task of protecting, sheltering, and serving the community, and upholding the law. \*\*)
5. The structure and position of the Indonesian National Military and the state Police of the Republic of Indonesia, the relationship of authority between the Indonesian National Military and the state Police of the Republic of Indonesia in carrying out their tasks, the requirements for the participation of citizens in national defense and security, and matters relating to defense and security shall

be regulated by law. \*\*)

**Chapter XIII. Education**

**Article 31**

1. Every citizen has the right to education.
2. The government shall establish and conduct a national education system which shall be regulated by law.

**Article 32**

The Government shall advance the national culture.

**Article 33**

1. The economy shall be organized as a common endeavor based upon the principles of the family system.
2. Sectors of production that are important for the country and affect the life of the people shall be controlled by the state.
3. The land, the waters and the natural riches contained therein shall be controlled by the state and exploited to the greatest benefit of the people.

**Chapter XIII. Education**

**Article 31**

1. Each citizen has the right to education. \*\*\*\*)
2. Each citizen is obliged to attend primary education and the Government is obliged to bear the cost. \*\*\*\*)
3. The Government shall develop and maintain a national system of education that increases faith, God-consciousness and noble conduct, in the course of educating the people, which is regulated by law. \*\*\*\*)
4. The state shall prioritize expenditures on education, so that it shall comprise at least 20% of the state Budget and Regional Budgets in order to fulfill the needs of national education. \*\*\*\*)
5. The Government shall advance science and technology by respecting religious values and national unity, for the progress of human civilization and the welfare of the human race. \*\*\*\*)

**Article 32**

1. The state shall advance the national culture of Indonesia among human civilization by guaranteeing the freedom of the people to cultivate and develop their cultural values. \*\*\*\*)
2. The state shall respect and cultivate regional languages as a national cultural treasure. \*\*\*\*)

**Article 33**

1. The economy shall be organized as a common endeavor based upon the principles of the family system. (No Change)
2. Sectors of production that are important for the country and affect the life of the people shall be controlled by the state. (No Change)
3. The land, the waters and the natural riches contained therein shall be controlled by the state and exploited

	<p>to the greatest benefit of the people. <i>(No Change)</i></p> <ol style="list-style-type: none"> <li>4. The national economy is organized based on economic democracy and the principles of togetherness, efficiency of justice, sustainability, environmental awareness, self-sufficiency and by safeguarding the equilibrium between progress and the unity of the national economy. ****)</li> <li>5. Further stipulations concerning the implementation of this Article shall be regulated by law. ****)</li> </ol>
<p><b>Article 34</b> The poor and destitute children shall be cared for by the state.</p>	<p><b>Article 34</b></p> <ol style="list-style-type: none"> <li>1. The poor and destitute children shall be cared for by the state. ****)</li> <li>2. The state shall develop a system of social security for all the people and shall empower the weak and impoverished in accordance with human dignity. ****)</li> <li>3. The state shall be responsible for the provision of suitable healthcare facilities and public service facilities. ****)</li> <li>4. Further stipulations concerning the implementation of this Article shall be regulated by law. ****)</li> </ol>
<p><b>Chapter XV. The Flag and the Language</b></p> <p><b>Article 35</b> The national flag of Indonesia shall be the Honored Red-and-White.</p>	<p><b>Chapter XV. The Flag, the Language, the state Emblem and the National Anthem</b></p> <p><b>Article 35</b> The national flag of Indonesia shall be the Honored Red-and-White. <i>(No Change)</i></p>
<p><b>Article 36</b> The national language of Indonesia shall be the Bahasa Indonesia or the Indonesian language.</p>	<p><b>Article 36</b> The national language of Indonesia shall be the Bahasa Indonesia or the Indonesian language. <i>(No Change)</i></p>
	<p><b>Article 36A</b> The state emblem is the Garuda <i>Pancasila</i>, with the motto, <i>Bhinneka Tunggal Ika</i>. **)</p>
	<p><b>Article 36B</b> The national anthem is Indonesia Raya. **)</p>

	<p><b>Article 36C</b> Further stipulations regarding the national flag, the national language, the state emblem and the national anthem shall be regulated by law. **)</p>
<p><b>Chapter XVI. Amendments to the Constitution</b></p> <p><b>Article 37</b></p> <ol style="list-style-type: none"> <li>1. In order to amend the Constitution, not less than two thirds of the total number of members of the Majelis Permusyawaratan Rakyat shall be in attendance.</li> <li>2. Decisions shall be taken with the approval of not less than two thirds of the number of members in attendance.</li> </ol>	<p><b>Chapter XVI. Amendments to the Constitution</b></p> <p><b>Article 37</b></p> <ol style="list-style-type: none"> <li>1. A proposal to amend the Constitution may be placed on the agenda of a session of the Majelis Permusyawaratan Rakyat if it is proposed by not less than one-third of the total number of members of the Majelis Permusyawaratan Rakyat. ****)</li> <li>2. Each proposal to amend the Constitution shall be submitted in writing and shall clearly show the parts which are proposed to be amended, with reasons. ****)</li> <li>3. In order to amend the Constitution, not less than two-thirds of the total number of members of the Majelis Permusyawaratan Rakyat must be present at the session. ****)</li> <li>4. Decisions to amend the Constitution shall be made with the agreement of not less than fifty per cent plus one member of the entire membership of the Majelis Permusyawaratan Rakyat. ****)</li> <li>5. The form of the Unitary state of the Republic of Indonesia may not be amended. ****)</li> </ol>
<p><b>INTERIM PROVISIONS</b></p> <p><b>Article I</b> The Preparatory Committee for Indonesian Independence shall arrange and implement the transfer of government to the Government of Indonesia</p>	<p><b>INTERIM PROVISIONS</b></p> <p><b>Article I</b> All regulations and legislation that are in force shall continue to have effect until new regulations and legislation are enacted under this Constitution. ****)</p>
<p><b>Article II</b> All state bodies and regulations that exist shall continue to function until new bodies are</p>	<p><b>Article II</b> All state bodies that exist shall continue to function in so far as they implement the</p>

formed under this Constitution.	provisions of this Constitution and until new bodies are formed under this Constitution. ****)
<p><b>Article III</b> The first President and Vice President will be chosen by the Preparatory Committee for Indonesian Independence</p>	<p><b>Article III</b> The Constitutional Court shall be formed at the latest by 17 August 2003 and before its formation its authority shall be exercised in full by the Supreme Court.</p>
<p><b>Article IV</b> Until the Majelis Permusyawaratan Rakyat , the Dewan Perwakilan Rakyat and the Supreme Advisory Council are formed in accordance with this Constitution, their powers will be fully exercised by the President, assisted by a National Committee.</p>	
<p><b>ADDITIONAL PROVISIONS</b></p> <p><b>Article I</b> Within six months following the end of the Greater East Asia war, the President will arrange and implement all matters stipulated by this Constitution.</p>	<p><b>ADDITIONAL PROVISIONS</b></p> <p><b>Article I</b> The Majelis Permusyawaratan Rakyat shall carry out a review of the material and legal status of Provisional Decrees of the Majelis Permusyawaratan Rakyat and the Decrees of the Majelis Permusyawaratan Rakyat, to be decided on at the 2003 Session of the Majelis Permusyawaratan Rakyat. ****)</p>
<p><b>Article II</b> Within six months following the formation of the Majelis Permusyawaratan Rakyat, the Majelis will meet to confirm the Constitution.</p>	<p><b>Article II</b> With the finalization of this amendment of the Constitution, the 1945 Constitution of the Republic of Indonesia is comprised of the preamble and the Articles. ****)</p>
<p><b>Elucidation</b></p>	<p><b>Deleted.</b></p>

## Appendix 2: Sample of Questions for the Interview

1. Why was it necessary to amend the 1945 Constitution?
2. Which body should have the power to make and amend the Constitution?
3. Do you think it would have been better for an independent commission to prepare (consult and decide about constitutional changes and put those changes into a draft legal form) the amendment process?
4. Why did many MPR members not agree to give such powers to an independent commission?
5. Did Indonesia need a completely new Constitution or just amendments to the 1945 Constitution?
6. Were the step-by-step amendments of 1999-2002 an effective method of transforming the 1945 Constitution into a more democratic document?
7. What do you think were the strengths of this amendment process?
8. What do you think were the weaknesses of this amendment process?
9. Do you think the degree of public participation during the amendments was satisfactory? If not, why? Is that a problem?
10. Is there any information about the first amendment process which has not been released to the general public but would help to explain how decisions were reached and why particular decision were taken? Please explain and give details if relevant.
11. Is there any information about the second amendment process which has not been released to the general public but would help to explain how decisions were reached and why particular decision were taken? Please explain and give details if relevant.
12. Is there any information about the third amendment process which has not been released to the general public but would help to explain how decisions were reached and why particular decision were taken? Please explain and give details if relevant.
13. Is there any information about the fourth amendment process which has not been released to the general public but would help to explain how decisions were reached and why particular decision were taken? Please explain and give details if relevant.
14. What do you think about the substance of the first amendment?
15. What do you think about the substance of the second amendment?
16. What do you think about the substance of the third amendment?
17. What do you think about the substance of the fourth amendment?
18. Is the 1945 Constitution now satisfactory in democratic terms? Why yes/why not?
19. Do you think further Constitution reform is necessary?
20. If further reform is needed, what are your recommendations?

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