

CONSTITUTIONAL AMENDMENTS,  
A BRIEF NOTE ON INDONESIA'S CASE.\*

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The 2001 Annual Session of People's Consultative Assembly (Majelis Permusyawaratan Rakyat – MPR) was convened from November 1 to November 9.

On the last day of the session, 23 articles - consisting of 68 clauses and 3 new chapters - were agreed to be changed or to be added to the constitution. With this third amendment, the changes have been made to almost all important topics of the constitution, such as to secure the ultimate sovereignty of the people, to reaffirm the supremacy of law, to assert a workable check-and-balance mechanism, to clarify and to assert the presidential system, including the direct presidential election, to guarantee the human rights, to secure the fair and accountable general elections, etc., and accordingly, to build new institutions such as the Regional Representatives Council (Dewan Perwakilan Daerah –DPD), the Constitutional Court, and the Judicial Committee. So far MPR has amended 9 articles - 16 clauses, another 25 articles - 59 clauses, and 2 new chapters in 2000. In all cases, the amendment was made on 57 articles, changed or added, consisting of 129 clauses and 5 new chapters.

What is left for the 2002 Annual Session are a couple of topics such as how or who will execute the second round of the direct presidential election, religion (article 29), education (article 31), social well-being (article 33) and amendment to the constitution (article 37). All is believed to be much less complicated than the previous topics. We are optimistic that through these four consecutive amendments, after the 2002 Annual Session, we will have a more comprehensive, democratic and workable constitution that highly respects the human rights.

Actually, from the outset the debates on the amendments have been comprehensive and systemic and the process has been doing by involving participations from people in many ways.

We understand that a constitution is and should be a holistic system.

But, though the preparation is comprehensive in nature, unavoidably the finalization were done in phases, article by article, clause by clause. And, since many of the articles and or the clauses are interrelated to each other, it was almost impossible to conclude the primary part of the constitution in the initial phase of the process.

In regards, I must admit that there are accusations that the amendment process has been doing in partial, was very elitist and exclusive, and was done behind the closed door and doesn't involve people.

The term “amendment” used is easily interpreted as partial adjustment and misleading

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The results of every annual session were very partial, while the process of the preparation was not exposed properly to the public properly, which generated distortions on what were really happening. Subsequently, there is doubt in the society on the sincerity of the MPR to conduct the reformation of the constitution.

Actually, all the plenary meetings of the ad-hoc committee were open to public and attended by journalists, as well as by researchers and representatives from international organizations, though not many news were considered interesting enough to be covered by newspapers and other mass media. When MPR has no budget allocated to broadcast the meetings, secretariat general of MPR managed to have cooperation with UNDP to help financing the program. Hundreds of public discussions were held, at least once in every 350 districts in the country, attended by activists from political parties, mass organizations, NGOs, prominent figures, members of local house of representatives, academic communities, head of districts, etc. The similar public discussions were also conducted in every capital city of the provinces. Series of public hearings with prominent figures, institutions and NGOs were also conducted in MPR building. In cooperation with the academic associations, series of seminar with topics on law, economy, politic, autonomy, religion, and education were organized in several cities with participants from almost all of universities and research centers from all over the country. We are opened to and have supports from international institutions such as NDI (National Democratic Institution), UNDP, IFES (International Foundation for Electoral Reform), IDEA, as well as from foreign embassies, which provided literatures, invited scholars, organized discussion, or just gave comments and or analysis.

We sent teams to countries in Asia, Australia, Europe, America, and Africa for comparative studies.

We also had a team of 29-people senior experts with backgrounds on economics, political sciences, law, religion and education to work with us.

Besides, we received hundreds of written inputs and feedbacks from the society.

Obviously, not all of the inputs and proposals are acceptable. But one will see the significant influences of those involvements upon the substances of the amendments.

On the other hand, although the present MPR is formed after a democratic election, the MPR (the Assembly) still bears an unfortunate image of being very powerful supreme institution, with unlimited authority, as it is stipulated in the original constitution. It was a symbol of power abuse and anti democratic practices of the past. It is not easy for the people to see that this superior political body will voluntarily and willingly give away its own power, or to see it in a position to make significant changes necessary for democratization. So it is understandable that many people are in doubt over the amendment process and its results.

But I must disclose that there are groups in the society that are trying to disparage and to stop the amendment process and to have an “independent” constitutional committee to draft a totally new constitution instead.

The political consensus in 1999, after the general election – which was acknowledged internationally as a just, free, and accountable election – was to have the constitution amended while preserving the Preamble of the 1945 constitution, the form of the unitary republic and the presidential cabinet system in the 1945 constitution. According to the constitution, the amendment should be done and is the responsibility of the MPR.

Therefore, 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 political consensus at all to begin with. What matters the most is the process and the substances of the amendment, and not the formal forms of the process and the result.

Indonesia is an archipelago country with 210 million people. The demography is very imbalanced. More than 50% of the people live in Java and Bali islands which constitute merely 20 % of the entire land. The rest inhabits other islands, more than 17,000 in total. Indonesia is a developing country with an income-per-capita of around \$400 (down from almost \$1000 before the monetary crisis), with very poor infrastructure. There is indeed a thin layer of people with modern-rational values, but in general the society is a transitional-prismatic type, with pre-mordialism as the dominant values. We still have nomadic tribes, people who live in the early stage of agriculture, even people who have been just recently exposed to the rest of the society. We have large tribes and small tribes, with Javanese as the largest. Every world religion exists in this country, while Islam constitutes about 85 % of population.

This part of the world was under Dutch colonial for about 350 years and under the Japanese Imperial colonial ruler for three-and-a-half years.

With that multiple diversities in the background, Indonesian nationhood grows as an amalgamation of shared humiliation and sufferings under Dutch and Japanese colonialism, and a shared dream of a just, bright and prosperous future for all.

The main elements of Indonesian nationalism are created by: the emergence of a thin layer of new Dutch-Indies elites resulting from the ethical policy under Dutch colonial government, the defeat the Russian Emporium (West) navy by the Japanese Imperial navy (East) at Tsushima Straits in 1905 – which awakened the Asian pride against Western superiority –, the spread of ideas of democracy and equality in Europe which subsequently infected Dutch Indies, the emergence of a new generation of Western educated leaders who were able to articulate and organize colonized people's aspirations in a modern way. In short, the main elements of Indonesian nationalism are the spirit of unity after suffering together under colonial ruler, the vision of sharing a free, just, and wealthy future, and the ability to organize those aspirations in modern ways. Framed by economic, communication, (colonial) political and government structures, this nationalism grows within a diverse society. In such a process, values such as inclusiveness and equality become the integrated part of our nationhood, as manifested in our coat of arms: *bhinneka tunggal ika*, which literally means: diverse, yet one.

At the end of the long struggle for independence, the Preamble of 1945 constitution was drafted during the later months of Japanese occupation. Yet the ideas contained in it are very surprisingly democratic. It adheres the supremacy of law and the ultimate

sovereignty of the people, asserting the respect of human rights, years before the United Nations' declaration of human rights in 1948. (The Preamble is attached to this paper).

This is the nation that then proclaimed its independence in August 17, 1945. It had fought to defend its integrity for years, undergone difficult times and is now endeavoring toward democracy and prosperity.

The above facts are obviously pertinent factors to consider in the amendment process. It is of our interest that the amendment processes and changes will not damage our nationhood and our integrity.

But, as asserted in the Preamble, it is obvious that we should have the amended constitution functions as a driving power toward modernization, democracy and to respect human rights.

In article 1 of the amended constitution it is reasserted that the sovereignty is in the hand of the people and shall be executed according to the constitution and that the country is a unitary republic that is based on law. Before, it was asserted that the sovereignty shall be in the hands of the people and shall be exercised in full by the MPR.

With amendment in article 3, MPR is repositioned to be a political body with high but limited competences, such as to amend or to draw up a constitution, as an electoral college (if MPR decides that the 2nd round of presidential election should be done by MPR), and as an institution to impeach the president. Before, the MPR is a superior and the highest political body with unlimited power and competence, which functions as the alter ego of the people – as elaborated in the Elucidation of the Constitution. MPR will no longer has the competence to neither set up the broad lines policy of the state nor have the accountability of the president. In case of impeachment, MPR has no exclusive rights to impeach the president, but only to respond to the accusation proposed by the DPR if and only if, prior to that, the Constitutional Court has decided the President or/and the Vice President is proven to be guilty. A president cannot be impeached on political bases, but over high crime violence(s).

In the future, there will be no Annual Sessions like we have now, and no MPR's decision will be a part of the legal system. It is agreed already that the MPR will consist of members of DPR (House of Representatives) and members of DPD (Regional Representatives Council). The debate on the existence of another membership in MPR, that is the appointed members from functional groups, is postponed to the next period. As for the military and police representatives, it is agreed that they will have their representatives in MPR until 2009 at the latest, and it is agreed to have it stipulated in the transitional provision of the constitution. After that time, the law will reactivate the voting right of the military and the police in general election. It has been agreed previously that the armed forces and the police will have their members in the House of Representatives until 2004 at the latest.

The original article 5 stipulated that the President should hold the power to make statutes with the approval of the House of Representatives. It has been amended and it is the House of Representatives, which have the power to make statutes and the President, shall have the right to submit bills to the House.

In the original text of article 6, the President should be a native Indonesian. Now it has been changed so that the President should be an Indonesian by birth, in line with the principles of human rights. It is also regulated that the candidates for presidency should be nominated in pair and should be proposed by a political party or by a coalition of political parties.

We will have the President and the Vice President elected directly by the people, simultaneously in the general election for the members of the House. The pair who receives more than 50% of the total (national) popular vote, which is distributed in more than half of the provinces with at least 20% vote in each province, wins the election. MPR will then automatically install the winner as the President and the Vice President.

We have not agreed on how or who will elect the President if there is no pair that meets the above requirements. However, it is agreed that only the first and the second winner are eligible for the 2nd round.

There are 2 alternatives for the second round to be debated for the 2002 Annual Session. The first alternative is to have the finalists elected by the MPR. In this case, MPR will act as an electoral college. The 2nd alternative is to have another round of election throughout the country. The pair who wins the popular vote will take the oath before the MPR plenary meeting as President and Vice President.

However, this process is still open for other option(s).

Amendment on article 7 has clarified that the country should have a presidential system. The president shall hold office for a term of five years (fixed term) and shall be eligible for re-election only for one more term.

In this part of the constitution, amendment has been made to underline that a dismissal of an incumbent President and/or Vice President is an extraordinary measure, an exception that can be processed only in accordance with the procedures regulated in the article 7B of the constitution. It is stipulated that a President cannot be dismissed because of his or her policy or other political reasons. He or she can only be impeached if he or she is proven, in prior by Constitutional Court, to have committed high crimes such as bribery, treason, money laundering, narcotics, etc., or if he or she can no longer meet the prerequisites of being a President or Vice President, such as health conditions.

In the Elucidation of the original constitution it was explained that the MPR appoints the President and the Vice President and the President is subordinate to and responsible to MPR.

There are some amendments made on articles 8 to 17. But two issues in this part are agreed to postpone until next session. The first one is the question on who will in charged temporarily if the President and the Vice President are simultaneously incapacitated?

The second issue is on the existence of the Supreme Advisory Council (Dewan Pertimbangan Agung – DPA). Should it be a high level political body or should it be an ordinary advisory body – though a prestigious one - subordinates to the President?

Amendment on article 18 on Local Government has asserted that the province and the district or the municipal shall administer and manage their governmental affairs by

themselves, according to the autonomy principles. With the amendment, the hierarchical relationship between national government and the regional government will be asserted, with the authorities maintained in the hand of the central government and those that will be delegated to the autonomous regions will also be clarified.

The newly added clauses underline that the state should recognize and respect the units of traditional society with their traditional rights, as long as they exist and in accordance to the community development and principles of a unitary state.

The amendment has asserted the full functions of the DPR (House of Representatives). The House shall hold the authority to make statutes. Furthermore, the House has the budgetary function and supervisory function. The House has the full authority to supervise the government, and for that purpose, the House has the rights for interpellation, inquiry, and statement of views and immunity for its members. It is stipulated that the President cannot dissolve the house, while the House cannot topple the President. But the House has the right to propose to MPR to impeach the President, but only if the Constitutional Court has proven, in prior, that the President is guilty.

This empowered legislative branch is supported by an independent and empowered Supreme Audit Board (Badan Pemeriksa Keuangan – BPK), which will be the only external auditing body with the exclusive right to issue opinions on auditing outcomes.

In this section, two new chapters on DPD (Regional Representatives Council) and on General Election have been added.

As stipulated in article 22C, the country will have a new institution, the Regional Representatives Council (Dewan Perwakilan Daerah-DPD). DPD has rights to introduce bills to DPR, which are related to autonomy, relation between national and regional authorities, formation of a new province or district/municipal, and on management of economic resources in regards with the financial relationship between national and regional authorities. DPD participates in debating the drafts on autonomy, and other materials related to the relationship between national and regional authorities. DPD can supervise the implementation of laws regarding to autonomy matters and BPK (Supreme Audit Body) will provide DPD with its findings.

Members of DPD are elected in the provinces on individual bases and each province has similar number of representatives, despite its respective size and population, and they are automatically member of MPR.

The presence of the DPD is aimed to enrich the political process at national level, so that the aspirations of the people and the diversity of the country will be much better represented and absorbed.

The amended constitution has article 22E on General Election added, which stipulates that the country shall have direct, general, just, transparent, accountable and regular general elections for members of house of representatives, national and regional levels, for members of regional representatives council, and for electing the president and the vice president.

The constitution does not include the regulation for the general election system as it is agreed by MPR to be regulated in law(s), because the election system might be more changeable than the constitution.

In article 24 on Judiciary Power, the amendment has reasserted that the judiciary power is an independent power and should be free from any interventions. The recruitment process for judges and justices is improved by setting-up a judicial committee that is accountable to the public. This judicial committee shall also function as an ethical council for the judges. The Supreme Court is the highest court and has competence for judicial review on lower laws. The chairperson and the deputies of the Supreme Court should be elected from and by the justices.

The idea of having the integrated judiciary system be incorporated in this chapter has also been discussing.

The amendment has also introduced a new institution within this judiciary cluster that is the Constitutional Court.

This is a very important institution for upholding the supremacy and the integrity of law. Among others, the Court has competences to test the constitutionality of law and to judge disputes on competences of institutions with authorities entrusted by the constitution.

In year 2000, two new chapters on national territory and on citizen and inhabitants had also been inserted. There are three articles with 4 clauses.

A full chapter on Human Rights was also added in MPR 2000 Annual Session. The chapter consists of 10 articles and 26 clauses.

The first article is on the right of every person to live and to defend his or her life and livelihood. Another article stipulates that every child shall have the right to live, to grow, and to be protected against violence and discrimination. It is also stipulated that every person shall have the right for recognition, guarantees, protection, and a just legal certainty as well as equal treatment before the law.

Another article asserts that every person shall be free to adhere his or her respective religion and worship performance, according to his or her religion, to choose his or her education and learning, to choose his or her work, to choose citizenship, to choose to reside within the nation's territory and to depart from it, and is entitled to return. Every person shall have the right to have the freedom of belief, to express his or her thoughts and attitudes, in accordance with his or her conscience.

The article also describes that the protection, advancement, upholding, and fulfillment of human rights shall be the responsibility of the state, especially the government. For the purpose, the constitution instructs that, in order to uphold and to protect human rights in accordance with the principles of a legal democratic nation, the practice of human rights shall be guaranteed, arranged, and embodied in statutory laws.

There are critics on this articles on human rights, especially on the article 28I clause 1 which underlines the right for living, the right for not being tortured, the right for freedom of thought and conscience, religious rights, the right for not being enslaved, the right for being recognized as an individual before the law, and *the right for not being*

*prosecuted based on retroactive laws shall be the rights as human that may not be diminished in any situation whatsoever.*

The critics say that this article might be used to protect those who are committed for human rights violations in the past.

But on article 28J it is asserted that in carrying out rights and freedoms, every person is required to obey the predetermined limitations regulated by the law for the sole purpose of guaranteeing recognition and respect over the rights and freedoms enjoyed by other people and to fulfill the just demands in accordance with considerations of morals, security, and public order within a democratic society.

With this article, limitations are set up in laws, including in the international conventions that we ratified, the constitution will not let those who are committed for gross violations against human rights, be concealed from the court.

(The full chapter on human rights is attached to this paper)

Amendment is also made on chapter XII article 30 on defense. The title of the chapter is changed to National Defense and Security.

It is stipulated that the State's defense and security efforts shall be conducted through a system of total people's defense and security by the Indonesian National Army (TNI) and State Police of the Republic of Indonesia, as the main component, and the people, as the supporting component.

The Indonesian National Army (TNI) shall consist of the Army, Navy, and Air Force as the nation's forces in their duty of defending, protecting, and maintaining the integrity and sovereignty of the state.

The State Police of the Republic of Indonesia as the national apparatus in preserving security and public order shall have the duty to protect, shelter, and serve the public, and to uphold the law.

At this stage, it is already apparent that the amended constitution has guaranteed the civil participation in political life and the human rights.

And, it is valuable to note that although the debates were in depth and serious, MPR has decided all amendments in unison and that all amendments have been officially enacted.

As mentioned before, the time limit to complete the amendment process is the MPR Session in year 2002.

There are still some important topics to decide, such as the composition of MPR (article 2 clause 1), on religion (article 29), on education (article 31), on social well being (article 33) and on the alteration procedures of the constitution (article 37). But it seems that those topics are not as complicated as the other topics that have been settled.

However, we will continue our effort to involve the public in the whole amendment process. While in the past we had an experts' team from various backgrounds of academic skills to assist the Ad Hoc I Committee, the Committee plans at least to organize another series of public hearings with the academic community, NGOs and others. We also will organize discussions in every district, as well as in Jakarta and province's capitals as we did before, both to encourage the participation of the public in the process and to disseminate the outcomes of the previous amendments.

We'll still need supports from international organizations and from other countries.

Considering the topics to be finalized, the spirit that has been shaped among the members of MPR, and the ample time the MPR still have until the 2002 annual session, we are optimistic that this amendment process, at the end of the day, will produce a comprehensive, democratic, and workable constitution, as desired. .