

*Constitution and Human Rights Provisions in Indonesia: an Unfinished Task in the Transitional Process**

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Introduction

Indonesia is now facing the important moment of constructing a new foundation in a transitional period. After the fall of the New Order regime, there have been efforts in bringing Indonesia through the period of 'transition to democracy'. One of the efforts is to reform the 1945 Constitution.

Until now, the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat*, 'MPR') has promulgated three amendments consisting of 103 new/amended provisions. From the fact that there are three amendments, one may form the opinion that the reform started in 1998 has been going well in terms of constitutional reform.

There are, however, certain issues beyond the quantity of the articles and the 'legality' of the process. Can the amended articles meet the need of democratisation? What are the implications of the inserted new articles to human rights and the political system? Has civil society genuinely participated in the process? Having reviewed the way in which the MPR performed the process, does the MPR have full legitimacy to reform the constitution?

I will address the issues while referring to human rights provisions in the constitution. In addition, because I am here in my capacity as an NGO personnel who has been involved closely with the civil society movement advocating a 'New Constitution through Constitution Commission,' I will also particularly elaborate that issue in outlining the present state of constitutional debate in Indonesia. It is that capacity too, that places me in the position of merely describing what is happening in Indonesia, and not analysing it from the theoretical point of view.

I. Brief Review on the Amendments of the 1945 Constitution

The 1945 Constitution was drafted before Indonesian independence on 17 August 1945 and promulgated a day after the independence. It therefore reflected the need of the society **at that time**, which was the need to have a new independent government to establish an independent country. Therefore, there were only 37 articles concerning basic provisions for a newly established country. As the annotation reads:

'The Constitution is made up of only 37 articles. The clauses merely refer to transitional and additional aspects....'

It is adequate if the constitution only contains the fundamental provisions and guidelines as directives for the government and other state institutions to conduct state affairs and create public welfare. In particular for a new and young country, such a basic law is best to contain the basic provisions only while the operational procedures can be accommodated in laws, which are easier to make, amend and repeal. Hence the system in which the constitution is drafted.'

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All of the ‘founding parents’ realised, so that it is stated clearly in the text, that the Constitution was meant to be a temporary constitution and it should be replaced by a comprehensive and definitive constitution after the transition from a colonial state to an independent one was completed and peace and stability were achieved (Article 3, Additional Provisions, and the Annotations of the 1945 Constitution).

In a legal-formal perspective, however, the 1945 Constitution is definitive, since it was promulgated as a definitive one in 1959 by a Presidential Decree (in Soekarno’s administration, known as ‘*Dekret Presiden 5 Juli 1959*’) when the *Konstituante* (Constitutional Body that was assigned by the 1950 Constitution to draft a definitive constitution) considered to have failed in its task.¹

Although the 1945 Constitution is legally binding, the fact that it was made as a temporary constitution, which has limited provisions, leads to the question whether it is still sufficient for the present situation. Since it was meant to be a temporary constitution, the content is rather simple and open to multiple interpretations; this is the major weakness of the 1945 Constitution. The basic content of a constitution, which consists of human rights, the division and limitation of power, and the manifestation of state based on the rule of law, were not sufficiently accommodated in it.

Due to the nature of its suitability for those who wanted to abuse and maintain their power at the same time, the 1945 Constitution was treated as a ‘sacred document’ during the New Order era. Then, as the movement to overthrow the New Order regime reached its peak in 1998, the demand to reform the constitution received a response from the ‘new’ MPR resulting from the first general election after the New Order regime.²

There have been three amendments afterwards. The first was in 1999, the second was in 2000 and the third amendment has just been ratified in November 2001.

There are two criticisms articulated by the Civil Society Organisations of the amendments. The first criticism is regarding substance. Even though there have already been three amendments (and will be followed by a fourth next year), there was no clear paradigm on which the amendment should be based. Thus, the provisions are not coherent.

The limitation of presidential power, for example, was the first thing that was enacted in 1999, mainly motivated by the ‘bad experience’ of the excessive power of the president during New Order and Guided Democracy regimes. Yet the MPR has not really decided what type of system of government the Constitution should be based on. As a result, there is no clarity in the pattern of interaction between the president and the parliament. In practice, it is difficult to determine whether Indonesia applies a presidential system, parliamentary system, or even a mixed system of government. Therefore, it is wide open for interpretation from whoever has special interests. One of the most obvious results of the lack of clarity was the conflict between the parliament and the president months ago that has ended in impeachment of the president. Despite of the fact that there was a strong political conflict behind this case, an endless debate among the constitutional lawyers during the process strongly indicated the problems.

¹ It should be noted that there is a strong argument stating that *Konstituante* almost finished its duty when the Presidential Decree was enacted. Yet, because of the political reasons, the President issued the Decree. See Adnan Buyung Nasution, *The aspiration for constitutional government in Indonesia : a socio-legal study of the Indonesian konstituante 1956-1959* (1992).

² MPR consists of 695 members, 500 members are at the same time the members of DPR (*Dewan Perwakilan Rakyat*, People’s Representatives or the Parliament), 130 members are the representatives of provinces elected by the local parliament, and 65 members are representatives of Societal Groups appointed by the Election Committee. Among the 500 members of DPR, 38 seats are allocated for the Military and the Police Force (Police Force in Indonesia is part of the Military Forces) and the rest were elected through the general election in 1999. It has authority to (1) elect the President and Vice President; (2) amend the Constitution; and (3) enact a General Guidelines for State Policy (*Garis Besar Haluan Negara*) every five years.

The second critique regards the process, which includes the limited time spent in the deliberation process and the lack of public participation. MPR members are divided into three Ad-Hoc Committees; one of them (Ad-Hoc Committee I or *Panitia Ad-Hoc I* in Bahasa Indonesia, 'PAH I') is assigned in particular to prepare the draft of amendments. PAH I worked for approximately nine months before the draft was submitted to the Annual Session of MPR. However, during the session, before it is ratified in a plenary session, the draft will be discussed by a new commission (Commission A) which consists of different persons (200 members). This Commission will discuss the whole draft all over again within five days. As a result, particularly in the second amendment, the full draft that has been prepared by PAH I was not enacted, rather, only certain articles that are considered 'safe' for every faction's interests were enacted.

As for the people's participation, although MPR did conduct a series of seminars in different provinces, they were not involving civil society very much. Whereas the CSOs demand the participation of civil society in the broader term, only academics, government apparatus, local parliament members, and certain organisations (usually those related to political parties) were invited to the seminars.

It is true that every discussion of PAH I preparing the draft amendment was open to the public and broadcast through *cable television for people in Jakarta*. Nevertheless, at the end of the day, many of the final decisions were made during the five days of Annual Sessions and, because five days with 200 persons involved was not enough, there were many lobbying sessions and discussions done beyond the public eye after the sessions. Therefore, it was almost impossible for the public to really know which articles were going to be ratified at the end of the session.

Based on those critiques, the CSOs are now questioning the 'legitimacy' of MPR to conduct the task of reforming the Constitution. Furthermore, although the 1999 general election was considered the first democratic one since 1955 by monitoring groups, the representation in the MPR is still problematic. There are still appointed members, especially the Military faction, that are not considered as the people's 'real representatives'; and there is also the lack of 'communication' between the MPR members and their constituents. This subject will be discussed further in the third part of this paper.

II. Constitutional Provisions Regarding Human Rights

Now I come to the part that is the important theme of this conference, which is the human rights issue.

The original text of the 1945 Constitution only contains six provisions that explicitly talk about human rights with 15 Human Rights Principles included.³ Human rights provisions in the 1945 Constitution are also problematic because there were too many further regulations delegated to laws/statutes. Thus, they could be easily 'twisted' according to those in power. For instance, there was a law regarding mass organisation (Law No. 8 year 1985) imposing 'Pancasila' as the only principle for every organisation as a further regulatory provision of 'the right to organisation' provided in Article 28 of the 1945 Constitution. Without having 'Pancasila' as its principle, a group was not allowed to establish an organisation.

I am pretty sure that all participants of this conference have been aware that human rights issue were indeed one of the most important concerns in the reform process. There was a national action plan regarding human rights announced in 1998 during President Habibie's government, which was planned to finish in 2003. The MPR also immediately responded to the concern by

³ See Todung Mulya Lubis, *In Search of Human Rights: Legal-Political Dilemmas of Indonesia's New Order, 1966-1990* (1994).

promulgating an MPR Decree No.XVII/MPR/1998 regarding Human Rights. The next MPR (the 'new' one) then 'modified' and inserted articles in the MPR Decree as parts of the second amendment in 2000.

These articles, however, need to be analysed further as to whether or not they are appropriate in protecting human rights. The most controversial article is article 28I section (1) that says:

The rights to life, freedom from torture, freedom of thought and conscience, freedom of religion, freedom from enslavement, recognition as a person before the law, and the right not to be tried under a law with retrospective effect are all human rights that cannot be limited under any circumstances.

With this provision, it would be impossible to prosecute those responsible for human rights crimes during the New Order that are not considered crimes under the prevailing Criminal Code, such as crimes against humanity and genocide. As Indonesia applies a civil law system and has a legislative hierarchy, no act may contravene the Constitution, and this could have affected the Law on Human Rights Tribunal that was drafted at the time the article was inserted into Constitution.

It is correct that the non-retroactive principle is universally acknowledged. Nonetheless, there is also an exception of this principle for the gross violation of human rights, as the practice of international law has applied this exception to the Nuremberg and Tokyo Cases in 1946 and 1948 for war crimes during the Second World War.

Prof. Muladi, the former Minister of Justice and Human Rights and an expert in Criminal Law said 'although non-retroactivity is a general principle of the law, it would be better not to include it in the Constitution'.⁴

Opinions concerning this article were also stated by Prof. Suwoto Mulyosudarmo, a constitutional law expert and Prof. Bagir Manan, a constitutional law expert and Chief Justice. As Prof. Mulyosudarmo put it: 'To avoid further problems, the article should be revoked in the next amendment'.⁵

Apparently, however, since the human rights activists and experts strongly opposed this principle and advocated bringing the human rights violators into court, the DPR then ratified the Law on Human Rights Tribunal (Law No. 26 year 2000)⁶ that put aside the non-retroactive principle for gross violation of human rights. The government and DPR agreed that gross violation of human rights in the past should be put under the jurisdiction of the Law on Human Rights Tribunal, but that the settlement should be done by the establishment of an Ad-Hoc Tribunal of Human Rights with consideration to the time and place of the violations (*tempus delicti* and *locus delicti*).

To conclude this case, apart from the fact that it is not proper to put such a principle in a constitution, it should be said that it is peculiar to have one principle in the Constitution while there is a law that actually opposes the principle, especially for a country that applies a civil law system with stricter hierarchy of legislation.⁷ The question is then, if the government and DPR

⁴ <http://www.etan.org/et2000c/september/17-23/21ethuma.htm> (cited 24 November 2001).

⁵ *Ibid.*

⁶ There is also Law regarding Human Rights, Law No. 39 year 1999.

⁷ Because there is MPR Decree No. III Year 2000 on the Source of Law and Hierarchy of Legislation, in which the law and other regulations should be based on the Constitution.

were able to agree not to recognise this particular principle in the Human Rights Tribunal Law, why did MPR put this principle in the Constitution in the first place? Bearing in mind that almost three quarters of MPR members are DPR members and they were supported by experts as well as watched by Human Rights CSOs, how could this ‘politically heavy’ principle pass? Subsequently, should the amended constitution be ‘re-amended’? Or should the law be amended according to the constitution and thus, let the violators of human rights escape from national trial and/or be tried in the International Tribunal of Human Rights?

I need to add here that there is very strong indication of strong political pressure behind the ratification of this particular provision. This indication resulted from the fact that this specific provision was not endorsed during the formal session; it was a result of a lobbying session among the faction leaders after the formal one.

III. Present Constitutional Debate

The aforementioned debates regarding critiques from CSOs towards the amendments as well as the case of the non-retroactive principle in the Human Rights provision lead to the discussion on present constitutional debate in Indonesia.

At present, there is a civil movement led by CSOs/NGOs advocating the making of a new constitution through a deliberative process involving as many members of society as possible. This movement also particularly advocates the establishment of a Constitution Commission similar to those in Thailand, South Africa, and the Philippines. This demand is based on the following reasons:

1. The societal context within the 1945 Constitution is not relevant anymore within the present situation. Indonesian society needs sufficient provisions regarding human rights and governance so as to limit power and be in line with the present societal state. For instance, it needs provisions that can address wealth distribution among the regions, as development has been centred only in Java island, and Jakarta in particular.
2. The way the MPR amended the 1945 Constitution resulted in a vague system. The people argue that they need a coherent constitution that cannot be interpreted by those in power for their own political interests.
3. There must be participation from as many people as possible, because ultimately the Constitution will affect all people and it is believed that people’s participation is an important key in having a constitution that reflects the real need of the society. Moreover, it is likely that such involvement can channel the potential conflicts within the society.

This group has been conducting a series of discussions in many regions, media advocacy, lobbying sessions, and establishing a network among those supportive to this proposal.

This recommendation became a national issue when President Megawati Soekarnoputri mentioned the possibility, in the president’s annual speech in 18 August 2001, of setting up a Constitution Commission to reform the Constitution.

The opponents of this recommendation, mainly MPR members, claim that MPR has full legitimacy to reform the Constitution based on the Constitution itself, therefore establishing a Constitution Commission is a violation of the Constitution. They also say that their legitimacy cannot be questioned as the current members of MPR resulted from the first democratic election since 1955.

On the other hand, the proponents’ arguments come from the very fact that MPR has not really represented their needs, especially since there is no adequate communication between MPR

members and their constituencies apart from those who are within the organisational structure of political parties. Moreover, the reality that the people elected them in the general election brings a consequence that they have to ‘hear’ what the people say—even if they are only a small part of the whole people—and not just claim their legitimacy while rejecting the people’s opinion.

As for the opinion regarding the legal basis of the Constitution Commission, the supporters put forward the fact that it is the same constitution that places MPR as a supreme body, therefore, so long as there is political will from MPR, it can amend Article 37 regarding the amendment and/or assign a Constitution Commission to draft a new constitution and ratify the draft afterwards.⁸

Another debate surrounding this issue is on the basis that the amendments were drafted in a proper way so that there is no need of a new constitution. It is enough that MPR assigned a group of experts, invited people to submit the recommendation, and conducted comparative studies by visiting foreign countries.

On the other side, the group which supports the making of a new constitution by a Constitution Commission state that participation is not ‘genuine’ and experts do not always reflect what the people need. It needs people’s genuine participation to have a constitution that reflects the people; and having people’s aspiration is crucial for a country like Indonesia that is in the middle of a transition process. Through the involvement of civil society, the trust in the state that was lost since the constitutional provisions have been abused by the authorities in maintaining their power and repressing the people, can be gradually regained.

From the CSOs’ viewpoint, indeed, the very large amount of money spent in conducting comparative studies—which is believed have been done by experts and can be done through document study and the Internet—would be better spent building a system that is transparent and open for the people in the whole region.

In addition, the proponents also point out the weaknesses of the amendments as described above. Therefore, there is the need of a **new** constitution with coherent and clear provisions, which at the same time can guarantee human rights, rather than having the original text of 64 provisions that are amended by the total of 103 provisions and which have resulted in a vague system.

Since this subject was touched upon in a formal speech by a president who is also a leader of a majority party within MPR, the issue became more substantial. Some political parties stated their support and this topic was even discussed during the 2001 Annual Session of MPR. However, because there are some factions that did not agree with this proposal, the campaign and advocacy activities of the civil society movement continue and it even becomes more massive.

Conclusion

To sum up, I need to re-emphasise that 1998, the year when the New Order regime was overthrown, was not the end of the reform. It is, in fact, the beginning of a reform process—a transition to a more democratic Indonesia. Therefore, it should have been started with a fundamental change: constitutional reform involving civil society. Yet changing ‘the persons in power’ seemed to be more important at that time. This resulted in an elite-dominated process of reform and, in turn, political conflicts among the elites rather than addressing the needs of the civil society.

⁸ This happened in Thailand’s constitution-making process. There is no doubt that other countries’ experiences in constitutional reform play an important role in enriching this debate. Researches studying on constitutional reform experiences have been conducted by both groups in order to support their arguments.

Although there has been a reform of the 1945 Constitution, it could be said that the amendments have failed in bringing about a fundamental reform, that is, constituting clear and coherent provisions regarding the political and legal system as well as guaranteeing human rights. Indeed, constitutional reform in this sense remains unfinished; and it needs civil society's participation to go through this process.

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Position Paper and campaign documents of NGO Coalition for New Constitution