

FROM BIG BANG TO INCREMENTALISM: CHOICES AND CHALLENGES IN CONSTITUTION BUILDING

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Indonesian Post-Crisis Constitutional Reform: An Incremental Big-Bang Constitutional Change Between 1999 and 2002

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The magnitude of change

The Indonesian Constitution of 1945 is the shortest constitution in the world. It is much shorter than the US Constitution which is usually claimed by some American scholars to be the shortest. The US Constitution contains 4608 words compared to the Indonesian Constitution of 1945, which contained only 1393 words. After the reformation process over 1999-2002, with only four amendments the content of the constitution increased to 4559 words, over 300%. When it was promulgated on the 18 August 1945, the Constitution consisted of 71 ruling articles. By the adoption of the fourth amendment in 2002, the contents had grown to 199 ruling articles. Of the 199 articles of the new Constitution, only 25 originated in the 1945 document. The other 174 articles are all new.

Between 1999 and 2002, four constitutional amendments were adopted: the first amendment in 1999; the second in 2000; the third in 2001; and the fourth in 2002. The new articles cover a wide range of matters and were added to almost all parts of the Constitution. Articles on human rights, which were avoided in 1945, were adopted in articles 28A until 28J, incorporating rights from almost all international instruments on human rights. Other matters adopted by the four amendments were (i) limitations on presidential power; (ii) strengthening of parliamentary functions and legislative power and the establishment of a regional representative council; (iii) shifting the constitutional system from the supremacy of the institution of the Peoples' Assembly to the supremacy of the Constitution, supported by the establishment of a constitutional court and the principles of checks and balances between branches of power; (iv) moving from a semi-presidential system, with the People's Assembly as the highest body, to a pure presidential system with a directly elected president; (v) empowerment of local government with stronger decentralization and local autonomy policies; (vi) greater emphasis on directive rules for social and economic justice and social welfare policy; (vii) greater support for the independence of the judiciary, including a more effective system of

constitutional ethics; (viii) providing clear rules for procedures to amend the constitution; and (ix) some other new constitutional rules.

The four constitutional amendments were an integral process of change. That is why, officially, the framers of the amendments characterised it as one process with four stages of constitutional reform. The changes, the method, and the process of change are incremental, but the contents are nothing less than a big-bang. Therefore, I suggest that the Indonesian experience between 1999 - 2002 should be understood as incremental big-bang constitutional change.

How and why: The process and substance of change

The Constitution of 1945 was intended to be temporary in nature. It was drafted in a very short and simple formulation. The Constitution was adopted the day after independence day 18 August 1945. It has since been changed by replacement three times. The first was when the unitary state changed to federal system in 1949. The second was when the form of state returned to a unitary system with the promulgation of the Provisional Constitution of 1950. Following the first general election in 1955, a Constituent Assembly was established to draft a new Constitution. However, President Soekarno with the support of the military declared the reapplication of the 1945 Constitution. As a result, from 1959 to 1965 (the Old Order Regime) and from 1966 to 1998 (the New Order Regime), President Soekarno and President Soeharto enjoyed almost unlimited power, enabling them to govern for long periods of time.

After the crisis in 1997-1998, the agenda of constitutional reform was unstoppable. The problem was that the opposition to Soeharto consisted of two different groups: the emergent modernist Islam and progressive reformists on one side; and the conservatives and traditional nationalists on the other. The latter group, headed by Megawati Soekarnoputri, the daughter of Soekarno, initially opposed any changes to the Constitution, but later accepted the idea with several conditions. The compromise set out five conditions to achieve before the Working Committee of Constitutional Change could begin a substantive debate over the agenda of the first amendment of 1999. Those conditions were: (i) the Preamble of the 1945 Constitution cannot be and will not be changed; (ii) the guaranteed existence of Indonesia as a Unitary State Republic (NKRI); (iii) strengthening of the presidential system of government; (iv) the official explanation of the 1945 Constitution would be adopted into the content of the Constitution; and (v) the constitutional change would be conducted not by replacement of the original document, but by way of addendum enclosed to the original constitution.

Consequences of the choice to pursue amendment rather than a new Constitution

The multi-staged amendment process meant that Indonesia could adopt the social aspirations for continuity and change at the same time. However, there were many weaknesses with this approach including the potential to lead to problems of interpretation and implementation. The first four amendments were constructed by maximizing the momentum of in the wake of social crisis, without any profound preparation or public awareness within the dynamic constitutional cultures of plural Indonesia. The substantive changes were so significant in nature that it might have been better to frame them as a compact document to be rewritten in a consolidated text of the 1945 Constitution. Because of that, the name of the new Constitution was agreed to change from 'UUD Tahun 1945' to 'UUD Negara Republik Indonesia Tahun 1945' (The Constitution of the State Republic of Indonesia of 1945). In 2003 an independent Constitutional Committee was formed, comprising mostly members

from universities and NGOs. The independent Committee was tasked with consolidating the five documents (the original constitution and the four amendments) to become one. Regretfully, the independent Committee was too independent, in the sense that they made their own new and different constitution, such that the Peoples' Assembly did not take any official steps in response to the Committee's proposal.

Fortunately, the idea to establish a constitutional court was adopted and included in the third and fourth amendments. This new institution meant we could control democratic mechanisms and provide constitutional directions through judicial review according to the Pancasila (the five principles of basic philosophy) and the Constitution. Through court rulings, the rules of the Constitution are enforced to prevail in the exercise of power relations. Accordingly, the Constitution can be expected to live and evolve through a philosophical, political, economic, social and even cultural reading by the Court. This suggests that constitutional interpretation is actually another form of constitutional change in action, besides formal amendment and constitutional conventions. Through its rulings, the court has power to be (i) the final interpreter of the constitution and the constitutionality of public policy; (ii) the controlling power of democratic rules of majoritarian procedures for the protection of minority rights; (iii) the protector of citizens' constitutional rights; (iv) the protector of human rights; (v) the resolver of conflicts and disputes on democratic electoral results; (vi) the resolver of disputes between branches of power and other offices in exercising constitutional powers; and (vii) the ruler on presidential impeachment according to law and the Constitution.

Sources of comparative experience

In the era of globalisation, it is impossible for any country not to learn, borrow, or adopt some constitutional ideas from others. Although the Indonesian nation has developed over hundreds and even thousands of years as a very pluralistic society with its local political cultures, Indonesia in 1945 constructed its first written constitution in modern terms, influenced by many foreign constitutional traditions. We adopted some aspects of the American presidential system balanced with the existence of the highest body of the peoples' assembly as was common in the USSR and eastern European countries. Some state institutions were adapted from the old ones under the Dutch colonial government, using Indonesian terms. Some of the legal terms used in the official explanation of the 1945 Constitution reflected German words, showing the framers' references to the German constitutional system. The ideas of the triple system of representation in the Peoples' Assembly consisting of political representatives (the House of Representatives), regional representatives (from the provinces), and functional representatives (from tribal groups and other non-political parties NGOs and other professional organizations) was transplanted creatively from several bicameral parliamentary systems including Britain, the United States and other European countries.

However, during the reformation in from 1999 to 2002, the sentiments toward foreign influence among the people and those in the opposition were critical. There were many funding agencies from foreign countries which set as their priority agenda to provide assistance to the pro-democratic activists, university scholars, and NGOs. Even the official institutions such as the parliament, government agencies and the courts, used the funding provided for technical assistance with little political consideration of conflict of interest. While they had enough budgets for the purpose, foreign assistance was accepted by many reformists because of more simple procedures. Consequentially, there are still many conservative groups which claim that the constitutional reforms of 1999 to 2002

were nothing less than foreigners' projects, a foreign intellectual brain-washing, and a transplantation of foreign constitutional traditions to colonize Indonesian peoples' mindset through constitutional amendment. There are still many people, especially older peoples, former public officials, former military commanders, but also a growing number of young people, who are in the opposition position and dream to be back to the original Constitution of 1945. One of the most important political parties has set forth in its by-laws an explicit agenda to restore the original Constitution if they win the election. I believe that these kind of set-back ideas will never be able to win the peoples' voices and collect significant support from voters in any general election in the future because most young people today are more easily moved by ideals towards the future than romantic dreams towards the past.

Today, we cannot get escape the reality of interdependence and mutual borrowings among civilizations of human beings, especially on the highest values of common virtues as reflected in the constituting document, the highest source of constitutional law and ethics. For example, when I was invited and asked to speak in front of the Working Committee of the Peoples' Assembly in 2002 about article 31 on education, I urged the members of the Committee to accept the idea to include provisions for a minimum 20% budget for education. Many people, especially high ranking experts and economists opposed the idea, saying that it was too much and that the Constitution should only include principles and not technical things such as the calculation of the budget. To convince the politicians, I provided them the copies of Taiwan's Constitution and Brazil's Constitution, the only two countries in the world that adopted an article for a minimum education budget in their Constitutions. In Taiwan, the national education budget is set forth as a minimum 15%, the provincial budget for a minimum 25%, and the district level budget for a minimum 35%. While in the Brazilian Constitution, the educational budget is set at 25% for every level of government. Most members of the Working Committee were impressed and agreed to adopt the present formulation of article 31(4), which provides that 'the state shall give priority to the education budget by allocating at least 20% of the state's as well as of the regional budgets to meet the requirements of implementing national education'. This provision was needed in order to institutionalise the highest awareness of the importance of education and human investment for the future.

There are many other issues and ideas that were adopted from other countries' best practices, including, for example, the adoption of almost all International Instruments of Human Rights in Articles 28A to 28J, the establishment of the Constitutional Court, and the establishment of Judicial Commission. This era of globalisation is now the time to consider the reality of the universalisation of constitutional values around the world. At the same time, I also urge and try to convince legal and constitutional scholars not to forget about the long and dynamic constitutional culture of our own respective countries. Universal values are not identical to foreign or international values. The universal values may be found from the best practice in any country and in the international context as well as from the local wisdom of our own respective cultural histories.

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