

# **Constitutional Reform in Indonesia: A Retrospective**

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## ***The Process of Constitutional Change***

The constitution of any country defines the institutions by which that country governs itself, and indeed the relationship between the citizens of the country and its institutional framework. As such, it is a fundamentally political document, establishing the rights and duties of citizens and state institutions, and reflecting also the way in which society wishes itself to be governed. It may therefore be expected to be the result of wide ranging political debate. As with any process of political debate, there will be those with interests to promote or protect. It is evidently legitimate, and indeed desirable, that constitutional debate centring on long term vision should be encouraged. It is also however inevitable that particular short term, sectoral and even venal interests will affect the course of that debate. To take just one example, the Constitution of Australia took effect in 1901, and still retains a provision detailing what happens in assessing representation at federal level when people are excluded on racial grounds from the franchise at state level – a provision which reflects the anti-aboriginal and anti-Asian and Pacific migrant climate of 1901 Australia.

Nonetheless, the proposition was often advanced in political debate in Indonesia during the process of constitutional amendment that there was some kind of ideal constitution, which could be devised or discovered by independent technical experts. No such ideal can exist in practice. The story of the constitutional amendment process undertaken by Indonesia between 1999 and 2002 is a highly political one, in which fortunately vision did play a significant role alongside narrow interests, and in which both the ideas and the personalities of the key actors were thus of substantial importance.

## ***The 1945 Constitution of Indonesia***

The 1945 Constitution of Indonesia is the key document, although it contains only 37 articles, and was originally written as a temporary text. Its pattern of state institutions was substituted in practice within three months of its promulgation, and no other nation has since copied it. Yet the 1945 Constitution has enduring emotional significance to most Indonesians as a symbol of the struggle for independence and as a founding pillar of the unitary state of the Republic of Indonesia. In the transition since 1998, not only the substance of the 1945 Constitution, but the symbol of 'the 1945 Constitution' was at stake.

The 1945 Constitution provided that the sovereignty of the people was to be exercised 'in full through the *Majelis Permusyawaratan Rakyat* (MPR)'. The MPR concept derived from the doctrine of the integralistic state, based on "the principles of unity between leaders and people and unity in the entire nation" in the words of drafting committee chair Soepomo. The MPR was to be established as the highest institution of state and 'the manifestation of all the people of Indonesia', and was to 'determine both the Constitution and the Guidelines of State Policy' – the latter subsequently institutionalised as the *Garis-Garis Besar Haluan Negara* or GBHN. The MPR was to consist of directly elected legislators, regional representatives, and representatives of functional groups (*Utusan Golongan*), originally conceived as 'cooperatives, labour unions and other collective organisations'.

The MPR was to meet once every five years 'to decide the policy of the state to be pursued in the future' and thus to give its mandate to the President. The five high institutions of state, the President, People's Representative Assembly (*Dewan Perwakilan Rakyat* or DPR), Supreme Advisory Council, State Audit Board and Supreme Court would submit reports to the MPR at the end of each five year electoral term. This structure therefore rejected both the principle of separation between the individual and the state and the principle of separation of powers between the institutions of the state, putting checks and balances in place.

### ***A 'Presidential System'?***

The President was to be 'the Chief Executive of the State' and 'the true leader of the state', and would 'hold the power of government in accordance with the Constitution': but 'the powers of the Head of State are not unlimited'. The President was both 'not in an equal position to' and also 'subordinate and accountable to' the MPR, and indeed was 'the mandatory of the MPR' and 'the highest administrator of state below the MPR'.

Indonesians described this arrangement as presidential. While the Republic of Indonesia has had a President since independence, the conventional definition of a presidential system by political scientists and political analysts requires considerably more. A presidential system may be defined by three specific characteristics: a one person rather than collegiate executive, an executive directly elected by the voters, and a fixed term chief executive not subject to legislative confidence.

The 1945 Constitution was thus not conventionally presidential. The President was indirectly elected by the MPR, not elected by the voters. The MPR set state policy through the GBHN without presidential involvement. The President was specifically tasked with implementation of policy in line with the GBHN. The MPR had the right, through a special session requested by the DPR, to dismiss the President before the end of his/her term in the event of clear violation of national policy - which included not only the 1945 Constitution itself but also the contents of the GBHN. While these procedures were lengthy and complex, the removal from office of President Abdurrahman Wahid during 2001 showed that they could have real teeth. By contrast, in a conventional presidential system, the grounds for presidential impeachment are normally restricted to breach of the constitution or criminal acts, with sometimes the addition of moral turpitude.

It was a long time before the concepts of the 1945 Constitution were tested under conditions that could be described as democratic or even transitional. While Indonesia was still fighting to realise its independence from the Netherlands, the full set of institutions envisaged in the 1945 Constitution could not be established. In October 1945, institutions of a more parliamentary nature were put in place: although their consistency with the 1945 Constitution is perhaps debatable, they were generally accepted, and lasted until the Round Table Agreement with the Netherlands in 1949.

The federal constitution of the Round Table settlement was rapidly replaced by the Temporary Constitution of 1950, which established a more parliamentary form of government. However, the 1950s did not see a consolidation of democratic institutions. President Soekarno on 5 July 1959 reintroduced the 1945 Constitution by decree. From this time onwards, he characterised it as a historic document, the symbol of the basis of the revolution, not amenable to amendment, addition or improvement.

President Soeharto also promoted the doctrine that the 1945 Constitution was a fixed text which was not capable of amendment or improvement. Soeharto took iron control of the various nomination processes leading to MPR membership and ensured that the MPR would be a pliant body – enabling real power to lie with Soeharto and the executive. The MPR merely met every five years as required.

Constitutional change was a key demand of those who demonstrated for Soeharto's fall in 1998. During the run-up to the General Election

of June 1999, however, new electoral and political legislation and organisation and preparation for the election took over the agenda. The constitutional reform debate was shelved: although radical student elements demanded immediate constitutional reform, they were rapidly sidelined. Although the need for institutional change was a consistent undertow in discussion, most parties fighting the 1999 election reaffirmed their commitment to the symbol of the 1945 Constitution and avoided raising its substance. Substantive change was put on the public agenda only after the election.

### ***Reformasi: Constitutional Review Begins***

The MPR General Session which followed the 1999 election agreed by consensus to a review of the Constitution during the following year. Reflecting the continuing importance of the 1945 Constitution as symbol, amendments would be made to the existing 1945 Constitution, rather than an entirely new constitution being written.

The first priority at this Session was a significant transfer of power from the executive to the legislature. The article relating to the law making process was amended – although the joint DPR/Presidential approval procedure for legislation that was agreed by the MPR meant that the real transfer of power to the legislature was not as significant as many imagined. At the same time, however, the MPR amended its Standing Orders, introducing Annual Sessions from 2000 onwards. The public discussion of an annual presidential report by the MPR and the annual ability to agree policy directions which followed from this formed a much more substantial move of the balance of power away from the presidency. In addition, the new MPR agreed that the president and vice-president could 'be re-elected to the same office for one further term only'. This package was agreed immediately by consensus by the MPR as the First Amendment to the Constitution.

An Ad Hoc Committee (*Panitia AdHoc I* or PAH I) was formed to handle the review of the Constitution. The title 'Ad Hoc' is perhaps surprising in view of the central role this committee played over the three years following. The term originates from the new Standing Orders adopted by the MPR in 1999, which included a standing Working Body (*Badan Pekerja* or BP) each of whose members would serve on one Ad Hoc Committee. Every PAH would reflect the political balance of the MPR, and would elect its own four person leadership. PAH I started work immediately, and chose the four members of its leadership, with positions going in order of seniority to the four largest political groups.

1999 was a time of great political change and ferment. Most of the members of the MPR were new, and people's capabilities and current political positions were not necessarily well known. Almost everyone's political position had changed, political know-how and experience was valuable. Jakob Tobing of PDI-P, who was elected as Chair of PAH I, had first become a Golkar member of the DPR member in 1968, had served several terms in the DPR and had held senior Golkar positions, although he had not always seen eye to eye with the Golkar's direction. In 1998 he had joined Megawati's PDI-P and was the party's nominee to the General Election Commission (KPU), which led to his also being chosen as the Chair of the *Panitia Pemilihan Indonesia* or PPI. This was the body responsible for the administration and day-to-day organisation of the 1999 elections. Chairing it was not easy, but it was a role in which Jakob Tobing was known as calm, polite and effective and in which he was respected across the parties. This approach was to prove just as effective in PAH I. He was convinced that the 1945 Constitution was not satisfactory in practice and was quietly committed to its major amendment and to the introduction of checks and balances and separation of powers. He did not look or sound like a radical firebrand: the result of this was merely that opponents continually misunderstood his direction and underestimated his determination.

Jakob Tobing was joined in the PAH I leadership by Slamet Effendy Yusuf of Golkar, another longstanding DPR member and experienced pair of political hands, as the first Deputy Chair. The team was completed by two members serving for the first time in the MPR: Harun Kamil of *Utusan Golongan*, a notary and a representative of Islam in UG, as second Deputy Chairs, and Ali Masykur Musa of Abdurrahman Wahid's PKB as Secretary. These four were to serve as leadership throughout the process, ensuring direction and continuity.

PAH I rapidly established its ground rules and broad principles. It immediately reaffirmed support for the existing Preamble, the unitary state, and the presidential system – but without saying what 'the presidential system' meant. Where no consensus to amend existed, the original constitutional text would be retained.

It became evident very early on that PAH I, representative as it was of the political composition of the MPR, had a broad commitment to fundamental constitutional change while still holding lively differences of opinion on a substantial number of key issues. More reform minded members from almost all political groupings had become members of the BP and then of PAH I – perhaps a reflection of political

commitment and enthusiasm at this stage. Importantly, PAH I rapidly developed a collective identity and loyalty. Jakob Tobing and his leadership colleagues encouraged and fostered this, recognising that reform would only be successful if it enjoyed wide support and understanding across all groups in the committee. The management of the committee proceedings in a quiet, open and consensual style which gained and retained members' trust enabled the members of the committee to contribute and the party representatives to explore ideas and negotiate with confidence.

As PAH I's work got under way, huge changes were taking place. The explosion of media free from Government control, the successful holding of the 1999 elections, and the passage of radical regional autonomy legislation which transferred a wide range of both powers and officials from Jakarta to local authorities were just some of the major components. And Abdurrahman Wahid (Gus Dur) had defeated Megawati Soekarnoputri for the Presidency at the MPR session – to the surprise of many, not least Megawati, who had failed to appreciate the need for coalition building in the key phase before the MPR assembled.

It is thus not surprising that the proceedings of PAH I, meeting in a committee room under the main hall in part of the MPR complex, attracted little attention. Even so, PAH I met two and three times in most weeks, consistently in public, and set up a series of consultation hearings and witness hearings both in Jakarta and in the provinces. In July 2000, it presented a comprehensive report which contained new drafting relating to almost all of the articles of the 1945 Constitution: disagreements were reflected by alternatives at 24 points. Much of the final wording was the result of carefully crafted, essentially political deals made between PAH I members. Inevitably, some chapters were well drafted and others rather less so.

### ***Political Problems and Procedural Delays***

The 2000 MPR Annual Session was overshadowed throughout by persistent talk of a confrontation between President Abdurrahman Wahid and the MPR and of possible removal from office proceedings, although the eventual showdown only took place later. While most PAH I members had now become familiar with and knowledgeable about constitutional issues, these now came to the attention of many other MPR members for the first time. For some, especially traditional nationalists, Soekarno loyalists and the more conservative military members, the PAH I report was much more wide-ranging and fundamental in scope than they had imagined.

Once debate exposed the differences that lay beneath some of the compromises in the report, they started to unravel. The importance of the issues, the 1945 Constitution as symbol, and the political strength of the more conservative forces meant that little effort was made within the MPR to force contested issues. In addition, some party fractions had proved better than others at communicating with and convincing the rest of their party. Issues were reopened from the beginning on the floor of the MPR, which was still exploring its new found freedom of action. Procedural conventions were inadequate to enable the discussion of a significant volume of complex material. Only about a third of the tabled amendments were even discussed – and those were the easy ones.

The failure to address most of the constitutional amendment agenda led to division between the MPR itself and many in Jakarta elite circles outside. The latter were vocally disappointed, and increasingly sought to develop a new concept of the state and a new Constitution. The MPR's legitimacy to conduct the constitutional debate, taken as read following the 1999 election, would henceforth be under steady external attack.

Consensus was however reached on several major issues relating to regional government, the DPR, citizenship, defence and security, and human rights. These formed the core of the Second Amendment. The DPR would become a fully elected body at the next General Election in 2004, with an end to military and police representation in the legislature. The powers of the DPR were specified: to legislate, to exercise oversight, and to approve the national budget. The Presidential 'pocket veto' was abolished: if the DPR and the President jointly agree legislation and the President fails to sign it within 30 days, the legislation takes effect regardless. (This, again, was widely misinterpreted: many people thought for some time afterwards that the DPR had powers to sign into law any bill that it alone had agreed if Presidential approval was not forthcoming).

The MPR – albeit for the most part unconsciously – made its first explicit change to the fundamental thinking of 1945, when proposals to include human rights provisions in the Constitution had been specifically rejected. Soekarno had said that such individual rights detracted from the freedom of the sovereign state: Soepomo had stated that the individual was nothing more than an organic part of the state. But the new human rights chapter proved controversial. Its provisions were substantially drawn from the Universal Declaration on



Human Rights (UDHR). However, human rights and NGO activists attacked the provision about trial under retrospective legislation as the outcome of a hidden agreement with the military, designed to block calls for justice for New Order human rights violations. Most MPR members appeared taken by surprise that this reaction was generated by a provision inspired by the UDHR.

### ***Trying Again: Core Unresolved Issues***

Attempts were made to widen the constitutional debate in late 2000, with initiatives taken by both PAH I and by Indonesian democracy and governance NGOs. The hearings in the regions did not generate a ferment of constitutional debate in response. At a consultation meeting in Central Java in late 2000 attended by the author, the major concerns of some 300 assembled local government officers and community leaders were the failure of the Government to issue key implementing legislation for the regional autonomy legislation due to take effect on the ground a few weeks later, and a general view that while different groups locally were cooperating to getting things done, all that could be seen and heard of Jakarta politics and government was confusion and deadlock. While the consultation team from PAH I tried gamely to pursue the constitutional agenda at the meeting, they and the audience effectively talked past each other for much of the session.

The central unresolved constitutional issues lay in a basket of interconnected questions about the basic structure of state institutions and the future form of the Indonesian state. There were four key points:

First, the nature of the sovereignty of the people. Some supported the 1945 concept, with sovereignty being exercised in full through the MPR as the highest state institution. Others believed that 'the presidential system' required acceptance of the separation of powers principle – and that this was a necessary and positive step to establish an effective democratic polity.

Second, the role, function and composition of the MPR. The advocates of separation of powers insisted that direct popular sovereignty requires all the representatives of the people to be elected. The MPR would thus be reconstituted solely as a joint session of two constituent houses, the DPR and a new *Dewan Perwakilan Daerah* or DPD. However, *realpolitik* dictated possible additions: proposed military and police representation in the MPR until 2009 was formalised in an MPR

Decree.

Third, the establishment of a system with two representative chambers, and the definition of the powers of the DPD. The DPD would have equal representation from each province; it might or might not be given legislative power on regional issues, but would not have powers in other areas. This would mark another major break from the 1945 concept. The original regional representatives were seen as part of the process of reaching consensus within a unitary MPR: the grant of any legislative powers to the DPD would accept the principle of separate bodies able to reach separate positions on certain issues.

Fourth, direct election of the President and Vice-President would give the extra legitimacy of a direct mandate. The relationship between the election manifesto of the successful ticket and the GBHN agreed by the MPR required clarification. Breach of the GBHN by the President was questioned as a valid ground for impeachment. More, the existence of the GBHN itself was questioned. The answers would critically affect the future balance of power between the legislature and executive.

### ***President Wahid Removed from Office***

Debate was effectively suspended in 2001 while the Presidential drama was played out. The July Special Session of the MPR removed President Wahid from office, replacing him with Vice-President Megawati. Although challenged, the removal procedure appeared in line with the Constitution, with one exception when the Special Session was accelerated to open before the requisite two months' notice period expired. These events demonstrated vividly how the relationship between the MPR and the presidency under the 1945 Constitution had changed in the new era of legislative assertiveness. They also had a constitutional legacy in the provision later enacted to enable the debarring of candidates for president and vice-president on health grounds – later to be used to disqualify Wahid from standing for President in 2004.

### ***The Third Amendment: Fundamental Change Enacted***

The 2001 Annual Session was thus delayed until November. The political tension of much of the preceding year had largely dissipated: there was no talk of challenge to Megawati's presidency. The PAH I leadership had however learnt the lessons of 2000. Negotiating and drafting meetings ran in parallel with plenary sessions of the

commission handling constitutional issues, in order to ensure that a wide range of MPR members could be heard while key players had time to try to thrash out the necessary compromises. Contributions from the floor were held much more strictly to time than in 2000.

The core of the deal proposed in the negotiating meetings was acceptance by PDI-P – the largest party in the MPR - of some legislative power for the DPD, in exchange for acceptance by Golkar – the second largest party – of a second round presidential election by the MPR, rather than directly, in the event that no ticket for president and vice-president polled more than 50% in the first round. But this deal could not be completed by consensus, as other parties were not prepared to accede to the proposed second round presidential election in the MPR. Further, *Utusan Golongan* members started to mobilise against the proposed new model MPR, from which they were to be excluded. They gained the support of a number of PDI-P members who opposed the existence and the powers of the proposed new DPD, believing it to threaten the unitary state and the founding principles of Indonesian nationalism. At one point the negotiations appeared close to breakdown as a result of Golkar's unhappiness that PDI-P seemed unable to deliver its own members behind the potential agreement.

When it finally became evident that no full agreement could be reached, a very quick decision was made to enact as the Third Amendment everything already agreed, and to use the remaining options as source material for a further year's debate. This decision was a major tactical success for the PAH I leadership and faction leaders, and especially for Jakob Tobing and the PDI-P constitutional reformers, who had outflanked their internal opposition. It was immediately confirmed as a very tired session closed. Its implications had not been appreciated by many MPR members, or by most people outside the MPR. Its result was a fundamental change in the institutions of Indonesia – but almost nobody noticed it happen. The disappointment that a full agreement had not been reached obscured the changes that were agreed. In political circles, and even more in media and commentary circles, the full meaning of the Third Amendment did not sink in until well into 2002.

When reality dawned, debate was particularly fierce within PDI-P. A number of its significant figures sought to reject altogether a Fourth Amendment, which was still necessary to complete the amendment process. They argued that this would lead to a return to the original 1945 Constitution, even though the Third Amendment specified that it took effect immediately. Once again, Jakob Tobing and the

constitutional reformers within PDI-P had to fight an internal battle, and had to ensure that Megawati remained on side despite her seeing the original 1945 Constitution as her father's legacy. The internal argument in PDI-P only abated after Megawati herself chaired a central party meeting.

PAH I drafted the Fourth Amendment, still containing alternatives, in April 2002. There was much speculation about deadlock at the Annual Session, as party leaders and significant figures staked out negotiating positions. The importance of reaching an agreement became more and more clear. Three big issues had to be solved.

First, the composition of the MPR. The question remained whether the future MPR should consist only of elected members. *Utusan Golongan* representatives starkly articulated the choice between the 1945 concept of the MPR bringing groups in society together, and the import of the 'Western' – specifically US – concept of bicameralism and of the principle that all representatives should be elected.

Second, the electorate for the second round of the presidential election, which appeared the most difficult issue to resolve. Opponents of the second round direct election proposal cited cost and security implications. Equally, second round election by the MPR was questioned on the grounds that the final decision would be taken by a relatively small (and thus potentially corruptible) group, and also because of the legitimacy questions that would arise if the MPR overturned a first round popular plurality.

Third, Islam and the Indonesian state. The constitutional review had enabled parties based on Islam to reopen the debate on the addition to Article 29 of the Constitution of seven key words (in Bahasa Indonesia) of the 'Jakarta Charter' of 1945: 'with the obligation for adherents of Islam to carry out syariah law'. This phrase had been contained in the original 1945 Constitution until its penultimate draft and had remained the subject of deep divisions during the constitutional debates of the 1950s. It was controversial not only among more secular nationalists and among followers of other religions, but within Indonesian Islam itself. Its inclusion was never going to command a simple majority in the MPR – let alone the two-thirds required if the issue had gone to a vote. But many of the Charter's supporters were putting forward a position of principle. In addition, the issue also provided a distinguishing public theme for the Islamic parties.

## ***The Proposal for a Constitutional Commission***

An independent Constitutional Commission was first promoted after the disappointments of the 2000 Annual Session by a large coalition of NGOs, gaining considerable momentum after a favourable mention by President Megawati in August 2001. The NGOs drew parallels with experience in Thailand, the Philippines and South Africa: but the Thai constitution had originated from the military, the Philippine constitution from former President Marcos, and the South African constitution from the apartheid regime, and all three were thus discredited documents. The 1945 Constitution as a symbol of Indonesia's independence was very different.

The MPR was never likely to accept a proposal to take the process almost fully out of its own hands. However, the Constitutional Commission proposal gained new support just before the 2002 Annual Session from military leaders – but for very different reasons. Strong pressure was brought by retired generals to roll back the whole amendment process and return to the integralistic concept of the 1945 Constitution. Given the momentum behind the Fourth Amendment at this stage, their idea was to use a Constitutional Commission to reverse the changes.

## ***Amendment Completed***

July 2002 followed a frequent pattern in the final stages of controversial and wide-ranging negotiations of any kind. Political leaders made strong statements warning of the dangers of failing to adopt their own entrenched positions – threats of delayed elections, amendment implementation delayed until 2009, or a Constitutional Commission – while detailed work in PAH I continued. PDI-P had however now accepted a direct second round presidential election – Megawati probably perceiving the desirability of maximum legitimacy for the second term that she, and most others, then expected would result from direct election.

The 2002 Annual Session was lively from the beginning. Anti-amendment members raised a series of points of order challenging its legitimacy, debating whether or not the MPR was still the highest state institution, and questioning the validity of Standing Orders. This was followed by an attempt by some PDI-P members to block the nomination of Jakob Tobing as chair of the commission dealing with the amendment process – despite his being one of their own party

representatives! It took almost two full commission sessions to complete the formal process of leadership selection.

The two round direct presidential election was agreed without argument. *Utusan Golongan* were isolated in their opposition to an all elected MPR when the military announced that their role lay in defence and security, not politics, and that they would withdraw from all representative institutions in 2004. They had recognised that the powers of the new MPR would be limited, and that a small group of military members would be merely a focus for unpopularity. The Islamic parties finally indicated that they would not oppose the decision of the MPR to retain the original wording of Article 29, although they regretted the rejection of the Jakarta Charter amendments and would continue to support their inclusion in a democratic way. These positions were to be included in the official record of the session. The supporters of amendment had made their case, demonstrated their position to the public, and been formally recognised; their opponents had retained Article 29 unamended – the elements of a win-win solution.

By contrast, the abolition of *Utusan Golongan* representation was finally agreed by a vote. Most parties were reasonably united. However, PDI-P were split, with 80 votes for abolition and 64 for retention – the first time such a division of opinion in any party had been demonstrated so clearly on the floor of an Indonesian representative institution. This vote could be seen as a reflection of the division within the party between nationalist modernisers and traditionalists. It perhaps showed the maximum of the sympathy that existed for the traditionalist position, as it enabled those who were doubtful about change to join the strong believers in the original 1945 framework in voting against a change which everyone knew would be carried, registering their personal reservations by doing so.

Just as it appeared that it was all over, the constitutional commission proposal emerged once again. Despite the previous agreement, the military tabled a proposal to reopen the limited status of the constitutional commission (note the lower case) that had been agreed, and proposed in addition that the four Amendments should be valid only to enable the 2004 elections. Further tense negotiating breaks followed: most of the politicians saw this new proposal as another attempt to overturn the new structure – and as an unacceptable breach of a previous consensus. Finally, the military recognised that there was insufficient support for their proposal and withdrew it. An exhausted session finally closed with members responding to a

proposal to mark the making of history by singing the National Anthem together.

### ***A Consistent Package***

From an integralistic state with a single highest state institution, Indonesia has become a state with constitutional checks and balances and with separation of powers between the legislature, executive and judiciary. The major changes made to the 1945 Constitution by the four Amendments are:

- The sovereignty of the people is no longer exercised in full through the MPR but is implemented in accordance with the Constitution itself.
- The MPR has limited specific functions only. These include considering constitutional amendments, swearing in the elected President and Vice-President, and deciding action if the Constitutional Court rules that an impeachment charge is well grounded. The presidential/vice-presidential impeachment process excludes removal from office on policy grounds.
- The MPR no longer has the constitutional function to make Broad Guidelines of State Policy (GBHN).
- The MPR consists entirely of elected representatives - the members of the DPR and the members of the new regional chamber, the DPD.
- The DPD participates in legislation on issues relating to regional autonomy, centre/region relations and natural resource management, and exercise oversight on these issues plus budget management, tax, education and religion.
- The president and vice-president are elected as one ticket in a direct election, with two rounds if no ticket achieves 50% + 1 of the vote and at least 20% in half the provinces in the first round.
- The independence of the election commission is specified. Political parties are the participants in DPR elections, and individual candidates in DPD elections.
- A Constitutional Court separate from the Supreme Court has been established with powers of judicial review of legislation, resolving disputes between state institutions, hearing claims for the dissolution of political parties and disputes relating to election results, and ruling on motions to impeach. (The general power of the Constitutional Court to interpret the Constitution remains unclear.)

- An independent Judicial Commission has been established dealing with judicial ethics issues and proposals for Supreme Court appointments.
- The Supreme Advisory Council has been replaced by a presidential advisory council within the executive branch.
- Constitutional backing is given for the principles of regional autonomy.
- A central bank whose independence and accountability is to be determined by law is provided in the Constitution.
- Human rights provisions are added in line with the larger part of the Universal Declaration of Human Rights.
- Future constitutional amendments can be introduced by at least one-third of the members of the MPR and will require the support of over half its total membership with two-thirds of the members present. The Preamble is not amendable. The form of the unitary state is unamendable, although the article containing this provision can itself be amended.

The new provision requiring the support of one-third of the members of the MPR for any proposed constitutional amendment makes it unlikely that the Jakarta Charter can be reintroduced in the near future. In 2004, the parties which supported its inclusion and their identifiable successors polled together only around 21 per cent.

### ***Soekarno Vindicated?***

In addition to completing the substantive changes, the Fourth Amendment appeared to resolve a major argument of Indonesian constitutional history. President Soekarno's Decree of 5 July 1959 dissolved the Constituent Assembly (*Konstituante*) elected in 1955 and reinstated the original 1945 Constitution, an action accepted by the DPR seventeen days later. (The MPR did not exist in 1959, as there was no such body in the 1950 Temporary Constitution.) The constitutional legitimacy of this action has been much debated, although it has usually been regarded as valid *de facto*. However, the Fourth Amendment specifically defines the 1945 Constitution as that Constitution which was proclaimed in 1945 and came back into force through the Decree of 5 July 1959. The institutions of the democratic era have accepted and validated Soekarno's action.

### ***2004: Elections and After***

With the new constitutional framework agreed, Indonesia moved almost immediately into pre-election mode. Five major pieces of



legislation were necessary: a new general election law, a new political party law, a new law regulating presidential elections, a new law on the structure and composition of state elected bodies (*Susduk*), and a new law to fill in the necessary details to establish the Constitutional Court. Further transitional work was required, including for example a review of all MPR Decrees that remained in force, before the MPR was to lose its power to make (and thus amend or repeal) decrees.

Despite the controversy that had surrounded the process of change, the amended 1945 Constitution rapidly became an accepted fact. Three elections were held successfully in 2004, legislative elections in April, a first round presidential election in July, and a second round presidential election in September. Incumbent President Megawati Soekarnoputri was challenged by her former Coordinating Minister for Politics and Security, Susilo Bambang Yudhoyono (SBY), who led after the first round and secured a convincing victory in the second round. Voters appeared to be seeking a convincing alternative to a government that had become perceived as complacent and unwilling to act on issues of corruption. A successful peaceful transfer of power is a positive sign for the robustness of the new institutions. The next question is the effectiveness of SBY's new government in practice under the new system.

### ***How well was Indonesia's constitutional change handled?***

Jakob Tobing commented shortly after the passage of the Fourth Amendment that "most people did not realise what was happening until it was too late". While the implications of the amendments were understood by the constitutional reformers within PAH I, they were not realised widely until the major principles of change were already agreed and the Fourth Amendment already under discussion. Nonetheless the process was not secret: plenary meetings were open to the press and public throughout, and many meetings for socialisation or consultation took place. The entire amendment process appears to have been conducted in line with the rule of law, following the Constitution, MPR Standing Orders and other legal instruments in force. Given the principle of agreement by deliberation and consensus, it is doubtful that these far reaching changes would have been agreed if all MPR members had been fully aware of what was going on throughout.

This appears at first sight difficult to square with the conventional wisdom of democracy building, in which the achievement, acceptance and anchoring of positive change is promoted and helped by wide and inclusive debate. At one level, the limited nature of such debate across Indonesia was not for want of trying to kindle it. At another, its absence in some circles in Jakarta assisted the agreement of the key amendments.

Was the process well handled? A consequence of living through a complex process of change is that it is seen in full, blow by blow. Rambling discussions, contributions to debate which might be better forgotten, and excursions into blind alleys stand alongside the making of far-reaching decisions. Impatient observers of the amendment process sometimes contrasted it unfavourably with the clear-cut achievements of the Founding Fathers of Indonesia or the progenitors of the United States Constitution. What is forgotten is not so much that history is written by winners (although that is relevant) but that it is by definition condensed. The boring bits, the irrelevant bits and most of the ridiculous bits get edited out in the telling. The result is a story of grand purpose and achievement, which inevitably does not reflect the experience of a contemporaneous participant or observer. The day to day problems or histrionics of the Indonesian constitutional review should not hide that a memorable change has taken place.

While presidentialism is well established as a theoretical form of democratic government, there has however been considerable doubt expressed outside the unique context of the United States as to whether it can work effectively in practice. Experiences in Latin America, where presidential constitutions are now the common form, have sometimes suggested a bumpy ride, and many Latin American democracies now also face problems both of corruption and in an even more acute form than Indonesia the implications for democracy of huge disparities of wealth. Academic writing tentatively suggests three helpful factors in making presidential systems work: an electoral system likely to give the president a substantial block (not necessarily a majority) of reliable supporters within the legislature, the absence of wide ranging independent presidential legislative powers (governing by decree), and a political party system which is neither too tightly disciplined nor loose and chaotic. Under Indonesia's amended Constitution and political laws, the first is almost certain, the second substantially true, and the third is not so likely.

The results of the 2004 elections initially looked set to put this theory to the test. Megawati's PDI-P would clearly not be expected to support

SBY's government: equally, Golkar under Akbar Tanjung had endorsed Megawati's candidacy in the second round. Between them, these two parties hold well over 40 per cent of the seats in the DPR, and their initial move was to form an alliance. Tussles immediately followed, with the sharing out of DPR committee chairs and SBY's decision to review Megawati's attempt to appoint a new military commander in chief shortly before leaving office both proving highly controversial.

The political landscape however changed in December 2004. SBY's choice of Jusuf Kalla as his Vice-Presidential candidate bore fruit when Kalla, previously a prominent Golkar figure from Sulawesi, succeeded in a quest where many others had failed, and ousted Akbar Tanjung from his position as Golkar chair. Golkar, therefore, was changed from a predominantly opposition stance to one likely to be supportive of the Government at key points. This was borne out in early 2005, when an attempt in the DPR to reject SBY's decision to reduce fuel price subsidies failed although the decision had appeared initially not to command majority support in the DPR.

How will the pilots of the constitutional amendment process therefore be remembered? Jakob Tobing and his colleagues are perhaps unlikely to become names that will resonate like Soekarno and Hatta. But, for over three eventful political years, they managed to maintain their vision of a presidential constitution with full separation of powers, and to maintain a broad unity across political party lines in PAH I. They recognised the strategies and tactics necessary to enact change through the democratic process and followed the rules of the context in which they were working – demonstrating the link between legitimacy and the rule of law. They learnt as they went along: the process of agreement by deliberation and consensus, and the consequent question of how to overcome the veto that it appeared to give to diehard opponents of change, were not previously written into the comparative textbooks.

Whether or not the amended Constitution leads eventually to stability, economic success and established democratic institutions, the MPR set a rare international precedent by agreeing peacefully and voluntarily to vote away its own all-powerful status. That will clearly stand as an achievement. The system that has been created has not yet had the time to establish robust traditions and has not yet been tested by real political conflict. Indonesia is now set to contribute to understanding one of the major practical questions of debate about constitutions and institutional frameworks: how to make a presidential system succeed – or why it fails.