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The Indonesian Constitutional Transition: Conservatism or Fundamental Change?

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I. Introduction

THIS paper describes and analyses the constitutional amendment debate that has taken place in Indonesia since the fall of Soeharto in 1998. In doing so, it goes back to the roots of the Indonesian Constitution, first enacted in 1945, and traces the genesis and development of issues both of substantive and of symbolic importance that have influenced the recent debates. It tracks in particular the major elements of discussion and disagreement over the three years of the constitutional review begun in 1999 and looks in particular at the sessions of the People's Consultative Assembly (*Majelis Perwakilan Rakyat* or MPR) which have undertaken the task of enacting the amendment. While it is finalised immediately before the 2002 MPR Annual Session and therefore does not contain the final stages of the story, it concludes that the constitutional review, despite criticisms levelled at it, is likely to bring fundamental change to the way the institutions of Indonesia operate.

II. The 1945 Constitution of Indonesia

The 1945 Constitution of Indonesia is a short document containing only 37 articles. It was written and reviewed during July and August 1945 by the Committee for Examination of Indonesian Independence *(Badan Penyelidik Usaha-usaha Persiapan Kemerdekaan Indonesia* or BPUPKI) and the Preparatory Committee for Indonesian Independence *(Panitia Persiapan Kemerdekaaan Indonesia* or PPKI) and is specified in its concluding Additional Provisions as being a temporary document. Much of the inspiration of its major authors related to the nationalist perspective of Indonesian independence; no other nation seeking to establish democracy has since adopted the same pattern of state institutions. In addition, this pattern of state institutions was substituted in practice within three months of its promulgation. Yet the 1945 Constitution is a document with strong emotional and enduring

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significance to most Indonesians, a symbol of the struggle for independence from colonialism and a founding pillar of the unitary state of the Republic of Indonesia. This symbolism is encapsulated in the very phrase 'the 1945 Constitution'. When defined further, its three major elements are the Preamble, the unitary state of the Republic of Indonesia, and the presidential system.

The 'New Order' regime of President Soeharto was brought to an end in May 1998 and a transition towards democracy began. In the course of this transition, debate over the future of the Indonesian polity has had to grapple with these symbols. Much of this debate has thus been confusing to participants and observers alike, in that the arguments over questions of substance have been paralleled by divisions over issues of symbols, language and perception. In Indonesian constitutional matters, what is in the bottle does not always match what is on the label. This article summarizes the major elements of Indonesia's constitutional history from the genesis of the Constitution through the transition so far. It also attempts to disentangle and assess both the issues of substance and the issues of symbol.

II. Basic Features of the 1945 Constitution

A. *Structure of the Constitution*

The 1945 Constitution is a short document not only because of the exigencies of the situation in which it was completed, but also by design. It has three parts: a Preamble which contains a statement of basic principles, the Articles of the Constitution itself accompanied by transitional and additional provisions, and an Elucidation section expanding on the general principles and individual Articles. The use of an Elucidation section of this kind is standard Indonesian practice: such a section is attached to most legislation. The Elucidation section states that '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.'[1]

The 1945 Constitution created 'a state based on law' and 'government based on the constitution as against absolutism.'[2] However, the document was consciously designed to be flexible. As the Elucidation states, 'the

1 S 5(IV) of the Elucidation to the 1945 Constitution. The English translation used throughout this paper is the most recent version (undated) published by the Department of Information of the Republic of Indonesia.

2 S 6(II) of the Elucidation to the 1945 Constitution.

more flexible a provision, the better. We have to see to it that the system of the constitution does not lag behind the change of time.'[3]

B. *The People's Consultative Assembly (Majelis Permusyawaratan Rakyat or MPR)*

The sovereignty of the people was to be exercised 'in full through the MPR.'[4] 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'[5] – these guidelines being 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[6] – originally conceived as 'cooperatives, labour unions and other collective organisations' playing a significant role in the process of establishing the new state.[7] This reflected an emphasis on the goal of Indonesian economic independence espoused and promoted by many of the leaders of the independence movement, and in particular by Soekarno both as leading figure of the independence movement and subsequently as Indonesia's first President.

The MPR was to meet once every five years 'to decide the policy of the state to be pursued in the future'[8] 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 (*Dewan Pertimbangan Agung* or DPA), State Audit Board *(Badan Pemeriksa Keuangan* or BPK) and the Supreme Court would submit reports to the MPR at the end of each five year electoral term. This concept of the MPR derived from the propounding by Soepomo[9] – who chaired the small drafting commission of the 1945 Constitution – of the doctrine of the integralistic state, rejecting both

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3 S 5(IV) of the Elucidation to the 1945 Constitution.
4 Art 1(2) of the 1945 Constitution.
5 S 6(III) of the Elucidation to the 1945 Constitution.
6 Art 2(1) of the 1945 Constitution.
7 Elucidation to Art 2(1) of the 1945 Constitution.
8 Elucidation to Art 3 of the 1945 Constitution.
9 Soepomo (1903-1958) was a professor at the Faculty of Law in Jakarta and an official in the Ministry of Justice during the Japanese occupation, during which period he developed his theory of the oneness of the individual and society. He played a leading role in both BPUPKI and PPKI and became the first Minister of Justice of the Republic of Indonesia. See further Nasution, Adnan Buyung (1995), *Aspirasi Pemerintahan Konstitusional di Indonesia*, Pustaka Utama Grafiti, Jakarta, 58: note 62.

the principle of separation between the individual and the state and the principle of separation of powers. As he described it to BPUPKI on 31 May 1945: 'the principles of unity between leaders and people and unity in the entire nation.'[10]

C. *The Role of the President*

The President was to be 'the Chief Executive of the State': in the conduct of state administration, the power and responsibility would rest with the President.'[11] The President would be 'the true leader of the state.'[12] The text of the 1945 Constitution states that 'the President shall hold the power of government in accordance with the Constitution.'[13] Specific powers of the President include that he or she 'is the Supreme Commander of the Army, the Navy and the Air Force,'[14] 'declares war, makes peace and concludes treaties with other states,'[15] 'declares a state of emergency',[16] 'appoints ambassadors and consuls' and 'receives the credentials of foreign ambassadors.'[17] However, the Elucidation states clearly that 'the powers of the Head of State are not unlimited.'[18] It provides that the Presidency is 'not in an equal position to' and is 'subordinate and accountable to' the MPR. Indeed it 'is the mandatory of the MPR,'[19] and that the President is 'the highest administrator of state below the MPR.'[20]

D. *A 'Presidential System'?*

Perhaps as a result both of Soepomo's description of the President as leader and of power having been vested solely in the President for the eleven days following the promulgation of the 1945 Constitution, the Constitution is described by Indonesians as presidential. While it is certainly the case that the Republic of Indonesia has always had a President, the conventional classification of a system as a presidential

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10 Mohammed Yamin, *Naskah Persiapan Undang-Undang Dasar 1945*, Vol I (Jakarta: Yayasan Prapanca, 1959) 111-113.
11 S 6(IV) of the Elucidation to the 1945 Constitution.
12 *Risalah Sidang BPUPKI dan PPKI* (1995), Sekretariat Negara Republik Indonesia, Jakarta: 41.
13 Art 4 of the 1945 Constitution.
14 Art 10 of the 1945 Constitution.
15 Art 11 of the 1945 Constitution.
16 Art 12 of the 1945 Constitution.
17 Art 13 of the 1945 Constitution.
18 Title of S6(VII) of the Elucidation to the 1945 Constitution.
19 S 6(III) of the Elucidation to the 1945 Constitution.
20 S 6(IV) of the Elucidation to the 1945 Constitution.

system requires considerably more than this. Arend Lijphart[21] lays out three specific characteristics of a presidential system: 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 system is not conventionally presidential under these criteria. While it meets the first, it does not meet the second because the president is elected by the MPR, and it has been shown in practice not to meet the third because of the ability of the MPR to dismiss the President for breach of the GBHN adopted by the MPR. Neither, however, is it a conventional parliamentary system, or even a recognised hybrid or semi-presidential system.

E. *Indirect Election Of The President Under The 1945 Constitution*

The composition and the functions of the MPR make it an unusual body when considering constitutions commonly accepted as democratic. There is no parallel found in conventional presidential systems to the indirect election of the president by the MPR. The MPR is itself a representative body, even though it includes a substantial number of indirectly elected or appointed members. Given its role and powers, the MPR is certainly not merely an electoral college. The President is not elected by the public on a policy manifesto: the overall policy to be followed by the President is determined by the MPR in setting the GBHN.[22] The presidency is not involved in the making of the GBHN, but the President is specifically tasked with implementation of policy in line with it.

F. *Accountability of The President under the 1945 Constitution*

Nor is the accountability relationship between the MPR and the President that of the conventional presidential system: the Presidency is circumscribed. While, for example, the President of the United States can only be removed from office for 'Treason, Bribery and other high Crimes or Misdemeanours,'[23] the MPR has the right to dismiss the President of Indonesia before the end of his/her term in the event of clear violation of national policy. This is defined as including not only the 1945 Constitution itself but the contents of the GBHN. As the Elucidation states, 'if the DPR is of the opinion that the President has acted in contravention of the state policy as laid down in the Constitution

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21 Arend Lijphart, *Patterns of Democracy*, (New Haven: Yale University Press, 1999) 116-142.

22 Power under Art 3 of the 1945 Constitution.

23 Art II(4) of the Constitution of the United States of America.

or as determined by the MPR, the MPR may convene a special session and request the President to account for this.'[24] The procedures for this are laid down in MPR Decree (*Ketetapan* or TAP) III/1978. These grounds are considerably wider than that found in conventional presidential systems, where they are normally framed in terms of breach of the constitution, with sometimes the single addition of acting with moral turpitude. The President in a conventional presidential system may be said to have accountability only to the Constitution itself, and not to any legislative body. The President of the Republic of Indonesia has a clear additional accountability.

G. *Character of the Presidency*

Notwithstanding the foregoing, the presidency in Indonesia is still a different and stronger institution from a parliamentary head of government. The grounds for dismissal under MPR TAP III/1978 and the lengthy procedures required to implement such dismissal are a higher hurdle than the tabling and debate of a parliamentary vote of no confidence, even in those systems where the tabling of such a vote requires the nomination of an alternative head of government. The removal from office of President Abdurrahman Wahid during 2001 showed that these procedures could have real effect, although complex and lengthy.

IV. The Executive and Legislature after the Declaration of Independence, 1945-1949

Following the defeat of Japan in August 1945, the Indonesian Declaration of Independence was made on 17 August, before representatives of the Allied forces could reach Jakarta. A final constitutional drafting session took place overnight and the Constitution was promulgated on 18 August. The 1945 Constitution vested power initially in President Soekarno, who along with Vice-President Mohammed Hatta was elected by the Preparatory Committee for Indonesian Independence (PPKI)[25] that was established in August 1945. The President then had the duty[26] to 'take preparatory steps and execute all the provisions of this Constitution' within six months of the end of the Asian War. Within six months of the formation of the MPR, it was to convene a session to enact a constitution.[27]

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24 S 6(VII) of the Elucidation to the 1945 Constitution.
25 Art 3 of the Transitional Provisions of the 1945 Constitution.
26 Additional Provision 1 of the 1945 Constitution.
27 Additional Provision 2 of the 1945 Constitution.

However, it was a long time after its promulgation before the concepts of the 1945 Constitution could be tested under conditions that could be described as democratic or even transitional. Budiarjo[28] has described the process after 17 August 1945 in detail. Between the Declaration of Independence and the Round Table Agreement of December 1949, Indonesia was still fighting to realise its independence from the Netherlands in practice, and the full set of institutions envisaged in the 1945 Constitution could not be established. On 7 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 as being in line with the Constitution. These institutions lasted until Indonesia's signing of the Round Table Agreement with the Netherlands in December 1949. During this period, the government of the Republic of Indonesia was trying to make its writ effective in substantial parts of the country. It was in addition engaged in negotiations with the Netherlands, and initially also with the British post -war occupation force.

The institutions of October 1945 were generally accepted in the situation of conflict that existed as being in line with the Constitution, although in theory debatable. A series of governments, from that of Soetan Syahrir in November 1945 to that of Mohammed Hatta in January 1948, took the form of parliamentary cabinets. These governments were approved by President Soekarno and by the Central National Committee of Indonesia *(Komite Nasional Indonesia Pusat* or KNIP). KNIP was founded initially as an advisory body assisting the President in establishing the MPR, DPR and DPA under the initial Transitional Provisions. But under the conditions of the fight to realise independence, KNIP in October 1945 took on the role of a legislative body pending the establishment of the MPR and DPR.[29] Although the Supreme Court did not have and does not have powers to interpret the 1945 Constitution, its advisory view at the time supported this use of the parliamentary format. Since there was no attempt either by the President and ministers to dismiss KNIP, or by KNIP or its Badan Pekerja to dismiss a government, during the 1945 to 1949 period, the actual power relationship between the legislature and executive at this time was not definitively settled.

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28 Miriam Budiarjo, *Menggapai Kedaulatan untuk Rakyat*, (Bandung, Mizan Press, 1998) 131-166.

29 *Maklumat* (Declaration) of the Vice-President No X of 16 Oct 1945.

V. THE 1945 CONSTITUTION SUPERSEDED: 1949-1959

Between 1949 and 1959, the 1945 Constitution was not in force. The federal constitution which formed part of the Round Table settlement was rapidly replaced by the Temporary Constitution of 1950, which established a more parliamentary form of government within the framework of the unitary state. However, the 1950 Constitution did not lead to a consolidation of democratic institutions. The process of this failure is described in detail by Herbert Feith.[30] He concludes that the attempts of one segment of the political elite – exemplified by Vice-President Hatta – to build a rule-based politics were thwarted by those who believed that the process of nationalist revolution should be continuous and ongoing, as expressed articulately by President Soekarno.[31] Nasution[32] describes the failure of the *Konstituante* (Constituent Assembly) elected in 1955 to agree on a replacement for the Temporary Constitution. Soekarno on 5 July 1959 suspended the operation of the Konstituante and reintroduced the 1945 Constitution by decree. The legitimacy of this action has been much debated. However, the subsequent basis of constitutional action and legislation depends on it, and the practical approach in Indonesian political and constitutional discourse now is to regard it as valid *de facto*.

During 1956 and 1957, Soekarno and his supporters frequently stated that 'the root of Indonesia's ills lay in the decision to abandon the 1945 Constitution, change from a presidential to a parliamentary system and call political parties into being.'[33] From 1957 onwards, Soekarno argued for a new constitution in line with the life and characteristics of the people of Indonesia. In a speech to the Konstituante on 22 April 1959, he called for a return to the 1945 Constitution. From this time onwards, he characterized it as a historic document, the symbol of the basis of the revolution, which was not amenable to amendment, addition or improvement. He sought to use it as the basis of the state in the same fashion as the Constitution of the United States of America.[34]

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30 Herbert Feith, *The Decline of Constitutional Democracy in Indonesia* (Ithaca, New York, Cornell University Press: 1962).

31 See for example the excerpts from a 1960 speech of Soekarno in Feith, *ibid,* at 607.

32 *Nasution* (1995), *op cit,* 259-315. *[to check cite]*

33 George Kahin, George, *Nationalism and Revolution in Indonesia* (Ithaca: Cornell University Press, (1952) 153-155.

34 *Nasution* (1995), *op cit,* 318-323.

VI. After 5 July 1959: Guided Democracy and the New Order

The general nature and flexibility of the provisions of the 1945 Constitution made it susceptible to use in a very different way from the 1945-1949 period. Following the Decree of 5 July 1959, it was possible for Soekarno as President to use the Constitution as the basis to implement his concept of Guided Democracy during the years up to 1965. The DPR would act only as a consultative body. A temporary MPR (*MPR Sementara* or MPRS) was convened, constituted according to the 1945 Constitution, but to which the President possessed the power to appoint additional members.[35] The MPR would meet only every five years, thus greatly strengthening the powers of the executive.[36]

Following the transfer of power from Soekarno to Soeharto in 1966, it was equally possible for Soeharto as President to develop the 1945 Constitution further as an instrument of authoritarian rule with power concentrated in practice in the executive. Soeharto ensured that the size of the MPR was increased and the proportion of appointed members likewise.[37] The MPR met according to schedule every five years but acted throughout the years of the New Order as a silent partner which followed Soeharto's bidding. Soeharto, like Soekarno before him, promoted the 1945 Constitution as a fixed text which could be used to further his aims and which should be considered as not capable of amendment or improvement. Those who articulated the aims of *reformasi* at the time of Soeharto's fall in May 1998 therefore included constitutional change as one of their six key demands.

VII. The Habibie Presidency, 1998-1999: Constitutional Change Delayed

The process of transition was not however discontinuous or revolutionary. Soeharto was replaced as President by his incumbent Vice-President BJ Habibie, and the MPR and DPR elected under the New Order regime in 1997 continued to function. Many of those associated with the New Order – including the incumbent Golkar party, the combined Islamic party of the New Order the Party of Unity and Development *(Partai Persatuan Pembangunan* or PPP), and a significant proportion of the armed forces and police – recognised both the need and the opportunity to run with the tide of *reformasi*. In doing so, they were able to achieve considerable success in controlling the process of change. Debate on

35 *Penetapan Presiden Republik Indonesia No 2/1959,* Lembaran Negara Republik Indonesia (1959), no 77.

36 *Nasution* (1995), *op cit,* 323.

37 Budiarjo, *supra* note 28, at 172-173.

constitutional reform was put onto the back burner, in response to the continuing influence of more conservative and the need perceived by those who had held positions under the New Order to ensure that there would be no process of lustration or similar.

During the period between the Special Session of the MPR called in November 1998 to bring elections forward and the General Election which took place on 7 June 1999, political activity was concentrated on the debate over electoral and political legislation and on the organisation and preparation for the election. This also facilitated the shelving of debate on constitutional reform at this point. While more radical student elements rejected this process, they were rapidly sidelined in relevance. As a result, while there was a consistent undertow in political discussion of the need for change in the state institutions, most of the parties fighting the election campaign reaffirmed their commitment to the symbol of the 1945 Constitution and did not discuss its substance. The substance of any change did not fully enter the agenda of debate until after the elections of June 1999.

VIII. Constitutional Review Begins: The 1999 General Session and After

The General Session of the MPR followed the General Election and took place from 14 to 21 October 1999, electing Abdurrahman Wahid as president over Megawati Soekarnoputri. The MPR decided to undertake a process of review and amendment of the 1945 Constitution over the year following.[38] In line with the principles of deliberation and consensus outlined in Pancasila and specifically included as the preferable decision making process in MPR Standing Orders, this decision was taken by consensus. Although most members of the MPR had not served in the institution before 1999, strong importance was attached to the symbolism of the 1945 Constitution, especially among traditional nationalists in Megawati's Indonesian Democracy Party – Struggle *(Partai Demokrasi Indonesia – Perjuangan* or PDI-P) and the representatives of the armed forces and police (TNI-Polri). The amendment process was to be based on the preparation of draft amendments to the existing 1945 Constitution, rather than the drafting of an entirely new constitution. In addition, it was subsequently decided that the amendments to the 1945 Constitution should be grouped together and titled by number, which was seen as following the procedures of the United States – and perhaps also contained an echo of Soekarno's aims of 1959.

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38 MPR TAP IX/1999 on the Tasking of the *Badan Pekerja* to Continue the Process of Amendment of the 1945 Constitution.

A Shift of Power to the Legislature

The process of review was initiated by the consideration of a number of articles of the Constitution during the course of the General Session. The rejection of Soeharto's authoritarian executive domination led to the passage of the First Amendment, the major feature of which was a significant transfer of power from the executive to the legislature. The powers of the DPR were clarified. The presidential powers in appointing ambassadors and consuls and receiving foreign ambassadors were to be exercised 'having regard to the opinion of the DPR.'[39] The President's 'holding of the power to make statutes in agreement with the DPR' was changed to being 'entitled to submit bills to the DPR.'[40] The DPR's role in legislation changed from requiring 'approval' of a law to stating that the DPR 'shall hold the authority to establish laws' and establishing a joint approval procedure.[41] Presidential grants of amnesty or the dropping of charges were required to 'have regard to the opinion of the DPR.'[42] While Soeharto had been re-elected every five years by his controlled MPR, the new MPR built in the safeguard that the president and vice-president could 'be re-elected to the same office for one further term only.'[43] The First Amendment was carried by universal agreement and consensus.

The MPR also completely revised its Standing Orders at this General Session,[44] and decided to introduce Annual Sessions of the MPR from 2000 onwards. There were two particular goals for these sessions. First, the MPR would hear an annual progress report from the President, the DPR, the Supreme Advisory Council (DPA), the State Audit Agency (BPK) and the Supreme Court. Second, the MPR could amend the constitution and/or pass decrees, as it saw fit. The MPR has no power under these Standing Orders to demand, or to accept or reject, a presidential accountability report at an Annual Session. Nonetheless, the existence of an annual meeting of the supreme body clearly changed the balance of power substantially away from the presidency. The public discussion of the presidential report by the MPR and the policy directions which would be included in the consequent TAP created new pressures on the presidency in a system which had previously be intrinsically executive heavy.

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39 Art 13 of the 1945 Constitution as amended by the First Amendment.
40 Art 5(1) of the 1945 Constitution as amended by the First Amendment.
41 Art 20 of the 1945 Constitution as amended by the First Amendment.
42 Art 14 of the 1945 Constitution as amended by the First Amendment.
43 Art 7 of the 1945 Constitution as amended by the First Amendment.
44 This revision of Standing Orders was contained in MPR TAP II/1999.

B. *The First Year's Work of the Constitutional Review Committee*

Implementation of the decisions of the MPR was delegated to the MPR Working Body *(Badan Pekerja* or BP),[45] which formed *Ad Hoc* Committee I (*Panitia AdHoc I* or PAH I) in late 1999 to handle the review of the Constitution. After its formation, PAH I rapidly established its ground rules and broad principles, immediately reaffirming support for the existing Preamble, for the unitary state, and for the presidential system – although it did not define what was meant by the presidential system. There was next to no support for any move to a parliamentary system. The memories of the 1950 to 1959 period had made the concept and phrase unacceptable. In the same way, it was rapidly evident that the legacy of the Round Table agreement and the 1949 Constitution was such that both the word and the concept of federalism were politically unacceptable, although the National Mandate Party *(Partai Amanat Nasional* or PAN) had briefly floated the idea and there was some support for it in academic circles.[46] PAH I also decided to improve the clarity of the Constitution by incorporating the principles laid down in the appended Elucidation *(Penjelasan)* section into the main text.

During early 2000, PAH I conducted witness hearings, provincial consultation meetings, and international study missions. As formal meetings of an MPR committee, all plenary sessions and witness hearings of PAH I were open to the public in accordance with the new MPR Standing Orders. During May and June, PAH I moved to conduct a detailed chapter-by-chapter review of the 1945 Constitution. Further debate took place during July in an attempt to reduce the number of open questions. The final PAH I report was agreed on 31 July, and was transmitted *via* the Badan Pekerja to the MPR Annual Session.

These proposals had been drawn up by the committee through a process of plenary sessions, lobbying and negotiating sessions between the committee leadership and fraction representatives, and drafting sessions involving representatives of all eleven MPR fractions – nine parties or groupings of parties, the armed forces and police (TNI-Polri) fraction, and the fraction of functional group representatives (*Utusan Golongan* or UG). The resulting report was comprehensive and complex,

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45 MPR TAP IX/1999.

46 For example in many of the papers presented at a seminar organised by the Indonesian Institute for Science and Knowledge *(Lembaga Ilmu Pengetahuan Indonesia* or LIPI) in Jakarta in Mar 2000 and published as Irine Gayatri, and Ikrar Nusa Bhakti, *Unitary State versus Federal State*, (Bandung: Mizan Media Utama, 2002).

and included alternatives at some 24 points. It addressed a wide range of issues in a broadly coherent manner, although inevitably some chapters were well drafted and others less so. Many parts of the final wording were the result of carefully crafted, essentially political deals made in the drafting process. Although a period of two weeks had been planned for dissemination and socialisation of the final report before the Annual Session, the complexity of the issues and the substantial areas of disagreement meant that minimal time was available for this, and little socialisation actually took place.

IX. The 2000 Annual Session: Successes and Failures in the Constitutional Debate

The 2000 Annual Session of the MPR convened in early August in an atmosphere of political tension, with persistent talk of a confrontation between President Wahid and the MPR and of possible proceedings to remove him office. In the event, this showdown did not take place at this stage. The headline events however both set the atmosphere of the Annual Session and drew attention and interest away from its work on other issues.

The Annual Session referred the PAH I report to its Commission A, which met from 11 to 14 August. The report from this Commission returned to the plenary session on 15 August. Those provisions that were finally agreed were accepted into the Constitution as the Second Amendment on 18 August, on the anniversary of the promulgation of the original document in 1945.

A. *A Comprehensive Report*

The PAH I proposals reviewed the whole Constitution and included revisions of the 16 chapters of the existing 1945 Constitution and draft text for 5 new chapters. The 21 proposed chapters were divided by Commission A into four groups: three on which full agreement had been reached in PAH I, three on which such agreement was almost in place, six where minor issues remained to be resolved and nine where major issues of difference still existed.

In the event, this categorisation proved optimistic. On only one chapter – that dealing with the national flag, language and symbols – was there immediate full agreement. In the 21 hours which were available to Commission A, only the first three categories, totalling 12 chapters, were debated at all. Of these 12 chapters, it was only possible to reach full agreement on seven. There were two main reasons for the slow progress: the first related to political positions, the second to procedural issues.

B. *Political Disagreement and Caution Surfaces*

The political cause of delay was the lack of any real consensus on the major structural issues of the Constitution, and the fact that debate on the basis of the state had not been joined. Some members of the MPR clearly perceived the report as much more wide-ranging and fundamental in scope than they had imagined. While many PAH I members had already become very familiar with and knowledgeable about the key issues, other MPR members, asked to consider basic issues for the first time, were not yet ready to do so. Elements in the MPR which were more conservative on constitutional change, including Vice-President Megawati's PDI-P and the TNI-Polri fraction, sought to conduct the debate in a slow and cautious manner.

As is common with such agreements, the negotiated compromise wording on key issues in the PAH I report would only hold if all parties involved wished them to do so. Once the debate started to expose the differences which underlay the compromises, different parties adopted different interpretations and the compromises started to unravel. The context and importance of the 1945 Constitution, combined with the political strength of the more conservative forces, meant that little effort was made within the MPR to force contested issues such as the establishment of a regional chamber of the legislature. Even had more effort been made on such issues, it is unlikely that it would have succeeded at this time.

In addition, PAH I decisions which appeared to have all-fraction political backing turned out in the event not to do so. Debate in PAH I on the issues had been conducted between the fractions, through the presentation of 11 viewpoints and subsequent discussion and negotiation. However, some fractions proved better than others at communicating with and convincing their fraction leadership and their MPR colleagues outside PAH I of their positions. Debate consequently started again at the beginning in Commission A plenaries.

C. *Procedural Difficulties and New Traditions*

This led into procedural difficulties and arguments. The issue arose as to whether members of PAH I who had signed the agreed committee report were now entitled to take a position (whether as a fraction position or on a personal basis) of disagreeing with the report. There was considerable feeling that such action was wrong, but this did not lead to universal adherence to the committee report by PAH I members. In a body in the course of transition, it was not surprising that there

were no existing rules or traditions. Acceptance of norms of custom and practice within the legislative body may develop over time, rather than through any formal decisions or rulings.

The tendency for the length of debates to expand was accentuated by the decision – which appeared to emerge rather than have been formally made – that contributions to the debate in Commission A would be made by individual members rather than by fractions. These contributions were called in two rounds of speeches by members. Some rounds had as many as 16 contributions, and many contributions were not time limited.

Moreover, these contributions addressed any element of the chapter under discussion. Where the chapter contained a number of points of debate, discussion jumped to and fro between them. In considering a long report full of complex proposals and alternatives, this caused some confusion. Neither before debate or in the course of it could specific proposals for secondary amendments to the tabled report be reduced to writing and discussed in turn. This process only took place in the lobbying sessions which follow initial plenary debate. (One attempt to address this problem through line by line drafting in a plenary of over 200 members was, unsurprisingly, not successful.)

As a result of these essentially procedural issues, it was never going to be possible for the entire PAH I report to be considered in the context of the less than four days' debate available to Commission A. Some participants learnt practical lessons for future Annual Sessions. The procedural conventions were inadequate to enable the discussion of a significant volume of complex material – whether constitutional amendments or anything else. The complexity of the process of putting items on the MPR agenda meant that the procedures were not likely to be changed by a formal decision. Where the decision making framework is rigid and formalised, the changes necessary to speed up the process of debate are more likely to develop informally over time through practice.

D. *The Scale of the Task Becomes Apparent*

The deeper significance of this aspect of the 2000 Annual Session took longer to emerge. Procedural and practical realities had made it impossible to consider the whole of the Constitution together. From this point on, division grew between those – primarily inside the MPR – who accepted that the full process of amendment required a step by step approach, and those – primarily in elite groups outside the MPR – who wanted to see a new Constitution based on an agreement on a concept of the state. These groups grew steadily further apart.

X. Outcome of the 2000 Annual Session: The Second Amendment

Despite the procedural difficulties, amended text was agreed by consensus for five chapters of the Constitution: regional government, the DPR, citizenship, defence and security, and national symbols. In addition, two new chapters, on human rights and on national territory, were added.

A. *Regional Autonomy Gets a Constitutional Basis*

On regional government, the general spirit of Laws 22/1999 and 25/1999 – the legal basis for a fast and wide ranging decentralisation and devolution of powers to regional authorities which had been put in place by the Habibie administration – was confirmed in the Constitution. A strongly regional flavour is given by the principle laid down that regions 'shall exercise wide-ranging autonomy, except in matters provided by law to be the affairs of the central government.'[47] Governors and *bupati/walikota* (executive heads of second level regions) are to be 'elected democratically',[48] with the method (direct election or election by the local legislature) to be determined by law. However, the alternative proposal to specify universal direct elections to these positions in the Constitution was not accepted.

B. *The Legislature Further Strengthened*

The DPR was to become a fully elected body at the next General Election in 2004:[49] there would therefore no longer be military and police representation. The powers of the DPR were clarified further, including its legislative function, the oversight function, and the right to approve the national budget.[50] The Constitution now provided that the DPR should 'hold interpellation, investigative and opinion rights:'[51] the rights of interpellation and inquiry (which had existed in practice since the days of the KNIP)[52] were made into constitutional provisions. Parliamentary immunity was made constitutional.[53] The Presidential 'pocket veto' was abolished: if the DPR and the President jointly agree

47 Art 18(5) of the 1945 Constitution as amended by the Second Amendment.
48 Art 18(4) of the 1945 Constitution as amended by the Second Amendment.
49 Art 19 of the 1945 Constitution as amended by the Second Amendment.
50 Art 20A(1) of the 1945 Constitution as amended by the Second Amendment.
51 Art 20A(2) of the 1945 Constitution as amended by the Second Amendment.
52 Budiarjo, *supra* note 28, at 115.
53 Art 20A(3) of the 1945 Constitution as amended by the Second Amendment.

legislation and the President then fails to sign it within 30 days, the legislation takes effect regardless.[54]

However, the proposal to formalise in the Constitution the existing procedures laid down by MPR TAP III/1978, enabling the DPR to call for an MPR Special Session for the purposes of receiving a Presidential accountability report, was dropped. This happened primarily as part of the resolution *pro tem* of the conflict between President Wahid and the legislature, but also because this issue needed to be considered along with the wider question of the nature of the presidency at a future point.

C. *Controversy Over Human Rights*

The addition of a substantial new chapter on human rights[55] proved controversial. The provisions of the new chapter were substantially drawn from the Universal Declaration on Human Rights (UDHR). It was recognised that the UDHR could not be incorporated in total, and this was not even discussed. Pancasila and the 1945 Constitution impose a requirement of universal religious belief: as stated in the Preamble and in Article 29(1), 'the State is based on belief in the One and Only God'. This was interpreted in practice by the New Order regime as requiring every citizen to have a religion, in particular as it sought, as Robert Hefner describes,[56] to restrict the activities of Javanese 'nominal' Muslims who draw also on mystical traditions. This interpretation was taken as a common assumption during the PAH I debates. It was considered to conflict with Article 18 of the UDHR guaranteeing freedom of thought, conscience and religion – which implies the freedom not to have a religion.

In particular, the new chapter followed Article 11(2) of the UDHR, stating that 'the right not to be tried under a law with a retrospective effect [is a] human right that cannot be limited under any circumstances.'[57] Its effect appeared to be to require that prosecutions for past violations need to be made under the Criminal Code in force at the time of those violations; it was also however said to be possible, although unclear in extent, that provisions of international law may be relevant. The juxtaposition of these international human rights standards and the calls for justice for human rights violations committed under the New

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54 Art 20(5) of the 1945 Constitution as amended by the Second Amendment.

55 Ch XA, Arts 28A to 28I of the 1945 Constitution as amended by the Second Amendment.

56 Robert Hefner, *Civil Islam* (New Jersey: Princeton University Press, 2000) 82-85.

57 Art 28I(1) of the 1945 Constitution as amended by the Second Amendment.

Order created a dilemma for Indonesian human rights activists. Many human rights and NGO activists attacked the new provisions as the outcome of a hidden agreement with the armed forces (TNI) and fundamentally opposed to the interests of *reformasi* and justice: most of the MPR members appeared to be taken by surprise that a provision inspired by the UDHR could generate such a reaction.

In passing the human rights clauses in the Second Amendment, the MPR – albeit for the most part unconsciously – made its first explicit change to the basic thinking of 1945. Both Soekarno and Soepomo had specifically rejected proposals to include human rights provisions in the Constitution. Soekarno had said that such individual rights detracted from the freedom of the sovereign state,[58] while Soepomo believed that the individual was nothing more than an organic part of the state.[59]

D. *Defence and Security*

Finally, a specific distinction was made between the duty of the armed forces (TNI) 'to defend, protect and maintain the integrity and sovereignty of the state',[60] and the duty of the national police (Polri) 'to protect, guard and serve the people and uphold the law.'[61] The 'total people's defence and security system' doctrine[62] was included in the Constitution, with a provision for citizen assistance to the TNI/Polri core role in national defence. This was seen by some of its proponents as a reforming step, as a statement that national defence is of wider interest than to TNI and Polri alone. It remains to be seen whether this perception persists in the future. The precise roles of TNI and Polri and the definition of citizen assistance were to be dealt with by law, and were immediately considered in MPR decrees on the subject.[63]

XI. The Agenda Following the 2000 Annual Session

The larger part of the material submitted to the Annual Session had not been agreed. Three draft chapters – on elections, finance, and the State Audit Board (BPK) – had appeared to fail purely through lack of time. The debate in Commission A on these chapters centred on important points of detail rather than fundamental differences.

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58 *Nasution* (1995), *op cit,* 92.
59 Yamin, *supra* note 10, at 114.
60 Art 30(3) of the 1945 Constitution as amended by the Second Amendment.
61 Art 30(4) of the 1945 Constitution as amended by the Second Amendment.
62 Art 30(2) of the 1945 Constitution as amended by the Second Amendment.
63 MPR TAP VI/2000 on the Separation of TNI and Polri; MPR TAP VII/2000 on the Roles of TNI and Polri.

Of the unresolved issues, there were a number which appeared to stand alone. These included societal questions relating to education and culture, where the question of the role of religion needed to be resolved and the appropriateness of a constitutional commitment to a minimum 20% of budget spending considered; and the economy and social welfare. They included the question of religion, discussed below.

A. *The Core Of The Debate: Sovereignty and the Institutions of State*

The core of the unresolved issues, however, lay in a basket of connected questions relating to the basic structure of the institutions and the future form of the Indonesian state. The key issues and points of disagreement can be summarised as follows:

a. *The Nature of the Sovereignty of the People*. Some took the view that this should remain as conceived in 1945, with sovereignty being exercised in full through the MPR as the highest state institution. Others believed that the commitment to 'the presidential system' required the formal establishment of the separation of powers principle – and that this would be a necessary and positive step to establish an effective democratic polity. It would require the legislative, executive and judicial branches to be separately defined, and for no highest state institution to exist. Some tried in debate to define an intermediate '*primus inter pares*' role for the MPR, but found no successful formulation.

b. *The Role, Function and Composition of the MPR*. If the MPR were to remain as the highest state institution, it would also need to remain a permanent body. However, the advocates of a separation of powers settlement believed that the MPR should cease to be a permanent body, and espoused the basic principle that direct popular sovereignty requires that all of the representatives of the people should be elected. The MPR should thus be reconstituted solely as a joint session of two constituent houses (the DPR and the *Dewan Perwakilan Daerah* or DPD). However, *realpolitik* dictated the possible addition of some extra members. In particular, the proposal that TNI and Polri should retain their MPR membership until 2009 was formalised in an MPR Decree.[64] The issue of the role of the military in representative politics appeared to have been settled and removed from the constitutional review agenda.

64 MPR TAP VII/2000.

c. *The Creation and Definition of Powers of the DPD & Establishment of a Two Representative Chamber System*. The DPD would have equal representation from each province; it might or might not be given legislative power on issues relating to regions, but would not in any event have powers in other areas. Some described this as a weak bicameral system: others looked at the MPR as the fundamental body and saw it as a kind of unicameral system. But however described, this proposal would be another major change to the basic 1945 concept. The regional representatives *(utusan daerah)* in the unamended text 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 some issues.

d. *Direct Election of the President and Vice President.* This proposal would clearly give extra legitimacy in practice to the President and Vice President, who would be able to appeal to a direct mandate. It also raised the question of the relationship between the election manifesto of the successful ticket and the Broad Outlines of State Policy (GBHN) agreed by the MPR. Indeed, the advocates of a conventional presidential system had begun to question the existence of the GBHN in a direct election system, and also whether breach of the GBHN by the president – which would be a disagreement on a question of policy – should be a valid ground for impeachment. The answers to these questions would critically affect the future balance of power between the legislative and executive branches.

e. *Future of the DPA*. Some argued that presidential advisory bodies should not appear in the Constitution: others that the DPA should be constitutionally redefined as a purely executive advisory body.

f. *The Judiciary*. The independence of the judiciary had been generally accepted. However, drafting in this area had been one of the weakest parts of the text submitted by PAH I, and this had been referred for further debate as a result.

g. *Requirements for Future Constitutional Amendment.* This was clearly connected to the future status and function of the MPR. The possibility of a requirement for a referendum on any amendments which would change the preamble, the unitary state or the presidential system was floated.

XII. The Lead-in to the 2001 Annual Session

With the core of the constitutional debate for the most part unaddressed, the MPR took the decision to use the major part of the material prepared by PAH I as the source for continuing constitutional debate, scheduled to take place over a further two years – up to August 2002.[65] This was seen as the latest Annual Session at which it would be sensibly possible to pass major changes to the structure of state institutions in time to put the practical arrangements in place to conduct elections for the new institutions on time in 2004. The Badan Pekerja was tasked with further consideration of the remaining material and options.

A. *No Reopening of Agreed Issues*

The Badan Pekerja undertook a further series of regional socialisation and consultation meetings, and passed the task of further revision back to PAH I. PAH I operated according to the principle that issues already covered in the First and Second Amendments would not be reconsidered. This gave the committee an ability to set the agenda which was found to be particularly valuable later when the real implications of the Third Amendment were first realised.

B. *Expert Team Assistance to the Constitutional Review Committee*

Seeking to widen its base of support, PAH I appointed an expert assistance team of some thirty academics and commentators, who provided further input on the unresolved issues during 2001. In the joint sessions between PAH I and its expert team, many PAH I members showed themselves to have gained familiarity in depth with the material and concepts, and were debating with the expert team members on equal terms. Indeed, since the PAH I members had spent considerably more time in meetings at all levels debating issues and drafting text, they often displayed a more cohesive approach than was evident in some of the positions taken by members of the expert team.

On the core institutional issues, the views of the expert team were frequently outside the range of debate encapsulated in the alternatives that had been defined by PAH I. In particular, several of the expert team members advocated a conventional presidential system with strong bicameralism, with the DPD possessing the same range of powers as the DPR – a model parallel to the US Congress. The MPR members, however, stuck to the alternatives already defined, framing the question

65 MPR TAP IX/2000.

to ask whether any DPD should possess legislative powers in limited fields or only hold advisory powers. This was perhaps evidence of the division that had opened up after the 2000 Annual Session between the MPR on the one hand, and many academics, commentators and civil society activists on the other. Both sides were developing ideas. Both sides attempted, largely unsuccessfully, to engage the attention of the wider public in the debate. As the relationship between elected members and external elites worsened, both sides increasingly questioned the legitimacy of the other.

C. *The New Interpretation of the 1945 Constitution: How the President Can Be Removed From Office*

Progress on debate was however effectively suspended in the middle of 2001 as the final series of events unfolded which led to the Special Session of the MPR in July. This removed President Abdurrahman Wahid from office and replaced him with his deputy Megawati Soekarnoputri. The substantive grounds for the removal of the President – which include not only breach of the constitution but also breach of state policy guidelines as determined by the MPR – were clearly met. Although the grounds for action changed throughout the removal procedure under MPR TAP III/1978, there was no requirement in the rules to prevent this. Procedurally, the removal procedure appeared to violate the rules clearly at one point only – when the acceleration of the Special Session to open on 21 July 2001 removed the requisite two months' notice period. These events[66] demonstrated in practice how the relationship between the MPR and the presidency under the 1945 Constitution could now work in the new era of legislative assertiveness.

As a result of the Special Session, the 2001 Annual Session was delayed from the planned early August slot until early November. The process of development of 'institutional tradition' is illustrated by many MPR members' opinion that early August was already in 2001 the 'normal' slot for the Annual Session, despite the fact that there had only ever been one previous Annual Session!

D. *Preparation for the Annual Session: Political Lessons are Learnt*

September and October saw final deliberations by PAH I on the report which was to form the basis of debate at the 2001 Annual Session.

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66 A fuller account may be found in NDI, *The Beginning of Stability? Indonesia's Change of President and Government, Jul/Aug 2001* (Jakarta: National Democratic Institute, 2001).

This report covered only the first 25 articles of the Constitution, but in doing so presented the alternatives on all of the major linked structural issues which formed the most difficult part of the constitutional debate. The number of options had been reduced through further negotiation: for example, agreement was reached that the proposed Constitutional Court should be a separate body, and not part of the Supreme Court. PAH I members had learnt from their experience of 2000, when proposals that had been agreed by party representatives in the committee evinced unhappiness in the political leaderships and were effectively disowned on the floor of the MPR. Time and effort was set aside in the last days preceding the opening of the Annual Session for intensive discussions between the committee leaders, the leadership of the MPR, and the overall party political leaderships, in an attempt to ensure the support of the wider party leadership for their colleagues' proposals in PAH I. Acceptance was reached that the core issues of sovereignty and structure would be tackled in 2001 and not left to 2002.

XIII. Constitutional Debate at the 2001 Annual Session

The 2001 Annual Session convened on 1 November in a quieter atmosphere; much of the political tension of the preceding year had largely dissipated. The new government of President Megawati had been in place for only three months, a period largely overshadowed by the impact of the events of 11 September 2001. In the event, the session did not receive a great degree of coverage, and the coverage that it did receive was deeply unfavourable.

A. *The Annual Session Receives Negative Coverage*

The first plenary set the Annual Session off on a very bad footing, as a fist fight broke out on the floor. This took place after some members complained that the decision made by the 2000 Annual Session to establish a regional representatives' fraction before the end of 2000 – a formal provision in Standing Orders – had still not been implemented. The lack of implementation of this decision had previously been raised at the Special Session in July 2001, and the proposal on the floor in this first plenary was to refer the question to a commission later in this year's Annual Session. The supporters of the new fraction lost patience and the ensuing fight was broadcast live on television.

B. *The Structure of the State Negotiated*

Unlike in 2000, the most significant and controversial discussion was always going to be that on constitutional amendments. Commission A immediately showed that it had learnt the lessons of 2000. Throughout

its four days of deliberations, there would be a negotiating and drafting meeting running in parallel with its plenary sessions, in order to ensure both that full input could be obtained on the report tabled and that key players could try to thrash out the necessary compromises. During the plenary sessions themselves, there were to be two rounds of discussion on each question: a first in which any member could put forward a view, and a second in which the views of fractions were put forward. Contributions from the floor were held much more strictly to time than was the case in 2000. This pattern was followed through the three days of commission sessions held between 5 and 7 November.

The central key to the negotiations on the structural issues turned out to lie within the two issues of the powers of the proposed DPD and the question of what would happen if no candidates received an absolute majority in a direct poll for president and vice-president. 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 which Golkar – the second largest party in the MPR – would accept that the second round of the presidential election would take place in the MPR. The new model MPR which would undertake this election would be a joint session of the DPR and the DPD, with the addition for the transitional period up to 2009 of representatives of TNI and Polri.

There were two complicating factors which meant that a full agreement based on this deal could not be completed by consensus. First, other supporters of the second round presidential election being a direct popular election, in particular the Islamic United Development Party (*Partai Persatuan Pembagunan* or PPP) and the National Awakening Party *(Partai Kebangkitan Bangsa* or PKB) associated with former President Wahid, were not prepared to accept the proposal to use the MPR. Second, functional group (UG) members started to mobilise against the proposed new model MPR, in which they would not be present. They gained the support of a number of PDI-P members who were not happy with the existence or the powers of the proposed new DPD, believing it to threaten the unitary state and the founding principles of Indonesian nationalism. Indeed at one point the negotiations appeared close to breakdown as a result of Golkar's unhappiness that PDI-P appeared unable to deliver its own members in support of the potential agreement.

Long and detailed negotiating meetings took place in parallel with the sittings of Commission A and continued through the report back sessions. There was however still no agreement on the last evening of the Annual Session on 9 November – even after the arrival of President

Megawati and Vice-President Hamzah Haz for the formalities of closure. When it finally became evident that no full agreement could be reached, a decision was very quickly made to enact all of the text that had been agreed as the Third Amendment to the Constitution, and to pass the remaining options back to the BP as source material for a further year's debate. This decision was encapsulated by consensus as MPR TAP XI/2001, and a very tired session finally closed about an hour before midnight.

C. *Agreement on the Last Night of the Session*

It was perhaps inevitable that the initial comment focused heavily on the failure to reach a full agreement. The decision to enact the Third Amendment was taken quickly and late in the evening, and was therefore neither immediately published in writing nor widely communicated externally. The implications of the consensus enacted had not been appreciated by a large number of MPR members, and by most people outside the MPR. The external perception was that the Annual Session had been a failure – whereas in reality it had taken decisions of basic principle and enacted an internally consistent package of constitutional amendment that establishes the principle of constitutional checks and balances to Indonesia. The result was a fundamental change in the institutions of Indonesia – but almost nobody noticed it happen. The news of the disappointment that a full agreement was not reached obscured the very wide ranging changes that were agreed. In political circles, and even more in media and commentary circles, the implications of the Third Amendment did not sink in until well into 2002.

XIV. The Third Amendment – A Fundamental Structural Change

The Third Amendment marks the basic decision to change Indonesia from a state with a single all-powerful highest institution of state to become a state with constitutional checks and balances. It establishes the principle of the independence of the judiciary. It goes most of the way to abandoning the 1945 system in favour of a conventional presidential system. It firmly replaces Soepomo's vision of the integralistic state.

The major points in the agreed Third Amendment are:

A. *Popular Sovereignty*

The sovereignty of the people is changed from being exercised in full through the MPR, to being 'in the hands of the people and implemented

in accordance with this Constitution.'[67] The commitment that Indonesia is to be 'a state based on law', previously contained in the Elucidation section, is incorporated in the main text.[68]

B. *Abolition of the GBHN*

The Broad Guidelines of State Policy (GBHN) are removed as a constitutional function of the MPR.[69]

C. *Directly Elected Presidency and Vice-Presidency*

The president and vice-president are to be 'elected as a single ticket directly by the people,'[70] with tickets to be 'proposed prior to the holding of the general election by political parties or combinations of political parties which are participants in the general election.'[71]

D. *President and Vice-President Cannot Be Removed on Policy Grounds*

An impeachment process relating to the presidency and vice presidency is set up which does not allow removal from office on policy grounds ('... both if it is proven that he/she has violated the law in the form of betraying the state, corruption, bribery, other criminal acts, or disgraceful behaviour, or if it is proven that he/she no longer meets the requirements to serve as President or Vice-President'[72]). The legal decision on the admissibility of impeachment proceedings is to be determined by the Constitutional Court ('The Constitutional Court has the obligation to investigate, bring to trial, and reach the most just decision on the opinion of the DPR...'[73]).

E. *Judicial Independence*

The independence of the judiciary is formalised. '[T]he judicial power shall be independent and shall have the power to organise the judicature in order to enforce law and justice'[74]) and 'shall be implemented by a Supreme Court... and by a Constitutional Court.'[75]

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67 Art 1(2) of the 1945 Constitution as amended by the Third Amendment.
68 Art 1(3) of the 1945 Constitution as amended by the Third Amendment.
69 Art 3 of the 1945 Constitution as amended by the Third Amendment.
70 Art 6A(1) of the 1945 Constitution as amended by the Third Amendment.
71 Art 6A(2) of the 1945 Constitution as amended by the Third Amendment.
72 Art 7A of the 1945 Constitution as amended by the Third Amendment.
73 Art 7B(4) of the 1945 Constitution as amended by the Third Amendment.
74 Art 24(1) of the 1945 Constitution as amended by the Third Amendment.
75 Art 24(2) of the 1945 Constitution as amended by the Third Amendment.

F. *Establishment of a Constitutional Court*

The Constitutional Court 'shall have the authority to try a case at the first and final level and shall have the final power of decision in reviewing laws against the Constitution, determining disputes over the authorities of state institutions whose powers are given by this Constitution, deciding over the dissolution of a political party, and deciding over disputes on the results of a general election.'[76] Also, it 'shall possess the authority to issue a decision over an opinion of the DPR containing alleged violations by the President or Vice-President of this Constitution'[77] – that is, to rule on motions to impeach. Judicial review of regulations below the level of laws remains with the Supreme Court, which has the authority 'to review ordinances and regulations made under any law against such law.'[78] The extent of the general power of the Constitutional Court to interpret the constitution remains not totally clear.

G. *Establishment of an Independent Judicial Commission*

There will be 'an independent Judicial Commission which shall possess the authority to propose candidates for appointment as justices of the Supreme Court and shall possess further authority to maintain and ensure the honour, dignity and behaviour of judges.'[79]

H. *Establishment of a Regional Legislative Chamber*

A regional chamber (the DPD) is established which may 'propose to the DPR' and 'participate in the discussion of' 'bills related to regional autonomy, the relationship of central and regional government, the formation, expansion and merger of regions, the management of natural resources and other economic resources, and financial balance between the centre and the regions.'[80] The DPD has the right to 'provide considerations to the DPR on the state budget and on bills relating to taxation, education or religion.[81] The DPD has in addition the power to exercise oversight over the implementation of laws in any of these fields and to submit the result of this oversight to the DPR.[82]

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76 Art 24C(1) of the 1945 Constitution as amended by the Third Amendment.
77 Art 24C(2) of the 1945 Constitution as amended by the Third Amendment.
78 Art 24A(1) of the 1945 Constitution as amended by the Third Amendment.
79 Art 24B(1) of the 1945 Constitution as amended by the Third Amendment.
80 Arts 22D(1) and 22D(2) of the 1945 Constitution as amended by the Third Amendment.
81 Art 22D(2) of the 1945 Constitution as amended by the Third Amendment.
82 Art 22D(3) of the 1945 Constitution as amended by the Third Amendment.

I. *Independent Administration of Elections*

Constitutional provision is made for general elections to be 'organised by a general election commission (*komisi pemilihan umum* or KPU) of a national, permanent and independent character.'[83] The participants in elections for the DPR and for regional authorities 'are political parties',[84] and the participants in elections for the DPD 'are individual candidates'.[85]

J. *A Single Independent State Audit Agency*

The State Audit Board (BPK) is redefined as the single external public audit agency 'which shall be free and independent'.[86]

K. *Implementation*

The text of the Third Amendment states that the changes contained within it were to take effect 'on the date of its enactment'.[87] However, much of this was impractical, as the new institutions – in particular the DPD, the Constitutional Court and the Judicial Commission – require further statutory definition, and therefore a significant volume of subsequent new legislation to be agreed by the President and the DPR.

XV. The Proposal for a Constitutional Commission

During the first year of the constitutional review, the academic and NGO community based primarily in Jakarta had attempted to engage the parliamentarians in debate over the constitutional review. Disappointment with what they perceived as the lack of progress in 2000, they lost patience, and moved to a position in which they questioned the legitimacy of the MPR's role in constitutional review. This divorce between the legislature and the NGO community led to continuing proposals by NGOs, academics and in the media to establish a Constitutional Commission or a National Constitutional Committee. This idea gained considerable momentum after a favourable mention by President Megawati in her speech before Independence Day in August 2001. However, the idea meant very different things to different participants in the debate. At one extreme, the NGO coalition envisaged the Commission as an independent body without any membership from

83 Art 22E(5) of the 1945 Constitution as amended by the Third Amendment.
84 Art 22E(3) of the 1945 Constitution as amended by the Third Amendment.
85 Art 22E(4) of the 1945 Constitution as amended by the Third Amendment.
86 Art 23E of the 1945 Constitution as amended by the Third Amendment.
87 Post-amble of the Third Amendment to the 1945 Constitution.

the legislature, which would present its report to the MPR on an accept-or-reject basis, with an MPR rejection to be followed by a popular referendum. At the other, the detailed concept put forward in debate by PDI-P was essentially an enlargement of external, particularly regional, input and expert assistance to the existing constitutional review process taking place under the direction of the BP. And there were some who rejected the Commission idea altogether.

A. *Why the Constitutional Commission Proposal Failed*

It was always unlikely that the MPR would accept a proposal to take the process almost fully out of their hands. Any Constitution, as the foundation of a state, reflects political choices. It is a mistake to believe that it is possible to 'take the Constitution out of politics' and hand it over completely to 'independent' experts: political judgments and choices are not only inevitable but an essential part of constitution making. Constitutions worldwide bear the imprint not only of the long-term visions of founding fathers but of the short and medium term political debates and imperatives of the age in which they were conceived.[88]

Removal of constitutional review from the political process became even less likely because the NGO proposal involved not only removing the process from the MPR, but writing a completely new constitution rather than amending the existing 1945 Constitution. In taking this position, parallels were drawn with the new constitutions adopted in recent years by constitutional commissions in Thailand, the Philippines and South Africa, all of which used this method.

However, there is one very important difference between these three cases and the debate in Indonesia. In all three, the previous constitution had little or no credibility. The Thai Constitution had been introduced by the military, the Philippine Constitution by former President Marcos, and the South African Constitution by the apartheid regime. In all three cases, wide popular involvement in the process was sought and to

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88 Witness for example Art 25 of the Australian Constitution, entitled 'Disqualification by Race':

> For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.
>
> In 2002, it is probably unimaginable that this could ever take effect in practice. However, when this Constitution was adopted in 1900, it directly related to a live issue in Australian politics.

a significant extent achieved, but in all three cases, political realities were also recognised.[89] By contrast, both within and outside the MPR the importance attached by many people to the 1945 Constitution as one of the fundamental symbols of Indonesia's independence meant that there was very little resonance for the proposal to jettison the 1945 Constitution completely. The campaigners may have made a key mistake when they combined their demand for more widespread involvement in the process with the demand for a new Constitution.

In addition, despite considerable efforts both by the MPR members and by the campaigners, there was no groundswell of mass interest in the process, which remained predominantly a debate of Jakarta elites. The estrangement between the members and the campaigners meant that the influence of the campaigners was very limited. In the end, no meeting of minds took place in the MPR, both within the 2001 Annual Session and subsequently, either on the necessity for a Commission or on its composition and functions. The whole issue of the Commission was referred back to the Badan Pekerja, which decided that since much of the constitutional review was now in place, there was no need to take the idea further.

XVI. The Remaining Agenda After 2001

The outcome of the 2001 Annual Session left a very limited remaining constitutional agenda, which was referred to the Badan Pekerja.[90] It however included the core structural issues where no negotiated agreement had been possible, some invested with substantial political and emotional significance. Most importantly, these were the composition of the MPR, in particular the future of functional group representation, and the arrangements for the presidential and vice-presidential election when no ticket had received 50% plus 1 of the popular vote, plus 20% in at least half the provinces. Less salient but still significant remaining issues were the procedure in the case when there is a simultaneous vacancy for president and vice-president, the future of the DPA, and questions relating to the currency and the central bank.

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89 For example, a leading member of Thailand's Constitutional Commission has indicated privately to the author his view that one major reason for the large number of state bodies defined in the 1997 Constitution of Thailand was a perceived need to create positions which could be filled by the holders of offices under the previous Constitution, who would then be more likely to 'buy in' to the process of adoption of the new Constitution.

90 MPR TAP XI/2001 amending MPR TAP IX/2000.

In addition, a number of issues had not been on the Annual Session agenda in 2001. Most significantly, these included the proposal to include the key phrase of the 'Jakarta Charter' *(Piagam Jakarta)* in the Constitution. Other such issues included the provisions relating to education, culture, the economy and social welfare.

A. *The Fourth Amendment Drafted*

Reconvening in March and April 2002, PAH I drew up the outline draft of the Fourth Amendment. It resolved the procedure in the event of a double casual vacancy to provide that three senior ministers would take the helm pending the election of replacements by the MPR. It left currency questions to be determined in laws. It agreed a provision that 20% of state and regional budgets should be devoted to education. This provision appears symbolic of the importance of education, as it is not clear that aggrieved parties could bring an action against the Government, regional authorities and/or the DPR in the Constitutional Court if budgets do not comply with this. (There was no debate for example parallel to that in the Constitutional Convention of India, distinguishing between fundamental rights and directive principles of state policy, and between justiciable and non-justiciable provisions[91]). It agreed a compromise formula on the economy retaining the previous reference to 'common endeavour based on the family system'[92] but adding further subclauses relating to natural resources and economic democracy. It introduced a requirement for a referendum requiring a yes vote from two-thirds of the electorate on proposals to change the establishment of the unitary state. It included new Transitional and Additional Provisions passing powers from the old institutions when the new ones are in place, formalising the transitional membership of TNI and Polri in the MPR, requiring the establishment of the Constitutional Court within one year and declaring the Elucidation to be a historical document no longer in effect.

B. *Early Stages of The Final Negotiations*

These agreements covered the simpler issues: some fundamental disagreements remained. Substantive questions of the existence and role of the DPA, the role of the central bank, and the quorum in the MPR for future constitutional amendment were unresolved. But the

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91 An account of this process may be found in Granville Austin, *The Indian Constitution*, (Oxford: Oxford University Press, 1966) 50-115.

92 Art 33(1) of the 1945 Constitution.

core of the argument for the 2002 Annual Session remained based round three big issues.

C. *The Composition of the MPR – Back to the Fundamentals?*

The basic question over functional groups remains whether or not the future MPR should consist only of elected members. The existing UG representatives starkly posed this question in July 2002 to support their case for a continuing role. They have articulated this role in terms of a choice between the original 1945 concept of the MPR bringing groups in society together, and what they see as the importation of the Western influenced bicameral and fully representative concept. This argument of principle remains real, indeed fundamental – although it perhaps needed to have been made at the point when the role of the MPR and the form of popular sovereignty was agreed in late 2001. Timed some months later, when the UG group faced the opposition of all party fractions to their continued presence in the MPR, the argument may be perceived to relate to an issue whose time has passed. The issue became even clearer when the idea of TNI/Polri representatives serving in the MPR for a further transitional period up to 2009 was finally dropped in late July.

D. *The Two Round Presidential Election Proposal*

The second round presidential election issue also looked difficult to resolve at this stage. Arguments were raised against both the second round direct election proposal supported by Golkar, PPP, PKB and PAN, relating for example to cost and security implications. Equally, second round election by the MPR, supported by PDI-P and TNI-Polri, was questioned on the grounds that the final decision would be taken by a small (and potentially corruptible) group and also of the legitimacy questions that would arise if the MPR overturned a first round popular plurality.

E. *Islam and the Indonesian State*

The proposal to add the provisions of the 'Jakarta Charter' to the existing Article 29 sought to include in the Constitution a provision requiring adherents of Islam to practice their faith: 'with the obligation for adherents of Islam to carry out syariah law.' It symbolises for its supporters the principle of state support for Islam.[93] This was

93 A full discussion of this is beyond the scope of this paper but may be found in Hefner, *supra* note 56.

contained in the 1945 Constitution up to the penultimate draft but removed by Soekarno and Hatta immediately before the proclamation of the final version in the interests of diversity: however, 'belief in God' was amended to 'belief in the One Almighty God'[94].[95] The issue was the subject of deep divisions during the constitutional debates of the 1950s and has remained as an aspiration of some Islamists. Soekarno said in 1959 at the time of the return to the 1945 Constitution that the Charter was 'a historic document which had great meaning for the struggle of the people of Indonesia.'[96] Some had hoped that the establishment of the New Order would lead to the introduction of the Charter, but were to be disappointed: military opposition was clear and Soeharto did not think otherwise.[97]

The constitutional review gave the opportunity for the debate to be reopened. The proposed amendment to Article 29 first seemed to appear on the agenda in order to give PPP a bargaining counter against PDI-P proposals to add the principles of Pancasila – a nationalist icon – to Article 1 of the text as well as being included in the Preamble. However, the inevitable dynamic once this debate had started meant that both PPP and the Crescent Moon and Star Party *(Partai Bulan Bintang* or PBB) were able to take the opportunity for the substantive case for the Charter's inclusion to be argued once again.

The Jakarta Charter is both a substantive and a symbolic issue, dealing both practically and emotionally with the relationship between the Indonesian state and Islam. It remains controversial within the different strands of Indonesian Islam – the leaderships of both mass Islamic organisations, *Nahdlatul Ulama* (or NU) and *Muhammadiyah*, have opposed its inclusion in the Constitution through the Fourth Amendment. It is equally controversial among followers of other religions, some of whom fear it as the cornerstone of an Islamic state, and among more secular nationalists. Although there does not appear to be even a simple majority for the proposal, it remains a sensitive and potentially divisive debate the tone of whose conduct and resolution will be a very important factor in the continuing process of transition.

F. *The Final Agreement Takes Shape?*

July 2002 followed the predicted pattern of the final stages of such negotiations. Strong statements by political leaders in support of positions

94 *Nasution* (1995), *op cit*, 61-62.
95 Hefner, *supra* note 56, at 42.
96 *Nasution* (1995), *op cit*, 322-323.
97 Hefner, *supra* note 56, at 91.

and warning of the dangers and consequences of failing to adopt them – threats, for example, of a delay in the elections, a delay in implementation until 2009, or a Constitutional Commission – were matched by further work at detailed level. The problem of the timing of the implementation of the Third Amendment was a subject of negotiation. Members of PDI-P argued that since the Third Amendment stated that it took immediate effect, the MPR had ceased to be the highest state institution in November 2001. There was thus no requirement for President Megawati to present a report which would be heard, discussed and result in a MPR TAP containing policy directions to the executive. Other parties, keen to make political points against the executive in 2002 (and 2003 and before the election in 2004), argued that the MPR elected in 1999 retained its powers and functions until 2004.

Agreement was however finally reached on the text for a presidential consultative council within the executive branch which would replace the DPA. More surprisingly, PDI-P moved to adopt the second round presidential election proposal, prompting questions as to what it had received in exchange. The proposal to amend the title of Chapter XIV from 'Social Welfare' to 'Economy and Social Welfare' was finally agreed – a debate whose outcome makes little practical difference but which returned to the symbolism of Soekarno and Soepomo's rejection of individualism as a constitutional principle. But the composition of the MPR, the Jakarta Charter, the central bank provision and the question as to whether the Preamble and fundamental sovereignty provisions should be unamendable or subject to a referendum with a very high threshold remained to be resolved. With the principles of the previous Amendments looking more secure, members of PDI-P were also able to break the 'no re-opening' principle and reintroduce some issues relating to the First and Second Amendments. They proposed the removal of the DPR's role in the acceptance of foreign ambassadors, the removal of the word 'indigenous' from the citizenship requirements, and the reworking of the retrospection provisions in Article 28I(1). However, they did not appear able to secure agreement from the other fraksi for these changes.

G. *The Constitutional Commission Proposal Re-emerges*

The Constitutional Commission proposal resurfaced in the latter stages of the 2002 debate, promoted by civil society groups and academics, who again attacked the inevitable political 'cow trading' involved in reaching any final agreement. Their call was again endorsed by President Megawati, but this attracted little resonance within the MPR: it has been suggested that it may have been intended more as a public negotiating tool than as a proposition to be realised. The campaigners

for the Commission have begun to see their proposal as a long term aim, with the 1945 Constitution as finally amended in 2002 serving as a transitional constitution. Whether this will have any basis in reality will depend on the success of the conventional presidential institutions which appear likely to be finalised in 2002. It will also depend on the campaigners' success or otherwise in presenting a case and building either a relationship or a show of strength which persuades the members of the new MPR to share their constitutional amendment functions.

XVIII. The 2002 Annual Session: The Final Step?

The final stages of the constitutional review debate can still be observed at two levels. At one level, a process of negotiation is taking place between political parties and other forces, based both round perceptions of the national interest and perceptions of party interest. Naturally parties tend to identify these two interests as the same, perhaps sometimes genuinely and sometimes for political advantage. There is a perception that it would be dangerous for Indonesia to fail at this final stage. The substance of the negotiations may be unfamiliar to many outside observers, but the process is similar to most negotiations. Threats not to agree are traded in advance of the final decision making meetings. Different political actors have different views of the implementation timetable. The biggest concessions may be made only at the last minute in marathon lobbying and drafting sessions. If successful, the result is likely to be key provisions worded in a manner which appears less well thought through than the rest of the text. They would take the form of political compromise wording, the precise detail of which is necessary for parties and groups representing at least the required two-thirds majority to be able to live with it. And while parties who are seriously seeking an agreement are considerably more likely than not to reach one, the possibility is always present of miscalculations and excessive bids by the negotiators in the final stages leading to breakdown. The immediate result of such a breakdown would be a part amended constitution that could not be operated as written.

A. *Will Deliberation and Consensus Be Maintained?*

At another level, however, the remaining process is still deeply symbolic. Although the 1945 Constitution itself provides that 'all decisions of the MPR shall be taken by a majority vote',[98] the view of the government

98 Art 2(3) of the 1945 Constitution.

as presented to the Konstituante in May 1959[99] was that all deliberations of both the MPR and the DPR should result in consensus. Current MPR Standing Orders[100] require every effort possible to be made to reach deliberation and consensus, and the 2001 decision to defer outstanding issues rather than vote on them illustrates again the depth of that tradition. President Megawati reemphasised her support for these principles of deliberation and consensus on 14 June 2002, stating that voting is not Indonesian culture.

A polity may seek to function on the basis of deliberation and consensus, especially on key issues and especially if the assumption is that participants in debate are essentially united. But even if participants have very different perceptions or interests, it may be possible to reach negotiated agreements in such a system in which all gain something and nobody everything. Every represented group holds a veto, but every represented group is under very powerful pressure to reach an agreement.

It is not yet clear that amendment of the constitution by deliberation and consensus *(musyawarah dan mufakat)*, a principle which held in respect of the three amendments passed in 1999, 2000 and 2001, may not be achievable for the resolution of the final issues. Major parties – including PDI-P, Golkar, PKB and PAN – have indicated that they do not wish to see constitutional amendments decided by voting. At the same time, the possibility of voting is used in the negotiations to force concessions from reluctant fraksi who would otherwise wield a veto power (such as UG in relation to the composition of the MPR).

However, consensus not only on functional group representation but also on the Jakarta Charter does not yet seem close. Indeed, PBB and significant elements in PPP clearly see the Jakarta Charter not only as a point of principle but as an issue which defines and differentiates their party to the electorate, and as a result appear to regard a vote in the MPR as desirable. The question, therefore, is whether every participant has a veto, or whether the task of the amenders is to be prepared to push for a vote to be taken and to avoid the coalescing of a blocking third against the Fourth Amendment. Those who wish to see a vote, and those who threaten it during discussions, will be challenging yet another powerful constitutional symbol.

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99 *Risalah Perundingan Tahun 1959*, Vol II, Konstituante Republik Indonesia: 810.

100 Arts 82 and 83 of MPR TAP II/1999 as amended by MPR TAP I/2000, MPR TAP II/2000 and MPR TAP V/2001.

XVIIÎ. CONCLUSIONS

A. *Substance and Symbol*

Between October 1999 and July 2002, the MPR almost completed the process of review of the 1945 Constitution of Indonesia to bring it into line with the demands of a transition to democracy. In doing so, the MPR made decisions of substance, the most important of which being the move to a separation of powers principle and a conventional presidential system. In doing so, it also found itself addressing powerful issues of symbolism.

The retention and amendment of the 1945 Constitution, rather than the writing and adoption of a new Constitution, was in itself a potent example of symbolism. The protection of the Preamble and the unitary state were highly symbolic. As the debate on the 'presidential system' unfolded, it became evident that the words had at least two meanings: one defined in 1945, the other very different.

At the last stage, questions of both substance and symbolism remain. The substantial question is whether an agreement can be reached through existing procedures on the remaining issues of constitutional debate (linked perhaps formally or informally to implementation timetables or to other policy or personnel issues outside the constitutional field) to which sufficient political actors will sign on. The symbolic question is whether any agreement reached uses deliberation and consensus, or whether voting and the support of a two thirds majority will have been necessary. The answer may be a major influence on the shape of the continued development of Indonesian democracy.

B. *Will a Conventional Presidential System Succeed in Indonesia?*

What practical effect will the constitutional review have? Despite the claims of some people outside the MPR that the proceedings are irrelevant, it does not seem possible that the new balance of legislative and executive power and legitimacy implicit in a conventional presidential system can fail to have an impact on the operation of the Indonesian state.

Outside the United States, the conventional presidential system has in the past often not been regarded as likely to bring stable and effective democratic government. It was possible in 1988 for Fred Riggs to argue that 'almost universally, politics (that have adopted presidentialist constitutions) have endured disruptive

catastrophes'[101] and for Scott Mainwaring to write in 1990 that 'under democratic conditions, most Latin American presidents have had trouble accomplishing their agendas.'[102] However, more recent and detailed analysis is less firm in this conclusion. Writing in 1997, Mainwaring and Matthew Shugart conclude that there are many variations among presidential systems, and that these variations have consequences for how well they are apt to function. They suggest that 'presidential systems tend to function better with limited executive powers over legislation' and that 'presidentialism tends to function better when presidents have at least a reasonably large bloc of reliable legislative seats'[103] – but make it clear that these are only tentative conclusions. Indonesia's adoption of conventional presidentialism will have the benefit of the developments of presidential constitutions worldwide in the last fifteen years. Its presidential system, and the details not only of the amended 1945 Constitution but of the necessary implementing legislation, may equally make a major contribution to understanding what can make presidentialism succeed or fail.

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101 Fred Riggs, 'Presidentialism: A Problematic Regime Type' in Arend Lijphart, *Parliamentary versus Presidential Government*, (Oxford: Oxford University Press, 1992) 218.

102 Scott Mainwaring, (1990), *Presidential Systems in Latin America*, in Arend Lijphart, *Parliamentary versus Presidential Government*, (Oxford: Oxford University Press, 1992) 112.

103 Scott Mainwaring & Matthew Shugart, *Presidentialism and Democracy in Latin America* (Cambridge: Cambridge University Press, 1997) 436.