

Chapter I

THE CONSTITUTION

A. THE CONSTITUTION

The legal basis of the Indonesian state is the 1945 Constitution was promulgated the day after the 17 August 1945 proclamation of independence. The Constitution was essentially a draft instrument hurriedly crafted by the Independence Preparatory Committee in the last weeks before the Japanese surrender. It is important to note that the Constitution was the product of a unitary republic.

As the provisional legal framework for a modern state, the Constitution has proved to be extremely elastic, subject to broad interpretation depending upon the constellation of political forces in control at any given time. Other than outlining the major state structures, the document contains few specifics about relations between citizens and the government, and leaves open basic questions about rights and responsibilities of the citizen and the state. The political struggle from 1945 to 1959 over the constitutional framework of the state stemmed not from the ambiguities of the Constitution or its heavy reliance on executive power, but rather over deep disagreements about the nature of the state itself.

The Constitution was amended four times in the period from 1999 to 2002. Prior to this series of amendments, scholars usually separate the Constitution into three distinct periods; namely, 1945-

1949 (the liberal democracy period), 1959-1966 (the guided democracy period), and 1966-1998 (the new order period).

The first amendment was made on 19 October 1999, the second was made on 18 August 2000, the third made on 9 November 2001, and the fourth was made on 10 August 2002. The yearly amendment of the Constitution was an intense period of constitutional reform when compared to other States, such as the United States of America. The United States have made just 27 amendments to their Constitution over a 200-year period or an average of just 1 amendment every 8 years.. The basic driving force of constitutional reform in Indonesia over that period was the belief within the community that the Constitution did not allow democratic institutions to function as they were designed to, this is in spite of the common acceptance that the underlying premise of the Constitution is ‘sovereignty of the people’.

The amendments principally were drafted to address the perceived weaknesses in the prevailing provisions of the Constitution at that time. It was believed that the Constitution allowed for the establishment of a fake democratic system in Indonesia. The primary weaknesses include that the political system is too executive oriented, the ambiguity of the provisions, and extensive use of delegation power.

B. THE LEGISLATIVE

The body that can be categorized as the legislature in Indonesia is the House of Representatives (the “DPR”). The most significant distinction between the DPR of the 2004-2009 period and the DPRs of former periods is the recruitment of its members. At this moment all DPR members are people who have been directly chosen by the voters.

In previous periods, some DPR members were appointed by the President and some of them were appointed by parties. Voters were not able to choose their representatives directly in a general election. Voters were only required to choose a party to represent their aspirations as it were rather than individual candidates. The appointment system described above has created a 'fake democracy'. Democracy was claimed to be the creation of democratic institutions however it was clear that the behavior and actions of the DPR in performing its tasks were neither democratic nor representative of the people's aspirations. Simply, one of the primary tasks of the DPR was never able to be adequately executed; namely, ensuring the accountability of the President as it was seen merely to be rubber stamping the autocratic wishes of the Former President Soeharto. However, with the fall of the Soeharto regime in 1998 left the window of democracy slightly ajar and this opportunity has not been missed in the sense that the DPR has become a considerably more powerful State institution in the intervening period.

The current DPR (2004-2009) comprises of members of political parties however these members have been elected directly by their respective constituencies. The DPR consists of 550 members and each member is elected to a 5-year term which expires on the taking of the oath of office by the newly elected members of the following DPR. The DPR has 3 primary functions according to the law; namely, the drafting and enacting of legislation, budgetary affairs, and a supervisory function. However, the Chief Justice of the Constitutional Court, Jimly Asshidiqie, has stated that the primary functions of the DPR also include representation of the people's aspirations through the performance and execution of the powers and authorities conferred upon it to take and make political decisions.

The performance of these functions are reflected in the powers and authorities granted to the DPR to : a) draft laws that will be discussed and debated within the DPR and with the President

with a view to garnering agreement, b) discuss and give consent on Interim Law or Law in Lieu of Law, c) accept and discuss the Bills delivered by the Regional Representatives Council (the “DPD”) that relate to particular subject matters and inviting the DPD to be part of the discussion, d) consider the DPD’s suggestions on the State Budget Bill and Bills related to Taxation, Education, and Religion, e) implement the National Budget with the President by considering the DPD’s suggestions, f) supervise the enforcement of Laws, the National Budget, and the government’s policies, g) discuss and follow up the results of those observations submitted by the DPD on the enforcement of laws on local autonomy, establishment, enlargement, and integration of local regions, the Central and Regional Government relationship, natural resources and other economic resources, the implementation of the National Budget, taxation, education, and religion, h) choose the members of the State Audit Board by considering the recommendations of the DPD, i) discuss and follow up the results of observations on the usage of State funds that have been submitted by the State Audit Board, j) give consent to the President on the election and termination of the members of the Judicial Commission, k) give consent with respect to candidates for Supreme Court Justices as recommended by the Judicial Commission and to be confirmed by the President, l) choose three candidate justices for the Constitutional Court and submit the names to the President to be confirmed, m) provide consideration to the President in assigning Ambassadors, accepting Ambassadors from foreign countries, and providing consideration to the President in the process of granting amnesty and pardons, n) giving consent to the President to declare war, make peace, and agreements with any other State, and in making other international agreements that will have an extensive and substantial effect on the lives of the people or that are related to the burden of State financial policy and/or the making of Laws, o) absorb, compile, collect, and follow up the aspirations of the people, and p) perform any other duties and executing any other authorities that are mandated by the Law. To realize those functions as an institution the DPR has

several rights such as a right to: a) interpellation, b) survey, and c) express opinions. Furthermore, each Council member has the right to: a) propose bills, b) raise questions, c) suggest recommendations or express opinions, d) to vote and be voted for, e) self-defense, f) immunity, g) protocol, and h) finance and administration.

Interpellation is a right to ask official questions of the President, particularly with respect to account for performance in the position. Survey is a right to conduct an investigation of a particular case including the right to subpoena any witnesses and sources needed. In the event assistance from the Police or Public Prosecutor is required to conduct the examination or help the DPR complete the investigation then the DPR has a right to request this assistance. The right to express opinions includes statements, resolutions, or warning memorandums on certain government policy or on certain conditions that are addressed to the President or to the public.

In addition to the DPR, Law No. 23 of 2003 established a new state body called the Regional Representatives Council. Generally, the DPD would not be categorized as a part of the legislative body however the description of it appropriately fits into this section because the process of recruitment of its members and some of its functions are quite similar to those of the DPR.

The DPD consists of representatives of provinces that are voted into office at the general election. Each province has 4 DPD members. DPD members must live in the electorate from which they are elected and mandated to represent. Nevertheless, they are required to be resident in Jakarta during session times and most official business is conducted in Jakarta as well. Therefore, the reality is that most members of the DPD spend considerably larger amounts of their time in Jakarta than in their electorates. Each member is elected for a term of 5 years and that term of office ends once the following DPD is sworn in.

The DPD has several functions including to: a) propose recommendations involving the discussion and consideration that is related to particular legislative areas, and b) supervise the enforcement of particular laws. The DPD has the right to propose Bills to the DPR and to be involved in the discussion of Bills related to Local or Regional Autonomy matters, the relationship between Central and Regional Government, the establishment, enlargement, and integration of local regions, management of natural resources and other economic resources, and other issues that relate to the revenue allocation between the Central Government and Regional/Local Government. The DPD also provides input to the DPR on matters related to the Bill on the National Budget and Bills that relate to taxation, education, and religion. The DPD also provides input on the selection and appointment of members to the State Audit Board. The DPD can observe and supervise the enforcement of the Law on Regional Autonomy, as well as the establishment, enlargement, and integration of local regions, the Central and Local Government relationship, natural resources, and other economic resources, the implementation of the National Budget, taxation, education, and religion. The results of these observations and supervision are submitted to the DPR as considerations that are to be followed up. Each member of DPD has the right to: a) propose recommendations and opinions, b) to vote and be voted for, c) self-defense, d) immunity, e) protocol, and f) finance and administration.

Besides the DPD, the People's Consultative Assembly (the "MPR") also can be placed into this section on the legislative. The MPR is not a legislative body *per se* as the MPR consists of the members of the DPR and the members of the DPD. The duties and authorities of the MPR are to: a) amend and implement the provisions of the Constitution, b) swear in the President and Vice President at the MPR's Plenary Session, c) resolve the DPR's recommendations based on decisions of the Constitutional Court to impeach the President and/or Vice President after the President

and/or Vice President is given the chance to provide an explanation to the MPR for their actions at a MPR Plenary Session, d) swear in the Vice President as President in the event of the death of the President, resignation, impeachment, or when the President can no longer execute their obligations and duties of office, e) within 60 days the MPR must choose the Vice President from the two candidates submitted by the President if the Vice President position is vacant, f) choose the new President and Vice President from two joint candidacies submitted for the position of President and Vice President as proposed by a political party or coalitions of political parties, in the event that both the former President and Vice President resign at the same time, g) enact internal orders, rules, and code of ethics of the MPR. Each member of the MPR has the right to: a) propose recommendations on the amendment of the provisions of the Constitution, b) decide the manner and option in any decision making activities, c) to vote and be voted for, d) self-defense, e) immunity, f) protocol, and g) financial and administration matters.

The members of the MPR, the DPR, and the DPD enjoy parliamentary privilege and immunity in that they cannot be sued in court based on their statements, questions, and/or opinions that are delivered orally or in writing during the course of any parliamentary meeting so long as it does not contradict any internal orders, rules, or ethical standards of each body. However, this provision is void if the member publishes materials that have already been agreed in a private meeting to be kept secret. All MPR members (the members of the DPR and the DPD) shall not: 1) hold concurrent public office as: a) state official, b) justice of any court, c) civil servant, a member of the military or police forces, an employee of a state-owned enterprise, regional government-owned enterprise, and/or any other institution that has as its source of budgetary funds the National, Regional, or Local Government Budgets, 2) the performance of any duties as a structural official in a private education facility, public accountant, consultant, advocate/lawyer,

notary, medical doctor, and other work that has any relationship to any duty, authority, or right of the member of the MPR, the DPR, or the DPD, and 3) or participate in corruption, collusion, and nepotism. Should a member of the MPR, the DPR, or the DPD be alleged to have committed a crime, the summons regarding any testimony and investigation must have the written consent of the President.

C. THE EXECUTIVE

The executive body in Indonesia is the Office of the President. The President and Vice President hold their respective positions for five years and can be re-elected for one further term. In the event that the President dies, resigns, is impeached, or is unable to perform presidential duties as required by the Constitution, then the President will be replaced by the Vice President. The Vice President will serve out the remainder of the replaced President's term of office. The Office of Vice President cannot remain vacant for more than 60 days. The MPR shall convene a special session to elect a Vice President from a list of two candidates proposed by the President.

The President must have the consent of the DPR to make international agreements that have a major and fundamental effect on the lives of the people, particularly international agreements that create any burden on the State financial position or require the State to amend or create law. When the President wants to appoint an ambassador or wants to provide an amnesty or pardon, the President must consider the DPR's recommendations. When the President wants to grant clemency with respect to a verdict or rehabilitate the name of a convict

then the President must consider the recommendations of the Supreme Court.

The President has the right to propose Bills to the DPR. Every Bill, by law, is to be discussed by the President and the DPR with a view to garnering a joint agreement between the parties as to the content of the bill. Should the bill not achieve the requisite joint agreement of the parties then it cannot be submitted again for the DPR's deliberation during the current sitting of parliament. In the event that the bill does garner joint agreement, has been submitted to parliament, deliberated, and passed, then the bill will become law. A bill that is agreed by parliament will automatically become law after 30 days even if the President fails to enact the law within this period of time. The final act before a bill becomes law is for it to be published in the State Gazette.

The conditions that must be satisfied in order to become either the President or Vice President are not onerous but comprehensive. A candidate for the Office of President or Vice President must be an Indonesian citizen since birth and have never held the citizenship of any other country. The rationale for such a provision is that an individual's patriotism comes into question should they have been born overseas or have ever held the citizenship of another country, particularly to charges that their loyalties are divided leading to an increased risk of treason and betrayal of the State. Furthermore, the candidates for President and Vice President must be spiritually aware and of sound mind and body in order to be able to successfully execute the duties and authorities of the Office of President and Vice President. The President and Vice President are elected as a package team directly by the voters. The package or pair of candidates for the Office of President and Vice President is to be proposed by a political party or a coalition of political parties and the pair of candidates that secure more than 50% of the votes

cast in at least half of the total number of provinces in Indonesia will be declared to have won the election.

The President and/or Vice President may be impeached by the MPR upon the recommendation of the DPR. There are several types of alleged offences that may lead to the impeachment of the President and/or Vice President: a) if he/she has been proven in a court of law to have violated the prevailing laws and regulations with respect to treason, corruption, bribery, other serious criminal acts, and dishonest behavior, b) if he/she has been legally proved to be incapable of fulfilling the duties and functions required as President or Vice President. Suggestion of the impeachment of the President and/or Vice President can only be proposed by the DPR to the MPR only if the DPR had asked the Constitutional Court to examine, put on trial, and judge pursuant to the misconduct alleged by the DPR. The President can not suspend or dismiss the DPR ensuring that the President or Vice President may attempt to circumvent impeachment proceedings by dismissing the parliament.

The President can offer clemency to prisoners in the form of changing, lowering, or erasing the sentence or the decision. Clemency does not require that the President give any particular consideration or weight to the decision of the original judge in the matter. Clemency is considered to be a Presidential Privilege that is exercised within the parameters of compassion or forgiveness. It is important to note that clemency can change, lower, or erase the criminal punishment attached to the original decision however it neither eliminates any fault of the convict nor does it endeavor to rehabilitate the convicts name or reputation.

Any verdict or decision that has been handed down by a competent court and is deemed final and binding on the convict may be subject to an appeal by the convict directly to the President for clemency. The verdicts that may be subject to an appeal for clemency include: a) death sentences, b) life

sentences, c) and prison sentences of greater than two years. An appeal for clemency does not delay the execution of a Court's verdict except in death sentence cases.

The appeal for clemency must be submitted in writing by the prisoner, the prisoner's lawyer, or the prisoner's family to the President. A copy of the appeal is delivered to the court that decided the case in the first instance, and then the first instance court will deliver the appeal to the Supreme Court. The appeal and any copy of the appeal may be given to the Head of the prison, who is then obligated to send the appeal to the President and send a copy to the court that decided the case in the first instance.

No later than 20 days of the copy of the appeal being accepted, the court that decided the case in the first instance must send that copy and the prisoner's case files to the Supreme Court. Within 3 months of receiving the documents from the court of first instance the Supreme Court must send its recommendation to the President.

The President has the right to accept or reject the appeal for clemency. Nevertheless, the President must give consideration to the recommendations of the Supreme Court however even in the event the Supreme Court recommends clemency the President still retains the prerogative to reject the clemency appeal. The acceptance of the appeal for clemency by the President is usually in the form of: a) reduction or change of the sentence imposed, b) lower the nominal sentence imposed, c) and erase any imposed sentence.

D. THE JUDICIARY

The judiciary in Indonesia consists of the Supreme Court and all courts under its jurisdiction and the Constitutional Court. The courts under the Supreme Court include the General Courts, the Military Court, the Religious Court, and the State Administrative Court.

The organization of the Supreme Court comprises Chief Justices, Deputy Chief Justices, Associate Justices, Registrars, and a Court Secretary. The number of Supreme Court justices that may be appointed to the court is stipulated in law and cannot exceed 60 judges. The justices of the Supreme Court are appointed by the President from a list of candidates that have been proposed by the Judicial Commission. Supreme Court justices may be appointed from outside of the judicature in the event that such an appointment is required or necessary however before appointment the candidate would still be required to satisfy all normal requirements for appointment. The main requirement for an appointment of a Supreme Court justice from outside the judicature is that the candidate must have a minimum of 25 years experience in the legal profession or as a legal scholar.

The Supreme Court has the authority to: a) hand down decisions at the cassation level, b) undertake judicial review of legislation, and c) exercise any other authority or power granted to it at Law. At the cassation level the Supreme Court can overturn a decision of a lower court based on the following reasons: a) the lower court does not have the requisite authority or is exceeding that authority, b) the lower court does not apply the law correctly, and c) the lower court is negligent in its application of the prevailing and relevant legislation.

The Constitutional Court is a court of first instance and of appeal ensuring that decisions are final and binding once handed down by the court. The authorities and powers of the court include:

a) judicial review of any Law alleged to be in conflict with the Constitution, b) decide any conflict between state institutions that derive their respective authority and power from provisions contained in the Constitution, c) decide on the dissolution of political parties, and d) decide conflict that arise over the results of general elections. In addition to the above noted authorities and powers the Constitutional Court must decide upon opinions submitted by the DPR with respect to allegations that the President or Vice President are in breach of the prevailing laws and regulations with regard to treason, corruption, bribery, other serious criminal acts, dishonest behavior, or is incapable of fulfilling the requirements for the Office of the President and/or Vice President.

The Constitutional Court comprises 9 members of which one is appointed Chief Justice. Justices to the Constitutional Court are appointed by the Supreme Court, the DPR, and the President, with each appointing 3 justices. The provisions of the Constitution, the relevant laws, and implementing regulations expressly prohibit justices of the Constitutional Court from concurrently holding positions as: a) state officials, b) members of political parties, c) entrepreneurs, d) advocates, or e) civil servants including as active members of the National Armed Forces or National Police Service.

All organizational, administration, and financial matters relating to the General Court system resides with the Supreme Court. The Constitutional Court also possesses the same authorities and powers as the Supreme Court with respect to the management of organizational, administration, and financial matters relating to the Constitutional Court.

E. DIVISION OF POWER

The ‘separation of power’ doctrine is not applied in Indonesia in preference to the division of ‘power doctrine’. The meaning of separation of power is clearly different from that of division of power. The separation of power doctrine explicitly distinguishes the constitute parts of State power and stipulates that each constitute part is separate from the other with respect to not only function but personnel as well. It is stated that in strict empirical terms a pure separation of powers cannot be achieved. Consequently, Indonesia has elected to use the division of power doctrine to elaborate the relationship between the constitute parts of State authority. Essentially, the division of power doctrine allows for power to be divided among several constitute parts but the parts are not independent and separate from each other.

Theoretically, the separation of power doctrine can be found in the writings of John Locke in “two treatise on civil government.” Locke said that there are three kinds of power in every State; legislative, executive, and federative. Legislative power means the power to make Statutes. Executive power means the power to execute or implement Statutes. Federative power means the power related to war and peace, making alliances with other States, and all activities related to the people or institutions of foreign States. Montesquieu expands on Locke’s writings and states that the three kinds of power in every State are legislative, executive, and judicative. Montesquieu did not believe that the federative power identified by Locke was a power that can stand on its own. Montesquieu believed that the federative power described by Locke was part of the executive power and he subsequently merged the federative power into those powers attributed to the executive. Instead, Montesquieu proposed an alternative third power, the judicature. He expressly defined that judicative power is the power to solve legal conflict. Furthermore, he stated that each of those three powers is different from the other with respect to not only

function but with respect to the individual that exerts control over the power and the functions executed.

Empirically, Montesquieu's theory is not applicable in the real world. For example, in the making of statutes the legislative must cooperate with the executive. The basic reason is because the executive is the party that will implement the statute and therefore in order to make the implementation effective the executive must be involved in the drafting of statute. Moreover, the executive has more resources than the legislative in terms of human resources, information, practical experience, finance, and facilities.

The division of power doctrine is the antithesis of the Montesquieu theory. The division of power doctrine was defined by Ivor Jennings. Jennings said that the division of power can be seen from both material and formal perspectives. The division of power from the material perspective means that the division of power is rigid by separating the state power into three distinct institutions, legislative, executive, and judicative. From the formal perspective, Jennings said that the division of power is not rigid.

In Indonesia the division of power is evidenced in the fact that no one single State institution has exclusive power. For example, to appoint an Ambassador the President must consider any recommendations from the legislature, the legislature must also have the President's agreement on a Bill to ensure that the Bill will become Law, and the composition of justices on the Constitutional Court involves both the recommendations of the President and the legislature.

