

CONSTITUTION MAKING AND NATION-STATE IMAGINATION: A HISTORICAL COMPARISON, 1945-2002

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Abstract

In Indonesia's history, the making of the constitutional foundation has been shaped by its political context. From the decolonization process till present, the making of the constitution has been intervened by various actors, both national and international parties. Hence, constitution changes are socially and politically complex. The complexities are represented in constitution-making governance, process, and its debates in the substantive drafting. This article focuses on how the constitution-making processes and its debates regarding issues of human rights and fundamental freedom have been contested since the very beginning of Indonesia's independence, and how this debate provides answers to the causes, processes, substance, and implementation involved in Indonesia's constitution-making. It is clear in a comparative analysis, using Arato's model, that the constitution making during the amendment period (1999-2002) is the best process that involved civil society and substantially more progressive. However, this argues that understanding the constitution-making would play important role in underpinning Indonesia's nation state imagination.

Keywords: *Comparative constitution; constitution making; human rights; nation state; Indonesian history.*

PEMBENTUKAN KONSTITUSI DAN IMAJINASI NEGARA BANGSA: SUATU PERBANDINGAN HISTORIS 1945-2002

Intisari

Dalam sejarah Indonesia, pembentukan landasan konstitusional telah dibentuk oleh konteks politiknya. Dari proses dekolonisasi hingga saat ini, terlihat bahwa pembentukan konstitusi telah diintervensi oleh berbagai aktor, baik nasional maupun internasional. Oleh karena itu, perubahan konstitusional bersifat kompleks secara sosial dan politik. Kompleksitas tersebut terdapat dalam model pembentukan konstitusi, proses, dan perdebatan dalam penyusunan substansinya. Pembahasan artikel ini berfokus pada bagaimana proses pembentukan konstitusi dan perdebatannya mengenai beberapa isu hak asasi manusia dan kebebasan dasar sebagai gagasan yang diperdebatkan sejak awal kemerdekaan Indonesia, dengan memberikan jawaban atas penyebab, proses, substansi, dan implementasi yang terlibat dalam pembuatan konstitusi baru di Indonesia. Jelas dalam analisis komparatif, berbasis model Arato, bahwa pembentukan konstitusi selama periode amandemen (1999-2002) merupakan proses terbaik dalam melibatkan masyarakat sipil dan secara substansial lebih progresif. Namun, hal ini menunjukkan bahwa memahami pembuatan konstitusi akan memainkan peran penting untuk mendukung imajinasi negara bangsa Indonesia.

Kata Kunci: *Perbandingan konstitusi; pembentukan konstitusi; hak asasi manusia; negara bangsa; sejarah Indonesia.*

A. Introduction

The debates on Indonesia's constitution-making have been shaped by the discourses on anti-imperialism, which is common. It is called an 'independent constitution' in constitution-making generation.¹ Having such context, unsurprisingly, the development of human rights and fundamental freedom ideas in Indonesian constitution-making history has been strongly emphasised. The vehement debates were influenced by the American War of Independence and the French Revolution. This can be traced from the minutes of constitution-making in which many of the founding fathers have often argued their thoughts by referring to the American Bill of Rights of 1791 or the French *Déclaration des droits de l'homme et du citoyen* of 1789 since they were major landmarks in political thought worldwide.² On the other hand, Indonesians adopted local values for making fundamental principles in social-economic issues. This can be traced to its debates on '*gotong royong*' (mutual cooperation) principles.³

Constitution-making in 1945 showed debates reflecting global–local interplay. This is coined as the concept of 'glocalised constitution-making'.⁴ It influenced the constitutional amendments between 1999 and 2002, which reflected the co-existence and relationship between those who were involved in parliament for changing the constitution and drafting the constitution substantively.

1 Yash Ghai, *The Role of Constituent Assemblies in Constitution Making* (Stockholm, Sweden: International Institute for Democracy and Electoral Assistance (International IDEA), 2006), https://constitutionnet.org/sites/default/files/2017-08/the_role_of_constituent_assemblies_-_final_yg_-_200606.pdf.

2 Saafroedin Bahar, *Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan Indonesia . Panitia Persiapan Kemerdekaan Indonesia: Risalah Sidang Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan Indonesia (BPUPKI)-Panitia Persiapan Kemerdekaan Indonesia (PPKI), 29 Mei 1945-19 Agustus 1945 (Ed. Ke-2, Cet Ke-3.)* (Sekretariat Negara, 1992). All translations from Indonesian sources are the author's own unless otherwise noted.

3 Article 33 section 1 of the Indonesian Constitution (1945). This principle is one of economic principles under socialism values which had really influenced during constitution making session, especially in response to previous imperialism and capitalism. See Bivitri Susanti, "Neo-Liberalism and Its Resistance in Indonesia's Constitution Reform 1999-2002: A Constitutional and Historical Review of Indonesian Socialism and Neo-Liberalism" (Masters of Law Dissertation, University of Warwick, 2002).

4 Maartje De Visser and Ngoc Son Bui, "Glocalised Constitution-Making in the Twenty-First Century: Evidence from Asia," *Global Constitutionalism* 8, no. 2 (July 2019): 297–331, <https://doi.org/10.1017/S2045381719000066>.

‘Constitutional aspirations’ include the adoption ideas of human rights, and are thus closely linked to the concept of ‘human rights constitutionalism.’ ‘Constitutionalism’ here incorporates the pursuit of grounding rights and freedoms in a constitution, thus strictly and clearly limiting the power of the state. It determines the legitimate authority or, adversely, arbitrary power or misuse of power.⁵ In other words, constitutionalism is a political doctrine claiming that political authority shall be bound by institutions in order to limit the ruling power.⁶ The diverse approaches within constitutionalism are sometimes explained as a dichotomy between liberal approaches, which centre on rights-possessing individuals who seek equality before the law, and socialist approaches, which grant rights to the community at the expense of the individual and which allow community interests to be determined by the state.⁷

Proposal to insert freedom of expression during the 1945 constitution-making reflected vehement debates among Indonesian political leaders, especially between Soekarno’s nationalism and Hatta’s socialism.⁸ It concerns the extent to which freedom of expression has been discussed and guaranteed in promoting rights... This analysis becomes important and reflective accounts of the major issues of comparative constitution-making history in Asian jurisdictions. Following Son and Malagodi, this article explores the process and contents in the making of a constitution, especially by providing answers to the causes, processes, substance, and implementation.⁹

The present chapter will focus on these constitution-making processes and their debates regarding the issues of human rights and freedom of expression as contested ideas since the very beginning of Indonesia’s independence.

However, discussing constitution-making in Indonesia would deal with major discussions on five moments for constitutional changes: 1945, 1949,

5 Soetandyo Wignjosoebroto, *Hukum: Paradigma, Metode, Dan Dinamika Masalahnya*, Cet. 1 (Pasar Minggu, Jakarta: Elsam : HuMa, 2002), 415–17.

6 Jan-Erik Lane, “Constitutions and Political Theory,” *Capital & Class* 21, no. 2 (July 1997): 19, <https://doi.org/10.1177/030981689706200117>.

7 Graham Hassall and Cheryl Saunders, *Asia-Pacific Constitutional Systems*, 1st ed. (Cambridge University Press, 2002), 33.

8 Indonesia’s Constitution (Undang-Undang Dasar Negara Republik Indonesia Tahun 1945), UUD NRI 1945 § Article 28 (1945). Freedom of association and assembly, and freedom of expression of thought and of issuing writing and the like, shall be prescribed by statute.

9 Ngoc Son Bui and Mara Malagodi, eds., *Asian Comparative Constitutional Law, Volume 1: Constitution-Making*, 1st ed. (Hart Publishing, 2023), <https://doi.org/10.5040/9781509949724>.

1950, 1956-1959, and 1999-2002. From those five changes, four of them reflected constitution-making in the sense of new forms of constitutional formulations, while one of them (1999-2002) reflected an amendment, instead of a 'new constitution.' Hence, the latest constitution-making is called as amendment of the 1945 Indonesian Constitution.¹⁰

Before such an amendment, the first was called the 1945 'Independence Constitution,' in 1945. Second, Indonesia's Federal Constitution, in 1949. Third, the Provisional Constitution of the Republic of Indonesia, in 1950. Fourth, the Constitutional Council 1956-1959, which was a draft constitution. From 1959 to 1999, or 40 years after returning to the 1945 'Independence Constitution,' constitution-making took place. Given these constitutionmaking processes, this article would also compare the design, process, and its outcomes. This study is necessary due to the tendency of reconstitutionalisation of the old version without taking into account the context of the debate in the constitution-making..

This article uses an interdisciplinary approach, combining the study of comparative constitutional law and historical accounts on constitutional changes. It limits the discussion on constitution-making in Indonesia, which would deal with major discussions on five moments for constitutional changes: 1945, 1949, 1950, 1956-1959, and 1999-2002. Hence, a socio-legal approach is used to dissect the social and political context of constitutional changes in such periods.

This study makes extensive use of literature reviews from Leiden University, as well as discussions with historians who provide critical reflections.¹¹ Historical, political, social, and discourse approaches are used in order to understand this constitutional law.

B. Constitutionalizing Ideas

These sections contain the analysis and discussions on how ideas on

10 Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 (Amended), UUD NRI 1945 (1999).

11 The author would like to express special gratitude to Adriaan Bedner and colleagues at the Van Vollenhoven Institute, Faculty of Law, Leiden University, who provided the opportunity to be a visiting researcher in Leiden for several months in 2022-2025.

human rights and fundamental freedoms have been debated in the constitution-making.

1. 'Independence Constitution': 1945

In the generations of constitution-making, 'independence constitution' is the most common feature. In Indonesia, constitutionmaking can also be reflected during two sessions, prior to and after Indonesia's independence declaration. Those were the BPUPKI and PPKI Sessions. BPUPKI, the abbreviation of *Badan Penyelidik Usaha Persiapan Kemerdekaan Indonesia*, or the Investigating Committee for Preparing Indonesia's Independence, is a Japanese-organised committee that supported independence in Indonesia. While post-declaration, constitution-making were carried out in the PPKI session. PPKI refers to the *Panitia Persiapan Kemerdekaan Indonesia* or the Preparatory Committee for Indonesian Independence.

The global political situation that influences the nature of the debate about the 1945 Constitution reflects how the constitutional makers is involved in an inevitable narrative for fighting imperialism. During World War II, with the Japanese about to lose the war, the Dutch sought to re-establish their authority in Indonesia. Before their defeat, however, the Japanese started helping the Indonesian nationalists to prepare for self-government. On 7 September 1944, Prime Minister Kuniaki Koiso promised Indonesia independence, although no date was set.¹² About half a year later, this promise led to the establishment of the Investigating Committee for Preparing Indonesia's Independence (BPUPKI), a Japanese-organised committee, which was to support independence in Indonesia.¹³ The first task of this committee was to prepare independence and to draft a constitution. This development contributed significantly to the revolutionary character of the transition to independence.¹⁴

12 The promise of independence was continued by appointing Soekarno and Hatta as leaders of the nationalists, whose antagonism to the Dutch had led them to look at the Japanese as an evil, but necessary ally. The two started the process of preparing for independence in May 1945, hoping to secure it before the expected victory by the allied forces; Robert Cribb and Colin Brown, *Modern Indonesia: A History Since 1945* (London: Longman, 1995), 15.

13 *Dokuritu Zyunbi Tyoosakai* or *Badan Penyelidik Usaha Persiapan Kemerdekaan Indonesia*. The organisation was founded on 29 April 1945 by Lieutenant General Keimakici Harada, the commander of the 16th Army in Java.

14 Herbert Feith, *The decline of constitutional democracy in Indonesia* (Ithaca, NY u.a.: Cornell

The idea of liberalism and nationalism was discussed during one of the meetings held by the BPUPKI. The BPUPKI members were divided into several sub-committees (*Bunkakai*) and the so-called Committee of Fundamental Law (*Panitia Hukum Dasar*). The Committee of Fundamental Law had 19 members and was chaired by Ir Soekarno. It was renamed the Constitutional Committee (*Panitia Undang-Undang Dasar*), with most of its members assigned to sit on the so-called Small Committee of Constitutional Drafters (*Panitia Kecil Perancang Undang-Undang Dasar*), chaired by Prof. Mr. Dr. Soepomo. There were two official sessions, chaired by Dr. Radjiman Wedyodiningrat. The first session was held between 28 May and 1 June 1945 and discussed the philosophical underpinning of the state.¹⁵ The second session was conducted between 10 and 17 July 1945, and dealt with the state's form, its territory, citizenship, the draft constitution, economy and finance, defence, education, and teaching.

The Constitution Committee's first meeting took place on 11 July 1945 in the Tyuuoo-In building.¹⁶ The draft of the constitution was first debated on the content followed by comprehensive checking of its language. The concept and rules of freedom of expression, as articulated in Article 28 of the Constitution (UUD 1945),¹⁷ were only briefly touched upon. In BPUPKI's second session, on 15 July 1945, Soekarno spoke of the importance of moving away from individualism and asked the members of the BPUPKI not to incorporate freedom of thought into the constitution as a 'right of the citizen.' For Soekarno, the idea of 'social justice,' which was formulated in the Preamble of the Constitution, was a fundamental statement against individualism.

What is interesting about Soekarno's idea is that it does not merely reflect an 'indivisibility' principle, but this also refers to the inseparability or integration of two types of human rights, the civil and political rights on one hand, and economic, social, and cultural rights on the other. Soekarno regards what he calls 'freedom of speech' as a right that is inseparable from the 'right to food or freedom from starvation.'¹⁸ The principle of indivisibility was also

Univ. Press, 1978), 2.

15 *Dasar Negara*.

16 Currently this building is the Foreign Affairs Department.

17 Undang-Undang Dasar 1945.

18 Wiratraman Herlambang Perdana, *Press Freedom, Law and Politics in Indonesia: A Socio-Legal Study* (Leiden, Netherlands: Meijers Institute, 2014).

discussed during the drafting process of the Universal Declaration of Human Rights.¹⁹²⁰

After Soekarno had spoken before the BPUPKI session, Hatta replied as follows:

... [B]ut I worry about one thing, if there is no belief or commitment to the people in the Constitution about the right to speech and expression – the right in the Constitution that we are drafting now – we may establish a state model with which we disagree. Because in the state's law as we have it now, we see a “*kadaver discipline*” situation as we have seen in Russia and Germany, and this is my point of objection. Regarding the incorporation of the “*droits de l’homme et du citoyen*,” it is indeed unnecessary to include them here (Constitution), because they are just the requirements for protecting human rights against ruthless kings in the past. These rights are incorporated in the *grondwet-grondwet* (fundamental laws) after the *Franse Revolutie* (French Revolution), just for fighting such ruthlessness. But we are founding a new state. We should consider requirements in order for our state not to turn into an authoritarian state based upon power. We want a state that rules, we awaken a new society based on mutual assistance, common endeavour, our aim to improve society. Nevertheless, we should never give unlimited power to the state so that on top of that new state, a state based on power arises. Therefore, it is good to provide an article to prevent fear of using freedom of speech for citizens.²¹²²

19 Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*, Pennsylvania Studies in Human Rights (University of Pennsylvania Press, 1999), 290–96.

20 Michael Freeman, *Human Rights: An Interdisciplinary Approach*, Key Concepts (Cambridge, UK : Malden, MA: Polity Press ; Blackwell, 2002), 34–42.

21 Saafoedin Bahar, Ananda B. Kusuma, and Nannie Hudawati, *Risalah Sidang Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan Indonesia (BPUPKI), Panitia Persiapan Kemerdekaan Indonesia (PPKI), 28 Mei 1945-22 Agustus 1945*, Cet. 1., ed. 3 (Jakarta: Sekretariat Negara Republik Indonesia, 1995), 262.

22 Translation into Bahasa Indonesia: “.. [t]etapi satu hal yang saya khawatirkan, kalau tidak ada satu keyakinan atau satu pertanggungjawaban kepada Rakyat dalam Undang-Undang Dasar yang mengenai hak untuk mengeluarkan suara, yaitu bahwa nanti di atas Undang-Undang Dasar yang kita susun sekarang inimumkin terjadi suatu bentukan negara yang tidak kita setuju. Sebab dalam hukum negara sebagai sekarang ini mungkin timbul suatu keadaan “*kadaver discipline*” seperti yang kita lihat di Rusia dan Jerman, inilah yang saya khawatirkan. Tentang memasukkan hukum yang disebut “*droits de l’homme et du citoyen*.” memang tidak perlu dimasukkan di sini, sebab itu semata-mata adalah syarat-syarat untuk mempertahankan hak-hak orang seseorang terhadap kezaliman raja-raja masa dahulu. Hak-hak ini dimasukkan dalam *grondwet-grondwet* sesudah *Franse Revolution* semata-mata untuk menentang kezaliman itu. Akan tetapi kita mendirikan negara yang baru. Hendaklah kita memperhatikan syarat-

Hatta's statement thus underlined the importance of "freedom of speech" in holding power accountable.²³ This line of argument was consistently championed by Hatta during the BPUPKI sessions. In the end, it was Hatta's persistence on this issue that 'guaranteed' freedom of expression in Indonesia's Constitution.²⁴ 'Guaranteed' in this regard is a compromise as an initial step in constitution-making.

Muhammad Hatta and Liem Koen Hian are two key figures in bringing the message that fundamental freedoms must be adopted into the constitution. Hatta discussed the need for fundamental freedoms in constitution-making, and how people's pressure on the colonial government had led to the annulment of Article 11 of the *Regeringsreglement* (the Netherlands-Indies Constitution), which prohibited the gathering of political organisations.²⁵ Limiting freedom of expression, including press freedom, should never be done "in a conservative way," so he argued. As he wrote in *Daulat Rakjat* (No. 8, 30-11-1931), press freedom in the Constitution of Belgium was much broader than in the Dutch Constitution (as stipulated in Article 7). Under the Dutch Constitution, press freedom could be limited by the law. If the ruler is conservative, it is likely that "what is given by the right hand is taken away by the left hand." Thus, originally, Hatta argued for a more liberal way of protecting press freedom. During the constitution-drafting process, however, he agreed to the idea of limiting press freedom through legislation on the grounds that the limitation

syarat supaya negara yang kita bikin jangan menjadi Negara Kekuasaan. Kita menghendaki negara pengurus, kita membangun masyarakat baru yang berdasar kepada gotong royong, usaha bersama, tujuan kita ialah membaharui masyarakat. Tetapi di sebelah itu janganlah kita memberikan kekuasaan yang tidak terbatas kepada negara untuk menjadikan di atas negara baru itu suatu negara kekuasaan. Sebab itu ada baiknya dalam salah satu pasal, misalnya pasal yang mengenai warga negara, disebutkan juga di sebelah hak yang sudah diberikan kepada misalnya tiap-tiap warga negara jangan takut mengeluarkan suaranya."; Bahar, Kusuma, and Hudawati, *Risalah Sidang Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan Indonesia (BPUPKI), Panitia Persiapan Kemerdekaan Indonesia (PPKI), 28 Mei 1945-22 Agustus 1945*, 286.

23 The opinion that freedom of speech and freedom of expression should be regarded as fundamental freedoms cannot be separated from Hatta's ideas during the BPUPKI sessions. Although it was hardly debated, freedom of expression was finally guaranteed by the Constitution, even if some restrictions remained in place. See also Soebadio Sastrosatomo, *Pandangan Politik Hatta*, Cet. 2 (Jakarta: Pusat Dokumentasi Politik "Guntur 49," 1995), 25, who argues that human rights articles, especially on the freedom of expression, were adopted into the Constitution because of Hatta's efforts.

24 Sastrosatomo, *Pandangan Politik Hatta*, 25.

25 Mohammad Hatta, "Toedjoean Dan Politik Pergerakan Nasional Indonesia," in *Pidato Di Moeka Rapat Dari Perkoempoelan Student-Student Indologi Di Utrecht, 4 November 1930* (Jakarta: Daulat Ra'jat, 1930), 8.

could not contradict the essence of constitutional rights.²⁶ While Hian, chief editor of *Sit Tit Po*, argued during the BPUPKI session on 15 July 1945 that press freedom must be guaranteed by Indonesia's Constitution. According to Liem, "[i]n proposing fundamental rights (*grondrechten*), not only the right of assembly and the right to discuss, but also right to print (*drukpers*), and the *onschendbaarheid van woorden* (inviolability of words) should be guaranteed. Press freedom is needed to reduce the badness of state and society."²⁷ However, Hatta and Liem's proposal was rejected by Soepomo and Yamin, both lawyers and considered as 'law experts.'

They argued that the principle of the family system and of deliberation which have been accepted as Indonesian state foundations, automatically include people's freedoms to unite and assemble. Yamin argued on a view promoting universalism of human rights, i.e. not limiting or distinguishing between human rights by dividing them into particular ideological or political blocks. Hence, after very long debating about the adoption of fundamental freedoms into the constitution, finally on 16 July 1945, Soepomo proposed article 28 to be "The freedoms to unite and assemble, to express thought in oral, written and other forms are prescribed by law."²⁸

One day after Soekarno-Hattapromulgated independence, the Committee for Preparing Indonesia's Independence (PPKI) started its sessions. The PPKI was established on 7 August 1945 and started work after the declaration of independence on 17 August 1945. At the first session of the PPKI on 18 August 1945, the BPUPKI draft of Article 28 of the Constitution was read out again by PPKI Chairman Soekarno, and officially approved.

What we could learn from these vehement debates during BPUPKI and PPKI on freedom of expression is related to the contested global v. local. This is between the adoption of universalist global perspectives and the local imagination on 'kindship, cooperation, the tradition of mutual assistance and family system.' These debates reflect what has been coined as 'glocalised constitution making.'²⁹ As written, the crafting of modern-day constitutions is

26 Herlambang Perdana, *Press Freedom, Law and Politics in Indonesia*, 27.

27 Adinegoro Djamiludin, *Publisistik & Djurnalistik* (Gunung Agung, 1963), 62.

28 Bahar, Kusuma, and Hudawati, *Risalah Sidang Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan Indonesia (BPUPKI), Panitia Persiapan Kemerdekaan Indonesia (PPKI), 28 Mei 1945-22 Agustus 1945*, 360.

29 De Visser and Son Bui, "Glocalised Constitution-Making in the Twenty-First Century," 297–331.

not a purely domestic enterprise, if it ever was. It is micro-level studies that take the inevitable interplay between the global forces and domestic realities seriously. This article has put forward the concept of glocalised constitution-making as a useful prism in this respect.

Constitution-making during BPUPKI and PPKI sessions has emphasised the meaning of ‘the abuse of power.’ Despite different ideological perspectives in relation to liberalism and individualism that were presumed to endanger the tradition of mutual assistance, they were finally resolved by the introduction of a short and simple article on freedom of expression as a fundamental freedom under the Constitution.

2. Federalist v. Republican, 1949 and 1950’s Constitutions

There have been two military aggressions carried out by the Dutch in the early years after independence, 1947-1948. The Dutch military tried to claim authority and control over Indonesia. In political governance, the Netherlands promoted a federal state form, such as Indonesia Timur, Pasundan, Jawa Timur, and others. The Federalist Agreement was accepted by both the Netherlands and the Republic of Indonesia in the Linggarjati Agreement in November 1946. Both parties also agreed to promote fundamental human rights as formulated in the United Nations Charter and to respect them in both the Republic and the other states forming part of the Union.³⁰

The Dutch military attacks led to backfire and elicited a negative response from the international community.³¹ As a result, the United Nations forced the Dutch government to resume negotiations with the government of the Indonesian Republic, the so-called Renville negotiations. On 18 March 1948, the Dutch presented a working paper on the Constitution. Only a few days later, the Indonesian Republican Committee headed by Soepomo presented a

30 P. J. Drooglever, “The Genesis of the Indonesian Constitution of 1949,” *Bijdragen Tot de Taal-, Land- En Volkenkunde / Journal of the Humanities and Social Sciences of Southeast Asia* 153, no. 1 (1997): 69, <https://doi.org/10.1163/22134379-90003945>.

31 G. M. T. Kahin, *Nationalism and Revolution in Indonesia*, Studies on Southeast Asia (Southeast Asia Program Publications, Cornell University, 2003), 401; The states which supported Indonesia in condemning the Dutch military attack included Iraq, Iran, Egypt, Pakistan, Morocco, and many other Asian states, especially the states that attended the Asian Conference in New Delhi on 20 January 1949. It should be noted that India was the pioneer of Asian and African states in mobilising international support for Indonesia’s independence struggle at that time; Abdul Haris Nasution, *Sekitar Perang Kemerdekaan Indonesia: Periode Konferensi Meja Bundar* (Bandung: Sedjarah AD - Penerbit Angkasa, 1979), 11:9–63.

draft of its own, which contained the principal outline of a constitution for the United States of Indonesia. This draft included the protection of human rights as referred to in the United Nations Charter.³²

The United Nations' Security Council Resolution of 28 January 1949 once again made clear what importance was attached to the freedom of expression. It recommended the establishment of a commission to guarantee fair and democratic general elections as well as freedom of expression (Para. 4 (e) a-b).³³ This resolution became an important reference for the negotiations between Indonesia and the Netherlands about the provisional constitution for the new state. These negotiations, called the Roundtable Conference (KMB),³⁴ took place in The Hague from 23 August to 2 November 1949. The Indonesian side was represented by the government of the Republic of Indonesia and members of the *Bijeenkomst voor Federaal Overleg* (BFO),³⁵ led by Mr. Mohammad Roem. The other participants were the Dutch government and the United Nations Commission for Indonesia.³⁶

As a consequence of accepting the results of the KMB (roundtable discussion), the Republic of Indonesia changed into a united state, as stated in the Constitution of RIS (Federal Constitution).³⁷ The negotiations heavily influenced the draft for the federal constitution-making. There were three major points of agreement: first, the establishment of the United States of Indonesia (USI; *Negara Republik Indonesia Serikat*, RIS); second, the transfer of sovereignty to the United States of Indonesia, and third, the establishment

32 NIB XIII: 222-3, 276-9, in Drooglever, "The Genesis of the Indonesian Constitution of 1949," 70–71.

33 UN Security Council Resolution Para. 4 (e) a-b: "*The Commission, or such other United Nations agency as may be established in accordance with its recommendation under paragraph 4 (c) above, is authorized to observe on behalf of the United Nations the elections to be held throughout Indonesia and is further authorized, in respect of the territories of Java, Madura and Sumatra, to make recommendations regarding the conditions necessary (a) to ensure that the elections are free and democratic, and (b) to guarantee freedom of assembly, speech and publication at all times, provided that such guarantee is not construed so as to include the advocacy of violence or reprisals.*"

34 *Konferensi Meja Bundar*.

35 The Meeting for Federal Consultation, also known as the PPF delegation. The chairman of the BFO/PPH was Sultan Hamid II, who also represented the delegation from West Kalimantan/Borneo.

36 UNCI (*United Nations Commission for Indonesia*) is the organisation established by the United Nations.

37 A. Arthur Schiller, *The Formation of Federal Indonesia 1945-1949* (The Hague/Bandung: W. Van Hoeve Ltd., 1955), 24.

of a union between the Netherlands and the United States of Indonesia. Therefore, the draft constitution for the United States of Indonesia, henceforth referred to as the 1949 Federal Constitution, was formulated by the delegates of the Republic of Indonesia and the BFO.³⁸ The final constitution draft was concluded in Scheveningen and added as an appendix to the Agreement Charter (*Handvest van Overeenstemming*) between the Republic of Indonesia delegation and the BFO delegation about the Draft Planning of the United States of Indonesia Constitution on 29 October 1949.³⁹

Nevertheless, although many constitutional law scholars argued that such a federal constitution had been pushed by the Netherlands political interests, the fact was not purely a foreign intervention. During a pan-Indonesia conference in Yogyakarta, the republicans and the Federalists had already discussed and negotiated a constitutional design. It had already been discussed before the official negotiations started. Soepomo, as a lawyer, was the key architect of this constitution-making.⁴⁰ However, it was clearly not an individual role, since the draft had also been approved by the Central Indonesia National Committee (*Komite Nasional Indonesia Pusat*/KNIP).⁴¹ It was officially adopted on 14 December 1949 and came into force on 27 December 1949.⁴²

38 The final document was concluded in Scheveningen and added as an appendix to the Agreement Charter (*Handvest van Overeenstemming*) between the Republic of Indonesia delegation and the BFO delegation about The Draft Planning of the United States of Indonesia Constitution, 29 October 1949; Het Secretariaat-Generaal van de Ronde Tafel Conferentie, *Resultaten van de Ronde Tafel Conferentie, 2 November 1949, Ridderzaal Te 's-Gravenhage* ('s-Gravenhage: Staatsdrukkerij Uitgeverijbedrijf, 1949), 54–55. Nevertheless, the republicans and federalists had already discussed and negotiated a constitutional design during a pan-Indonesia conference in Yogyakarta.

39 Het Secretariaat-Generaal van de Ronde Tafel Conferentie, *Resultaten van de Ronde Tafel Conferentie, 2 November 1949, Ridderzaal Te 's-Gravenhage*, 54–55.

40 According to Drooglever, “The Genesis of the Indonesian Constitution of 1949,” 79, the republican arrogance and the federalist weakness was reflected furnished by an act of Soepomo, who at the end of a long discussion on an unrelated subject flung a small note on the table with the casual remark that he supposed that the gentlemen would agree with its contents, and that they would do so without a word.

41 The Vice-President’s Proclaim (*Maklumat Wakil Presiden*) No. X of 16 October 1945 authorised the legislative power of the KNIP, whilst MPR and The People’s Representative Council (or DPR) had not been established yet.

42 Two important things should be noted. First, the 1949 Federal Constitution was provisional in nature, as defined by Article 186, which stipulated: “*The Constituante (Constitution Making Council), together with the Government are asked soon to formulate the Republic of Indonesia Constitution that will change this provisional constitution.*” Second, the USI establishment was based on the 1949 Federal Constitution, which also recognised the territory of the Republic of Indonesia. Article 2 of the 1949 Federal Constitution recognised the Republic of Indonesia as

The demand for Indonesia's unity became a stronger issue, not only in the high-level high politics, but also in society. 'Social and regional' forces, as well as military factions, rejected ideas of the separation of governance. Therefore, these encouraged the Republic of Indonesia and USI to sit together to reconsider the change of the constitution. Less than a year after the enactment of the Federal Constitution in 1949, the Republic of Indonesia and USI agreed to rebuild a Unitary State of the Republic Indonesia (NKRI, *Negara Kesatuan Republik Indonesia*) on 19 May 1950. NKRI is an ideal imagination for a united form as mandated since the promulgation of independence on 17 August 1945. Hence, the Agreement Charter between the Government of the United States of the Republic of Indonesia and the Government of the Republic of Indonesia was concluded. The making was represented by their respective Prime Ministers, Mohammad Hatta (RIS) and A. Halim (RI).⁴³

A two-day session, on 19-20 July 1950, after the draft of the Provisional Constitution of the Republic of Indonesia had been presented, agreement was reached. This was called the Provisional Constitution of the Republic of Indonesia or *UUD Sementara Republik Indonesia/UUDS*). This was formally enacted by Law No. 7 of 1950 (Official Gazette of RIS 56/1950). From the point of view of a constitutional lawyer, enacting a constitution by using lower legislation is incorrect, but – similarly to the 1949 Federal Constitution – the

a part of the USI, which territory was mentioned in the Renville agreement. From the point of view of the constitution's applicability, the UUD 1945 still existed in the Republic of Indonesia, whilst the 1949 Federal Constitution still existed in the USI. Hence, Indonesia used to have two constitutions, each of which was applicable to a different territory. The federal state in the form of the KMB could no longer exist, because power had been consolidated in the early years after independence, so that the idea of the United States of Indonesia became unpopular. Both in the Netherlands as well as in Indonesia, the result of the KMB was opposed, not only for the legal consequences, but also for political and psychological reasons. See for example Mr Moh Roem's speech, the Chairman of the Republic of Indonesia delegation in The Second Minister Conference Union Indonesia-Netherlands, S-Gravenhage, 20-29 November 1950; *Nederlands-Indonesische Unie*, "Resultaten van de Tweede Conferentie van Ministers van de Nederlands-Indonesische Unie," 's-Gravenhage: Secretariaat-Generaal van de Nederlands-Indonesische Unie, 1950, 24.

- 43 The follow-up to this agreement was the preparation of a draft constitution and the establishment of a Joint Committee (*Panitia Bersama*). The Joint Committee was chaired by Prof Dr R. Soepomo (representing RIS) and Mr Abdul Hakim (representing RI). The result of this committee was noted in *Rentjana Konstitusi Sementara Republik Indonesia* (the Provisional Constitution Draft of the Republic of Indonesia), which was set up by the Joint Committee of the United States of the Republic of Indonesia and the Republic of Indonesia. The result was submitted to and authorised by the Working Council of the Central Indonesia National Committee (*Badan Pekerja Komite Nasional Indonesia Pusat* or *KNIP*, authorised on 12 August 1950 and also known as the People's Representative Council (*Dewan Perwakilan Rakyat*)) and the Senate of the United States of Indonesia (*Senat Republik Indonesia Serikat*, authorised on 14 August 1950).

UUDS 1950 was provisional in nature, as clearly formulated in Article 134.⁴⁴

The main difference between the 1950 Constitution and the 1949 Federal Constitution concerned the form of the state, and this reflected a contestation between federalism and a unitary system, brought by federalists and republicans. Compared to the 1945 Constitution, the provisions on human rights in the 1949 and 1950 constitutions were more completely and comprehensively adopted. The 1949 Federal Constitution incorporated the Universal Declaration of Human Rights (UDHR) and thus contained a solid list of fundamental rights and freedoms. These were directly transplanted to the 1950 Constitution⁴⁵. The fundamental rights and freedom provisions in the Annex of Statute of the Indonesia-Netherlands Union were also stipulated in Parts V and VI of the UUDS 1950. In addition, Article 21 of the 1950 Constitution introduced the right to strike, which neither the 1949 Federal Constitution nor the 1945 Constitution had included.⁴⁶

The constitution also reflected the adoption of global discourse on human rights and fundamental freedoms. Regarding free expression, both constitutions adopted it in a clearer formulation. This included, “Every person has the right to hold and express opinions,”⁴⁷ and its limitation of rights/freedoms,⁴⁸ “the exercises of the rights and freedoms listed in this part can only be limited by legislation in order to guarantee their recognition and respect for them and to fulfill the just requirements for peace, morality, and prosperity in a democratic society.”⁴⁹ Yamin, a lawyer and key actor in the constitution-making, argued that legislation may only further regulate constitutional rights,

44 Article 134 of the UUDS 1950 states: “*The Constituant (Constitution Making Council), together with the Government are asked soon to formulate a Republic of Indonesia Constitution that will change this provisional constitution.*” This article is similar to Article 186 of the Federal Constitution.

45 Kuntjoro Purbopranoto, *Hak-Hak Azasi Manusia Dan Pancasila* (Jakarta: Pradnya Paramita, 1979), 28.

46 Civil rights groups, especially Indonesian labour movement groups, faced a real struggle to obtain this right. The inclusion of this right in post-WWII constitutions following civil rights groups pressure also occurred in the USSR (1946), France (1946), and Italy (1947); Soepomo, *Undang-Undang Dasar Sementara Republik Indonesia, Dengan Sekedar Tjataan Dan Keterangan Dibawah Tiap-Tiap Pasal Menurut Pendjelasan Dan Djawaban Pemerintah Kepada Parlemen RIS* (Djakarta: Noordhoff-Kolff N.V., 1950), 9–10, 42.

47 This provision is similar to Article 19 of the Konstitusi RIS.

48 Article 33 and 34 of the 1950 Constitution

49 This article is similar to Article 32 of the Konstitusi RIS, article 33 of the 1950 Constitution, and Article 29 section 2 of the 1948 Universal Declaration of Human Rights.

but never narrow them down.⁵⁰ Nevertheless, the scope of guarantees of rights and freedoms in the 1950 Constitution and the 1949 Federal Constitution was considerable, certainly for its time. As noted by Poerbopranoto in 1953⁵¹, “the 1949 Federal Constitution and 1950 Constitution are the only constitutions that adopted human rights as a United Nations Organisation decision (Universal Declaration of Human Rights, 1948) into a Constitution Charter.”

3. Terminated Democratic Constitution, 1956-1959

In Indonesia's constitutional history, the debate on the 1956-1959 constitution-making had been mostly disregarded in constitutional law debates. In fact, this constitution-making had been resulted from the first and most democratic election in 1955, the longest process in making the constitution. The process was full of crucial and fundamental issues, such as the form of the state, the adoption of full series of human rights and fundamental freedoms. Vehement debates from various groups, such as modern and traditional Islamists, nationalists, socialists and communists went along the process. Ideology has also been debated. From time to time, especially during the constitution-making process, ideological debates have become a constant occurrence, especially regarding integralism, liberalism, socialism, and political Islam.^{52,53}

In this constitution-making, we could learn how the parliament member argued by using not merely constitutional theories and ideologies, but also political-cultural arts, such as poems, rhymes, poetry, proverbs, and local wisdom. These values and principles serve as source of aspirations. However, there are three comprehensive studies for the constitutional design. Those

50 Muhammad Yamin, *Konstituante Indonesia Dalam Gelanggang Demokrasi* (Jakarta: Djambatan, 1956), 183.

51 Koetjoro Poerbopranoto, *Hak-Hak Manusia Dan Pancasila Dasar Negara Republik Indonesia* (Jakarta/Groningen: J.B. Wolters, 1953), 92.

52 Adriaan Bedner, “The Need for Realism: Ideals and Practice in Indonesia's Constitutional History,” in *Constitutionalism and the Rule of Law*, 1st ed., ed. Maurice Adams, Anne Meuwese, and Ernst Hirsch Ballin (Cambridge University Press, 2017), 191, <https://doi.org/10.1017/9781316585221.006>.

53 J. Tobing, “The Essence of the 1999-2002 Constitutional Reform in Indonesia: Remaking the Negara Hukum. A Socio-Legal Study” (Dissertation, Leiden University, 2023).

were written by Adnan Buyung Nasution,⁵⁴ Ahmad Syafii Maarif,⁵⁵ and Daniel S. Lev.⁵⁶

The special constitutional maker was named the Constitutional Council or *Konstituante*. This was officially formed on 10 November 1956 and held meetings for almost 2.5 years. Based on Article 134 of the 1950 Constitution, the *Konstituante* together with the government was in charge of drafting a new Constitution. The 1955 election resulted in 34 political parties and 514 individuals for *Konstituante* members. The majority of the parties constituting the Council fell ideologically into three groups:⁵⁷ those based on religion,⁵⁸ those based on socialism,⁵⁹ and those based on so-called ‘indigenous nationalism’.⁶⁰

On 12 August 1958, a drafting committee was established to conclude the debate on human rights⁶¹. Constitution-making during the *Konstituante*’s sessions promoted ‘citizen rights’ as a subject qualification of rights, which only applied to those with Indonesian nationality. The drafting report contained 24 human rights provisions, which were agreed upon, 18 citizen rights, and 13 additional rights, which were to be adopted as human rights or citizen rights. The draft was further considered by the Preparatory Committee, including 14 proposals for formulating other articles (*Risalah*, 1958/IV: 1881).⁶² However, the latter proposals were never put to a vote or returned to the Preparatory

54 Adnan Buyung Nasution, *The Aspiration for Constitutional Government in Indonesia: A Socio-Legal Study of the Indonesian Konstituante, 1956-1959* (Utrecht: Rijksuniversiteit te Utrecht, 1992).

55 Ahmad Syafii Maarif, “Islam as the Basis of State: A Study of Islamic Political Ideas as Reflected in the Constituent Assembly Debates in Indonesia” (PhD Dissertation, University of Chicago, 1993).

56 Daniel S. Lev, *The Transition to Guided Democracy: Indonesian Politics, 1957-1959* (Singapore: Equinox, 2009).

57 Other scholars have distinguished different categories, such as Herbert Feith and Lance Castles, *Indonesian Political Thinking, 1945-1965*, with Asia Society (Ithaca [N.Y.]: Cornell University Press, 1970) who divided Indonesia’s political thinking into five groups: (1) radical nationalism; (2) Javanese traditionalism; (3) Islam; (4) democratic socialism; (5) communism.

58 *Nahdlatul Ulama, Masyumi, Pergerakan Tarbiyah Islamiyah (Perti) and Partai Syarikat Islam Indonesia (PSII)*.

59 Indonesian Communist Party (PKI) and Indonesian Socialist Party (PSI).

60 PNI, *Partai Indonesia Raya* (PIR), and *Partai Rakyat Nasional* (PRN). Cribb and Brown, *Modern Indonesia: A History Since 1945*, 52.

61 *Risalah Sidang Badan Konstituante No. IV Tahun 1958* (1958), 1877–78.

62 This draft was proposed by the Human Rights/Citizen Rights and Obligations Drafting Committee, signed by Kuasini Sabil (Chair) and M. Soetimboel (Vice), Bandung 16 August 1958.

Committee for a final formulation.⁶³

One of fundamental freedom is related to free expression which was formulated as ‘citizen rights’⁶⁴. The Constitution Preparatory Committee continued discussing on free expression with far more caution than in the 1950 Constitution: “Establishing rights and freedoms as explained in this part can only be limited by legislation, just for guaranteeing and respecting non-derogable rights and freedoms and for fulfilling the requirements of legal justice, peace, decency, and prosperity in a democratic society.” Besides, one other important provision related to freedom of expression was the right to submit complaints or petitions to the government. This constitutional provision was agreed upon by acclamation in the following wording: “(1) Everyone alone as well as together with others has the right to freely submit complaints to the government either orally or in written form; (2) Everyone alone as well as together with others has the right to submit petitions to the government either orally or in writing.”⁶⁵.

These constitutional provisions are more concrete, comprehensive, and detail than the previous constitutions. Indeed, the *Konstituante* tried to formulate a special article to establish the press as an important pillar for constitutional democracy.⁶⁶ In his doctoral dissertation, Adnan Buyung Nasution explained how the idea of freedom of expression as debated by the *Konstituante* cannot be separated from the historical context of the early years of independence, when Indonesia had numerous steps to take in order to develop a constitutional government. One such step was to embed freedom of expression into the new constitution.

However, the constitution-making during the *Konstituante* session was eventually overturned when Soekarno released the Presidential Decree of 5 July 1959 (*Dekrit Presiden*). He declared the importance of ‘Guided Democracy’ in the country. It put an end to the sessions of the *Konstituante* and proposed to return to the 1945 Constitution. The termination of such constitution-making had been suggested by Yamin, who earlier had shown himself a supporter of a

63 Nasution, *The Aspiration for Constitutional Government in Indonesia*, 242.

64 Risalah Sidang Badan Konstituante No. IV Tahun 1958, 3161.

65 Risalah Sidang Badan Konstituante No. VI Tahun 1958 (1958), 3281.

66 Herlambang Perdana, *Press Freedom, Law and Politics in Indonesia*.

liberal constitutional model.⁶⁷ Some argue that the *Konstituante* only had itself to blame for failing to complete the task on time. Meanwhile, other scholars argued that such termination was caused by the failure of political consensus on adopting Islamic principles into the constitutional draft.^{68 69} Regardless of whether this is true or not, Soekarno's presidential decree paved the way to a truly authoritarian state.⁷⁰ In 1960, the Temporary People's Consultative Assembly (MPRS) decided on the contradictory constitutional democracy since they declared Soekarno as long live Indonesia's President.

Since then, there has been absence of constitutional change, till Soekarno had been impeached by parliament after the political turbulence and mass murders of 1965-1966. Soekarno was replaced by Soeharto, a figure of a military background who led the anti-communism operation throughout the country. Since then, Indonesia has fallen into the authoritarian military New Order regime.

4. The Constitutional Amendment Process (1999-2002)

The demise of Soeharto's authoritarian military regime in 1998 had changed many social-political developments in the country. The wave of *Reformasi* (reform) that swept over Indonesia included a process of amending the 1945 Constitution. People demanded democratic constitutional system to prevent power.

The constitution-making through amendment processes began in 1999. The constitutional reform included the limitation of Presidential powers (two terms maximum for presidential office), changes from parliament supremacy into constitutional law supremacy, prohibition on military entering political spheres, decentralisation of power for expanding regional autonomy, recognition of local plural legal system and its societies, and incorporation of human rights provisions.

To prevent future systematic human rights violations, public pressure rose to limit the power of the president and to prevent misuse of power by

67 Lev, *The Transition to Guided Democracy*, 247.

68 Yusril Ihza Mahendra, *Dinamika Tatanegara Indonesia: Kompilasi Aktual Masalah Konstitusi, Dewan Perwakilan, Dan Sistem Kepartaian*, Cet. 1 (Jakarta: Gema Insani Press, 1996).

69 Maarif, "Islam as the Basis of State: A Study of Islamic Political Ideas as Reflected in the Constituent Assembly Debates in Indonesia."

70 Nasution, *The Aspiration for Constitutional Government in Indonesia*, 259.

providing guarantees for the protection of human rights. Human rights could no longer be kept from the reformation agenda in Indonesia post-Soeharto.⁷¹ This also appeared from the enactment of Law 39/1999 on Human Rights, and Indonesia has been ratifying the major international human rights treaties thereafter.

The MPR's debates about constitutional reform centred on Article 28 of the 1945 Constitution, into which all new human rights were eventually included. Freedom of expression was included in Article 28E (3), but a specific provision about press freedom was never added. The main resource for the discussion is *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses dan Hasil Pembahasan, Buku VIII: Warga Negara dan Penduduk, Hak Asasi Manusia, dan Agama* (Comprehensive Paper for Constitutional Changes) published by the Constitutional Court (2008)⁷². In the 1945 Constitution, the human rights provisions could be found in Articles 27, 28, 29 (2) and 31 (1). In the Elucidation to the Constitution, two relevant categories were included: citizen rights (Articles 27, 30, 31(1)) and welfare (Articles 28, 29(1), 34).

The Ad Hoc Committee (*Panitia Ad Hoc/PAH*) involved numerous representatives from civil society groups, professional organisations, human rights-based NGOs, and constitutional law experts who provided their critical opinions. In discussing free expression, especially related to press freedom, the PAH invited the Indonesian Journalists Association (PWI),⁷³ the Independent Journalists Alliance (AJI),⁷⁴ and the Indonesian Press and Broadcast Society (MPPI).⁷⁵ These organizations were involved for constitution-making.

During the MPR sessions, human rights provisions were advocated by

71 During *Reformasi* the following pieces of legislation related to human rights were enacted: MPR Decree XVII/MPR/1998 on Human Rights (1998); Presidential Decree 129/ 1998 on Indonesia's National Action Plan on Human Rights (1998); Law 5 of 1998 on Ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1998); Law 8 of 1998 on Consumer Protection (1998); Law 9 of 1998 on Freedom of Expression in the Public Sphere (1998); Law 29 of 1999 on Ratification of the International Convention on the Elimination of All Forms of Racial Discrimination (1999); Law 39 of 1999 on Human Rights (1999); Law 40 of 1999 on Press (1999); Law 26 of 2000 on the Human Rights Court (2000).

72 Mahkamah Konstitusi, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses, Dan Hasil Pembahasan, 1999-2002* (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2008).

73 *Persatuan Wartawan Indonesia*.

74 *Aliansi Jurnalis Independen*.

75 *Masyarakat Pers dan Penyiar Indonesia*.

numerous non-governmental activists. The Indonesian Legal Aid and Human Rights Association (PBHI)⁷⁶ and the Indonesian Legal Aid Foundation (YLBHI) were two leading organizations in promoting law, human rights, and justice.⁷⁷ Hendardi from the PBHI recommended a comprehensive and explicit inclusion of citizens' fundamental rights, i.e. first, the protection of human dignity; second, the guarantee of individual freedom; third, equality before the law; fourth, freedom of religion and belief; fifth, freedom of expression; sixth, freedom to unite and assemble; seventh, the right to reside and move; eighth, the right to work and a proper salary; and ninth, property and heritage rights. Interestingly, these suggestions were fully adopted in the constitutional text.

The first discussion on human rights was progressively articulated through well prepared documents, held in the Ad Hoc Committee III Forum/ PAH III) in 1999. The discussion was continued by PAH I between 1999 and 2000. It resulted in a revised draft of Article 28 on Human Rights, which was brought before Commission A during the annual session of the MPR. The final revision was agreed upon during the MPR's annual session in 2000. Political responses from political parties were also positive in progressing human rights in constitution-making. In the Third Session of PAH I, on 6 December 1999, Abdul Khaliq Ahmad of the Nation's Awakening Party (*Fraksi Partai Kebangkitan Bangsa*), stated, "...As a nation which upholds democracy, the state should provide autonomous freedom for every citizen to create and express him or herself, also to choose his or her profession and his or her way of life. For that reason, according to the Nation's Awakening Party, don't you think that it is proper for the Constitution as a constitutional basis, a fundament, and beacon to provide specially or explicitly for human rights?"

However, not all liberal provisions on human rights and fundamental freedoms are easily adopted. The case of 'press freedom provisions' had failed to be adopted.⁷⁸ Article 28 of the constitution were to be amended to incorporate the freedom of expression with specific reference to the press. This article does not guarantee freedom of the press as a right. This did not

76 *Perhimpunan Bantuan Hukum dan Hak Asasi Manusia Indonesia*.

77 *Yayasan Lembaga Bantuan Hukum Indonesia*.

78 Herlambang Perdana, *Press Freedom, Law and Politics in Indonesia*.

really provide strong constitutional protection for press freedom, a priority which was indeed also absent during the constitution-making process in 1945.

Press organisations, such as the PWI, AJI and MPP, focused more specifically on press freedom as a pillar of freedom of expression. PWI proposed that Article 28 of the UUD 1945 should be maintained, but suggested to add a new paragraph saying “[p]ress freedom is guaranteed by the state based on the right to information as an Indonesian human right as regulated by MPR Decrees and Law.” Didik Supriyanto from AJI argued during session, “... we could learn from the American experience in practicing the constitution. After 180 years of application of the Constitution of the United States of America,⁷⁹ the first amendment was proposed in order to secure fundamental rights related to freedom of expression and press freedom. This amendment stated that Congress is not allowed to make legislation that limits press freedom and freedom of expression. For that reason, it is necessary for the amendment of the 1945 Constitution mention explicitly that the state should secure freedom of expression, freedom to unite, and freedom to assemble. In addition, it should be mentioned that no regulation can limit those freedoms [...]. The rule for press freedom should be given to society, either a code of ethics, a journalist association, or a society-based press organisation.⁸⁰ AJI’s statement was supported by the MPPI.⁸¹

Despite their arguments, the critical perspectives brought forward by the journalist organisations and NGO activists were not seriously discussed in the reformulation of Article 28. First, although participatory making involved plural social and political groups, this did not automatically adopt a meaningful participation, especially the adoption of civil society organization voices. Second, Indonesia was in political transition, from authoritarian to more democracy, during such constitution-making, however old legacies remained in place. Members of parliaments often resisted and even rejected

79 The statement is incorrect, because the First Amendment was adopted in 1791, and it was four years after the passing of the Constitution. It may well be possible that his statement was misinterpreted by the subsequent team.

80 Mahkamah Konstitusi, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses, Dan Hasil Pembahasan, 1999-2002*, 59–60, 167–68.

81 Mahkamah Konstitusi, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses, Dan Hasil Pembahasan, 1999-2002*, 61–62, 169.

any liberating ideas in constitutional changes.

Alex Litaay from PDIP questioned the plan to change the constitution. He argued that the decline of the state was not due to the constitution, but rather the incompetence of government administration.⁸² The chairman of the PDIP, Megawati, in a speech on 27 July 1999 also stated the same thing, “On the demands for amendments, I can only say whether I agree or not. When specifically what articles, why, and with what purpose the amendment needs to be made, it is already clear.”⁸³

This result was disappointing for journalists and others supporting press freedom. The absence of a special clause addressing press freedom reflected the lack of attention and unwillingness by MPR’s members to take press freedom seriously in Indonesia. Even if the MPR invited many journalist organisations and press freedom experts during the amendment process, the idea of guaranteeing press freedom in the Constitution gained insufficient support. Perhaps these representatives were afraid of a truly liberal press after so many years of repression. Nevertheless, more complete provisions on universal values in human rights were extensively adopted into the constitutional draft.

C. Analyzing Models in Constitution-making

After describing in detail how the constitution was formed, the following section looks at the comparative side, from the very beginning of the constitution formation to the last constitutional amendment in 1999-2002. The summary of constitution-making processes showed the diversity of forms and mechanisms, including those who were involved in the processes.

This table also uses Arato’s approach to see legitimacy issues. According to his writing, Convention, Constituent Assembly, and Round Table Four forms of original, democratic constitution-making can be organized around the reform and revolution polarity if we reconstruct it around two axes, legality and legitimacy, and rupture and continuity.⁸⁴

82 “Untuk Apa UUD 1945 Diamandemen,” *Republika*, July 21, 1999.

83 “PDIP Punya Sikap Terhadap Dwi Fungsi ABRI Dan UUD 1945,” *Suara Pembaruan*, June 17, 1999.

84 Andrew Arato, *Civil Society, Constitution, and Legitimacy* (Lanham: Rowman & Littlefield, 2000), chap. 3; Andrew Arato, *Constitution Making under Occupation: The Politics of Imposed*

Table 1.
Models in Indonesia's Constitution-making

Constitu- tion-making	1945 Constitu- tion	1949 Constitu- tion	1950 Constitu- tion	1956-1959 Constitution	1999-2002 Amendment Constitution⁸⁵
Take into force	18 August 1945 – 27 December 1949 5 July 1949 - 1 st amendment in 1999	27 December 1949 – 17 Au- gust 1950	17 August 1950 – 5 July 1959	Never, failed constitu- tion-making, back to the 1945 Consti- tution (1959- 1999)	21 October 1999-present
Constitutional makers	BPUPKI has 67 members (60 Indonesians and 7Japanese who were in charge of supervising), PPKI had 21 members, but then 6 persons joined later without the Jap- anese's permit	BFO, or Bi- jeenkombst voor Federaal Over- leg /Federalist and Republican, or the Republic of Indonesia (RI), supported by the UN rep- resentatives	BFO and Senate, approved by the House of Representatives of the Republic of the United States Indonesia (DPR-RIS) ⁸⁶	Konstituante (Constitutional Council), 34 parties, includ- ing 32 political parties and 2 individuals.	People's Rep- resentative As- sembly (MPR), and was divided into Ad hoc committee.
Political par- ties involved	62 Indonesians, 8 special people from Japan whose job was to observe, and an additional 6 members from Indonesia.	Resulted from the KMB (roundtable discussion), prepared by the federal repre- sentative (BFO) and the Indone- sian delegation	Charter of Approval of the Government of the United States of Indonesia and the gov- ernment of the Republic of Indonesia on 19 May 1950	28 political partiesresult- ed from 1955 election.	9 political parties, mili- tary, and police representative, and groups organization representative
Parliament Models	Unicameral	Bicameral, lim- ited legislative power	Unicameral	Unicameral	Unicameral (*)
Political con- text of consti- tution-making	Indonesia's Independence	Federalising states after Dutch aggres- sion	The national de- mand for unitary states	Making after the democratic electoral pro- cess	Democratic constitu- tion-making post-authori- tarian military regime

Revolution in Iraq (New York: Columbia University Press, 2009), chap. 1.

85 Amended each year, during 1999 to 2002.

86 The 1950 Constitution/The Provisional Basic Law of 1950 Was Enacted by Law No. 7 Dated August 15, 1950 or Undang Undang Dasar Sementara/UUDS 1950 (1950).

Institutional representation	BPUPKI (pre-independence) and PPKI (post-independence)	Indonesia delegation and BFO, in the Roundtable Conference	DPR RIS (Federalist Parliament) (*)	Constitutional Council (<i>De-wan Konstitu-ate</i>)	Representative People's Assembly (MPR)
Public participation	Representing several dominant regions in Indonesia (Papua was not included)	Limited participation, represented merely by BFO and RI	Citizens, through social movement, were pushed to end federalism and returned to unitary idea	Representing citizens through the General Election, no information on civil society groups involved.	Representing citizens through the General Election, however, many civil society groups, academia, and journalist associations are involved in constitution making.
Arato's schemes (2012: 177) ⁸⁷	Legality and legitimacy ruptured	Legality and legitimacy ruptured	Legality ruptured; legitimacy continuous (*)	Legality and legitimacy ruptured	Legality and legitimacy continue

From the table, it is known that first, there was no single model which was consistently applied for constitutional change. Second, social and political context influenced and played important roles in transforming a new constitution. Therefore, Arato's schemes are relevant to see in detail how the change has legitimacy and legality consequences.

The existence of the 1945 Constitution has been the longest period, especially from Soekarno's Old Order Regime (1959-1966) to Soeharto's New Order Regime (1966-1998). However, this was related to the constitution that was subordinated by authoritarian model of governance. While the demise of Soeharto has brought a new message for constitutional reform which led to change institutions, political cultures to more democratic situation.

Regarding the constitutional makers, due to political legacies of colonialism, the formation of the 1945 Constitution and the 1949 Constitution (Federal Constitution) were influenced by foreign actors, which were Japanese military delegation as observer and the Dutch in a roundtable discussion. However, as studied by Susanti⁸⁸, multilateral development banks through

87 Andrew Arato, "Conventions, Constituent Assemblies, and Round Tables: Models, Principles and Elements of Democratic Constitution-Making," *Global Constitutionalism* 1, no. 1 (March 2012): 173–200, <https://doi.org/10.1017/S2045381711000050>.

88 Susanti, "Neo-Liberalism and Its Resistance in Indonesia's Constitution Reform 1999-2002: A Constitutional and Historical Review of Indonesian Socialism and Neo-Liberalism."

many liberal technocrats were involved in influencing and adapting neoliberal reforms for changing the constitution. The vehement debates on Indonesia's socialism under article 33 of the 1945 Constitution was intended to change. Although it failed, two sections were adopted constitutionally to promote efficient management for public goods, which could be interpreted in different situations.

In response to how public could participate during constitution-making process, the table showed that the last constitutional amendment was the only one that involved civil society groups, especially those who were working in human rights and fundamental freedoms. Besides, academics, journalist associations, and religious or mass organisations also participated in providing inputs to the constitutional makers. This fact is a political consequence in transition from authoritarian regime to the democracy and freer social and political expression. Hence, a series of human right provisions were adopted in the constitution, including the idea of rule of law, limitation presidential power, prohibition of military's involvement in politics.⁸⁹ However, Horowitz argued that the reform has brought military down, but it did not remove military forces from politics. This constituted an incomplete agenda. The most serious failure is related to impunity, when the massacre after East Timor referendum as well as mass killing in Aceh could not bring top military ranks in accountability. Indeed, revenues from military business appear to have declined after 1998. Nevertheless, parts of armed forces remained entangled in unsavoury enterprises, such as drugs, illegal mining, illegal logging, and other business in borders.⁹⁰

The Arato's scheme is interesting to compare to what extent such constitution-making could affect the legality and legitimacy. In the beginning and earlier years of independence, the 1945 Constitution and the 1949 Federal Constitution showed the fragile transitional situation affecting legality and legitimacy of the constitutions. During those periods, Indonesia's new born country should deal with *Bersiap*'s chaotic phase of the Indonesian National

89 Valina Singka Subekti, *Menyusun Konstitusi Transisi: Pergulatan Kepentingan Dan Pemikiran Dalam Proses Perubahan UUD 1945* (Jakarta: Rajawali Press, 2008).

90 Donald L. Horowitz, *Constitutional Processes and Democratic Commitment*, Castle Lecture Series (New Haven: Yale University Press, 2021), 210–21.

Revolution following the end of World War II⁹¹, and also Dutch aggression.⁹²

Different from the previous constitutions, the 1950 Provisional Constitution continued its legality. However, the legitimacy of such constitutions was ruptured. This was caused by a parliamentary system instead of presidential system, where the cabinet was easily changed due to political crisis in governance system. Therefore, the election in 1955 was aimed at electing parliament members for drafting a new constitution. The constitution-making process in 1956-1959 was ended by Soekarno, and he re-enacted the 1945 Constitution through Presidential Decree (*Dekret Presiden*) on 5 July 1959. Hence, the 1956-1959 constitution-making was forcedly ended, and the constitutional draft has been neither legality nor legitimacy thereafter.

The only possible continuous legality and legitimacy is after the authoritarian military regime steps down in the country and constitutional reform takes place thereafter. Constitutional reform has been shaped by the greater demand on democratization. It was not merely on substantive constitutional rights and limiting power, but also on the constitution-making that involved many human rights groups, civil society organizations, and extensive public participation. In this regard, however, careful arguments were necessary in the constitution-making that reflects the ‘standards’ of stability, coherence, as well as legality and legitimacy. It should always be connected to Tobing’s argumentation of ‘the minimum of a shared vision,’⁹³ while Albert profound it as ‘the soul of the constitution.’ By learning the amendment processes in Canada, Albert argues that amendment rules are a ‘window into the soul of a constitution.’ He stated that if a constitutional text that lacks amendment rules is essentially unamendable, it is difficult to fathom how Canada’s Constitution functioned for about 115 years without such rules. Hence, it showed that an oversight or a congenital defect affected its constitutional ‘soul,’ raising intriguing and unsettling questions. Interestingly, arguing ‘amendment rigidity’ and ‘constructive unamendability’ are two of

91 Abdul Wahid, “Bersiap and Violence in Indonesia’s Revolutionary Period 1945-1949: A Historiographical Review,” 2013, <https://indisch4ever.nu/wp-content/uploads/2013/12/bersiap-and-violence-in-indonesia2-12-2013.pdf>.

92 Harry J. Benda, “Decolonization in Indonesia: The Problem of Continuity and Change,” *The American Historical Review* 70, no. 4 (July 1965): 1058–73, <https://doi.org/10.2307/1846903>.

93 J. Tobing, “The Essence of the 1999-2002 Constitutional Reform in Indonesia: Remaking the Negara Hukum. A Socio-Legal Study” (Dissertation, Leiden University, 2023).

Albert's focal concepts that also have salience for Canada.⁹⁴ In short, the process of constitution-making is highly connected to the political vested interests that work and influence the direction or orientation of its politics. Jokowi, who wants to arbitrarily change the constitution for the benefit of his own ruling for three terms, is a bad example of an effort to eliminate 'the essence' and 'the soul' of constitution-making. Undoubtedly, his proposal to 'three terms of Presidency' will constitute a direct affront to the importance of 'continuous legality and legitimacy' in Indonesia's constitution-making.

D. Conclusion

The constitution-making process is a civic political aspiration. Tushnet stated that constitutions as maps of power may be somewhat inaccurate. The realities of power may not be fully reflected in a constitution.⁹⁵ This article shows the same thing. Categorization results in misleading simplification because the reality is complex and influenced by political context, including the one contrary to the formulation of the constitution. In addition, this article is similar to Tobing's statement that ideology often becomes a myth, in that it appears in the debate on constitution-making, but is absent in the policy without clear political control.⁹⁶

Nonetheless, in Indonesia's history, the making of the constitutional foundation has been shaped by its political context. The decolonization process, transitional regimes, the local politics, representation, as well as the involvement of civil society groups during constitutional reform demonstrate that constitution-making has been intervened by various actors, both national and international parties. As emphasized by Vissers and Son,⁹⁷ there would be inevitable interplay between the global forces and domestic realities, as represented by the constitution-making in 1945, 1949, 1956-1959, and in the latest amendment in 1999-2002 indicating a contested idea between Indonesia's

94 Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions*, Oxford Scholarship Online (New York, NY: Oxford University Press, 2019).

95 Mark Tushnet, "Constitution-Making: An Introduction," *Texas Law Review* 91, no. 7 (2013): 1983.

96 Tobing, "The Essence of the 1999-2002 Constitutional Reform in Indonesia: Remaking the Negara Hukum. A Socio-Legal Study" (Leiden University, 2023).

97 De Visser and Son Bui, "Glocalised Constitution-Making in the Twenty-First Century," 297-331.

socialism and neo-liberal proponents during constitution-making.

Meanwhile, the Constituent Assembly period (1956-1959) was highly democratic, but it failed due to Sukarno's dominant political control that was supported by the military's influence. What is truly different from the constitutional amendments of 1999-2002 is the inclusion of the public or civil society. This does not necessarily mean that the inclusion of civil society automatically improved the process, as it seemed more democratic. However, the 1955 election system itself was the most democratic and progressive election in Indonesian history.

It can be concluded that constitutionmaking processes can involve broader public participation since they have freer situation that facilitates democratization. The comparative analysis reveals that the constitution-making during the amendment period (1999-2002) is the best one since it involved civil society. The changes were made in several steps. First is a democratic process by exploring the roots of social, economic, cultural, and political history of a nation. Here, the constitution makers adopted the transnational ideas. Therefore, Vissers and Son's 'glocalised constitution-making' is highly relevant. Second, guarantee of human rights, the values and goals of the nation, and the progressive movement in breaking through the rigidity and inequality of structural political economy shows progressive realization against political economy structural injustices. This is a message to encourage a much more dignified human civilization by constitutionalising human rights. Third, the glocalised constitution-making provides sufficient transformative space to build the character of constitutionalism (procedural-substantial character). These factors allow legality and legitimacy to last up to two decades after the amendment.

Nevertheless, better and improved constitution-making cannot guarantee that the implementation of the constitutional mandate can be carried out according to its substantive formulation. This article agrees with Bedner, albeit successfully formulating ideas for human rights and democracy into the latest constitutional amendment, the fact showed the opposite.⁹⁸ Lawmakers opted for a liberal model, including liberal economy, which often abuses human rights. Meanwhile, Indonesia's political system has been promoting anti

98 Bedner, "The Need for Realism," 159-94.

democracy models, as if it is trapped in clientelism, corruption, and money politics. Therein lies the existence of the constitution, where understanding and interpretation of the constitutional implementation requires consistent political strength. Constitution-making is influenced by the capabilities of its constitutional makers, which in today's context is largely determined by the intelligence of the people's representatives in understanding global developments and the real situation within their communities, as well as by the courage and ability to formulate the future imagination of the republic. In this regard, constitutional-political representation in the state is both a key and a test: the extent to which the electoral system fosters a democratic process and the enlightenment of citizens, thereby bringing about imaginative constitutional changes for the protection of citizens' rights.

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