

Constitutionalism and the Rule of Law

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1. The Constitutional Debate

1.1 The Historical Legacy

The initial commitment of the Founding Fathers of the Republic of Indonesia was expressed in the preamble to the 1945 Constitution. It states that Indonesia is to be a pluralistic and representative democratic polity, committed to the values of social justice, public welfare and a just humanity.

However, Indonesia's experience with democratic governance was short-lived. The failures of post-independence governments to deliver political and economic stability generated a sense of disillusionment and paved the way for restricted politics under President Soekarno's "Guided Democracy" and later President Soeharto's "New Order". During the New Order, the political strength of the regime was aided by the backing it received from the military and the quiescent acceptance of by the people, who were unable to challenge the government, but in return gained stability and economic development.

The transfer of power at independence did not lead to the establishment of a robustly democratic form of government. As a consequence, political culture in Indonesia has developed in an environment in which democratic practices, institutions and processes are unfamiliar. As a result, there is little political capital today which the community can draw on and develop as a framework for the future.

The political experience of Indonesia is of a powerful executive, backed by the military, interfacing with a weak and ineffective legislature. During the rule of President Soeharto, much effort was spent in building a "strong state", but the concerns and sensitivities of ethnic and religious groups were overlooked. Many groups and areas suffered from a lack of development, including those areas rich in natural resources. Where there were local protests, they were often met with violence. In some cases, the bitter history of human rights abuses has now generated

demands for secession.

Indonesia's rapid economic development during the New Order earned it respect at home and abroad and brought it the status of an Asian "tiger economy", but the basis of that development was clearly not stable. When the economy unravelled during the Asian financial crisis, the weak foundations of Indonesia's economic development, the depth of the country's indebtedness and the high degree of corruption that pervaded the system were revealed. As there was no transparency in the government or mechanisms for public accountability through the national legislature, the press or through special statutory commissions, dubious business practices had continued unabated and accumulated debts that compounded over time. Eventually, the Indonesian economy collapsed at great cost to its people.

1.2 Challenges for Democratic Reform in Indonesia

The *reformasi* movement that toppled President Soeharto and the New Order has created an opportunity for Indonesia to break away from its authoritarian past. The elections held in 1999 further endorsed this shift, but it is recognized that the transition to democracy is taking place under difficult circumstances. The economy is weak. Public trust in government and the institutions of government, including the military, are low. So is the patience of the electorate. Ethnic and religious conflicts have broken out in many parts of the country and secessionist movements have emerged. Poverty and unemployment are high, further undermining stability.

It is difficult for the country to move forward without coming to terms with the past. Many want justice for past human rights abuses and a public accounting for the corruption and abuse of power that ruined the national economy. They also want the government to move forward in charting a framework through which Indonesia can reclaim its place in the community of nations. To do this means addressing the fundamental conditions of the country's politics, economy, legal system and society.

Indonesia is struggling to find the balance between the preservation of the state and preserving, protecting and advancing the rights of its people. The "people" have identities as individuals, as men and women, as members of interest groups, as members of religious and ethnic communities

and as members of regions. These identities run concurrently. People and communities have political, economic and social rights that must be recognized, and they must be able to enjoy the benefits of these rights in their daily lives. The debate in Indonesia is no longer around balancing economic with political rights. It is about realizing economic and political rights and freedoms.

1.3 The Role of the Constitution

The constitution is recognized as the framework within which these issues are determined. A constitution is the most fundamental law of the land. It sets the tone, the spirit and the framework from which all other laws and the form of government draws its legitimacy. The constitution guarantees the political and legal system and its fundamental features. It determines and regulates the powers of and relationship between the presidency, the legislature and the judiciary. Where government is decentralized, the constitution also regulates the relationship between the central government and the regions, and between government at the regional and local levels.

It is the constitution that can provide and secure a framework for democracy, decentralization and deregulation and for the development of the country. Being difficult to amend, it gives security and reassurance to the community. By restating common aspirations, it also provides a basis for national identity. It is expected that such fundamental laws must be clear in their objectives, and be in tune with the needs, aspirations and spirit of the country.

1.4 Opportunities for Constitutional Reform

Constitutions adopted at one juncture may lose relevance in another, and such a time has come for Indonesia. The country's current constitution was drafted as an interim constitution in 1945 in the context of a protracted independence struggle. Five years later, it was replaced by another constitution which provided a much more powerful role for parliament than the 1945 version and was heavily influenced by the UN Universal Declaration of Human Rights in 1948.

This constitution, also intended to be temporary, lasted through nine years of turbulent parliamentary democracy before being replaced by President

Soekarno with the more authoritarian 1945 Constitution. Soekarno's decision also put an end to four years of discussions between the political parties, known as the *Konstituante*, about a permanent constitution for Indonesia. The 1945 Constitution has been the reference for four decades of authoritarian government since then, and it is widely recognized that it should be comprehensively revised in order to support the consolidation of democracy.

There are disparate views on the issue of constitutional reform. Some advocate drafting a new constitutional document through an open process such as a constitutional convention or council established by the People's Consultative Assembly (MPR). Others accept the necessity of fundamental review but wish to preserve the basic features and institutions of the 1945 Constitution, such as the Preamble and representation for functional groups as well as political parties.

There is, however, general agreement that the present constitution does not define with sufficient clarity the institutional roles and powers of the legislature and the executive and their relationship with each other, which is interdependent. Nor does it provide sufficient direction or security for democratic governance.

Some of the pressing governance problems that Indonesia faces are examined here and are identified in terms of a principle of governance that needs support or redress through the constitution. Accordingly, the recommendations for constitutional reform address governance issues through constitutional principles.

A South African jurist described a constitution as the "autobiography of the nation". As such it must not only reflect the story of the nation but be written by the nation. The people of Indonesia are at that challenging moment of time when they rewrite the nation's story to ensure that it will be a forward-looking document ready to deal with the challenges of governance in the twenty-first century.

Several fundamental issues that should be amended within the constitutional framework are identified through this consultative framework. These include:

- Re-defining the roles and inter-relationship between the legislature and the executive.
- Strengthening the democratic process through effective implementation of regional autonomy.
- Strengthening the rule of law and the role of the judiciary.
- Supporting and protecting democratic principles by means of independent and impartial institutions.
- Addressing the role of political parties and the electoral system.
- Codifying the fundamental rights and duties of state and citizen.

2. The Legislature and Executive: Defining their Roles and Inter-Relationship

Indonesia's political system has been characterized by a strong executive supported by a weak legislature that includes non-elected members from the military and functional groups. This has contributed to the lack of institutional controls over the executive. The relationship between the executive and legislature was also imbalanced because of the political culture which came to dominate the relationship between constitutional structures. This can be characterized as a hierarchical or command culture that undermined democratic control over government and it can be attributed, in part, to the lack of definition of the roles of the legislature and executive and the boundaries between them in the 1945 Constitution.

To redress this situation, the roles and inter-relationship between the executive and legislature need to be examined more critically.

Recent debate has centred on the most appropriate composition for the legislature. The legislature enjoys both the powers to make laws and to debate the performance of the executive and other institutions of government. The challenge, however, is to find a balance between an empowered legislature and an effective executive. It is not the role of the legislature to govern.

It also has an important role in provoking or encouraging a broader extra parliamentary political debate. To do so, it must be provide access to

information and debates and have an active committee system.

2.1 A Unicameral or Bicameral Legislature?

At present Indonesia effectively has a unicameral parliamentary system for its legislative proceedings. This function is carried out by the mainly but not wholly elected DPR or People's Representative Assembly. The full assembly, the MPR or People's Consultative Assembly, currently serves as an electoral college to elect the president, issues guidelines on state policy and ratifies constitutional amendments. The MPR in effect is not very distinct from the DPR of which it is in part comprised. Because the MPR is not constituted on different electoral or constitutional principles, it cannot be considered as a second house of parliament in the true sense.

It is recognized that there is no rationale for having a second chamber unless it has a distinctive role. Second chambers are expensive, and their value does not warrant this expense if they are appointed merely to exercise a weak oversight role or are made up of appointed representatives with no sectional perspectives to bear. Where it is constituted by an electoral principle or mechanism similar to that used for the first house, it becomes merely a mirror image of the first house. Unless a second house can bring truly new perspectives and concerns or can play a unifying role within the nation as a whole, then there is little to commend it.

During the debate which produced this paper, it was agreed that the role of a second chamber in Indonesia could be to ensure stronger representation for the regions in the national legislature. In such an ensemble the second chamber could bring explicitly regional perspectives to the consideration of national legislation. In a country as diverse as Indonesia, where the conditions for the implementation of legislation may differ from one region to another, such a chamber would add value to the legislative product.

It was recognized that such a reform would both strengthen regional representation and the integration of the regions into the national debate. As long as the representatives of the regions are delegates from regional government and not independent or free-floating, then a second chamber would be a useful way to draw the regions out of their parochial concerns and require them to take part in and share responsibility for

the management of the nation.

If a second chamber of the regions is accepted, then the Indonesian people need to debate and devise the modalities of composing it, the methods by which the mandates of representatives would be framed within the regions, and the precise powers of such a chamber.

The importance of such an institution is that a country with centrifugal tendencies as evident as Indonesia's needs to promote a counter-balancing national reintegration of regions into the nation as a whole. This reintegration should be done without sacrificing or compromising the principle of devolution of powers.

Representatives with a regional perspective will have regard to the applicability and appropriateness of legislation and the modalities of its implementation in the diverse circumstances that prevail in the various regions of Indonesia. It is after all in the regions that legislation is implemented, not in the MPR. This theme is discussed in greater detail below. It was recognized, however, that this would add an extra level of expenditure.

Recommendation:

- Indonesia should adopt a bicameral legislature with the second chamber composed of representatives elected by the regions.

2.2 Composition of the Legislature

It was recognized that Indonesia's democracy can only be consolidated through a fully elected legislature, and this requires the elimination of both functional representation and military appointees. Eliminating military appointees might require that members of the military be accorded appropriate civilian political rights in compensation. While it is clear that the military should not be able to intervene in party politics as an institution, it may be that members of the military should be accorded the right to vote as individual citizens, subject to appropriate safeguards regarding the neutrality of the institution itself.

This question is a matter to be dealt with more properly under the discussion on civil-military relations. It is dealt with in the context of constitutional reform only in as much as the representation of the military in the legislature, as of right, is out of line with the requirements of Indonesia's democratic transformation and contemporary developments world-wide.

There was discussion around the issue of incorporating "sunset" clauses into the constitution by which the military's current representation in the MPR would be reduced over time. However, the preferred view was that it is necessary to make a complete break with the past. In August, after the consultations had been completed, the MPR decided to allow the military to retain non-elected appointees in the MPR till 2009, although the previous expectation had been that this presence would end in 2004. However, the military appointees will have no voting rights (see Section 8: Concluding Note).

Thought needs to be given to the electoral system that will eventually be adopted in Indonesia, to guarantee that it will adequately represent the country's diversity and balance the needs of inclusive political representation with effective government. A fuller discussion on strengthening the electoral system appears in Section 6 below.

2.3 Powers of the Legislature

The powers and functions of the legislature should include the power to make laws and to oversee the military, the executive and the public service.

2.3.1 Powers of the legislature in respect of the military

The legislature should have oversight over the military budget, appointment of senior officers, military mobilizations and the military's intelligence-gathering functions. The legislature should not have an executive capacity in regard to military matters. It should, however, have full knowledge of military expenditure and be satisfied that monies voted to the military are spent in accordance with the vote. The legislature is also entitled to have

full knowledge of personnel matters and of the functioning of military intelligence within the constraints of the law. It is expected to confirm to the public at large that the military is operating within its proper budgetary and legislative constraints.

In regard to military deployment, the role of the legislature is to ensure that the deployment of the military takes place within the mission and mandate of the security forces as set out in the constitution. In particular the use of the military in an internal capacity, as against the citizens of its own country rather than in defence of the integrity of the borders of the country or against an external enemy, should be closely observed. Military involvement in foreign countries should also require positive parliamentary endorsement.

2.3.2 Powers of the legislature *vis-a-vis* the executive

The executive should be accountable to the legislature regarding the appointment of senior public servants, public expenditure and public policies. However, the constitution needs to distinguish between “oversight” and “being answerable”. It needs to be stated that the duty of the legislature is to confirm that public policy and public expenditure take place within the frameworks approved by the legislature. It is not to administer or manage the public service.

2.3.3 Law-making powers of the legislature

It should be ensured that only the legislature can amend the laws passed by the legislature. It would be contrary to basic democratic principles if the executive, established to implement and administer the laws passed by parliament, could amend those laws. It is for this reason that the power of the executive to make subordinate legislation must be confined within the powers of the principal law, which must indicate to the executive the criteria and purposes for which subordinate legislation is to be enacted. In no circumstances must the constitution allow the executive to amend the laws passed by the elected representatives of the people.

2.3.4 Proceedings of the legislature to be public

In order to promote public participation and popular awareness of the political process and public policy, it is important that the legislative

process be as open and as public as possible. To this end, there must be no unreasonable limitation on press reporting of debates and proceedings of the MPR or any of its committees. The committees in turn must have full powers to obtain information from the executive and to subpoena members of the public to testify on matters of public importance. Public debates can have a positive effect on public awareness as well as allowing an opportunity for civil society to influence public policy.

2.3.5 Oversight of independent institutions by the legislature

The legislature should also be the body to which independent institutions should report, more particularly those institutions whose task it is to monitor the performance of the executive. Such institutions would include the controller-general, the ombudsman and related oversight bodies. The legislature should have powers to send its committees to hear testimony or take evidence in public in the regions and provinces on matters of public concern.

2.3.6 Responsibilities of legislators to the public

The desirability of establishing codes of conduct governing the behaviour of public officials was dealt with in great detail. While such codes of conduct have been taken as applying only to public servants and members of the executive, there is increasingly compelling evidence to suggest that codes of conduct should also apply to members of the legislature. Members of the legislature should be obligated under such codes of conduct to declare their personal financial interest in a matter or to excuse themselves from the consideration of matters in which they or any of their relatives have a financial or other interest.

The code of conduct should also regulate the receipt of gifts and hospitality from individuals and corporations. The least such a code should require is the disclosure of income, specifically in regard to services or lobbying in respect of any external private interest. The public should have the ability to contact the legislature's members on matters of public concern.

Recommendations:

- The legislature should be composed only of elected representatives.
- Military representation in the legislature should be phased out.
- The legislature should enact all legislation, take initiatives in drafting codes of conduct, ratify treaties and review international contracts.
- The legislature should exercise oversight over the military regarding:
 - a) expenditure within military budgets
 - b) appointment of senior officers
 - c) military deployment in specific capacities other than routine exercises or training
 - d) the intelligence-gathering functions of the military
- The legislature should exercise oversight over, or monitor:
 - a) expenditure of public funds
 - b) appointment of senior public officials
 - c) the performance of the executive
- The legislature should conduct its business so as to be transparent and accessible to the public.
- The legislature should be empowered to review public policies.
- The legislature should receive reports from public bodies, independent institutions, watchdog bodies and members of the executive.

2.4 Powers of the Executive

The powers, duties and functions of the executive need to be defined more clearly. This includes the executive's law-making powers, financial and fiscal powers and powers of appointment. It should also address the executive's relationship with the Supreme Advisory Council (DPA).

While the legislature passes legislation, the executive has the power to implement those laws by making subordinate laws. It is necessary to ensure that the legislature and the executive do not clash in the operation of these powers. It was recommended that only the legislature should be empowered to amend legislation that it has passed, and that the executive can promulgate subordinate laws only in accordance

with guidelines set out in the authorizing Act, and for the purposes contained in the statute.

2.4.1 Duty of the executive to be transparent

Nepotism and patronage may take place through executive appointments by every level of government to a myriad of public offices, boards and parastatals. It is important, if the public is to have confidence in the government's honesty and integrity, that such appointments be made through a competitive and transparent appointment process. Unsuccessful applicants must be entitled to seek an explanation for any appointment or award.

The same considerations apply to the process of tendering for the supply of goods and services to the government. Where the tendering for the supply of goods and services takes place in secret or where the decision in regard to the award of such tenders is purely discretionary, then suspicion will inevitably appear even if it is groundless. The public may well believe that such tenders for the supply of goods and services have been awarded for improper reasons or by virtue of special and clandestine access to state officials. For this reason it is necessary that the constitution require a law to be enacted which sets standards for the tendering of the supply of goods and services and sets out fair and transparent procedures.

The role of the controller general is critical in ensuring that public bodies conform to the law, the budget and any official regulations setting standards for the manner in which funds are spent and accounted for. The controller-general must have unrestricted access to financial information within any state department so as to be able to confirm that the monies that have been voted to that department have been properly spent.

Recommendations:

- The constitution must define the powers, duties and functions of the president and cabinet. These must include:
 - a) the power to make subordinate laws only within the guidelines and for purposes contained in the authorizing statute

- b) the duty to consult with parliament and the governor of the central bank to ensure that economic plans and fiscal policies are compatible
- c) the duty to govern in accordance with principles of good governance, exercising powers transparently and in accordance with the rule of law
- d) that appointments to public offices, boards and parastatal committees be made public and preferably through a competitive appointment process
- e) that tendering for the supply of goods and services to the state must be transparent
- f) that there be a duty to furnish reports on request to parliament and to other constitutional bodies such as an ombudsman and a controller-general
- g) that there is a requirement to abide by codes of conduct enacted by parliament

- The constitution must rationalize institutions through reform, and this should include the abolition of the Supreme Advisory Council (DPA).

2.4.2 Presidential election: direct or indirect

The pros and cons of the different systems for electing the president were covered in detail.

It was argued that indirectly elected presidents are generally more accountable to parliament and are less likely to overrule or dismiss the concerns of parliament. The election of presidents by or through parliament allows requirements to be established regarding any minimum degree of regional support. Indirect elections tend to strengthen party political systems. However, the election of the president through parliament or an electoral college could be more vulnerable to excessive lobbying and money politics. In addition, indirect elections may undermine those political systems which rely on or are based on a separation of powers. Under a radical “separation of powers” doctrine, the executive

should have no direct relationship with the legislature.

Direct elections, however, could be more based on the personalities of the candidates. It is argued that directly elected presidents have a tendency to appeal to the people over and above the legislature. But they do provide a very direct form of executive accountability. Much of the public debate has been around a directly elected president. If a directly elected president is opted for, it is necessary to ensure that candidates have broad national support. It is suggested that a winning candidate should require not only a majority of the votes of the members of the legislature but also support from a majority of regions or from such other important sectors or interests as society may demand.

Recommendations:

- If a directly elected presidential system is adopted, the candidate should be required to win a majority of the votes in a majority of the regions.
- One of two other measures should be adopted:
 - a) a two-round runoff election to eliminate multiple candidates
 - b) a parliamentary vote to endorse the finalist candidates

2.5 Oversight and Accountability: President and Parliament

The nature of oversight between the president and parliament is dependent upon the basis of the president's authority. If the president is indirectly elected, the power to remove the executive or the leader by means of a no-confidence motion against the president is given to a parliamentary majority. So as to provide some stability to government, it is recommended that an extraordinary majority be required for a motion of no-confidence.

A motion of no-confidence indicates a lack of confidence in the

government as a whole and requires that the president and the cabinet resign if the motion succeeds. In some parliamentary systems it may follow that both the government and the members of the legislature are required to resign. This opens the way to fresh elections. This in itself inhibits no-confidence motions being called on a whim. The Indonesian system is a hybrid system and the view expressed was that a large parliamentary majority should be required to bring a no-confidence motion against the president. However, a no-confidence motion should not necessarily require fresh elections. It should allow for the formation of a new government commanding the necessary support from the members of parliament.

It was recognized that parliament is not required to have confidence in a president who is separately and directly elected by the people themselves. However, there should be allowance for impeachment proceedings as a check against a grossly incompetent or corrupt president. Impeachment proceedings are normally directed against a president who is guilty of gross misconduct, abuse of office, theft, treason or corruption. In order to determine whether the president is indeed guilty of such conduct, it is normally required that a mechanism of investigation be provided for impeachment that is to be conducted either by the legislature itself or by a specially constituted court.

When impeachment proceedings are successful, the consequence is not a fresh election or the removal of the cabinet but the removal of the incumbent president. Impeachment proceedings are directed against the individual and not against the government.

Recommendations:

- Include clearly defined criteria in the constitution under which the president can be removed through no-confidence motions or through impeachment proceedings.

2.6 Codes of Conduct

There is a need to establish standards to which members of the legislature and the executive at the national and regional levels must conform. This was recognized as particularly useful, given the past history of corruption and abuse of power within the political process. Parliament should draft and enact codes of conduct so as to ensure that public officials behave with the requisite integrity, honesty and civic virtue.

Such codes would normally prescribe that legislative and cabinet members disclose their assets and those of immediate dependent relatives before taking office and upon leaving office. The disclosure requirements should thereafter be furnished periodically in relation to gifts, hospitality and any alternative income, including the sources thereof, and be accessible to the public by means of a public register. Such disclosure should be made to an authority prescribed within the code and within regular and set time periods. Provided there is full and honest disclosure of income, it is usually not necessary to provide penalties for receipt of alternative income or lobbying as the mere disclosure thereof will act as an inhibition.

The code of conduct need not cover such malpractices as bribery and corruption, which either are or should be regulated by the criminal law with severe penalties provided. The code of conduct should provide for any limitations on activities deemed incompatible with parliamentary service. This would include limitations on ministers and certain high officials undertaking any alternative employment while in office. But the code as a whole must be underwritten by penalties, particularly for the failure to disclose income where such disclosure is required.

It is also necessary to set out the circumstances under which all public officials must disclose a conflict of interest. A conflict of interest would include situations in which the public official or any of his or her relatives may have an interest in a matter in regard to which the official has been called upon to exercise his or her vote or to take a decision. In addition there should be general duties cast upon all public officials to act in the public interest with integrity and honesty.

It was recognized that such enforceable codes of conduct were rare elsewhere in the world until the 1990s. However, they have become increasingly common in contemporary democracies as new and pernicious forms of buying influence and controlling public decision-makers

have emerged and have created scandals in many countries, including Indonesia.

It was recognized that codes of conduct should not be confused with the privileges afforded to members of parliament. It was also recognized that it is important for the purposes of a healthy democracy and wholesome debate that immunities are afforded to members of parliament to protect their conduct as parliamentarians. Parliamentarians should enjoy immunity in regard to any civil or criminal actions brought against them arising out of the performance of their duties as members of parliament.

Recommendations:

- The constitution must provide for a code of conduct to be endorsed by national and regional legislators as well as executive officers.
- The legislation providing for a code of conduct should be passed within a prescribed period.
- The code of conduct should require a full disclosure of assets before taking office and upon leaving office. Such disclosure should be made to a prescribed authority and within a prescribed period of time.
- Severe penalties for bribery and corruption must be prescribed by law.
- Where parliamentary or executive immunity is provided, such immunity should be limited to acts carried out during the course of duties as a public official, not extended to all acts.

3. Securing Regional Autonomy

3.1 Defining Regional Autonomy

There is a recognized need for democratic government to be responsive to the people's needs, and there is a growing worldwide trend for government to be brought closer to the people. In a country as populous and diverse as Indonesia this suggests the need to strengthen the existing second and

third tiers of government to ensure greater interaction and accountability between public officials and the people. Where elected government interfaces with people at a lower level, the public will have greater interaction with it and will be able to express their dissatisfaction with the performance of those officials should they fail to deliver government services.

However, multi-tiered government requires a framework for the appropriate allocation of powers and duties to each tier and a framework for integrating public administration within national objectives. The officials at lower levels of government must be accountable and have the powers to bring improvements to the conditions of life of the people or to give effect to their demands. If not, then the creation of such second and third levels of government, at the regional and local levels respectively, would be useless. In this context, additional levels of sub-national government are required to make political participation meaningful.

There are two ways to allocate powers to sub-national levels of government. The first is to accord such levels of government exclusive powers, while the second is to accord them concurrent powers which they share with national government. If powers are shared between the different levels of government, then it is necessary to consider the interests or principles which determine which level of government is pre-eminent or should have overall responsibility for ensuring effective governance.

The complexity of twenty-first century life means that several levels of government may have a simultaneous interest in the same area of social and economic life. In the case of education, for instance, national government has an important role in setting certain norms and standards and in prescribing levels of training and qualifications. But other levels of government may have an important role in the planning or the distribution of educational facilities. At the lowest level there is a legitimate claim to monitor the performance of teachers at a particular school. In matters where service delivery or the administration of facilities at a local level is involved, there should be accountability at that level.

A system of distribution of powers should also be judged against the important criteria of efficiency, cost-effectiveness and rationality. It does not serve the goal of effective government to confront citizens with contradictory laws or levels of government competing with each other in respect of legislative or executive powers.

It was recognized that Indonesia requires regional, municipal and local government to increase accountability. Local government is increasingly seen globally as an important agent of development, and it should also be recognized that this level is the most important for grassroots participation because it is the most able to respond to local needs and conditions.

Where there is devolution of powers to lower levels of government, such devolution must be accompanied with appropriate resources, fiscal and financial powers so as to enable the lower level of government to function effectively. The mere devolution of powers and duties cannot work if such powers are allocated without the proper means by which they can be properly exercised or discharged.

The national government is responsible for developing the country's macro-economic framework. Consequently, it is critical that the national government assumes the primary duty of ensuring that fiscal and financial powers are exercised within the framework of macro-economic policies. The national government must accordingly retain important taxation powers, as well as responsibility for the establishment of an independent reserve bank, and be responsible for the debt-servicing obligations of the country as a whole, usually as a first charge against nationally raised revenue.

Recommendations:

- The following should be included within the constitution:
 - a) the concept of regional autonomy (See Section 8: Concluding Note)
 - b) commitment of resources to ensure that regional autonomy is effective

- c) definition of the powers and functions exercised by each tier of government.
 - The powers of central government should include defence, the judiciary, finance and foreign affairs, while other powers should be shared with or devolved to the regions.

3.2 Harmonizing Regional Aspirations with National Integration

The harmonization of regional powers and aspirations within a united Indonesia will require the setting up of appropriate institutions in which representatives of the regions can meet and discuss regional and inter-regional issues. It is also necessary to ensure that regional aspirations are represented within national institutions and structures. The regions need to understand their role within national planning and management, which includes understanding the problems of other regions.

As the saying goes, all politics is local. Politicians the world over seek re-election by doing the best for their own constituency. It is inevitable that representatives of regions will promote the interests of their region even at the expense of other regions or of the nation as a whole. It is therefore important to balance the centrifugal tendencies of devolution of power with an integrating mechanism that emphasizes harmonization of the actions of regions and places a check on mutually destructive policies. Ways of developing co-operative government are a priority, and it is in this context that members of the working group suggested the establishment of a national institution with the capacity to resolve and manage disputes both between and within regions.

The national government has the role of and responsibility to assist regional governments and their people when there is a need to do so. It would still be the responsibility of the national government to undertake measures to alleviate gross regional disparities. This must be defined in legislation. The constitution or law should provide for measures that establish horizontal equalization by fiscal transfers in favour of regions with no resource base or tax base. Failure to provide for such equalizing transfers would lead to greater regional disparities.

Recommendations:

- Create through the constitution a second chamber that is composed of elected representatives from the regions.
- Ensure that the second chamber has the powers, capacities and resources to provide effective representation for regional interests.
- Identify through the constitution the electoral system by which regional representatives will be elected.

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- Legislation on regional autonomy must be sufficiently clear to ensure that national government has the residual power to intervene under clearly defined circumstances, and to help regions when there is a system failure or crisis.
- The national government must have a constitutional responsibility to assist grossly underdeveloped regions to attain a basic standard of development.
- Establish within the constitution a body or mechanisms to act as a forum for ongoing dialogue between regions.
- Set up a national institution for dispute management between and within regions and between regions and central government.

3.3 Fiscal and Financial Issues

3.3.1 Principles for resource allocation

There must be a review of the basis for entitlement of those regions in which natural resources are located and compensation for the environmental damage and degradation that arises out of the exploitation of those resources. Furthermore, there are additional costs that flow from the infrastructural demands occasioned by the extraction of natural resources that fall on the region, for which the region should be compensated.

At the same time, it was recognized that all Indonesians have a minimum entitlement to public services such as health, education and social services. The competing claims should be balanced by allowing local communities

or regions in which natural resources are to be found a claim part, but not all, of the revenue raised by the exploitation of those resources.

The process of allocating national revenues to different regions is of a competitive nature and it is important to establish the principle that regions should not be disadvantaged because of their political, ethnic or religious affiliations. In this regard, a neutral Fiscal and Financial Commission can play an important role in recommending the appropriate fiscal transfers to the various regions based on objective criteria, including the need to redress past neglect.

Recommendations:

- Establish a fiscal and financial framework that guarantees minimum financial capacity to second and third levels of government.
- Allocate powers to collect and impose taxes based within an appropriate authority and macro-economic framework.
- Second and third tiers of government must be entitled to sufficient secure revenue so as to be able to undertake development plans.
- Resources and financial allocations must be made with due regard for national minimum standards.
- Compensation should be made available to regional governments for costs in respect of environmental and other losses associated with national resource exploitation.

4. Strengthening the Rule of Law and the Role of the Judiciary

The rule of law is a necessary condition for economic and political stability and the need to strengthen the rule of law in Indonesia is recognized as integral. The rule of law is also important for economic issues such as the effective and credible handling of disputes. It was recognized that it is not possible to uphold the rule of law without strong constitutional provisions

that include, among others, a Bill of Rights and an independent and impartial judiciary in which the people have confidence.

An independent and strong judiciary also has a disciplining effect on the executive and assists in setting and maintaining standards of executive conduct.

For such a judiciary to function, it is important that the constitution prevent the possibility of interference by the executive in judicial matters. To ensure this, the tenure and conditions of services of judges should be guaranteed regardless of the judgements they hand down. To ensure this objective, judges should be appointed either for life or for non-renewable terms.

While it is important that the judiciary be insulated from executive interference, judges should also be accountable for the performance of their functions. Such accountability should be introduced through clear and transparent procedures for the appointment of judges, as well as by providing institutions to which members of the public can bring complaints against inappropriate judicial conduct and have their complaints addressed.

For the legal system to have credibility and legitimacy, it is important that it should not be seen as the preserve of corporate institutions or wealthy individuals or comprised of judges who are not representatives of the population as a whole. It is for this reason that it is important that judges should be representative of society. The state must also ensure that access to justice is affordable and that those who wish to have their disputes settled by a court of law are not frustrated by the mere absence of the financial resources to do so.

The issue of addressing constitutional disputes was discussed. It was recognized that it was possible for general courts to have constitutional jurisdiction. However, the trend in recent constitutions is to establish a special constitutional court as the highest court on constitutional disputes. There are advantages to having a constitutional court as an institution that can develop specialized constitutional expertise, though there is need for mechanisms which ensure that the court has legitimacy and its members are broadly representative.

The need for a Truth and Reconciliation Commission to deal with the human rights abuses of the past within an appropriate framework was also considered. The objective of such a framework would be reconciliation as well as establishing the truth in regard to past injustices. Such a process may be painful, but it is necessary if Indonesia is to look forward and not be haunted by an unrevealed past.

Recommendations:

- Constitutional provisions are needed to secure the independence and integrity of the judiciary, including:
 - a) clear and transparent procedures for appointment of judges
 - b) clear provisions outlining the exceptional circumstances in which judges can be removed, and how
- continued*
- c) protection of terms, conditions and tenure of judges
 - d) protection for the judiciary from control or interference by the executive
 - e) drafting a code of conduct for judges which includes a requirement for a declaration of assets
 - The rule of law should be strengthened by providing for judicial review of legislation and executive acts.
 - The following institutions should be created and empowered through the constitution with defined tasks and objectives:
 - a) a special constitutional court to undertake judicial review
 - b) a human rights court to support the National Human Rights Commission
 - c) transform the National Law Commission into the National Law Institute and empower it by law to take responsibility for legal planning and legal reform
 - Create transitional institutions to increase public confidence in the state's commitment to provide justice to its citizens, such as "truth commissions" to address issues of transitional justice.

5. Institutions to Support and Protect Democratic Principles

Democracy is not secured only through periodic elections. Democracy and democratic principles must be supported and sustained through systems of democratic accountability, which include constitutionally protected checks and balances and channels for transparent and accountable government.

Constitutions recently adopted by other countries where democracy is being consolidated have identified independent or impartial institutions to support and sustain democratic accountability. These act as checks and balances and ensure greater transparency.

The review and adoption of similar institutions of transparent, responsible and accountable government was recommended. Unless an institution has clearly defined objectives, powers and resources by which to achieve its objectives, then it will not contribute to the democratic process.

While some institutions need to be constitutionally established, the law could create others. The advantage of protecting an institution under the constitution is that it cannot be eliminated except under exceptional conditions. Five such institutions were considered: the ombudsman, the controller-general, an independent electoral commission, a human rights commission and a fiscal and financial commission.

5.1 The Ombudsman

The ombudsman monitors the acts of the executive, the legislature and the bureaucracy. He or she reports to parliament and the executives. To be effective, the office of the ombudsman must be adequately resourced. Far from being merely a “watchdog” over the state, such an institution serves to improve the performance of state functionaries and the levels of service of government employees.

5.2 The Controller-General

The controller general reports to parliament on the regularity and propriety of expenditure of public funds. It is parliament which approves the budget

and allocates to the executive the public monies for the performance of its functions. It is thus important that parliament be able to confirm that the expenditure of public funds has been in accordance with the requisite procedures, is not wasteful and is in accordance with the budget.

5.3 Independent Electoral Commission

The independent electoral commission protects the rights of people to participate in free and fair elections. The commission plays an important role in maintaining standards within the electoral process. Its role should include the direct overseeing of presidential, national and regional elections. To ensure the confidence of society, membership of the commission must be non-partisan. The commission must have adequate funds and resources to carry out its duties.

Independent electoral commissions are now universally recognized to be critical for stability in a constitutional democracy as the judiciary. One of the issues with the biggest capacity to destabilize a society and trigger conflict is an electoral result which is not accepted by the participants because they distrust the administration responsible for conducting the elections.

5.4 Human Rights Commission

A human rights commission should be established to review abuses by the military and prevent such occurrences in the future. Only through such a commission can citizens' faith in the rule of law be guaranteed.

5.5 Fiscal and Financial Commission

The function of a fiscal and financial commission would be to collect information and make recommendations concerning the allocation of funds to the regions. An independent commission is more likely to be able to make findings which will be accepted by regions that feel aggrieved by the apportionment of nationally raised revenue.

Recommendations:

- The following institutions should be included within the

constitution:

- a) an ombudsman to ensure accountability and performance of the executive, legislators and bureaucracy
- b) a controller-general to review public expenditure, the award of government contracts and allocation of funds by parliament
- c) an independent electoral commission to ensure the integrity of the electoral process
- d) a human rights commission to hold state officials accountable for human rights violations
- The following should be ensured through the constitution:
 - a) definition of the powers and functions of the above institutions
 - b) the state's commitment to adequately finance and support the above institutions
 - c) the appointment of persons of integrity to these commissions through a transparent process
- Consideration of a fiscal and financial commission to support regional autonomy through the collection of information and the making of recommendations on regional allocation of funds.

6. Political Parties and the Electoral System

The right of the people to elect their government through periodic elections that are free and fair is recognized as the most basic of democratic rights. The protection of this right requires the recognition of the right to vote and the need for an electoral system that is inclusive and produces a true representation of the will of all Indonesians.

This right is meaningful only when there is a guarantee that the elections will be free and fair and that the result is accepted by all, even by those who lose the election. Voters must be able to choose between political parties that are capable of offering the people a choice of programmes.

The exercise of this right to elect a government requires recognition of political parties as instruments of representative and participatory

democracy. The composition of the elected representatives should be in proportion to the votes cast.

One possible electoral system that could be adopted is one of proportional representation and regional representation, within a framework of legislation that allows people to campaign, obtain information and disseminate their political views, free from interference and financial manipulation.

Many democratic countries have given consideration to one or another system of funding political parties. Grants of public funds to political parties are intended to ensure that the latter will be able to put both information and real political choices before the people. However, this kind of funding is usually accompanied by measures which require transparency about the sources of party or campaign funds and which may even impose limits on campaign expenditure in the interest of fairness amongst parties in the electoral contest.

It is always important to ensure that a party in power or a party with special access to public funds does not abuse its position by obtaining clandestine forms of assistance from the state. The framework for free and fair elections must ensure all parties equal access to the media and to public facilities such as venues for holding political meetings.

Recommendations:

- The constitution should provide protection for voting and political parties through:
 - a) the right to vote in elections at least once every five years
 - b) the right of people to associate in political parties and participate in government through their elected representatives
 - c) the role of the independent election commission in ensuring free and fair elections
- Legislation should be enacted, consistent with constitutional principles and norms, to provide:

- a) an electoral system that guarantees proportional representation with a reasonable national threshold, for example of two per cent, and provides for regional constituency lists
- b) consideration of gender and ethnic balance in representation
- c) regulation of campaign financing and to ensure transparency in the funding of political parties

7. The Fundamental Rights and Duties of State and Citizen

The Indonesian State needs to make an enduring commitment to the fundamental rights of the people as citizens. Members equally believe in the need for the state to follow a path of democratic development for the good of all.

This can be done by enshrining the common aspirations of the people, with regard to their economic and political wellbeing, through a “Directive Principles of State Policy” and a charter on “Fundamental Rights, Liberties and Duties”. The constitution is the most appropriate instrument through which these can be achieved.

A list of directive principles and fundamental rights that have been universally accepted by the community of nations, including Indonesia, in the various international instruments, notably the United Nations Covenants, were reviewed by members of the working group, who debated whether they should be included in the constitution or not.

It is recognized that directive principles of state policy are not enforced in the same manner as fundamental rights. However, they are expected to guide government policy and actions and have persuasive power. In some countries, these principles have come to play a very significant role in constitutional litigation, especially in interpreting the scope of human rights. On the other hand, “Fundamental Rights” are enforceable.

While the law in limited circumstances may qualify the specific operation of certain rights, some rights are deemed absolute or inalienable and cannot be qualified or reduced.

7.1 Directive Principles of State Policy

The view was expressed that the state should be committed to providing basic needs to ensure that all Indonesians can live in peace and dignity and free from war.

It was recommended that, insofar as national resources permit, the people should enjoy social security, health care and access to water and housing. It was suggested that the state also guarantee the development of basic infrastructure to rural communities, and to manage the economy for the interests of increasing prosperity for all. It was recommended that the state should ensure the protection and sustainable utilization of environmental resources for the benefit of both present and future generations.

The state should also be committed to providing good governance to meet the aspirations of all Indonesians. This will ensure transparency and accountability from the government and citizens' access to information in relation to the government.

In discussions it was recognized that the Directive Principles of State Policy can play an important role in clarifying and highlighting the highest aspirations of Indonesians for an adequate standard of living for all citizens. It is important that such aspirations find expression within the constitutional text, or citizens may find the constitution lacking in vision and limited in the concerns it addresses.

Recommendations:

- The constitution should incorporate a comprehensive set of “Directive Principles of State Policy” addressing the need to provide basic goods and services, good governance, and a human-centred development policy.
- These principles should guide laws, governmental action and public policy.

7.2 Fundamental Rights and Liberties

The fundamental rights and liberties of the citizen should be protected as a high priority and abridged only in limited circumstances to ensure the enjoyment of these rights by other persons. The constitution should list a comprehensive charter of fundamental rights and limit the circumstances in which such rights may be abridged.

It is important to specify in the constitution the circumstances in which rights can be derogated from. In the absence of any such constitutional guidance, the executive might be tempted in an emergency to violate these rights more fundamentally than is necessary. The universal trend is to require that any limitation or derogation from the fundamental rights enshrined in the constitution be proportionate to the risk or danger facing the state. There are certain rights, such as the right to be free from torture, that should never be breached under any circumstances.

The range of rights in contemporary charters of fundamental rights should not be confined to the “negative rights” which protect the citizen from the state, but should include the new generation of rights which strengthen civil society, protect the environment and affirm the right to development. Such rights would include the right to information and to administrative justice, including the right to know the reasons for any decision taken by a state official. Recent charters also focus on previously neglected areas and seek to strengthen the protection of vulnerable or traditionally marginalized sectors of society such as children and the disabled.

The precise formulation of these rights should be appropriate for the circumstances within Indonesia. The state should be committed to protecting, as absolute rights, the personal rights of the citizen including the:

- Right to life
- Freedom from torture, cruel, inhuman or degrading treatment or punishment
- Right to dignity
- Equal protection and equal benefit for all citizens under the law
- Right to be free from discrimination

- Right to enjoy full equality

The state should be committed to protecting political rights for civic participation including the:

- Right to vote and run for public office
- Freedom of expression and the media
- Freedom of assembly and association
- Right to information

The state should be committed to protecting and enhancing social, cultural and economic rights including the:

- Freedom of worship, conscience and belief
- Freedom to choose and practise one's religion
- Right to education
- Right to the protection and expression of culture and language
- Right of access to health care
- Right to work and fair employment conditions
- Right to live and work in dignity
- Rights of marginalized communities and groups to advance their status
- Right to move and reside anywhere in Indonesia

The state should protect the family as a unit of society, including the:

- Right to a family life without interference by the state
- Enjoyment of rights within the family
- Equality of men and women in the family including equal rights to inheritance
- Rights of women to live free of violence
- Rights of children to protection by the state

The state should be committed to protecting judicial and administrative rights including the:

- Right to a fair trial without undue delay
- Right to fair administrative decisions
- Right to privacy of home and communications

Recommendations:

- Ensure that the constitution and all laws drafted are compatible with international human rights standards.
- Indonesia should ratify all international human rights conventions.
- Ensure that a comprehensive list of “Directive Principles of State Policy” and charter of “Fundamental Rights and Duties of State and Citizen” be included in the constitution.
- Ensure that these rights are not be abridged except in exceptional circumstances.

7.3 Amendments to the Constitution

There is a need to secure the constitution and give it stability while balancing the need to revise it to ensure that it is responsive to the needs of the community. Exceptional requirements should be introduced in respect to constitutional amendments.

A constitution must be both durable and flexible. The rights that it guarantees should not be easily removed at the instance of a temporary majority. The constitution is required to protect all citizens including political or other minorities.

Apart from the usual requirements that additional majorities be required before the constitution can be amended, there is a compelling argument that special procedures should also be followed. Such special procedures would include at least ensuring that any amendment to the constitution is the subject of public debate prior to its adoption. A typical example of such a procedure is one that would require an intended amendment of the constitution to be published for comment within a fixed time period before its introduction to parliament.

Recommendations:

- An amendment of the constitution must require a majority of two-thirds of all members of parliament, and if there are

two houses of parliament, by a two-thirds majority vote of both houses.

- The charter on “Fundamental Rights and Duties” can neither be amended nor abridged without a two-thirds majority vote in favour from the total membership of parliament, and if there are two houses, a two-thirds vote of both houses.

8. Concluding Note

The constitution is a living document and draws its life and meaning from its context. The recommendations in this report attempt to address features of Indonesia’s political system that have undermined its democracy in the past and will continue to do so if not addressed. But a constitution must not only build from the past. If it is to give direction to the destiny of the nation, it must also reflect the future.

The recent MPR sessions held in August 2000 did introduce some changes to the constitution but deferred many of the fundamental decisions on constitutional reform. The changes included: