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Paul J. Carnegie

Abstract:

Proposing constitutional reform and the process of establishing it are two distinct matters. The former is largely a normative projection of what could be whilst the latter involves the manner in which reform is brought about. In reality, translating proposals into accepted practice involves overcoming legacies of the past. Whether or not they can persist over time is a process that is invariably fraught and often generates mixtures of trade-off and compromise. The following paper examines the merits or otherwise of a gradualist approach to constitution-making. By anatomizing the constitutional reform process that took place in Indonesia from 1999-2002, it considers whether or not such an approach is appropriate for establishing meaningful constitutionalism in plural and divided societies.

Keywords: Constitutional Reform; Constitutionalism; Indonesia; Authoritarian legacies

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Paul J. Carnegie

INTRODUCTION

In countries transitioning from authoritarian rule, a key step towards more democratic politics is often constitutional reform. The institutions (re)formed in those fundamental laws can have important implications for the future accumulation, exercise and limits of political authority. It can also provide recognition for previously marginalized segments of society and lay foundations for more effective representation.

But whilst normative ideas about constitutions may inform what policy makers and politicians seek to establish, this does not tell us much about how and why a country ends up with the constitutional framework it does. In fact, there is a significant difference between proposing a constitutional framework and the process of establishing it. Pre-existing political configurations, underlying societal conventions and cultural practices of a particular setting can restrict or predispose specific options. This can generate distinct trade-offs and unexpected patterns of transformation (Carnegie 2012: 71-79). The process is invariably fraught and there is no guarantee that a legitimate or stable form of constitutionalism will emerge (Chen 2015; Dressel and Bunte 2014).

After the downfall of Suharto's authoritarian New Order regime in May 1998, Indonesia managed to complete four rounds of constitutional amendments from 1999 and 2002 during sessions of *Majelis Permusyawaratan Rakyat*¹ (MPR, People's Consultative Assembly)

¹ The MPR is the legislative branch of the Indonesia political system made up of representatives from the two national legislative assemblies *Dewan Perwakilan Rakyat* (DPR, People's Representative Council) and *Dewan Perwakilan Daerah* (DPD, Regional Representatives Council) with 692 members. Prior to 2004, it was the highest governing institution in Indonesia. In a formal institutional sense, it is now on a co-equal footing with DPR, the State Audit Board (BPK), the Supreme Court and the Constitutional Court.

(Carnegie 2014). By anatomizing this reform process, the following paper investigates the merits or otherwise of a gradualist approach to constitution-making in plural and divided societies. The paper proposes that a gradualist approach that takes advantage of opportunity, timing and momentum can pave the way for a ‘successful’ reform outcome (if it can even be called that). By finding a way through challenging circumstances, the Indonesian case underscores how and why gradualism can translate reforms into a meaningful level of democratic constitutionalism from a troubled past.

Caveats and limitations

Before investigating how and why this reform became reality, a few caveats are probably in order. The way Indonesia amended its constitution is not being held up as some sort of ideal of democratic constitution-making. From a normative standpoint, it was far from that. There was a tangible lack of strategic planning on how vital components of the process would proceed, i.e. timing, conduct, and proposed outcomes. Popular distrust and skepticism about the MPR’s ability to function as an effective constitutional reform body remained high. And public participation in the process was slim by any measure (Horowitz 2013). The little that did occur was also fairly poorly organized. This did not exactly augur well for a positive outcome.

Moreover, on a more meta-level, expecting that constitutional reform alone will inextricably lead to a more democratic state is wrong-headed. Contingent conditioning factors can constrain a country’s constitutional reform in different ways, as do respective positions within the international system of power and privilege (Horowitz 2006: 1-17). In post-colonial contexts in particular, different “imagined de-colonizations” have generated distinct tensions over how to define postcolonial identities and, *in extremis*, violent contestation (Carnegie 2013: 14-25). Political cultures, configurations of politico-business elites and patterns of civil-military relations can all play a role. Not to mention the timing of reforms.

In short, it is not the paper’s intent to draw definitive conclusions from a single case-study. The dissection is more for illustrative purposes. But with qualifiers in place, detailing how and why things ended up the way they did in Indonesia does give useful insight on the complicated challenges of constitutional reform and possible ways through them.

Getting past the past

Benedict Anderson (1991) once noted that people who perceive themselves as part of a political community ultimately imagine it. You cannot meet or know everyone in that community but you do believe that you have things in common that bind you. In this respect, the nation-state is a social construct sustained by the active (re)production of institutions that narrate this imagining (Carnegie 2019: 535). As such, when we gauge constitutional reforms, it is sometimes better to acknowledge what preceded them. A key issue for Indonesia was how to undo the structural and psychological grip exerted by its authoritarian past without shredding its constitutional foundations beyond recognition. From this perspective, the post-Suharto constitutional amendments were really geared towards preventing a reversion to his brand of authoritarian corporatism.

To elaborate, ever since Sukarno's Guided Democracy in the late 1950s and particularly under Suharto, the rhetoric of upholding the constitutional integrity of the republic (and by extension the nation-building project) had become key political narratives in legitimizing state rule and action. Even although oppositional group identities often forged and crystallized in response to the coercive or exclusionary practices of this nation-state building, it was used to legitimize the centralization and configuration of authority (Carnegie et al 2016: 56). This was especially the case under Suharto who set about restructuring the political system to coopt or neutralize potential opposition within his ruling coalition.

Local elites became firmly attached by patronage networks to a hierarchical state power-base in Jakarta (Antlov 1995; Asshiddiqie 2005). He did so through a mixture of 'fear and reward' across and between the state bureaucracy, business, and the military (Carnegie 2019). As Harold Crouch (1979: 578) once noted, "the New Order bore a strong resemblance to the patrimonial model...political competition among the elite did not involve policy, but power and the distribution of spoils." The regime was such a major socio-economic and political agent that a pattern of economic growth beset by patrimonial rent-seeking and inequality took a firm grip.

Excessive levels of centralization eventually descended into a form of 'sultanism'. Power and resources became ever more concentrated around Suharto's personal rule (MacIntyre 1991; 2000: 248–273). He ended up sitting at the apex of not just a political structure but also "a system akin to business franchising" that allowed him "to bestow privileges on selected firms." (McLeod

2000: 101). Suharto's hold over this elaborate patronage machine ensured that important economic and political players, particularly the military, were dependent on some form of state patronage. It was a reliance that extended through Golkar across the archipelago with personal favours and 'franchises' exchanged between state officials, business interests, and community elites to act in a similar manner.

As Richard Robison (1986: 105) noted candidly, it was in effect an "entrenchment and centralization of authoritarian rule by the military, the appropriation of the state by its officials, and the exclusion of political parties from effective participation in the decision-making process." This meant that Indonesia had a state "overdeveloped" in relation to an "underdeveloped" class structure.

The New Order can be seen as, "a self-perpetuating patronage system from top to bottom, rewarding those...in it and penalizing all those...excluded." (MacIntyre 1991: 45) Those who were 'in' had little interest or ability to challenge the system. Middle-class beneficiaries saw themselves as 'in' and subsequently displayed political ambivalence toward overturning this cozy status quo. Demands against the state for greater political freedoms were swapped for the stability of authoritarian corporatism. It made them hesitant to sacrifice what they already had for the sake of political change. The flip side was that Suharto had to keep the economic benefits coming in.

But Suharto's over-reliance on personal "cronyism" was a boomerang in motion. Mutually beneficial economic joint ventures formed between prominent ethnic-Chinese businessmen and high-ranking military officers. The latter acted as the "masters" of politics, while the former were the "masters" of capital (MacIntyre 2000: 248). State-owned industries were run with the financial backing of these cronies behind the scenes. This allowed officers to play the role of "old-time" Javanese rulers and aristocrats in a contemporary industrial-scale patron-client setup. Entrepreneurial cronies of Suharto such as Liem Sioe Liong (Sudono Salim) and The Kian Seng (Mohammad "Bob" Hasan) became some of the richest men in Asia with the help of regime patronage (Robison 1986: 322-370). His cultivation of these so-called *cukong* (financier/boss) relationships with his select group of friends, particularly over rounds at the Jakarta Golf Club, may have brought vast benefit for those involved and created levels of development but it did little to alleviate latent resentment toward Chinese-Indonesian commercial activities among *pribumi* economic interests.

The dependence of Suharto's 'repressive developmentalism' on personal cronyism and resource revenues meant it was ill equipped to weather external economic shocks. The regime was trapped within a type of development yoked to the demands and vagaries of international capital. Indonesia was internally dependent on the export of raw materials but externally dependent upon international markets and overseas finance. If you combine this with rampant corruption and abuses of office, a loss of confidence in the economy on world markets was an accident waiting to happen.

The regime's increasingly tenuous economic credibility along with its bankrupt political legitimacy disintegrated in the wake of the 1997 Asian Financial Crisis. Oil, gas, and other commodity exports plummeted and per capita GDP fell by 13 percent. The country was also experiencing the worst drought in 50 years and a major haze event. By 1998, there was visible discontent on the streets over food shortages, rising prices and overt allegations of regime corruption. With his house of cards collapsing around him, Suharto tried to deflect public anger by blaming ethnic Chinese "moneymen" and global financial institutions. His ruthless play on ingrained stereotypes stoked angry mob riots in Glodok (the Chinese district of West Jakarta) that killed an estimated 1000 Chinese-Indonesians (Carnegie 2010: 76). In the face of economic meltdown and pressure for *reformasi*, orthodox sections in the green (Islamic) wing of the military began shifting their support and eventually abandoned Suharto, as they saw him as a liability to their interests.

Renegotiating legacies to serve the present

Given these previous decades of governance, constitutional reformers in Indonesia faced the tricky problem of trying to dismantle the most authoritarian, personalistic and highly centralized structures of Suharto's rule without destabilizing the founding pillars of the republic. For many nationalists, two key aspects of the republic's identity are sacrosanct, namely eschewing Islam as the foundational basis of the state and upholding the state ideology (Pancasila) (Carnegie 2008). For political gatekeepers of this inheritance, the prospect of opening the 1945 Constitution to change that would jeopardize these twin pillars was and is viewed as non-negotiable.

The above political dialectic occasioned a process best characterized as uneven and cautious. It was beset with foot-dragging and trade-offs. Having said this, the MPR's decision to take responsibility for constitutional amendment as an 'insider job' rather than 'outsourcing' it to some external body forced parliamentarians to negotiate, compromise and find some form of consensus. In other words, they had to renegotiate their way through a distinct historical experience in a manner that would be accepted.

Interestingly, rather than pushing through contentious and sweeping reforms, Indonesia's adoption of a "gradual, insider-dominated, elections-first [approach to] constitution making" helped steer it away from potentially damaging polarization and intergroup violence (Horowitz 2013: 262). This may seem counterintuitive but those pragmatic compromises helped elicit acceptance for the course being charted.

As a result, the original 1945 Constitution grew from 37 articles to 73, of which only 11 percent remain unchanged from the original constitution. There were changes to the system of presidential elections and the composition of legislatures. The Supreme Advisory Council was abolished. There was constitutional mandate to allocate a specified amount from the national budget to education. A Constitutional Court was approved and established. And there was a phased removal of the military's pre-allocated seats in Parliament (Horowitz 2013).

In fact, the MPR took responsibility for reducing its own power. It is no longer the highest governing body in Indonesia but stands (formally at least) on a comparable footing with one of the two national legislative assemblies, *Dewan Perwakilan Rakyat* (DPR, People's Representative Council), the State Audit Board (BPK), the Supreme Court and the Constitutional Court (Ellis 2005: 1-19).

The restructured MPR consists entirely of popularly elected members of the DPR and the second national legislative assembly, *Dewan Perwakilan Daerah* (DPD, Regional Representatives Council). The adoption of a non-majoritarian 'list-PR' electoral system is meant to give greater recognition to Indonesia's diverse socio-cultural and ethnic makeup through representation, i.e. if a party gets say 7 percent of the vote that should translate broadly to 7 percent of the seats in parliament. This design prevents any one party gaining an outright majority and political dominance.

Increasing competition for office, logistically at least, was a way to dilute a system of top-down executive appointments and manipulated assembly votes (Carnegie 2008a: 523). Constitutional limitations on the power of the executive also meant the DPR gained more formal say in the legislative process. Having said this, whether there is a dramatic change in the new incumbents' representational priorities is harder to gauge.

Since 2004, the president is directly elected and can only serve one renewable five-year term (Liddle and Mujani 2006: 132-139). There is a qualified majority voting formula in place for presidential elections whereby the president elect must gain over half the total country wide vote in addition to over 20 percent of the vote in half of the Indonesian provinces (Ellis 2005: 1-19). It is supposed to favour more moderate candidates; ones who can appeal to different interests and form alliances across party lines and maintain broad support in the legislature and across the country (Liddle and Mujani 2006: 132-139). This is not to say Indonesia's constitutional reform is without issues, far from it.

The reality of reform is rather more messy and uneven than institutional recalibration suggests. Problems and flaws persist. Indonesia continues to struggle with corruption issues, ongoing policy ineffectiveness, judicial problems, institutional frictions, and personality politics. Although an increase in contestation and competition for office was supposed to improve representation and legitimacy, it has been accompanied by new emergent layers of corruption. New provincial political elites still seek to maintain their patronage links with the centre (Carnegie 2008a: 524). Similarly, altering the composition of parliament was meant to lessen regional distrust of central government but, in many cases, community interests remain marginalized and relatively subordinate to the interests of local patrons of national parties. Suffice to say, personality and money politics still loom large in the body politic (Johnson Tan 2006: 88-114). Yet, despite all of this, the reforms did bring about a routinization of a more democratic form of politics (Carnegie 2012: 77).

It is far from perfect and long on compromise but as this paper contends, Indonesia's new constitutional settlement was not a negative outcome. In the intervening years, Indonesia has, if not always without difficulty, transitioned from authoritarian rule to a functioning multi-party democracy with all its benefits and shortcomings (Carnegie 2013a: 64). Despite ongoing challenges, this is not an insignificant achievement. Given the danger of an authoritarian

regression, the most important development in the wider scheme of things was to establish a constitutional framework of political contestation that major elite political actors could accept and one that was perceived as legitimate by the population more generally.

Learning by Doing

What lessons can we draw from Indonesia's constitutional reform process? Firstly, constitutional reform does not derive exclusively from a free play of unconstrained choice. Legacies of the past can be resilient and present obstacles to establishing effective constitutionalism. The Indonesian experience shows us that countries do not emerge with readymade constitutions and a sense of constitutionalism overnight. Second, introducing generic or imitative articles in a constitution without regard to inclusion or context will rarely be sufficient in themselves. Third, the routinization of constitutionally mandated politics is really more to do with acceptance.

In sum, if a more democratic form of politics (which is never guaranteed) is to emerge then negotiation and compromise are required. It takes perseverance and vigilance for function to follow form. Relevant political actors must accept (and consequently be contained) within the new 'rules of the game'. If a greater degree of constitutionalism is to emerge they have to operate and contest their agendas within the constitutional rules of checks, balances, contestation and procedure that are being established.

What the Indonesian case demonstrates is that gradual constitutional reform of overly centralized political power structures can assist in reorienting habituated patterns of exercising political power, albeit by degrees. It does so by establishing an organizational context with the potential to cultivate a qualitatively different type of authority and rule. The 'legal state' of Indonesia is now more democratic in form than previously. Over time, a clearer formal separation of powers has emerged between the executive, legislature and judiciary, if not always in practice. Human rights protections are now more delineated as norms, again if not always in practice. What we begin to recognize here in a very Aristotelian way is that political compromise and negotiation are actually the constituents of a stable future from a troubled past (Carnegie 2008a: 518).

Having said this, several scholars have recently flagged signs of fragility and illiberal regression in Indonesia's democracy (Warburton and Aspinall 2019). This is nothing new for Indonesia watchers, appearances periodically peak the concern of observers. Whilst not wanting to misplace expectations on the substantive quality of its democracy, occasionally there is good medicine in having a counterpoint to such tropes about Indonesia's fragility, disintegrative tendencies and protracted un-consolidation. Granted there has been concerted pressure from well-funded illiberal forces and actors. The perennial populist polariser Prabowo Subianto, a cadre of vocal hardline Islamist groups like Islamic Defender's Front (FPI - *Front Pembela Islam*) and the so-called '212 protests' that demanded the prosecution for blasphemy of ex-Jakarta Governor Basuki 'Ahok' Tjahaja Purnama are the prime examples of this trend. But Indonesia's constitutional framework has shown, shall we say, not quite robust but decent resilience in the face of these stress tests especially since 2014. In fact, the results of the 2019 elections largely back up the latter diagnosis.

Asserting this is not an attempt to dismiss the threat posed by such illiberal forces and actors (they are real) especially the rise of religious conservatism bolstered by a proliferation of Salafi-oriented schools, primarily funded by Saudi Arabia. But these are societal issues not constitutional ones. And thankfully, after major protests, the ratification of the draft criminal code (decades in the making) has been postponed pending further input on several controversial articles that would have placed human rights and civil liberties on a backward footing in the country.

If the intent of prognosis is to give adequate forewarning then the fact that the waning Prabowo's wealthy and much younger running mate, Sandiagno Uno, is now firmly embedded in the populace's consciousness might give us pause for 2024 when Jokowi can no longer run. Political and societal moderates will have to coalesce to prevent such a divisively populist candidate leveraging the issue of religion for plutocratic ends. That is where the real game is afoot.

Conclusion

A country's past is unavoidable but how it negotiates past that past is what matters. As the Indonesian experience shows, constitutional rearrangement vis-à-vis institutionalized political power is not straightforward. It involved gradual renegotiation with varying legacies and followed

an unusual path. By taking advantage of opportunity, timing and momentum, this approach created time and space to help de-compress tensions and promote acceptance amongst major political actors. Despite its normative shortcomings, the gradualism of Indonesia's reform process has managed to translate into a meaningful level of democratic constitutionalism.

If this teaches us anything, it is that constitutional reform does not have to follow or reflect western norms. In fact, a country is no less a constitutional democracy for that, if that is indeed what eventuates. What emerges might not meet an abstract western liberal definition of constitutional democracy but in the real world there is no one-size-fits-all definition, rather many variations.

Yet, merely to state this raises difficult questions of interpretation. Complex local terrains with multiple conditioning factors affect decisions and strategies of reform in different ways. Coming to grips with relationships between political agency and narratives of history, culture, and identity in the study of constitutional reform is no easy task.

It seems fair to state that generic and prescriptive constitutional templates transferred from one setting and adopted (often under external pressure) into another deserve to be treated with caution and an intelligent skepticism. They are not necessarily appropriate for countries with specific patterns of socio-economic arrangements, religious tensions and ethno-cultural cleavages. When countries have different political institutionalization, socio-cultural heritage, or economic fundamentals, assuming that they can achieve a level of constitutionalism overnight in a manner that fully conforms to abstract constitutional norms is an unreasonable expectation.

It is the ability to reproduce accepted, localized constitutional politics overtime that really matters. That should be the goal of a reform process. If we can learn that lesson, we might just improve the chances of shielding pluralism in diverse societies from the abuse of executive power and 'tyranny of the majority' futures. Lastly, to paraphrase Clifford Geertz, 'we must leave those who find pleasure in passing sweeping censures on whole nations, to do so as they like... [*Indonesia will*] live on with or without their approval'.

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