

SYSTEMIC REFORM OR REFORMED CONTINUITY IN THE PACIFIC?

A MEMO FROM INDONESIA

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ABSTRACT

Normative ideas of constitutions inform what policy makers and politicians are seeking to establish, but this tells us little about how a country ends up with the framework it does. There is a significant difference between proposing a constitutional framework and the process of establishing that framework. The process involves a form of renegotiation with varying legacies of the past. This makes constitutional rearrangement vis-à-vis political power a complicated affair. The ways in which the process of reform unfolds in a particular setting and the challenges associated with it are often multiple and ambiguous. The following examines the constitutional reform process that occurred in Indonesia from 1999-2002 to underscore this claim and draw out key challenges Pacific Island Countries (PICs) may face along what are invariably fraught and uncertain paths. It argues that the measure of success for ongoing constitutional debates in PICs will depend in large part on the ability to translate opportunity, timing and momentum into meaningful reform that is accepted domestically and can sustain over time.

Keywords: Constitutional Reform; Indonesia; Legacies; Pacific Island Countries; Process

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INTRODUCTION

In 1971, Robert Dahl asked, ‘does it matter how a competitive regime is inaugurated?’¹ The question asks us to reflect on whether the foundational ‘social contract’ proposed by incumbent elites (upon which the future accumulation, exercise and maintenance of political power, influence and authority will rest) is sufficient to produce a legitimate competitive regime for the long term. Striking such a bargain involves enacting a constitution and reproducing the institutions that fundamental law establishes. And whilst normative ideas of constitutions inform what policy makers and politicians are seeking to establish, this tells us little about how a country ends up with the framework it does. There is a significant difference between proposing a constitutional framework and the process of establishing that framework. The latter process involves a form of renegotiation with varying legacies of the past that range from pre-existing socio-economic disparities to unresolved ethno-cultural tensions. This makes constitutional rearrangement vis-à-vis established socio-political power configurations in any particular setting less than straightforward. The ways in which these renegotiations unfold and the subsequent outcomes can have long term consequences for a country’s politics.

In the following I argue that the measure of success (if it can even be called that) for the ongoing constitutional debates across the Pacific Island Countries (PICs) will depend in large part on the ability to translate opportunity, timing and momentum into gradual reform that is accepted and can reproduce over time. I do so by introducing a comparative Southeast Asian perspective on constitutional reform that occurred in Indonesia from 1999-2002. This provides useful insight on the ways in which a gradualist and incremental approach to constitutional reform can translate into a meaningful level of constitutionalism while underscoring significant obstacles facing PICs. They face uncertain and challenging but not insurmountable times ahead along what are invariably fraught and uncertain paths.

TO HERE, FROM THERE?

By way of orientation, after the downfall of Suharto’s authoritarian New Order regime in May 1998, Indonesia has, if not always without difficulty, transitioned from authoritarian rule to a

¹ Robert Dahl, *Polyarchy: Participation and Opposition* (1971) 4.

functioning democracy with all its benefits and shortcomings.² During this time it also managed to complete 4 rounds of constitutional amendments from 1999 and 2002 at sessions of the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat*).³

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. A specified allocation from the national budget to education became constitutionally mandated. The phased removal of the military's pre-allocated seats in Parliament was instituted. And a Constitutional Court was approved and established.⁴

This is a significant achievement given the previous decades of authoritarian rule. Before investigating how these developments became reality, and what instruction, if any, they provide for the ongoing constitutional debates across the PICs, a few caveats are probably in order. Firstly, the way Indonesia amended its constitution is not being held up as some sort of general panacea for democratic reform. Second, the expectation that constitutional reform will inextricably lead to the realization of a constitutionally democratic state is a false assumption. Third, it is prudent to exercise caution before drawing any definitive conclusions from a cross-regional comparison. The points raised here are illustrative rather than indicative.

Of course, there are fairly significant differences between Indonesia and PICs. Political cultures differ, configurations of politico-business elites and patterns of civil-military relations differ, as do respective positions within the international system of power and privilege, as does the time and context of the reform process. No doubt distinct conditioning factors will affect constitutional reform in the PICs in different ways as they renegotiate with varying legacies of their past. But with qualifiers in place, highlighting why things ended up the way they did in Indonesia offers useful insight on the complicated challenges of constitutional rearrangement vis-à-vis political power.

² Paul J. Carnegie, 'Democratization and Decentralization in post-Soeharto Indonesia: Understanding Transition Dynamics' (2008) 81:4 *Pacific Affairs* 515.

³ Paul J. Carnegie, *The Road from Authoritarianism to Democratization in Indonesia* (2010) 112.

⁴ Donald L. Horowitz, *Constitutional Change and Democracy in Indonesia* (2013).

ANATOMY OF A PROCESS

From a normative standpoint, Indonesia was hardly a model of democratic constitution-making. Firstly, there was a tangible lack of a strategic plan on how vital components of the process would proceed, i.e. timing, conduct, and proposed outcomes. Secondly, there were high levels of popular distrust and skepticism about the MPR's ability to function as an effective constitution-making body. Thirdly, there was a minimal amount of public participation in the process and the little that did occur was pretty poorly organized. This did not exactly augur well for a particularly positive outcome but Indonesia made it through nonetheless.

Without wanting to sound the bells of pessimism too much, the above issues were really reflective of the grip exerted by Indonesia's founding 1945 Constitution. Starting with Sukarno's Guided Democracy in the late 1950s but then particularly under Suharto, the rhetoric of upholding the constitutional integrity of the fledgling republic and the nationalist project was deployed as a grammar of legitimacy to justify an intensive centralization of authority with local elites firmly attached by patronage networks to a hierarchical state power-base in Jakarta.⁵ Suharto was able to ensure support for his leadership by restructuring the political system and coopting or nullifying potential opposition within the ruling coalition by using a mixture of 'fear and reward' across and between the state bureaucracy, business, and the military. As Harold Crouch once noted, 'political competition among the elite did not involve policy, but power and the distribution of spoils.'⁶

In fact, the post-Suharto constitutional amendments were really geared towards preventing a reversion to authoritarianism, which had consolidated itself within and through the 1945 Constitution from 1959-1998. But many nationalists in Indonesia hold inviolable two key aspects of the republic's identity, namely the rejection of an Islamic state and the upholding of the state ideology (Pancasila) respectively. For political gatekeepers of the Republic's inheritance, the prospect of opening the Constitution to change that might jeopardize these twin pillars was and is viewed as non-negotiable. Incumbents and reformers were faced with the tricky and perplexing

⁵ Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme Indonesia* (Indonesian Constitution and Constitutionalism) (2005); Paul J. Carnegie, 'Trade-offs, Compromise and Democratization in a Post-Authoritarian Setting' (2012) 8:13 *Asian Social Science* 73.

⁶ Harold Crouch 'Patrimonialism and Military Rule in Indonesia' (1979) 31:4 *World Politics* 578.

problem of trying to dismantle the most authoritarian, personalistic and highly centralized structures of Suharto's rule whilst not disturbing these dual pillars.

In this context, 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, there was a renegotiation and compromise going on with specific social imaginary and contingent historical experience. A bit like gravity, you cannot see it but it exerts a pull nonetheless.

Interestingly, 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.⁷ In fact, the constitutional amendments enacted post-1998, saw the MPR taking responsibility for reducing its own power. Since 2004, it is no longer the highest governing body in Indonesia but stands on a comparable footing with the DPR (*Dewan Perwakilan Rakyat*, People's Representative Council), the State Audit Board (BPK), the Supreme Court and the Constitutional Court.⁸ It may seem a counterintuitive understanding of socio-political change but pragmatic interactions and forms of compromise can help smooth the renegotiation of new social contracts without undue social disturbance. What we recognize here in a very Aristotelian way is that political activity is what constitutes stable futures from troubled pasts.⁹

The restructured MPR now consists entirely of popularly elected members of the DPR and DPD (*Dewan Perwakilan Daerah*, 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 seven percent of the vote that should translate broadly to seven percent of the seats in parliament. This design prevents any one party gaining an outright majority and dominance. The increased competition for office, logistically at least, represents a gradual dilution of the system of top-down executive

⁷ Donald L. Horowitz n 4, 262.

⁸ Andrew Ellis, 'Constitutional Reform in Indonesia: A Retrospective' (2005) *International Institute for Democracy and Electoral Assistance*, 1-19.

⁹ Paul J. Carnegie n 2, 518.

appointments and manipulated assembly votes.¹⁰ Constitutional limitations on the power of the executive also meant the DPR gained more power 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 now directly elected and can only serve one renewable five-year term.¹¹ 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 twenty percent of the vote in half of the Indonesian provinces.¹² The thinking behind the formula is that it favours moderate candidates who can appeal to different interests and form alliances across party lines and maintain broad support in the legislature and across the country.¹³ This is not to say Indonesia's constitutional reform is without issues, far from it. The reality of reform is always far more messy and paradoxical than first assumed.

In Indonesia, although an increase in contestation and competition for office is supposed to improve representation and legitimacy it has been accompanied by new emergent layers of corruption with new provincial political elites seeking to maintain their patronage links with the centre.¹⁴ Similarly, although altering the composition of parliament is meant to eventually lessen regional distrust of central government, in many cases, community interests remain marginalized and relatively subordinated to the interests of local patrons of national parties. Suffice to say, personality and money politics still loom large.¹⁵

For sure, reform is a 'one step forward one step back' kind of process. Problems and flaws are still apparent, Indonesia continues to struggle with corruption issues, ongoing policy ineffectiveness, judicial problems, institutional frictions, and personality politics but there has been not insignificant reform and a routinization of politics.¹⁶ Although far from perfect, Indonesia's constitutional reform is not a wholly negative outcome and in certain respects, it is

¹⁰ Paul J. Carnegie n 2, 523.

¹¹ R. William Liddle and Saiful Mujani 'Indonesia in 2005: A New Multiparty Presidential Democracy' (2006) 46:1 *Asian Survey* 132-139.

¹² Andrew Ellis n 7, 15.

¹³ R. William Liddle and Saiful Mujani n 10, 132-139.

¹⁴ Paul J. Carnegie n 2, 524.

¹⁵ Paige Johnson Tan 'Indonesia Seven Years after Soeharto: Party System Institutionalization in a New Democracy' (2006) 28:1 *Contemporary Southeast Asia* 88-114.

¹⁶ Paul J. Carnegie n 5, 77.

better than the other alternatives. The most important development in the wider scheme of things is that the new constitutional framework of political contestation is accepted. The 'legal state' of Indonesia is now more democratic in form. There is a clearer separation of powers between the executive, legislature and judiciary and human rights protections are now more delineated as norms, if not always in practice.

LESSONS FOR THE PACIFIC?

What has all of this got to do with the Pacific? Well, firstly, the Indonesian experience shows us that countries do not emerge with readymade constitutions and a sense of constitutionalism overnight. Normative ideas of constitutions may help inform what policy makers and politicians are seeking to establish, but this tells us little about how a country ends up with the framework it does. The process of establishing a constitutional framework and the obstacles that militate against inculcating, performing and reproducing constitutionalism are multiple.

Secondly, reorienting habituated patterns of accumulating and exercising political power is not merely a matter of introducing generic or imitative articles in a constitution. It is really more do with acceptance and the ability to routinize constitutionally mandated politics in a particular setting. In other words, all major political actors must eventually accept and operate (and consequently be contained) within the constitutional rules of check, balances, contestation and procedure. If a more democratic form of politics is to emerge without undue social disturbance, this requires negotiation and compromise.

Thirdly, gradual constitutional reform of overly centralized political power structures can lay crucial foundations for the cultivation of more effective representation and higher degrees of democratic legitimacy. The restructuring of existing assemblies or introducing new representative bodies can also open up symbolic political space and greater recognition for previously marginalized segments of society. In other words, compositional and processual alterations can provide steps toward improving representation and accountability over time, albeit constrained and by degrees.

CONCLUSION

As the Indonesian case shows, constitutional rearrangements vis-à-vis political power are complicated and contingent affairs. The process of constitutional reform involves gradual renegotiation with varying legacies of the past and it can follow unusual paths. Moreover, there is no reason to assume that the process of constitutional reform in PICs has to necessarily follow or reflect western norms. If the Indonesia experience teaches us anything, it is that they do not need to and they will be no less constitutional democracies for that, if that is indeed what eventuates. What emerges might not meet a western liberal definition of constitutional democracy but there is no one-size-fits-all definition, rather many variations.

Generic prescriptions transferred from outside deserve to be treated with caution and an intelligent skepticism. They are not necessarily appropriate for countries with particular patterns of socio-economic, religious and ethno-cultural tension and cleavage. Legacies of the past will no doubt represent unavoidable parts of any prospective constitutional reform in PICs. Success (if it can even be called that) will depend largely on translating opportunity, timing and momentum into meaningful reform that is accepted by the people themselves and can sustain over time. If they can uphold and reproduce accepted reforms, then there is the possibility of shielding the pluralism and variety of their diverse societies from the capricious abuse of executive power and a one size fits all 'tyranny of the majority'. Lastly, we must leave those who find pleasure in passing sweeping censures on whole regions to do so as they like. The PICs will live on with or without their approval.