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THE CHALLENGE OF EMBRACING HUMAN RIGHTS AS A FUNDAMENTAL ELEMENT OF CONSTITUTIONALISM: A STUDY OF INDONESIA'S CONSTITUTIONAL JOURNEY

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Abstract
The adoption of human rights in the constitution is crucial in enhancing constitutionalism. In accordance with social contract theory, the people are the ultimate source of authority, from which governmental power is derived, and the primary tasks of the government encompass the protection of human rights. In any event, there are some particular constitutions are referred to 'constitution without constitutionalism' or as 'sham constitutionalism', both of which indicate the existence or absence of the rule of law, separation of powers, and the protection of human rights. These types of constitution may likewise contribute to the establishment of authoritarianism. This phenomenon generates a political pattern, known as 'political paradox'. In the context of Indonesia's constitutional journey, this pattern illustrates that despite the constitutional reform in 1999-2002 adopting human rights principles, the acceptance by the people continues to encounter significant challenge. The underlying cause is the impact of the political paradox, which encompasses political dynamics, cultural perspective, and background history of constitution drafting. This paradox entraps public's perception regarding the value of democracy and human rights. They continue to posit these values as external construct that do not align with genuine Indonesian values. Accordingly, it is crucial to elevate critical thinking in the analysis of history of Indonesian constitution to ensure the correct and comprehensive understanding, thereby enabling the incorporation of democratic ideal and human rights principles within the structure of 'our law' acceptance, as a core component of constitutionalism.

Keywords: Constitutionalism, Human Rights, Political Paradox, Indonesian Constitutional Reform

INTRODUCTION

According to the contract social theory, the primary aim of individuals in establishing a state is to protect their natural rights. In his book, Two Treatises of Government (1689), John Locke asserted that "the great and chief end, therefore, of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property"(Locke, 1796)."Property" according to Locke in this issue is the natural rights, consist of life, liberty, and estates. In the later development, these natural rights known as human rights. The protection of individual's natural rights is formulated in an 'original compact' to establish a state, or a 'social contract', which then take a form as a constitution.

Locke's theory explains that prior to the existence of the political authority or a state or a government, the individuals lived in a 'state of nature'. Locke described the state of nature as state of 'perfect freedom' and 'of equality'. In this peace condition of state, individuals possessed the absolute autonomy to do any actions, and no-one had more power and authority than any other because all humans had the same status and same advantages to the nature. There was no human law established to maintain law enforcement and social order, only law of nature bound the individuals' actions. However, among those people, there were some individuals who might have evil intention and became the offender or the aggressor by attacking other's freedom, equality and possessions. Because in that state no human law existed and the law of nature gave the rights of every human to defend themselves, thus every individual had authority to punish others who act as offenders. The peace condition was changed into a condition of full alertness and sense of unease, or 'the state of war'. This situation impelled people to find a solution by agreeing to appoint one person or a group of persons to have authority over the individuals to make laws, to punish

the offenders, the maintain the orders, with the objective to preserve their natural rights, those are their freedom, equality and estates. This mutual agreement, in the modern context, is the constitution.

The background of Locke's theory is the respond of the patriarchal political thought of Sir Robert Filmer which was used by the tyranny regimes to legitimate their authoritarian government. Locke attacked the thought which postulate the political power as a sacred power comes from the God, so if someone against the regime meaning that person against the will of God. Hence, Locke asserted that the political power of the authority originates from the people as a mandate from the people which defines in the social contract. He also explained that the power government should be limited and separated. Moreover, this limitation of power become the concept of constitutionalism as well as the concept of government's obligation to respect, to protect, to fulfill the human rights.

The progress of the concept of constitutionalism and the human rights theory had been developing parallel, side by side. They have the same root coming from defiance against tyranny. Therefore, we cannot separate human rights out of constitution. So that, human rights provisions must be listed in the text of constitution and the fundamental element of constitutionalism should be the protection of human rights.

William G. Andrews statesthat the concept of constitutionalism could be simplified with the phrase "limited government"(William G. Andrews, 1961). Furthermore, Andrew Heywood defines constitutionalism in narrow sense and broader sense. In narrow sense he views constitutionalism as "the practice of limited government … exist when government institutions and political processes are effectively constrained by constitutional rules."(Andrew Heywood, 2021). In broader sense, "… constitutionalism is a set of political values and devices that fragment power, thereby creating a network of checks and balances".Furthermore, he explains that "… such devices include codified constitutions, bill of rights, the separation of powers, bicameralism and federalism." Moreover, Alec Stone Sweet views constitutionalism as "cultural and ideological construct", therefore it implies to the commitment of all political community such as public officials, interest groups, political parties engage in action within the parameters of constitutional values(Sweet, 2017). Jack M. Balkin delivers the idea that constitutionalism is not only how to make constitution as 'higher law' and 'basic law', but constitution should be also "our law"(Jack M. Balkin, 2011). It means that the constitution should performs as "political culture" that encourage the people to perceive themselves as a "collective subject" who is the owner as well as the subject of the laws and core values in the Constitution that serves as guiding principles.

Referring to Heywood's broad definition on constitutionalism, human rights provisions are not only the essential element of constitutionalism, but it also should function as a 'set of political values and devices that fragment power' which is able to become part of 'political values' as Balkin's theory. However, the historical development of human rights thought shows us that the recognition of human rightshas been full of struggle because human rights concept was born from the defiance against tyranny. To achieve the status of 'our law' and becoming 'political values', there has been many challenges for human rights, especially in Asian and African countries because of the fact that the initial human rights development occurred in western world.

H.W.O. Okoth-Ogendoand Atilio Boron introduce the 'constitution without constitutionalism' phenomenon in African and Latin American countries(Okoth-Ogendo, 1988).The 'constitution without constitutionalism' represents a condition where a state maintains a constitutional framework yet fails to enforce vital constitutionalism doctrines, including the rule of law, the separation of powers, and the protection of human rights. They argue that there is 'political paradox' in accepting the concept of constitutionalism in the

constitution of many African and Latin American countries. The paradox lies in the existence of constitutions in African and Latin America countries without the application of the principles of constitutionalism, such as limited government, the supremacy of the law, democracy and the protection of human rights. In Asia, Albert H.Y. Chen argues that, for some periods of time, the 'constitution without constitutionalism' phenomenon could also be attached to describe the recognition of constitutionalism in some Asian countries(Chen, 2014).He asserts that in the realm of political and legal frameworks of a country, the formulation of a constitution is comparatively straightforward; however, the challenge lies in its execution, by implementing the constitution principles and bound with them, andthis is the essence of the constitutionalism.Furthermore, Chen notes that there is a 'syndrome' to posit the idea of constitutionalism as western concept which transplanted to some Asian countries.

David S. Law and Mila Versteeg also present similar phenomenon called "sham constitutions", that is condition when there is a "magnitude of the gap between what a country promises in its constitution and what it delivers in practice"(Law & Versteeg, 2013). However, Law and Mila notes that there are such conditions which some nations may effectively uphold a greater number of rights in practice thanthose explicitly promised in its constitution. Therefore, to categorize a constitution as a sham constitution, we have to analyze how large the divergence, the more significant the gap between the promises made in a constitution and their practical realization giving the higher degree for a constitution regarded as a sham constitution.

Furthermore, Dieter Grimm considers set of indicator function of a constitution to examine the achievement of constitutionalism(Rosenfeld & Sajó, 2012). According to this, Chen views that many countries in the world, especially in Asia, Africa, and Latin America, are still struggling to achieve the highest degree of constitutionalism.However, there are some challenges facing by some countries to get achievement of constitutionalism, those are political dynamics, cultural views, and historical millstone. Referring to Okoth-Orgendo's and Boron's theory, those challenges are similar of 'political paradox' in the phenomenon of 'constitutional without constitutionalism'.

In Asia, Chen argues that there has been progress for the constitutionalism recognition in some degrees while he also acknowledges the challenges to accept the concept of constitutionalism including the human rights principles in Asian Countries because those values were "derived from the theory and practice of legal transplant" form the western ideas(Saunders, 2014). This article will discuss how Indonesia as one of Asian countries has been struggling to achieve some degree of constitutionalism based on the recognition of human rights principles. The study will focus on Indonesia's constitutional journey since the preparation of the draft constitution prior to independence in 1945 until the constitutional reform as the result of thechange of regime in 1998.It will also examine why it is difficult to embrace human rights values to be recognized as 'our law' even though the Constitution has adopted them in the amendment of Constitution. The analysis will also elaborate the 'political paradox' situation in Indonesia and the recent discourse on the demand to return to original version of the 1945 Constitution.

RESULT AND DISCUSSION

Human Rights Promise in the Indonesian Constitution Following Amendment

After the fall of Suharto's regime in Indonesia in 1998, the people of Indonesia urged for political transformation, from authoritarian rule to democratic government. One of the essential agendas was the constitutional reform. From 1999 to 2002, the People's Consultative Assembly (MajelisPermusyarawatan Rakyat – MPR) prepared a four-stages of

constitutional change through amendment mechanism. The aim of the amendments is to achieve constitutionalism by creating the guarantee of separation of power, check and balances mechanism, democratic election system, and adopting human rights provisions(Harijanti & Lindsey, 2006).

The first stage of amendment in 1999, brought several significant changes, especially in limiting executive power and strengthening the position of the parliament or the House of Representatives as a legislative body. This amendment transforms the power to form the laws from President's authority to Parliament's authority. In the Article 20 of amended 1945 Constitution, it states that "The House of Representatives holds the power to make laws". Previously, in original version of 1945 Constitution,the President had an authority to make laws in agreement with the House of Representatives/Parliament. After the amendment, the role of President is to submit the draft laws to the parliament and discussed the draft laws, either proposed by the President or by the Parliament, to acquire joint approval.The amendment also changes term limits for the President and Vice President to be re-elected. Before the amendment there was no limitation to be re-elected after hold office for a term of five years. Afterwards, the amendment givesa limitation, by ruling that "President and Vice President can only serve five years in one term and be re-elected only for one subsequent term".

The second stage of amendment in 2000 fortifiedhuman rights principles within the constitution aligning with the demands of people's reform movement. The People's Consultative Assembly (MPR) adopted human rights provisions in new additional special chapter, Chapter XA of 1945 amended Constitution. This Chapter consists of ten articles, Articles 28A to 28J, deals with civil and political rights, and economic, social and cultural rights as well as the state's duty to protect and fulfill those rights. In addition, the constitution also mandates the establishment of legislation product to guarantee the implementation of human rights in accordance with the principles of constitutional democratic state.

The third stage of constitutional amendment in 2001 tries to adjust and harmonize the division of power, ensuring that each institution operates within its designated role and scope. The core objectives pursued in this endeavor include a fair and equitable distribution of power, the establishment of balance of power, and the implementation supervision and mutual control mechanisms. The essential changes in this stage of amendment are (1) strengthening the principle of the rule of law as the basis for the administration of government; (2) shifting the exercise of people's sovereignty from the supremacy institution (fully exercised by MPR) to supremacy constitution (people's sovereignty is implemented according to the constitution); (3) rearrange the constitutional authority of the President, and elaborating presidential candidacy and impeachment mechanism; (4) reformulating election process, (5) establishing new state institutions, such as the Constitutional Court, the Judicial Commission, the Regional Representative Council (DPD), and reforming the existing state institutions, such as the Supreme Court and the State Audit Board.

At last, within the fourth amendment in 2002, there are changes on the composition of MPR members which consists only two elements, namely members of the House of Representatives and members of the DPD, all by election, and no more appointed members. The amendment also adds more norms on the presidential election mechanism, abolish the Supreme Advisory Council, reform the constitution provisions on education, cultural, social and economic welfare, and the mechanism to change the constitution.

Human Rights in the Indonesian Constitution: High Promise, Low Acceptance

After the regime change in 1998, the spirit of incorporating human rights principles into the constitution found its space. The demand for the state to recognize, respect, and

protect human rights was responded to with the Decree of the People's Consultative Assembly of the Republic of Indonesia (TAP MPR RI) No. XVII of 1998 concerning Human Rights and Law (UU) No. 39 of 1999 concerning Human Rights. The events in East Timor in 1999 also prompted the Indonesian government to create Law No. 26 of 2000 concerning Human Rights Courts. This culminated during the series of amendments to the 1945 Constitution of the Republic of Indonesia. In the second amendment of the Constitution NRI 1945 in 2000, human rights were included as constitutional norms in a special chapter on human rights. Furthermore, to ensure and to guarantee the protection of human rights, the amendment of Constitution establishes the Constitutional Court with the power to exercise the judicial review(I.D.G. Palguna et al., 2022).

The amendments to the 1945 Constitution from 1999 to 2002, which adopting the explicit list of human rights provisions, hold the promise of transforming this nation's outlook on human rights. Moreover, some of the changes of the 1945 Constitution are drivenfrom the principles of democracy and human rights.Consequently, the fundamental nature of human rights should have emerged as the foundation of constitutionalism and recognized by the people as 'our law'.However, the actual circumstances in this country havebeen far from this ideal condition.Many Indonesian people as well as the political elites still view human rights principles as estranged values, and they accept these principles half-hearted. This condition also correspondingly affects the lack of engagement with human rights as a basic guideline for legislation makings, executive orders, and judicial decisions.Hereafter, it raises the question of what factors contributed to this problem.

Referring to Law's and Versteeg's category of 'sham constitutions', the failure to prioritize human rights as a fundamental standard in the establishment of legislation, the issuance of executive decrees, and the administration of judicial judgments could lead to the condition of 'shame constitutions.' It should raise the awareness of Indonesian people that the reluctant to recognize human rights values as 'our law' and as integral part of Indonesia's philosophical foundation of the nation, the Pancasila, will widen the distance of the gap between the promise and the realization of constitutional values, especially with the demand to return to original version of 1945 Constitution which had no explicit human rights provisions.

The notion of democracy and human rights continues to be perceived as external constructs derived from Western ideologies, which are deemed incompatible with the Indonesian local values. There has been mounting pressure from certain conservative factions, various prominent individuals, scholars, and retired military officials advocating for a reenactment of the 1945 Constitution to its original form, as it is believed to resonate more profoundly with the intrinsic values of the Indonesian nation. These groups also argue that the 1999-2002constitution amendment was invalidated due to its deviation from the original intent of the framers of the 1945 Constitution.

The Authoritarian Design of the 1945 Original Constitution: Historical Fact

During the enactment of 1945 original Constitution, Indonesia experienced the authoritarian regimes. Both regimes, Sukarno and Suharto, used the 1945 original Constitution to legitimize their authoritarianism. In his doctoral dissertation, Denny Indrayana argues that the weaknesses of the 1945 original Constitution contributed to the practice of authoritarianism in Indonesia(Indrayana, 2008).Sukarno used the politics of Guided Democracy to maintain his authoritarian administration and later Suharto used the concept of Pancasila Democracy to justify his authoritarian political actions. Furthermore, Jakob Tobing also argues that the authoritarian character emerged from the initial design of the 1945 original Constitution(Jakob Tobing, 2023). Accordingly, he considers that every

time the 1945 original Constitution is enforced, it carries the potential to give rise to an authoritarian form of government.

The original text of the 1945 Constitution prior to the 1999-2002 amendments actually did not explicitly include a formulation of human rights. Although there were some views that the formulation of Article 28 of 1945 original Constitutionto outlinethe freedom of association and freedom of expression in the constitution shall be prescribed by law considered as the recognition of human rights, however, I disagree with that.Likewise, other articles, such as Article 27 paragraph (1), Article 27 paragraph (2), Article 28, Article 29 paragraph (2), and Article 31 paragraph (1) of1945 original Constitution while containing norms related to human rights, are still insufficient to be regarded as a constitutional recognition on human rights.

This is a historical fact that there was a debate among the founding parents when drafting the Constitution in 1945 regarding whetherthe draft of constitution should adopt the explicit inclusion of fundamental rights in the meeting of the Investigating Commission for Preparatory Works for Independence (Badan Penyelidik Usaha-Usaha Kemerdekaan - BPUPK).This historical debate continues to influence pro and contra views on human rightsto this day, even though human rights have been included in the amended 1945 Constitution.This discussion was influenced by the differing views of some prominent figures in the independence movement, member of BPUPK: Muhammad Yamin and Mohammad Hatta on one side, Soekarno and Soepomo on the other. Yamin and Hatta proposed to includefundamental rights in the Constitution.Conversely, Sukarno and Soepomo rejected it with the argumentation that the concept is based on the western individual, so that it contradictswith the concept of state integralism and kinship which proposed by Soepomo at the previous meetings.

It is important to remember that at the time of the debate in 1945, the 1948 Universal Declaration of Human Rights had not adopted yet(Assembly, 1948). Therefore, the references in that debate were western documents such as the Declaration of Rights Philadelphia 1774, the Declaration of Independence of America 1776, the United States (U.S.) Constitution 1787, and especially the *Déclaration des Droits de l'Homme et du Citoyen* 1789(Congress, 1774). Moreover, it should also be noted that the constitutional debate forum was in a commission which formed and supervised by the Japanese Military Authority, and the discussion was on the preparation of Indonesia independence under Japanese's concept, that is the independent nation Indonesia as part of the Greater East-Asia Co-Prosperity sphere project(Jakob Tobing, 2023). In the view of Soepomo, the main drafter of the Constitution, 'the state integralist' concept as the foundation of the nation of Indonesia referred to the Germany's totalitarian school of thought and Japan's kinship model(NobertusJegalus, n.d.).

On 31 May 1945, Soepomo expounded upon his perspectives regarding the suitable foundational framework to establish Indonesia as independent nation with his concept, integralist state and kinship state(Kusuma, 2004). Initially, he elaborated three theories of state: (a) individualistic theory as thought by Thomas Hobbes, John Locke, J.J. Rousseau dan H.J. Laski; (b) class theory by Karl Marx, Engels and Lenin; (c) Integralist theory by Spinoza, Adam Muller and Hegel. Then, he argued that the selection theory which aligns with the nature and characteristic of Indonesian society is the concept of integralist state. He described the integralist state as cohesive organization of the people, no dualism between the state and its constituents. The state shall acknowledge and uphold the existence of all societal groups, yet the people and the groups must recognize their status as an organic component of the state as unified entity. He asserted that the head of the integralist state and government officials must be true leader with the concept of Javanese leadership concept

"*manunggalingkawulagusti*", the unity of the leaders and its people which the leader has a role as a father or mother for his or her children, similar to paternalistic political theory(Satrio, 2023).

Thereafter, on 11 July 1945, Muhammad Yamin proposed the declaration of rights referring to Philadelphia Declaration of Rights 1774, U.S. Declaration of Independence 1776 and U.S. Constitution 1787 in the plenary of meeting of BPUPK. However, in the meeting of the Committee of Basic Law, Soepomo opposed that idea by stating that the concept of the declaration of rights is based on the individualism concept, therefore, it does not comply with the kinship state model and the nature of east values. In the plenary of meeting of BPUPK on 15 July 1945, Soekarno supported the Soepomo's argumentation and rejected the idea to adopt the declaration of right in the constitution. Hatta responded Sukarno by arguing that even though he is on the position against individualism and supporting collectivism, but there should be constitutional norms on the guarantee of freedom of speech to avoid the practice of *macthstaat* or power based state or authoritarian state. At that moment, Soepomo repeated his argument regarding the kinship state concept and asserted that he goes against the individualism. He also argued that Hatta's proposal actually still based on individualism, however, he believed that in the kinship state concept the people can still have freedom of association and assembly as well as of expression. At the final stage of the constitution drafting, the Commission decided on the final draft of the Constitution that did not include a charter of fundamental rights, although it was claimed to have adopted several citizens' rights scattered across various articles, including Hatta's suggestion on freedom of association, assembly, and expression with subsequent law as a compromise.

The debate among the constitution framers has been continuing for decades afterward and influencing the discourse on the recognition and applicability of human rights in Indonesia. Even after the constitution NRI 1945 adopted human rights norms through amendments, the acceptance of these human rights norms has not been complete due to reasons of ideological and cultural constraint.Rhona K.M. Smith, et. al., have critiqued the pedagogical approach to human rights within Indonesian universities, positing that it remains predominantly introspective, emphasizing the pursuit of indigenous values rather than adopting an "international code" established post-World War II(Rhona K.M. Smith, 2018). Consequently, the curriculum tends to contrast local cultural norms against external values. Furthermore, there exists an initiative to regenerate Soepomo's concept of the integralist state, which has led to the framing of human rights discourse through the lens of the integralist state, thereby categorizing them as citizen's rights. Consequently, the discourse surrounding human rights is approached with skepticism, often perceived as self-serving (individualistic), liberal, and emblematic of "Western" values. The historical basis of the debate within the BPUPK regarding the necessity of including a declaration of rights in the constitutional draft during the BPUPK meetings has become an obstacle to establishing human rights as the essence and foundation for the purpose of the state, as well as for guiding the implementation of constitutionalism.

The Dynamic of Indonesian Constitutional Journey

Indeed, there existed various dynamic perspectives regarding human rights in conjunction with the evolution of the Indonesian constitutional framework. Indonesia experienced several models of constitution. There were nine phases of Indonesia constitutional journey. The first is the constitutional drafting process on 28 May – 17 July 1945 in the time of World War II and under Japan colonization. The constitution drafting was facilitated by Japan Military Authority through a forum called

DokuritsuZyunbiTyoosakai (BPUPK) and the result should be reported to the Japan Military Authority(Jakob Tobing, 2023).

The second phase is the adoption of 1945 Constitution on 18 August 1945, one day after the proclamation of independence, in an urgent situation, under a rush time, because there was concern on the transfer of power from Japan to the Alliance. At that time, Sukarno asserted that the 1945 Constitution is a "flash"constitution, a *revolutiegrondwet* or revolution constitution, and promised that after reaching stable political situation, there will be a preparation of a new constitution.

The third phase is the revolution era, 1945-1949. In this time, the governance was not running effectively, and the 1945 Constitution was not exercised consistently due to the instability condition, the armed conflict with the Netherland military, and the series negotiation with the Netherland to get recognition of independence. At this beginning of independence, there was not many issues on human rights and constitution exercise.

The fourth phase is the federal state term. After the Netherland recognized Indonesia independence in December 1949, the country change to be federal and having new constitution, the 1949 Constitution of the Republic of the United States of Indonesia (Republik Indonesia Serikat – RIS). This constitution adopted the bill or rights and human rights principles within the constitution, and interestingly, Soepomo was one or the prominent drafter of this liberal and democratic constitution(Lubis, 1993).

Few months later, the fifth phase began. The federal system was changed and Indonesia returned to be the unitary state of government, and the country enacted the 1950 Provisional Constitution (Undang-Undang Dasar Sementara – UUDS).There was not much different between the 1949 Constitution of the Republic of the United States of Indonesia and the 1950 Provisional Constitution. This time was known as the time of liberal democracy. The first general election in 1955 elected the member of House of Representative and the members of the Constitution Counsel (the Konstituante). The Konstituante carried out task to draft the new constitution to replace the temporary constitution, the 1950 Provisional Constitution.

It is noteworthy that Adnan Buyung Nasution,in his doctoral dissertation in Utrecht University, observes that while the dominant perspective surrounding human rights is often perceived as representative of western values, the Konstituante, in contrast, unanimously acknowledged the universal applicability of human rights as intrinsic to human nature and present across all human civilizations(Nasution, 1992). Human rights are regarded as fundamental objectives of the state. Although during the Konstituante's discussion on human rights, Indonesia resonated with widespread sentiments reflecting anti-western, anti-colonial, and anti-capitalist, nevertheless,according to 1957 Konstituante's Minute ofmeetings, all factions within the Konstituante affirmed the acceptance of human rights as inherent to human dignity and as the central to constitutional governance.

However, in the year 1959, after the Konstitutanteallegedly failed to draft a new constitution, President Sukarno issued a Presidential Decree to reinforce the 1945 Constitution, and this was the beginning of the sixth phase, the authoritarian regime with "Guided Democracy"(Nugraha, 2023).Denny Indrayana gives three examples on Sukarno's practice of authoritarianism using the deficiencies of 1945 original Constitution. Firstly, when Sukarno dissolved the parliament subsequent to its rejection of a budget proposal he submitted in 1960 and secondly, when he intervened in the judicial branch by enacting Law No 19 of 1964 on Judicial Power; and thirdly, when he appointed as President for life in 1963.

The seventh phase started in 1966 when there was transfer of power from President Sukarno to Suharto. Suharto named his regime as "New Order" as the contrary to Sukarno

regime which he called as “Old Order”. Suharto created the doctrine of ‘Pancasila Democracy’ and claimed it as a part of the purely and consistently implementation of the 1945 Constitution. Suharto used the centralized and monolithic constitutional interpretation to justify his authoritarian regime.

In 1998, there was a change of political situation, an economic crisis happened followed by massive protest to the regime. In May 1998, President Suharto stepped down and the eighth phase begun, the reform era. The change of regime followed by the constitutional reform. During 1999-2002, the People’s Consultative Assembly drafted the change of 1945 Constitution with four stages of amendment. The human rights provisions adopted in 2000 in the second of amendment.

The ninth phase pertains to the actualization of the 1945 Constitution as amended in 1999 and finished in 2002. The primary challenge lies in actualizing the assimilation of constitutional values as intrinsic norms within the societal framework. A lukewarm endorsement of human rights principles constitutes a significant challenge that needs to be addressed.

The spirit of the amendment of the 1945 Constitution in 1999 to 2002 were supported by a strong desire to place human rights as an important matter, following the experience of 32 years under the New Order regime, during which human rights were seen as an obstacle to political stability, and the 1945 Constitution was often used as a 'shield' to maintain power(Muhtaj, 2007). In a similar context, the principles of democracy, the limitations and distribution of authority, as well as the ideals of decentralization, substantially affected the discussions regarding the formulation of the constitutional amendments, which, whether directly or indirectly, reinforced the commitment to integrating human rights norms into the constitutional framework.Nevertheless, in practice, this does not necessarily lead to a strong understanding of the acceptance of human rights in Indonesia. Doubts, suspicions, denials, and even rejection of human rights still frequently occur.

The Challenge of Embracing Human Rights as Fundamental Element of Constitutionalism in Indonesia

The historical evidenceindicated that the design of 1945 original Constitution wasemblematic of a totalitarian regime, and whenever it was exercised, it would create an authoritarianism. This context serves as a persuasive explanation for the exclusion of human rights provisions within the 1945 original Constitution and clarifies the background of the framers’ debate on that issue. Consideringthat human rights are integral element of constitutionalism, the absence of human rights provision in 1945 original Constitution may create constitution without constitutionalism.

Given the fact that the amendments of constitution in 1999-2002 have fundamentally changed constitution’s paradigm concerning democracy and human rights, however, the historical debate from 1945 on basis of originalism interpretation has impeded the acceptance of these principles. The perspectives articulated by Sukarno and Soepomo in 1945, which opposed the incorporation of human rights into the constitution, were claimed as representative of authentic Indonesian values and this perspective still continues until recent time even though the global and domestic political situation has changed.However, many people failed to understand the context of the debate at that time, which was influence by the Japanese fascism and German totalitarianism and conducted under the supervision of Japanese Military Authority during World War II.

Although the collectivism and kinship state concept continuously are posited by some groups as Indonesian local values, in fact, the democracy concept and human rights principles are part of the development of civilization. If we examine theIndonesia's constitutional evolution, Indonesia has accepted these values significantly prior to the

amendments of 1999-2002, specifically during the enforcement of the 1949 Constitution of the Republic of the United States of Indonesia and the 1950 Provisional Constitution. Moreover, in the debate of Konstituante in 1957, the Konstituanteunanimously recognized the universality of human rights,and accepted them as part ofhuman dignity and civilizations, and as the central to constitutional governance.

The desire to returnto the1945 original Constitution can be characterized as a reflection of a‘political paradox’. This paradox encompasses various political dynamics, cultural viewpoints, and significant historical events.The people of Indonesia ought to release themselves from this cognitive restriction. There should be a critical requirement for an insightful review of the framers’ debate during drafting the constitution in 1945, coupled with an exploration of how Sukarno and Suharto administrations used the constitution to justify their authoritarian regimes. Therefore, regardless any perceived inadequacies within the amended constitution, returning to original version of the 1945 Constitution is not a sensible option, as it may lay the groundwork for possible authoritarianism and eliminate the human rights principles in the constitution.

CONCLUSION

To embrace human rights as fundamental element of constitutionalism in Indonesia is encountering significant challenges. The human rights principles are not fully accepted by the Indonesian society as inherent values. Even, there exist a notable movementurging the reenactment of the original version of the 1945 Constitution, notwithstanding Indonesia’ historical experience with authoritarianism during the enforcement of the 1945 original Constitution under the Sukarno and the Suharto regimes. The political elites have endeavored to maintain their power by capitalizing on the ambiguity of constitutional interpretation, while the people remain ensnared in a state of uncritical awareness regarding political dynamics, cultural viewpoints, and historical occurrences,which are categorized as‘political paradox’. This paradox, regrettably, hasshaped the people’s perspective concerning conflict of “local” versus “universal” values in the constitution. Therefore, it is essential to enhance critical thinking when examining any historical constitutional events in Indonesiato reduce the risk of the emergence of authoritarianism and to encourage the acceptance of human rights principles.

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Auhor Biography

Taufik Basari is the Chairperson of the Commission for the Study of State Constitutional of the People's Consultative Assembly of the Republic of Indonesia (MPR RI). He is a human rights lawyer, legal scholar, and former Member of Parliament (2019-2024), with an extensive career spanning constitutional law, human rights advocacy, and legal reform. He has played a pivotal role in in shaping Indonesia's legislative and judicial landscape, particularly in promoting judicial independence, civil liberties, and democratic governance.

Beyond his parliamentary work, Taufik is a lecturer at the Faculty of Humanities, University of Indonesia, where he teaches philosophy and human rights. He holds a Bachelor of Law and a Bachelor of Philosophy, from the University of Indonesia and earned his LL.M. from Northwestern University as a Fulbright Scholar. He is currently pursuing a doctoral degree at Padjadjaran University, Bandung, with a research focus on

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As a practicing lawyer, Taufik has been at the forefront of human rights litigation, press freedom advocacy, and access to justice initiatives. His legal career began in 2001 as a public defender at the Jakarta Legal Aid Institute (LBH Jakarta), followed by his appointment as Director of Advocacy at the Indonesian Legal Aid Foundation (YLBHI) in 2006. He later co-founded the Community Legal Aid Institute (LBHM) in 2008.