





have been stiff resistance (based on human rights discourses) from other groups and individuals with secular-liberal backgrounds.

This paper would like to address the constitutional position of shari`a in three Muslim countries: Indonesia, Tunisia and Egypt. It will especially look at the on-going processes of constitutional revision in Tunisia and Egypt. Before delving into details of each country, I would like first to share with you two general observation.

First, the question of who leads the transitional period while the new constitution is being amended or redrafted has been a key factor to determine the final outcome of constitutional processes. In Indonesia, the new president who succeeded Soeharto was his vice president Habibie. Although he was a close ally of the former authoritarian president, Habibie was a civil democrat. He was no longer in the office when all processes of constitutional reform were completed in 2002. Yet, many would agree that President Habibie was one of important figures who played a greater role in making all constitutional and institutional changes required for establishing a democratic system, and especially for organizing a fair and free parliamentary election in 1999.

In Tunisia, the Prime Minister Mohammed Ghannouchi had briefly claimed to be the new President replacing Ben Ali, but this self-claim was contested by many to be in disagreement with the Tunisian constitution. Fouad Mebazaa was then instead appointed as Acting President following the Constitutional Council's interpretation over the constitution and with regard to the emergency situation. Although he was part of the former authoritarian regime (he was member of the Central Committee of the former ruling party, Constitutional Democratic Rally), Mebazaa was a good technocrat and politician. He was able to ensure that a fair and free election (October 2011) taking place during his short term in the office (15 January-12 December 2011). He was then succeeded by Moncef Marzuki who was unanimously voted by the newly elected Tunisian parliament members.

In Egypt, following the resignation of President Mubarak on 14 February 2011 after being in the office for almost thirty years, the presidential power was supposedly transferred to his vice President Omar Suleiman. Like PM Ghannouchi in Tunisia who could only occupied the state leadership for a single day, Suleiman also faced the same situation. However, unlike in Tunisia where a single person succeeded the presidency, in Egypt, the Supreme Council of the Armed Forces (SCAF), which consists of 20 senior military officers, was determined to govern Egypt until the new President elected in June 2012 (this month).

Second, the abstention of the army, as well as the police forces, from involving in the primary political position during the transitional period plays a vital role to bring out a fruitful outcome toward democratic system. While in Indonesia and Tunisia, their





‘seven words’, was eventually removed from the final and ratified draft of the preamble on 18 August 1945. For one view, the deletion of the seven words that day was a temporal or conditional consensus, and, hence, a tentative agreement, but for the other, the withdrawal of the seven words was a substantial agreement, and, hence, a decisive agreement, made by the Founding Fathers of the country for the sake of Indonesian unity. Since then, however, the status of the ‘seven words’ has been a constantly controversial issue.

The struggle for the seven words has remained an ongoing issue in Indonesian politics. It arose repeatedly during the history of Indonesia since its independence in 1945. Attempts to reintroduce the Islamic *shari`a* into the Indonesian Constitution have been made at least three times. The first attempt was in the meetings of the Constituent Assembly from 1957 to 1959. The second effort took place in the first years of the New Order era (1966-1998), during the meetings of the Annual Session of the People Consultative Assembly from 1966 to 1968. Finally, the third attempt occurred during the process of constitutional amendment in the annual meetings of the People Consultative Assembly in 2000, 2001 and 2002. All these attempts were, however, unsuccessful.

Before going further, I will present here the result of the 1999 Indonesian election as the context of constitutional reform in Indonesia from 2000 to 2002. Of 462 seats being contested, the nationalist wing-Struggle Indonesian Democratic Party (PDIP) won the election by occupying 153 seats (33 per cent). Next as the runner up, the nationalist ruling party under Soeharto regime (Golkar) came up with 120 seats (around 22 per cent). Two Islamic parties (PKB and PAN) with a strong national ideology got 51 seats (12 per cent) and 34 seats (7 per cent) respectively. All other Islamic parties together controlled around 16 per cent with 88 seats. If all seats of Islamic parties, regardless of their different political orientation, are combined against other non-Islamic parties, that resulted in 173 seats (35 per cent) vis-à-vis 289 seats (65 per cent).

The main focus of Islamic parties during the constitutional amendment was their proposal for the reinsertion of the seven words of the Jakarta Charter into Paragraph One of Article 29: “The state is based on belief in One God”.

A heated debate between contending factions over the constitutional status for Islamic *shari`a* took place mostly in 2002. The Islamic faction can be identified as the pro-amendment camp. They proposed two alternative drafts by inserting ‘seven words’ which then the Article would be amended as follows:

- The state is based on belief in One God *with the obligation to enforce Islamic shari`a for its adherents.*























of the seats. One would predict that should the constitutional revision in Egypt goes on with this political configuration, the position of shari'a in the new Egyptian constitution may become more powerful.

The second is the issue of which institution that is assigned to draft, or amend, the constitution is quite significant to confirm a successful constitutional reform. Unlike Indonesia and Tunisia whose parliament or people assembly automatically turn to be the CA, Egypt decides to establish a separate institution to draft a new constitution. The Egypt's People Assembly together with the Egypt's Shoura Council are jointly responsible for establishing a constituent assembly. From comparative constitutional view, the constituent assembly is less successful than the parliament in revising, or remaking a new, constitution. A study by Hassall and Saunders (2002) revealed that the experience of a number of countries in the Asia Pacific region demonstrated that the constituent assembly is often failed in achieving its ultimate objective due to the tension with the transitory power or the incumbent government.

The third is the extents to which political parties or other involved stakeholders are able to agree on a number of fundamental issues. Having a pre-consensus among members of the constitutional assembly before they start drafting a new constitution is somehow critical to produce a new constitution that is for all subjects of the country. Prior to their meetings, Indonesian parliament members had agreed on five issues: (1) to keep the preamble of the constitution unchanged, (2) to maintain the form of the state as a unitary republic, (3) to retain the presidential system, (4) to amend the constitution by addendum (inserting more paragraphs), and (5) to incorporate norms and principles as found in the Elucidation of the 1945 constitution into the Articles of the constitution. A slightly similar situation seems to be present in Tunisia as described above, but it is totally absent in Egypt.