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## **The essence of the 1999-2002 constitutional reform in Indonesia: remaking the Negara Hukum. A socio-legal study**

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### **Citation**

Tobing, J. (2023, June 28). *The essence of the 1999-2002 constitutional reform in Indonesia: remaking the Negara Hukum. A socio-legal study*. Meijers-reeks. Retrieved from <https://hdl.handle.net/1887/3628352>

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**Note:** To cite this publication please use the final published version (if applicable).

## I.1 THE 1999-2002 AMENDMENTS OF THE INDONESIAN CONSTITUTION: DIFFERENT VIEWS

After the end of the New Order (1966-1998), the Indonesian 1945 Constitution or UUD NRI 1945 (*Undang-Undang Dasar Negara Republik Indonesia 1945*)<sup>1</sup> was amended in quite a remarkable way. It involved gradual change through a seriatim process that lasted four years, from 1999 to 2002. The main actor was the People's Consultative Assembly of the Republic of Indonesia or MPR-RI (*Majelis Permusyawaratan Rakyat Republik Indonesia*), a state institution that had the authority to amend the Constitution under Article 37 of the 1945 Constitution.<sup>2</sup>

A democratic election in June 1999 formed the new MPR. Following the MPR rule of order, the MPR then established the BP-MPR (*Badan Pekerja MPR* – the Working Body).<sup>3</sup> During the MPR's first session in October 1999, the BP-MPR formed three PAH (*Panitia Ad-Hoc* – Ad-Hoc committees). PAH III was assigned to prepare the draft amendments to the Constitution. Later, over the three subsequent MPR sessions in 2000, 2001, and 2002, BP-MPR assigned PAH I to prepare the draft amendments.<sup>4</sup>

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1 The object of the amendment was the 1945 Constitution, which was reinstated by Presidential Decree on 5 July 1959 and is hereinafter referred to as the 1945 Constitution.

2 The MPR was the supreme state institution which had vast powers and exercised the people's sovereignty in full under the old 1945 Constitution (Article 1 [1] UUD NRI 1945). Every other state institution was accountable to the MPR.

3 I use the term 'Working Body' instead of 'Working Committee', as used in the English translation of Decrees of the People's Consultative Assembly of the Republic of Indonesia, 1999, published by the Sekretariat General of the People's Consultative Assembly, 1999 (*Badan Pekerja Majelis Permusyawaratan Rakyat, BP-MPR*). It is hereinafter referred to as the MPR Working Body.

4 During the 1999 MPR session, the BP-MPR formed three PAH, namely PAH I for preparing the draft of the MPR's decree on GBHN (*Garis-Garis Besar Haluan Negara* - Broad Guidelines of the State Policy), PAH II for preparing non-GBHN MPR decrees and PAH III for preparing the draft amendments of the 1945 Constitution. See Majelis Permusyawaratan Rakyat Republik Indonesia, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, Tahun Sidang 1999, Edisi Revisi, Sekretariat Jenderal, 2010*, p. 34. In the subsequent MPR sessions, the BP-MPR formed PAH I to prepare the draft of the amendment of the 1945 Constitution, PAH II to review the existing MPR decrees and to prepare the new necessary MPR decrees and a Special PAH (PAH Khusus) to assist PAH I and PAH II.

At the beginning of the MPR session, the MPR's factions agreed to reform the 1945 Constitution so long as the Preamble and the state's unitary form would be maintained. Changes would only be made to the 1945 Constitution's Articles and Elucidation.<sup>5</sup> Remarkably, the MPR prepared no drafts of desirable changes in advance. Instead, the MPR used the original UUD NRI 1945 as the working document and made changes based on the proposals put forward by the factions and the public at large.

The MPR did not plan the phased process from the beginning.<sup>6</sup> In fact, the process followed achievable results, until it was determined in August 2000 – at the end of the second amendment – that the whole constitutional amendment process should be completed during the 2002 MPR annual session at the latest.

The MPR always began discussions with an overview of the entire system. It started from the main principles and structure of the 1959 version of the 1945 Constitution. It made gradual changes to parts of the Constitution. It discussed in detail the underlying concepts of each proposed change and made conclusions as far as the deliberations allowed. With this approach, some 'simple' topics could be agreed upon without any difficulty. Other, more complex topics required long deliberations and so were solved over a longer period. This approach demanded time, the ability to exchange views and the ability to compromise. Eventually, one by one, the MPR reformed the embedded principles of the 1945 Constitution, introducing new principles, institutions and procedures. It ultimately changed the 1945 Constitution at its core.

According to Donald Horowitz, this approach was far from common in constitutional reform. He wrote of the process: "One of the many paradoxes of the course chosen is that it was a constitution crafted by insiders, some of them tainted by their former affiliation or collaboration with the old regime". Two other features of the process were equally unusual. The reform process's second characteristic was holding elections prior to constitutional change and the third was that the constitutional change occurred incrementally over several years. This insider-dominated, unusually sequenced, and unhurried Indonesian reform, Horowitz continued, succeeded in bringing about a constitutional democracy and steered Indonesia away from the dangers of ethnic and religious polarization and violence.<sup>7</sup>

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5 Ibid., p. 84.

6 Initially, the MPR planned to amend the UUD NRI 1945 in one go during the MPR general session in October 1999. When that could not be realized, the MPR decided to finalize the amendments by 18 August 2000, 55 years after the UUD 1945 was ratified on 18 August 1945. However, the amendments were not completed as planned.

7 Donald L. Horowitz, *Constitutional Change and Democracy in Indonesia*, Cambridge University Press, 2013, p. 1.

This manuscript's author was one of those insiders mentioned above. I was the chairman of PAH I, the MPR Committee assigned to prepare the amendments to the 1945 Constitution.<sup>8</sup> In this study, I have tried to retrospectively assess the process in an academic, detached, and analytical way. Below I will set out the methodology that I applied. In the following chapters, I will refer to other academic analyses of the amendment process in some detail. In this introduction, I would like to briefly survey a few of them.

This thesis is not the first academic work on the amendment of the Indonesian Constitution. The existing body of knowledge produced by both Indonesian and foreign researchers provides descriptions, observations, and explanations of Indonesia's constitutional change, many of which I will discuss in the chapters to come. To some of these studies I have contributed indirectly as an interviewee or first-person resource. Most of them agree broadly with the previous description of the reform, often praising both the process and outcome. Others have identified shortcomings. This thesis occasionally engages with these evaluations and will contest some accounts of both the perceived value and the alleged drawbacks of the amendment process as part of a systematic, chronological, and thematic treatise.

Most of the criticism concerns the *process* of amendment and, in particular, its perceived undemocratic nature. A well-known example is Denny Indrayana's PhD-thesis, in which he argues that only a constitutional revolution could have transformed the original 1945 Constitution into a democratic document. In his own words:

"[...] the Indonesian constitution-making process of 1999-2002 was not truly a democratic one. Some clear indications of the flawed process were the continuously changing amendment schedule; contamination of debate by some short-term political interests acting in bad faith; MPR failure to win the people's trust in its capacity as a constitution-making body; and limited and badly organized public participation."<sup>9</sup>

He adds, "the constitutional reform process adopted in South Africa and Thailand was certainly a better model than the method adopted in Indonesia, if viewed in an abstract sense"<sup>10</sup> In support of this argument, the conclusion of his dissertation quotes a newspaper report that posits that, after the amendments, Indonesia remains on a transitional and bumpy road to democracy.<sup>11</sup>

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8 The author, Jakob Tobing, had been the First Deputy Chairman of the GOLKAR National Executive Board, the ruling party in the Orde Baru (New Order) era. Later he left the GOLKAR leadership, and after Suharto's fall joined the PDI. In the 1999 parliamentary elections he was elected for the PDI. See PART V. Short Autobiography.

9 Ibid., p. 352.

10 Ibid., p. 360.

11 Ibid., p. 387. *The Asia Times*, 14 August 2002.

A similar critique has been voiced by human rights activist Bambang Widjojanto, who writes that “the reform to the constitution had been conducted in partial, piece-by-piece, patchy and not in systematic ways”, so that it “is unable to provide clarity on the construction of the values and the state structure which is to be built. Paradoxes and inconsistencies become impossible to avoid.”<sup>12</sup> More seriously, Widjojanto alleges that the constitutional reform in Indonesia is a failure because it was carried out by an institution with vested and short-term interests in the resulting political products – a conflict of interest.<sup>13</sup> An even stronger allegation concerning the perceived undemocratic nature of the amendment process is from RM. A.B. Kusuma, who accuses the NDI (National Democratic Institute), a US-based NGO, of having influenced the dismantling of the 1945 Constitution and the MPR members of “shamelessly” trying to follow the example of the US Constitution and government system.<sup>14</sup>

Not all critics are as outspoken as this. Renowned political scientist Harold Crouch, for instance, writes that:

“[...] the constitutional amendment proceeded in piecemeal fashion during four MPR seasons between 1999 and 2002. In the absence of a dominant party or coalition able to impose its will on MPR, the only way forward was through compromise. The long-established practice of the Guided Democracy and the New Order periods of taking decisions by consensus (*musyawarah mufakat*) rather than voting was continued into the Reformasi era.”<sup>15</sup>

Further, Crouch writes that “The process was slow and cumbersome partly because MPR not only lacked a dominant party but even a dominant coalition.” Crouch concludes that it was the inclusive deliberations that made the process slow and cumbersome,<sup>16</sup> something that according to Indonesian constitutional law professor Jimly Asshiddiqie could have been prevented if the amendment process would have been guided by an academic draft.<sup>17</sup>

By far the most comprehensive study of the Indonesian constitutional amendment process is one by political scientist Donald Horowitz. Despite his appreciation of the amendment process in several respects, Horowitz is also critical of its democratic legitimacy. He argues that Indonesia’s course deviated from standard operating procedures of democratic change and broke the ‘rules of the game’ in several respects. First, there was no serious

12 Bambang Widjojanto, Saldi Isra, Marwan Mas (Eds.), *Konstitusi Baru Melalui Komisi Konstitusi Independen*, Pustaka Sinar Harapan, 2002, p. 3.

13 *Ibid.*, pp. 56, 59.

14 RM. A.B. Kusuma, *Sistem Pemerintahan “Pendiri Negara” versus Sistem Pemerintahan Presidensial “Orde Reformasi”*, Badan Penerbit Fakultas Hukum, Universitas Indonesia, 2011, p. xv.

15 Harold Crouch, *Political Reform In Indonesia After Suharto*, Institute of South East Asian Studies, Singapore, 2010, p. 53.

16 *Ibid.*, p. 62.

17 *Kompas*, newspaper, 2 July 2002.

split within the ruling authoritarian elite, so there was no space for soft-liners or reformers inside the regime to negotiate with outside democratizers. Second, the government started the democratization process, followed by cooperation with the opposition. And third, the reform of the Constitution was conducted in a non-participatory way.<sup>18</sup>

Interestingly, there is not much specified criticism on the substance of the amended Constitution. A remarkable exception is UN Commission on Human Rights Special Rapporteur, Dto' Param Cumaraswamy. In his report on the Mission to Indonesia from 15 to 20 July 2002, he concludes that,

“When the Suharto regime was overthrown, an opportunity arose for the review of the 1945 Constitution and the adoption of a new Constitution to meet the aspirations of the people for a democratic country under the rule of law, as happened in the Philippines in 1987. Unfortunately, this did not happen. The piecemeal amendments to the Constitution since 1998 and moreover some of these amendments yet to be implemented are not satisfactory.”<sup>19</sup>

Cumaraswamy further reports that “[t]here is no constitutional provision expressly guaranteeing the independence of the judiciary. There is also no express constitutional provision guaranteeing the right to a fair trial.”<sup>20</sup> This suggests that he had either not properly read the amended Constitution or that he used a flawed translation, for Article 24 (1) clearly asserts that the judiciary is independent. Article 28D (1) moreover stipulates that every person shall be entitled to recognition, protection, and equitable legal certainty as well as equal treatment before the law.<sup>21</sup>

In summary, most of the critique concerns the perceived lack of democratic representation and participation in the amendment process. By contrast, the comments that have focused on substance are generally much

18 Donald L. Horowitz, *op.cit.*, pp. 8 – 15.

19 United Nations, *Economic and Social Council, E/CN.4/2003/65/Add.2, Commission on Human Rights, fifty-ninth session, 13 January 2003, item 11 (d) of the provisional agenda*, point 79 of Chapter X, Conclusions and Recommendations, p. 17. The Mission further reported that “neither the Constitutional Court nor the Judicial Commission has been set up” (p. 5).

20 *Ibid.*, point 4, p. 4. Further, the UN Mission recommended that “With regard to constitutional provisions concerning the administration of justice: (a) The Constitution should be amended to provide a complete separate chapter for the provision of an independent judiciary and an impartial prosecutorial service providing for fair trial procedures in accordance with international standards”.

21 Amended Article 24 (1) of UUD NRI 1945, decided on November 2001, asserts that: “The judicial power shall be independent and shall possess the power to organize the judiciary in order to enforce law and justice”. The new Articles 28A–28J confirm the adherence to human rights, including Article 28D (1), which stipulates that every person shall be entitled to recognition, guaranty, protection, equitable legal certainty, and equal treatment before the law. *The Mission* further reports in point 96 that “The judicial reform process that began in 1999 has been slow. There are a number of initiatives underway but it is unclear how they relate to each other. Whatever changes and reforms may have been undertaken by the Government and the judiciary, they are not seen in reality” (p. 20).

more positive. They recognize that the newly amended Constitution, although it was born from the womb of the old 1945 Constitution, stands at a clear distance from the original texts.

Renowned New Order dissident and human rights lawyer Adnan Buyung Nasution, who himself wrote a PhD-thesis on the attempt to make a new Indonesian constitution in the 1950s, argues that if the 1959 version of the 1945 Constitution had been abruptly replaced with a new one, this would have potentially led to much resistance, thereby derailing the whole process of constitutional reform. Instead, the “MPR successfully carried out the amendments in four rounds from 1999 to 2002”<sup>22</sup> and “with all its shortcomings, the success of the constitutional amendment is worthy of appreciation as a remarkable achievement.”<sup>23</sup> Australian expert in Indonesian law Tim Lindsey is quite outspoken, not only in his appreciation of the result but also of the nature of the amendment process: “[t]his result is all the more remarkable for Indonesia because it was the result of a genuinely democratic process ... Few countries have achieved so elaborate a transformation of their systems of governments and politics and law so quickly, solely through parliamentary process.”<sup>24</sup>

Other scholars have not focused as much on the procedure but rather on the outcomes, which they view quite positively. Leading expert on Asian constitutional law Tom Ginsburg comments that “[a]ccording to conventional wisdom, Indonesia did everything wrong but nevertheless managed to produce a vibrant constitutional democracy.”<sup>25</sup> Likewise, John Ferejohn and Pasquale Pasquino notice that democracy and the rule of law – desirable attributes for a new political system after the transition from an authoritarian regime – have been asserted and incorporated into the Constitution.<sup>26</sup> Edward Schneier argues that “[f]ew governments have undergone more rapid changes than that of Indonesia”<sup>27</sup> and Mirjam Künkler and Alfred Stephan write that “this world’s largest Muslim-majority country strikes most observers as a democratization miracle.”<sup>28</sup>

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22 Adnan Buyung Nasution, *op.cit.*, p. 102.

23 Adnan Buyung Nasution, *op.cit.*, p. 103.

24 Tim Lindsey, *Rewriting Rule of Law in Indonesia*, in *Asian Discourses of Rule of Law, Theories and implementation of rule of law in twelve Asian countries, France and the U.S.*, edited by Randall Peerenboom, RoutledgeCurzon, 2004, p. 296.

25 See back-page comments on Donald L. Horowitz, *op.cit.*

26 John Ferejohn and Pasquale Pasquino, *Rule of Democracy and Rule of Law*, in *Democracy and the Rule of Law*, Jose Maria Maravall and Adam Przeworski (ed.), 2010, p. 242.

27 Edward Schneier, *Crafting Constitutional Democracy, The Politics of Institutional Design*, Rowman & Littlefield Publishers, Inc., 2006, p. vii

28 Mirjam Künkler and Alfred Stephan, *Indonesian Democratization in Theoretical Perspective*, in Mirjam Künkler and Alfred Stephan (eds.), *Democracy & Islam in Indonesia*, Columbia University Press, New York, 2013, p. 1.



Interestingly, some of the critics cited above turn much more positive after having provided their critical comments cited above. Thus, Indrayana, in contrast with his previous comment, writes that given the complex and explosive political circumstances during the process, “the often-messy, uncertain and slow step-by-step process adopted in Indonesia was both a reasonable political compromise and perhaps the only way real change could be delivered to Indonesia’s constitutional arrangements without a major crisis.”<sup>29</sup> And while Jimly Asshiddiqie was critical about the process, he still finds that the amendments to the 1945 Constitution occurred rapidly and on a broad and fundamental scale:<sup>30</sup> “Substantively, the changes that occurred in relation to the 1945 Constitution have changed the Constitution of the Proclamation of Independence into a totally new constitution, though still named the 1945 Constitution.”<sup>31</sup>

And finally, some scholars give *me* credit for the ways in which the process turned out successfully. Australian historian R.E. Elson concludes that “[o]ver a period of four years from 1999 to 2002, MPR re-engineered the Constitution in far-reaching, almost miraculous ways. Jakob Tobing, formerly of GOLKAR, now of Megawati’s Indonesian Democratic Party of Struggle (PDI-P), energised the process as chair of the MPR review and drafting committee (*Panitia Ad-Hoc I – Ad-Hoc Committee I*), and ensured that the sense of importance, commitment and direction was maintained.”<sup>32</sup>

Whether this is true or not is not on me to judge. I will come back to the other assessments later on. The chapters in this thesis speak to them and will enable the reader to form their own opinion on the amendment process and its results. But what I do want to emphasize here is how remarkable it is that, through amending the 1945 Constitution, the MPR voluntarily reduced its unlimited power.<sup>33</sup> It transformed itself into a regular political institution, with certain and limited authority, equal to other state institutions, establishing the principles of separation of powers and checks and balances in a constitutional democracy. This is most uncommon and important for the reader to keep in mind in reading the upcoming chapters. They will try explain how this was possible and if indeed Indonesia “broke all the rules” as Ginsburg mentioned.

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29 Denny Indrayana, *op.cit.*, p. 360.

30 Jimly Asshiddiqie, *Perkembangan dan Konsolidasi Lembaga Negara Pasca Reformasi*, 2nd edition, Sinar Grafika, Jakarta, 2010, p. 298.

31 Jimly Asshiddiqie, *Menuju Negara Hukum Yang Demokratis*, PT Bhuna Ilmu Populer, Jakarta, 2009, p. 179.

32 R. E. Elson, *The Idea of Indonesia. A History*, Cambridge University Press, 2008, p. 294. Actually, the author had joined the opposition in 1994, helped to establish PDI-Perjuangan in 1997 and became the Vice Chairman of the Research and Development Centre of PDI-Perjuangan in 1997.

33 Again, under the original 1945 Constitution, the MPR was the highest state institution, which exercised the people’s sovereignty in full. It was a supreme political body whose power was unlimited and to whom all state institutions were responsible.



## I.2 RESEARCH QUESTIONS

This thesis will address the following research questions:

1. How did aspirations for a democratic constitution based on the rule of law evolve in Indonesia between 1945 and 1999?
2. Why was the original 1945 Constitution amended rather than replaced? What were its perceived strengths and shortcomings?
3. How did the MPR make changes to the 1945 Constitution between 1999 and 2002, and what were the main enabling and inhibiting factors in this process?
  - 3.1. How did the MPR develop and affirm the principles of *negara hukum* (rule of law) and make them the essence of the renewed 1945 Constitution?
  - 3.2. How did the main actors, institutional and personal, exchange views and deliberate, and how did they reach decisions?
  - 3.3. How did other actors and factors influence the reform process?
4. To which extent has the *negara hukum* (rule of law) been set out consistently in the amended constitution?

The focus of the research is the amendment process between 1999 to 2002. However, the research also addresses a range of historical events related to the amendment's structure and substance.

## I.3 THE CONTEXT OF INDONESIA'S CONSTITUTIONAL REFORM

The structure and substance of the amendments had to consider the peculiarities of Indonesia, i.e., its geographic and ethnic diversity, its constitutional history and struggle with the state's identity, the "sacred" character of the 1945 Constitution, the country's history of violent conflict, and the critical conditions surrounding the amendment process. This section will provide a short introduction into these peculiarities.

Indonesia is the largest archipelago in the world, with more than 13,446 islands.<sup>34</sup> It is inhabited by more than 268 million people,<sup>35</sup> which makes the country the fourth most populous in the world after China, India, and the United States. The population counts more than 1,238 ethnic communi-

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34 Indonesia's BIG (*Badan Informasi Geospasial* – Geospatial Information Agency), 2013.

35 Indonesia Population Projection 2010-2035, BAPPENAS (Badan Perencanaan Pembangunan Nasional - National Development Planning Agency), BPS (Biro Pusat Statistik – Central Bureau of Statistics), United Nation Population Fund, 2013.

ties (*suku* or tribe) and speaks more than 737 languages and dialects. More than 87.2% of the population is Muslim,<sup>36</sup> making Indonesia the country with the largest Muslim population in the world.<sup>37</sup> Indonesia was never a nation or a state before 1945.<sup>38</sup> Instead, it became a new unitary state with old heterogeneous societies.<sup>39</sup> Indonesian nationhood is of a *demos* type, as contrasted with an *ethnos* type: nations which have a common language, faith, and ethnic ancestry.<sup>40</sup> Except for the Special Region of Yogyakarta, the country's provincial and district boundaries were often not primarily determined by an ethnic, cultural, religious, or political entity, but rather by the consideration of an administrative span of control, as introduced by the Dutch colonial authorities. So, Indonesian provinces and districts are usually heterogenous. Thus, while the cohesive power of colonial rule initially guaranteed Indonesia's political unity, independence brought the latent primordial differences to the surface.

In the history of Indonesia's constitutional drafting fora, the question of whether the state's foundation should be Islamic or nationalist and based on *Pancasila* has been featured in every single political debate.<sup>41</sup> This happened for the first time in 1945 during a meeting of the Investigating Commission for the Preparation of Independence or BPUPK (*Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan – Dokuritsu Zyunbi Tyoosa Kai*).<sup>42</sup> It next occurred in the Constitutional Assembly forum from 1956-1959, the so-called *Konstituante*.<sup>43</sup>

36 BPS (Biro Pusat Statistik – Central Bureau of Statistics) 2010.

37 Pew Research Center, 2015.

38 This heterogeneous society was forced to unite under colonial rule. The Ethical Policy of the Dutch colonial regime generated western-educated elites, who subsequently brought new national awareness among the people. On October 28, 1928, a Youth Congress attended by representatives of youth organizations from all over the country declared a pledge, known as the Youth Pledge (*Sumpah Pemuda*). This event is often seen as a milestone in the development of the Indonesian nation.

39 Eka Darmaputera, *Pancasila and the Search for Identity and Modernity in Indonesian Society, A Cultural and Ethical Analysis*, a PhD dissertation, presented to The Faculty of The Joint Graduate Program, Boston College and Andover Newton Theological School, Newton Centre, Massachusetts, 1982, p. 28.

40 Compare Michel Seymour (ed.). *The Fate of the Nation State*, McGill-Queen's University Press, 2004, p. 48.

41 *Pancasila* is a Sanskrit word which means the five principles. 1. Belief in One and only God or Belief in Oneness of God (*Ketuhanan Yang Maha Esa*). 2. Just and civilized humanity (*Kemanusiaan Yang Adil dan Beradab*). 3. The unity of Indonesia (*Persatuan Indonesia*). 4. Democracy guided by the inner wisdom in the unanimity arising out of deliberations amongst representatives (*Kerakyatan Yang Dipimpin oleh Hikmat Kebijaksanaan, Dalam Permusyawaratan dan Perwakilan*). 5. Social justice for all of the people of Indonesia (*Keadilan Sosial bagi seluruh Rakyat Indonesia*).

42 See among others Sekretariat Negara Republik Indonesia, *Risalah Sidang Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan Indonesia (BPUPKI) – Panitia Persiapan Kemerdekaan Indonesia (PPKI), 28 Mei 1945 – 22 Agustus 1945*, Saafroedin Bahar, Ananda B. Kusuma and Nannie Hudawati (Eds.), Jakarta, 1995, pp. 71, 345 - 352.

43 Audrey R. Kahin, *Islam, Nationalism and Democracy, A Political Biography of Mohammad Natsir*, NUS Press Singapore, 2012, pp. 99 – 101. See III.3., III.3.3.

Since the early years of the Republic, Islamic political parties such as Masyumi (*Majelis Syura Muslimin Indonesia* – Shura Council of Muslims in Indonesia) had political programmes which attempted to turn Indonesia into an Islamic state. For example, the Congress of Masyumi in 1952 asserted that Masyumi strives for the establishment of a state based on the law according to Islam.<sup>44</sup> On the other hand, soon after independence, the nationalist 1945 Constitution obtained extraordinary status as a symbol of Indonesia's existence and dignity as a nation, built after a long and persistent struggle for independence. Hence, in most mainstream Indonesian politics, the symbolic nationalist dimension of the 1945 Constitution was valued even more than its actual contents.<sup>45</sup>

Throughout its first two decades of independence, Indonesia experienced much violent unrest, which caused millions to lose their lives. These struggles were either driven by: ideologies, such as fundamentalist Islamists fighting to establish an Islamic state<sup>46</sup>; communists attempting to establish a Soviet Republic; the military-instigated massacre of communists – and those accused of being communists – in 1965-1966;<sup>47</sup> separatism;<sup>48</sup> or by regional frustration and resistance against the central government.<sup>49</sup> For 40 years, Indonesia was under authoritarian regimes based on rules which were derived from and justified by the 1945 Constitution, namely under President Soekarno, from 1959 to 1966, and President Suharto, from 1966 to 1998. Eventually, in 1997, a monetary crisis triggered multiple crises which also engulfed Indonesia and created an opportunity to reform the country.<sup>50</sup>

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44 Deliar Noer, *Partai Islam di Pentas Nasional 1945-1965*, PT Pustaka Utama Grafiti, Jakarta, 1st printing, 1987, p. 141.

45 This idolatry position of UUD NRI 1945 also inhibited its improvement.

46 A group called DI (*Darul Islam* – The House of Islam) under Sekarmadji Maridjan Kartosoewirjo, with its military wing, *Tentara Islam Indonesia*, (TII - Indonesia Islamic Armed Forces) proclaimed an Islamic State of Indonesia in 1949. Their activities covered areas in West Java, Central Java, Aceh, South Sulawesi, and South Kalimantan. A military operation ended the movement in 1962.

47 See notably Geoffrey B. Robinson, *The killing season: a history of the Indonesian massacres, 1965-1966*, Princeton, NJ: Princeton University Press, 2018.

48 There were three main separatist movements in Indonesia: the Free Aceh Movement (GAM – *Gerakan Aceh Merdeka*) was led by Hasan di Tiro, the Republic of South Maluku (RMS – *Republik Maluku Selatan*) was proclaimed in April 1950 and was led by Soumokil, and the Organization of Free Papua (OPM – *Organisasi Papua Merdeka*). GAM began in 1976 and ended their movement through a peace agreement with the central government in Oslo in 2005. In Indonesia, RMS was overcome in November 1950, but since 1966, there has been an active element in the Netherlands. OPM was established in 1965 and is still active.

49 PRRI-Permesta's (*Pemerintah Revolusioner Republik Indonesia* - Revolutionary Government of the Republic of Indonesia – *Perjuangan Rakyat Semesta* - The Universal People's Struggle) rebellion took place from 1958 until 1959. PRRI-Permesta did not rebel to secede from Indonesia. It demanded more autonomy and just relationships with the central government. PRRI-Permesta covered areas in northern Sumatera and northern Sulawesi.

50 Samuel P. Huntington, *The Third Wave Democratization in the Late Twentieth Century*, University of Oklahoma Press: Norman, 1993, p. 129.

Suharto's earlier efforts to reduce the role of the military and to establish a civil supremacy political system had been opposed by many in his circle. Then, under the intense pressure from students and other oppositional groups and abandoned by his confidants,<sup>51</sup> President Suharto resigned on 21 May 1998, just two months after he was re-elected for the seventh time. Meanwhile, economic conditions were adverse and trust in the government had declined. The reputation of the military and police in the eyes of the people was deteriorating. The political system was almost paralyzed and the political situation was at a critical point. Relations between the central government and some provinces were also worsening. Separatist activities in Aceh and Papua escalated and were so strong in East Timor that they eventually led to its secession.<sup>52</sup> Meanwhile, Islamic fundamentalists intensified their activities.<sup>53</sup>

Constitutional reform occurred under the following conditions: the threat of confrontation with competing groups, the alleged existence of groups who were gearing up and waiting for a coup opportunity,<sup>54</sup> and the possibility of severe conflicts exploding and causing a "*bellum omnium contra omnes*"<sup>55</sup> – a war of all against all.

#### I.4 RESEARCH METHODOLOGY

This study adopts a socio-legal approach. It is based on library and empirical research. It also incorporates my own notes and observations as the chairman of the Ad-Hoc Committee I of the MPR Working Body or PAH I BP-MPR (*Panitia Ad-Hoc I Badan Pekerja Majelis Permusyawaratan Rakyat Republik Indonesia*) and the chairman of Commission A of the MPR Plenary Sessions in 2000, 2001 and 2002, which prepared the draft amendments to the 1945 Constitution.

Through library research, I collected and analysed primary data, namely the extensive verbatim records of all meetings of the MPR's PAH I, as well as the MPR Working Body and Plenaries, the provisions and the relevant

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51 On 20 May 1998, 14 of Suharto's cabinet members, Ginandjar Kartasasmita, Akbar Tandjung, A.M. Hendropriyono, Giri Suseno, Rahardi Ramelan, Haryanto Dhanutirto, Subiakto Tjakrawerdaya, Rahmadi Bambang Sumadhijo, Kuntoro, Theo Sambuaga, Tanri Abeng, Sanyoto Sastrowardoyo, Justika S. Baharsjah, and Sumahadi stated they refused to join his government any longer. See also Kompas.com, 21 May 2016.

52 In 2002, after a UN-supervised referendum, East Timor became an independent Timor Leste.

53 *Jemaah Islamiyah*, a violent Islamist group, was convicted by the court in connection with the 2002 Bali bombings. See *BBC News*, 8 November 2008.

54 Lt. Gen. (ret.) Djadja Suparman, *Catatan Harian, Jejak Kudeta (1997 – 2005)*, Yayasan Pustaka Obor Indonesia, 1<sup>st</sup> printing, January 2013, pp. 133 – 140. Suparman was then the commander of Regional Military Command of Greater Jakarta, 1998 - 1999.

55 Latin: the war of all against all, a phrase especially associated with Thomas Hobbes's description of the state of nature. See Oxford reference.

laws. Quotations refer to the 2010 version of the revised minutes unless indicated otherwise.<sup>56</sup> For example, I also occasionally refer to the contents of the original meeting minutes that are not in the later revised minutes.<sup>57</sup> Secondly, I studied academic books and articles in search of both theoretical and empirical data. Thirdly, I studied relevant newspapers, journals, other periodicals, and internet sources.

During my empirical research, I interviewed many figures who had had direct and significant involvement in the amendment process, such as the MPR leader, the factions, and members of PAH I, PAH I expert teams, NGOs, and relevant academic circles.

In anthropology, the prevailing fieldwork method is 'participant observation', in which the researcher obtains a deep insight into human behaviour and communication. And in retrospect, this study is to a large extent based on participant observation. As the PAH I chairman, I was assigned to lead the preparation of the draft amendment from November 1999 to August 2002.<sup>58</sup> As the MPR's Commission A chairman, I was assigned with directing the finalization of the draft amendment in the MPR annual sessions of 2000, 2001, and 2002.

I focused the research and discussions on topics that I consider directly or closely related to this book's title and research questions. Therefore, I do not specifically discuss the topics of finance, the audit board, state defence and security, flags, language, or the national anthem. However, I do discuss education and culture, the national economy, and social welfare.

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56 The minutes of the amendment process are recorded in these books: 1). Majelis Permusyawaratan Rakyat Republik Indonesia, *Risalah Perubahan Undang-undang Dasar Negara Republik Indonesia Tahun 1945*, Tahun Sidang 1999, Edisi Revisi, Sekretariat Jenderal, 2010. 2). Majelis Permusyawaratan Rakyat Republik Indonesia, *Risalah Perubahan Undang-undang Dasar Negara Republik Indonesia Tahun 1945*, Tahun Sidang 2000, Edisi Revisi, Sekretariat Jenderal, 2010. 3). Majelis Permusyawaratan Rakyat Republik Indonesia, *Risalah Perubahan Undang-undang Dasar Negara Republik Indonesia Tahun 1945*, Tahun Sidang 2001, Edisi Revisi, Sekretariat Jenderal, 2010. 4). Majelis Permusyawaratan Rakyat Republik Indonesia, *Risalah Perubahan Undang-undang Dasar Negara Republik Indonesia Tahun 1945*, Tahun Sidang 2002, Edisi Revisi, Sekretariat Jenderal, 2010. The minutes of the meetings of the amendment process which lasted from 1 October 1999 to 11 August 2002 were recorded in 17 books with a total of 11.721 pages, which consists of one book of 1999 session with 963 pages, seven books of the 2000 session with 4.165 pages, four books of the 2001 session with 2.763 pages and five books of the 2002 session with 3.830 pages.

57 The Secretariat General of the People's Consultative Assembly (MPR) has edited the minutes of the 1945 Constitution amendments twice. The first minutes, compiled based on the secretary's notes and audio recordings and published in 2004. Apparently, there is a lack of accuracy in the insertion of notes into the minutes and some audio recordings had not yet been recorded in writings. To correct the minutes, the Secretariat General of the Assembly, with the assistance of former members of the PAH I, re-examined and refined the minutes. Apparently, the process also eliminated or changed some notes in the first minutes, which I know have been corrected. The first minutes were published in 2005 and the second revised edition was published in 2010.

58 The amendment to the 1945 Constitution was completed in the MPR's Annual Session in August 2002.

I must admit that, given the many hundreds of pages of the PAH-I minutes I went through, it was not always easy to choose which opinions to quote, especially from my fellow MPR members. However, I selected quotes intending to provide readers with a balanced and representative spectrum of what occurred during the amendment process.

In summary, this study answers the research questions by applying an empirical, textual and theoretical analysis based on several disciplinary approaches, including those of legal studies, history, and political science.<sup>59</sup>

Within this study, I acknowledge that I was an actor in the constitution-making process. I have tried to manage these overlapping roles and minimise any biased reporting. First, I was not a researcher during the amendment process from 1999 to 2002. I only became a researcher in 2013 after being accepted into the doctoral program at the Van Vollenhoven Institute, Law School, Leiden University, to prepare a PhD thesis. It took a further ten years to finalise this research. The researcher's role provided me with the space to take a historical perspective and see more clearly what had happened before and during the amendment process.<sup>60</sup> The passage of so many years allowed me to take a more detached approach towards researching the amendment process. Secondly, I based this academic study on the PAH-I, Working Body, and plenary MPR's published meeting minutes, which reproduce the discussions from those meetings with precision. This reliable source is accessible to anyone who seeks to verify the data I present in this thesis. Thirdly, the academic books and articles about the process and substance of the amendments enriched and sharpened my analysis. Fourthly, in recent years I participated in the Constitutional Forum (Forum Konstitusi) with a dozen former parliamentarians from different backgrounds with whom I participated in the 1999-2002 amendment process. I further triangulated the data this study focused on through numerous conversations with them.

Finally, it is worth acknowledging that my insider role provided me access to information and contacts that would be difficult for an outsider researcher to secure.

## I.5 THE STRUCTURE OF THIS BOOK

This thesis is organized into nine main chapters. Chapter One consists of an introduction, the thesis questions, the Indonesian context, the research methodology, and the dissertation's structure.

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59 See Bernard Arief Sidarta, *Refleksi Tentang Struktur Ilmu Hukum*, 2nd print, Mandar Maju, 2000, p. 218.

60 Importantly, these amendments would not have been possible without the demands of the young generation, students, campuses, educated people in general, and the support of those in power, such as the new president, the political parties, and the ABRI (military and police).



Chapter Two begins with the unique position of the 1945 Constitution and a brief history of the 1945 Constitution's preparations, the Old and New Order regimes, and the 1998-99 events that led to the amendment process. It then describes the colonial era's embryonic political structure and obscure institutionalized politics,<sup>61</sup> the evolution of ideas of democracy and the rule of law, and the making of the 1945 Constitution, the 1949 federal Constitution, and the provisional 1950 Constitution. It discusses the practice of parliamentary democracy in the first twelve years of independence (1945-1957) with its contestations about the *Pancasila* state philosophy, its halted constitution-making process, and its failure to consolidate the democratic system. Chapter Two then deals with the military's increasing involvement in politics and the practices of the authoritarian system based on the 1945 Constitution during the regimes of President Soekarno and President Suharto. It also describes how, during this period, aspirations for constitutional democracy and the rule of law developed.

Chapter Three discusses the political dynamics during the end of Suharto's and B.J. Habibie's presidencies which opened opportunities for the amendment of the 1945 Constitution. It also discusses the process of managing conflict to preserve the degree of political order necessary for constitutional reform. Finally, it delves into the special session of the People's Consultative Assembly in 1998 and its results and the expedited 1999 general election and its results – namely the composition of the new MPR and its leadership – which enabled the start of the reform processes.

Chapter Four provides the theoretical framework for understanding the essence of the rule of law, democracy, a constitution, and constitutional democracy. Activists across the world call for rule of law and democracy in their struggles against colonial or authoritarian regimes. However, these are contested terms and require clarification. The chapter also addresses the received constitutional narrative in constitution-making, constitution-making in crisis, the importance of the state's distinctive background and environment in constitution-making and the constitution as the political structure. Further, it also briefly discusses the constitution's amendment processes.

Chapters Five through Eight systematically discuss the process and substance of each of the four amendments. The first amendment process (Chapter Five) took place from 6 October to 19 October 1999, the second (Chapter Six) from 25 November 1999 to 18 August 2000, the third (Chapter Seven) from 5 September 2000 to 9 November 2001, and the fourth (Chapter Eight) from 9 January 2002 to 10 August 2002. These last four chapters emphasize

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61 The Dutch colonized most of the East Indies (Indonesia) from 1602 to 1941, which period was interspersed briefly by British rule between 1811 and 1816. The Japanese Empire colonized Indonesia from 1942 to 1945.



the development of *negara hukum* (the state based on the rule of law) and constitutional democracy, and the attempts to establish a corresponding political structure and procedures in the Constitution. In that regard, the chapters discuss every pertinent aspect of each amendment phase, including actual deliberations and individual contributions. Quoted opinions, with due respect to all MPR members, were selected from the most influential opinions based on what I perceived to be the MPR's collective reaction to such opinions in the discussion process.

Chapter Nine offers retrospective observations about the amendment process and outcome. It briefly describes how deliberation, although time-consuming and requiring perseverance and consistency, could overcome the challenges that existed while avoiding the possibility of fighting and division. It confirms that at the end of the process, Indonesia, a large and highly heterogeneous country, the largest archipelago with the world's fourth-largest population, and the largest Muslim population in the world, has emerged peacefully as the world's third-largest democracy with the rule of law.

