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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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Summary

When Indonesia started building democracy and the rule of law after President Suharto stepped down in 1998, it soon became clear that this was impossible without reforming the near sacred 1945 Constitution. This Constitution, a symbol of the struggle for independence, had been in place during the revolution from 1945 to 1949. Then, for the next ten years Indonesia had a federal Constitution and a provisional Constitution, until in 1959 the 1945 Constitution was restored.

The 1945 Constitution consisted of a Preamble, 33 articles, and an Elucidation added in 1948 by Minister of Justice Soepomo. The Preamble, drafted by a team of nine led by Soekarno and Hatta, records the spirit, the struggle and the dream of the people of Indonesia. However, the articles, which were drafted during the Japanese occupation of Indonesia established an authoritarian state without rule of law, human rights and general elections. Popular sovereignty was vested in the supreme People's Consultative Assembly, which consisted of MPs and appointed members. The Elucidation further strengthened the integralistic and authoritarian concepts in the 1945 Constitution. However, replacing this Constitution with a completely new one carried the risk of throwing Indonesia's many ethnic groups into a balkanization process.

This dissertation discusses how the integralistic and authoritarian features of the 1945 Constitution were removed and replaced by principles of people's sovereignty and rule of law, while the Preamble and the unity of the state were maintained.

Chapter I is an introduction, in which I describe how the original 1945 Constitution was amended in quite a remarkable way. The sole actor was the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat Republik Indonesia* or MPR-RI), which has the authority to amend the Constitution. This MPR-RI consisted of 14 factions: 12 factions elected democratically in the general elections of 7 June 1999 and two factions of appointed members, from the Armed Forces and the so-called Functional Groups. The MPR formed an Ad-Hoc Committee (PAH) and two commissions to prepare draft amendments: PAH III and Commission C during the October 1999 session, and PAH I and Commission A for the period of November 1999 – August 2002. The amendment process consisted of four phases, where each phase was a continuation of the previous one.

The MPR did not prepare a draft of the desired changes in advance, but instead used the original 1945 Constitution as a working document. The MPR began the discussions for each amendment with an overview of the entire system. It agreed that changes would only be made to articles and the

Elucidation, and that the principles of democracy and the rule of law should be incorporated into them.

Initially the MPR planned to make the amendments in one go during its general session in October 1999. However, when this proved not to be feasible the Assembly continued the process, in the end deciding that the entire effort should be completed during its 2002 annual session at the latest. Then, one by one, the MPR started discussing the principles and provisions of the 1945 Constitution.

The PAH III, PAH I and Commission A meetings were always open to the public. Experts from home and abroad, were invited to share their visions and suggestions. Likewise, various functional, social and religious organizations were invited to provide input. PAH I held public hearings in the regions and also organized comparative studies in various countries. Periodically, PAH I held press conferences to socialize the amendment process. The MPR even established a television station to broadcast the process live. During the third phase, PAH I invited experts from various disciplines to join as a team of experts to provide input and analysis to PAH I.

Chapter I also discusses comments by scholars and public intellectuals on the amendment process and the results achieved. Some of them have argued that the amendment process was not democratic or even a failure; that its piecemeal and unsystematic approach without an academic draft had led to paradoxes and inconsistencies; that the process had been controlled and financed by foreign countries; or that there would be no guarantee for the independence of the judiciary. Other scholars disagree, noting that the amendment was a remarkable achievement, the a result of a genuinely democratic, idiosyncratic process, and that it managed to produce a vibrant constitutional democracy.

Chapter II further elaborates on the unique position of the 1945 Constitution, and provides a brief history of its preparation, how it was applied under the Old and New Order regimes, and it discusses the 1998-1999 events that eventually led to the amendment process.

Chapter III and Chapter IV are also background chapters. Chapter III discusses the political dynamics during the end of New Order era and how developments preceding the 1997-1998 political crisis already opened up the way to reform. Chapter IV provides the theoretical framework of the dissertation, discussing the concepts of rule of law, democracy, constitution, and constitutional democracy.

Chapter V is the first substantive chapter. It discusses the start of the amendment process, which lasted from 6 to 21 October 1999, and the substance of the first amendment. It describes how the factions came to an agreement that the version of the 1945 Constitution that would be amended was the one enacted by President Sukarno's decree of 5 July 1959. The factions agreed that the amendments should make the constitution democratic and based on the rule of law. However, because of the limited time little progress was made and the factions then agreed that the amendment process would be continued – and completed – during the 2000 MPR annual session.

Chapter VI discusses the second amendment phase which lasted from 25 November 1999 until 18 August 2000. This phase was highly dynamic, as the political opening created by the process of *reformasi* brought to surface latent feelings of discontent. PAH I discussed such sensitive issues as the aspirations of the regions, which felt treated unfairly by the central government, and human rights violations. Some actors, including some within the factions in the MPR were uncomfortable with this development and tried to stop the amendment process, but to no avail.

During this phase differences of opinion on fundamental constitutional issues became apparent. While PAH I discussed the need for an independent judicial process to review the constitutionality of laws, another ad hoc committee, PAH II, with the same factions represented as in PAH I, concluded that constitutional review should remain the authority of the MPR. At this stage the MPR adopted the view of PAH II. Nevertheless, PAH I held on to its conclusion that constitutional review should involve a judicial process, conducted by an independent constitutional court. Later, PAH I succeeded to convince the factions' leaders to adopt its view.

PAH I also succeeded in incorporating human rights into the Constitution, in accordance with the United Nation's Universal Declaration of Human Rights, and it opened the debate to include a provision that Indonesia is a unitary, constitutional state based on the rule of law, with sovereignty in the hands of the people. During this stage Commission A invited constitutional law experts to help consolidate these ideas.

However, the MPR was unable to complete the amendments to the Constitution at this stage, as previously agreed. It then decided once again to continue the process during the next MPR annual session and to finalize the amendment at the 2002 MPR annual session.

Chapter VII discusses the period from 5 September 2000 to 9 November 2001. This third stage was full of political turmoil, but it saw many important developments in the constitutional design, such as affirmation that Indonesia is a constitutional democracy, with checks and balances, and guarantees for judicial independence. It also included the establishment of a Constitutional Court and a Regional Representatives Council. The MPR moreover revoked MPR Decree III/MPR/2000 which stated that the authority to review the constitutionality of law belongs to the MPR.

While the amendment process was ongoing, in January 2001, President Abdurrahman Wahid stated in response to the demands of various pressure groups that he was preparing to install a state commission to prepare an alternative amendment draft to be submitted to the MPR. As the relations between Wahid and the MPR deteriorated he issued a decree to suspend the MPR, whereupon the MPR dismissed him in retaliation. Vice-President Megawati Soekarnoputri was then inaugurated as the new president. At first she confirmed that she supported the idea of the state commission, but soon she decided to continue the ongoing amendment process by the MPR.

In February 2001, the MPR working body formed a Group of Experts with various academic backgrounds to assist PAH I. They were an internal

advisory body whose suggestions and recommendations were non-binding. At the same time the MPR invested much time and effort in publicity for their activities, through press conferences and similar events. In addition PAH I encouraged the public to submit proposals for constitutional change during public hearings, seminars and visits that were organized in every region. In addition to consulting the Group of Experts, PAH I also met with other experts from Indonesia and from abroad to hear their opinions and organized comparative study visits to various countries in Asia, Africa, Europe and USA. In cooperation with the UNDP, the MPR Secretariat General built a television station for live broadcasting of the meetings about the amendment process.

At the end of this phase, factions agreed to state that sovereignty is vested in the hand of the people and be exercised according to the Constitution and that the State of Indonesia is a state based on law. However, no agreement was reached yet about the future of the appointed members of MPR. Neither could the MPR reach a conclusion on the proposals to maintain or to amend Article 29 regarding religion and the nature of the education system.

Chapter VIII deals with the last phase of the amendment process, from 9 January 2002 to 11 August 2002. During this stage PAH I again conducted public hearings in the provinces, and meetings with universities, experts and various stakeholders. It also received a visit from a European Union delegation. However, political turmoil had not ended and several actors made efforts to halt the amendment process and restore the original 1945 Constitution. A crucial issue was the future of the appointed MPR members of the functional groups and in particular those of the Armed Forces. In the end this matter was decided through an open vote – the single vote taken during the entire four years of the amendment process. The majority voted for abolishing the appointed MPR members. Remarkably, more than half of the F-PDIP members voted against abolition, while all members of the Armed Forces faction voted in favour.

Another key issue concerned the election of the President. This was decided in favour of popular election, with the second round a direct election as well instead of of a second round by the MPR.

Yet another hard nut to crack was Article 29 on Religion, which after a long and complicated process was decided to be maintained together with a renewed Article 31 on Education and Culture. The latter provision provides for one national education system that enhances faith and piety, as well as noble character. About Articles 33 and 34, on National Economy and Social Justice, factions agreed to include a principle of efficiency with justice instead of one focusing on economic efficiency only.

During this entire stage, civil society groups continued demanding the establishment of an independent constitutional commission to take over the amendment process. They wanted this commission to draft a new constitution rather than amend the existing one. These attempts at intervention continued until the very end of the process, putting considerable

pressure on the process. This pressure further increased when approaching the end of the MPR 2002 annual session, the Armed Forces stated that the amendments deviated from their original purpose and therefore expressed their support for an independent constitutional commission. If that commission failed, the military and the police would support the reinstating of the original 1945 Constitution. Other groups proposed a similar alternative demanding that the MPR would install a commission to draft a constitution to be ratified by the MPR. If the MPR would refuse this draft it should be brought to a referendum. On top of this, resistance within the MPR itself also increased, but the majority of its members were determined to finalize the process. In the end, by way of compromise, the MPR agreed to establish a constitutional commission with the task of conducting a comprehensive study on the amendment made by the MPR.

However, the key to the successful conclusion of the debates was the change in position of the Armed Forces, which in the end expressed their full support for the amendment process conducted by the MPR. Thus, in the end, all the factions in the MPR supported the amendments as they had been developed over a process of four years. Moved by this historical moment, and preceded by a prayer of gratitude, all MPR members stood up and sang *Indonesia Raya*, the national anthem. After this, the MPR plenary session was closed.

Chapter IX is the conclusion of the book. It discusses the reasons why the amendments could peacefully reform Indonesia from an authoritarian state into a democracy. Several factors contributed to this process, but the main one is that in the end the major players rose above themselves and were willing to compromise in order to secure a better future for the country.

