

Constitutional Amendments in Indonesia: An Analytical Perspective of the Reformation Agenda

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ABSTRACT

Constitutional amendments in Indonesia are commitments to end authoritarianism and usher in a democratic dispensation. This is one of the fundamentals of a new constitutional order. However, given the lack of political will, the four constitutional amendments have fallen short of the expectation of what they ought to have delivered. The study adopts a doctrinal legal scholarship through the exploration of opinions on constitutional amendments in relation to Pancasila democracy in Indonesia. This research seeks to establish that a fifth constitutional amendment is not necessary, as the previous amendments are not yet effectively implemented. The research finds that Indonesia's democracy is in danger of regression because the current influence of anti-reformist elites depicts democratic stagnation and setbacks. As a civil law country, Indonesia has enacted an unprecedented number of pieces of legislation, and yet, it does not fulfil the dreams of the reformers. Indonesia lacks the political will to enforce norms that were created in the aftermath of the reformation agenda, and thus questions the essence of the four amendments. While new laws are a sine qua non of a new constitutional order, political will is a non-negotiable factor in implementation. This study, therefore, recommends that the State create an institutional transformation agenda for a new constitutional order in line with Pancasila. A fifth constitutional amendment is not necessary since the four amendments are yet to be fully implemented.

Introduction

A constitution is a key prerequisite for the creation and development of an independent nation.¹ Since practically every nation aspires to a constitutional state, at the dawn of global civilisation, the constitution was created as a framework for political life.² In Indonesia, the Constitution is not only a compact of legal texts but also a mirror of the country's historical and political journey.³ Features of a constitutional government include granting legislative authority to the people,

¹ Guillermo Larrain, Gabriel Negretto, and Stefan Voigt, "How Not to Write a Constitution: Lessons from Chile," *Public Choice* 194, no. 3–4 (March 22, 2023): 233–47, <https://doi.org/10.1007/s11127-023-01046-z>.

² Angelo Jr Golia and Gunther Teubner, "Societal Constitutionalism: Background, Theory, Debates," *ICL Journal* 15, no. 4 (December 20, 2021): 357–411, <https://doi.org/10.1515/icl-2021-0023>.

³ Ibnu Sina Chandranegara and Dwi Putri Cahyawati, "Conflict of Interest Prevention Clause in the Constitution: The Study of the Indonesian Constitution," *Heliyon* 9, no. 3 (March 2023): e14679, <https://doi.org/10.1016/j.heliyon.2023.e14679>.

rejecting authoritarian rule, and increasing political participation. The establishment of a constitutional state is a lengthy historical process, and it is always fascinating to examine the creation of a constitutional government.⁴ Aristotle's collection of several constitutions from different nations dates back to ancient Greece. For him, politics is grounded in a set of constitutions.⁵ The constitution was initially interpreted as a set of laws and traditions that applied only to civilisation, but it later acquired additional significance as a set of emperor-made laws and regulations.

The Republic of Indonesia is the biggest archipelagic state in the world. It has a population of more than 250 million and is one of Southeast Asia's most ethnically diverse societies. Additionally, it is considered one of the few relatively stable and functional democracies in this region. Following the fall of over three decades of authoritarian government in 1998, civil society experienced a renaissance, and some inclusive democratic reforms were brought about by an elite settlement.⁶ Since the end of Suharto's authoritarian rule, Indonesia has pursued a transformative agenda to move the state from an 'iron-fist' authoritarianism to a democratic dispensation. The Asian financial crisis of 1997 sparked the end of Suharto's autocratic rule and propelled the late 20th-century democratisation movement in Indonesia.⁷ Although the four constitutional amendments will be analysed in detail later in this research, it is fitting to point out that these amendments brought in, inter alia, progress in protecting human rights in Indonesia. From the recognition of fundamental rights and even the insistence of rights that belong to the category of non-derogatory rights in the Second Amendment to the 1945 Constitution, it is demonstrated by the advanced provisions that have established the human rights material.⁸ Without prejudice, some gaps are not yet filled in the implementation of the reformation agenda.

A written constitution with all of its definitions and purposes has been agreed upon by the proponents of the Unitary State of the Republic of Indonesia. In a document known as the Constitution of the Republic of Indonesia (UUD 1945), the preparatory committee for Indonesian independence ratified the Indonesian Constitution as a "grondwet revolution" on August 18, 1945, the day after the

⁴ Askari Razak et al., "Balancing Civil and Political Rights: Constitutional Court Powers in Indonesia and Austria," *Journal of Indonesian Legal Studies* 8, no. 2 (November 5, 2023), <https://doi.org/10.15294/jils.v8i2.70717>.

⁵ Robert K. Fleck and F. Andrew Hanssen, "The Emergence of Democratic Constitutions: Comparing the Modern World to Ancient Greece," *Public Choice*, April 7, 2025, <https://doi.org/10.1007/s11127-025-01273-6>.

⁶ Aurel Croissant, "Indonesia: Challenges of Conflict and Consensus in the Era of Reformasi" (Liverpool University Press, 2022), 75–119, https://doi.org/10.1007/978-3-031-05114-2_4.

⁷ Muhammad Bahrul Ulum, "Indonesian Democracy and Political Parties After Twenty Years of Reformation: A Contextual Analysis," *Indonesia Law Review* 10, no. 1 (April 30, 2020), <https://doi.org/10.15742/ilrev.v10n1.577>.

⁸ Leli Tibaka and Rosdian Rosdian, "The Protection of Human Rights in Indonesian Constitutional Law after the Amendment of the 1945 Constitution of the Republic of Indonesia," *FLAT JUSTISIA: Jurnal Ilmu Hukum* 11, no. 3 (February 28, 2018): 266, <https://doi.org/10.25041/flatjustisia.v11no3.1141>.

declaration of independence of the Republic of Indonesia on August 17, 1945.⁹ Therefore, the 1945 Constitution has all three of the contents required by the general principles of constitutional theory, despite its small length and mere 37 articles. By creating and implementing Article 37 of the 1945 Constitution regarding amendments to the Constitution, the drafters of the document itself did recognise the potential for change or adjustments.¹⁰ Furthermore, all Indonesians must be consulted through a referendum if the MPR plans to change the 1945 Constitution through Article 37.

Constitutional amendment naturally is a reflection of the commitment of countries that are determined to adhere to the democratic constitutional concept.¹¹ A constitutional amendment is very strategic and vital to make a constitution that a state could adopt. There is no section of a constitution that is more important than the part that guides its amendments.¹² Since constitutional amendments are a strategic tool for creating the desired constitution, a well-executed amendment procedure will result in the envisaged constitution. One significant feature of the constitutional amendment process is the presence of freely accessible public spaces, which is a natural byproduct of democracy.¹³ This is where Article 37 of the Constitution of the Republic of Indonesia, 1945 comes into play. It is legally prudent that Article 37 (amendment rules) is unamendable, and this is animated by the need to safeguard certain norms whose alteration can completely disorientate the state and meaning of an independent state. According to Jimly Asshiddiqie, the first Chief Justice of Indonesia's Constitutional Court and also a key participant in the four amendments, the original text of the 1945 Constitution contains 71 points of provisions; then, after going through four amendments, the content of the 1945 Constitution covers 199 points of provisions.¹⁴ This includes, inter alia, institutions and taking sovereignty from the People's Consultative Assembly (MPR) back to the people. Accordingly, "Sovereignty is in the hands of the people and is implemented

⁹ Abdurrachman Satrio, "Restoring Indonesia's (Un)Constitutional Constitution: Soepomo's Authoritarian Constitution," *German Law Journal* 24, no. 2 (March 3, 2023): 402–16, <https://doi.org/10.1017/glj.2023.16>.

¹⁰ Ignatius Yordan Nugraha, "Abusive Unconstitutional Constitutional Amendments: Indonesia, the Pancasila and the Spectre of Authoritarianism," *Oxford Journal of Legal Studies* 43, no. 2 (June 6, 2023): 379–404, <https://doi.org/10.1093/ojls/ggad002>.

¹¹ Novendri Mohamad Nggilu, Lisnawaty W Badu, and Suwitno Y Imran, "Alienation Changes in Formation Commission of Indonesian Constitution Of1945 (Contemplation Towards the Fifth Amendment)," *Jurnal Pembaharuan Hukum* 5, no. 1 (April 1, 2018): 74, <https://doi.org/10.26532/jph.v5i1.1975>.

¹² R. Albert, "Amending Constitutional Amendment Rules," *International Journal of Constitutional Law* 13, no. 3 (July 1, 2015): 655–85, <https://doi.org/10.1093/icon/mov040>.

¹³ Lisnawaty W. Badu et al., "Participative Model of 1945 (Fifth Amendment) Amendment Through the Constitutional Commission," in *Proceedings of the The First International Conference On Islamic Development Studies 2019, ICIDS 2019, 10 September 2019, Bandar Lampung, Indonesia* (EAI, 2019), 1–5, <https://doi.org/10.4108/eai.10-9-2019.2289420>.

¹⁴ Luthfi Widagdo Eddyono, "The Unamendable Articles of the 1945 Constitution," *Constitutional Review* 2, no. 2 (February 6, 2017): 252, <https://doi.org/10.31078/consrev225>.

according to this Constitution.”¹⁵ It establishes a change from parliamentary to constitutional supremacy. In this case, power now resides with the people. While constitutional amendments are a key issue in constitutional theory, prior research has not examined whether these amendments align with the Pancasila values on which the Indonesian State is founded. This research offers a new perspective on Indonesia’s constitutional amendment in light of Pancasila values. The Novelty of this study elucidates the five Pancasila values and makes a nexus between these values and future constitutional amendments.

Methods

This research offers a contextual assessment of constitutional amendments in Indonesia and the extent to which these amendments influence democracy and constitutionalism in the country. Here, an analytical perspective is taken through a doctrinal research method. Both primary and secondary legal materials have been sufficiently studied to conclude. The research used materials such as the 1945 Constitution of Indonesia and reviewed articles, books and conference proceedings that speak to the essence of the research. It also examines the state of Pancasila values and whether these amendments have adulterated these values, and the prospect of future amendments.

Discussion

The Constitutional Amendments in the Lens of the Pancasila Values

Indonesian society regards the Pancasila values, as stipulated in the preamble of the constitution, as so important. Thus forms the Indonesian national ideology. The five values are: a) Belief in one and only God; b) Just and civilised humanity; c) The unity of Indonesia; d) Democracy guided by the wisdom of representation; and e) Social justice for all people.

The one-thousand-dollar question here is: Did the constitutional amendments help in upholding these national values? Or have these amendments violated the spirit of this national ideology, and if that is so, what is the prospect of future constitutional amendments? These questions are intended not only to prompt scholars to consider what may happen to the Constitution of Indonesia in the future, but also to reflect on where it may lead the nation. There are also speculations by constitutional law scholars on the fate of this constitution. While this is disputable, it is clear that the reformation agenda ushers Indonesia to a state of Pancasila democracy – a system of democracy that helps to solidify and uphold Pancasila as a state philosophy. The phrase “...a democratic life led by wisdom of thought in deliberation amongst representatives of the people” prescribes a democratic system that is not completely liberal through the Western lens, but it creates an environment where people thrive. This quest for democracy and democratisation is a key agenda

¹⁵ Article 2 of the 1945 Constitution of the Republic of Indonesia. Prior to the amendment, the implementation of sovereignty was within the purview the parliament (MPR).

of the reformation project that brought in the Constitutional Court to determine disputes over issues of general elections, including controversial presidential elections, and decisions on the dissolution of political parties. This forms a new phase of the emergence of democracy in a country that was marred by authoritarianism for 33 years. However, to give an analytical perspective of the Pancasila values with respect to the four constitutional amendments, it is important to analyse each value separately.

It has been argued that the four 1945 constitutional amendments, which have brought about a new period of democracy, are incompatible with the Pancasila. The Pancasila are often regarded as the “basic norm” of Indonesian law. Based on this interpretation, it has been maintained that the Pancasila must be adhered to by all positive laws, including constitutional amendments.¹⁶ However, this interpretation is already in danger of violation. Indonesia’s transition can still be seen as a success because the amendments successfully democratised the constitution and adopted the principle of constitutionalism.¹⁷ For instance, by granting the legislator more authority over the legislative process, the amendments created the division of powers between Indonesia’s bicameral legislative body and the executive.¹⁸ A direct system for electing the president and vice president was also introduced, along with progressive measures to limit the president's term of office, expand human rights provisions, and establish new bodies tasked with limiting governmental powers, such as the new Constitutional Court.¹⁹

Before the amendments, the 1945 Indonesian Constitution was extremely constrained, badly written, and skewed towards authoritarianism. In fact, President Soekarno and his successor, President Soeharto, established authoritarian governments in part because of the 1945 Constitution’s ambiguity and incompleteness. Therefore, reforming the 1945 Constitution was one of the fundamental demands of the student protests that were successful in forcing Soeharto to resign in 1998.²⁰ The Soeharto government used the five Pancasila ideals in the 1945 Constitution’s Preamble during the New Order era²¹ in order to defend its authoritarian rule. The Indonesian 1945 Constitution was so limited, so poorly

¹⁶ Nugraha, “Abusive Unconstitutional Constitutional Amendments: Indonesia, the Pancasila and the Spectre of Authoritarianism.”

¹⁷ Bayu Dwi Anggono, Rian Adhivira Prabowo, and Yussele Nando Mardika, “Constitutional Court and the Past Conflicts in Post- Authoritarian Indonesia,” *Constitutional Review* 9, no. 1 (May 31, 2023): 077, <https://doi.org/10.31078/consrev913>.

¹⁸ Muhammad Jamaluddin, “The Role of the People in the Amendment of the 1945 Constitution Based on Democratic Constitution Making: Future Prospects,” *PADJADJARAN Jurnal Ilmu Hukum (Journal of Law)* 07, no. 01 (April 2020): 19–42, <https://doi.org/10.22304/pjih.v7n1.a2>.

¹⁹ Susi Dwi Harijanti and Tim Lindsey, “Indonesia: General Elections Test the Amended Constitution and the New Constitutional Court,” *International Journal of Constitutional Law* 4, no. 1 (January 1, 2006): 138–50, <https://doi.org/10.1093/icon/moi055>.

²⁰ Croissant, “Indonesia: Challenges of Conflict and Consensus in the Era of Reformasi.”

²¹ Pancasila is viewed by many Indonesians as a national ideology, it consists of five principles: (1) the belief in the One God; (2) humanism that is just and civilized; (3) unity; (4) populism that is guided by the inner wisdom of deliberation amongst representative; and (5) social justice for all Indonesian.

drafted, and so biased toward authoritarianism. Indeed, it is the vague and incomplete nature of the 1945 Constitution which contributed to the rise of authoritarian regimes under President Soekarno and, later, his successor, President Soeharto. Therefore, one of the basic demands of the student movements that succeeded in toppling Soeharto in 1998 was to reform the 1945 Constitution. His administration connected Pancasila with the collectivist ideals of Indonesian society that had formed the basis for Soepomo to establish his integralist beliefs, such as harmony (*rukun*) and mutual collaboration (*gotong-royong*).²² For this reason, any action that is thought to be against his administration would be seen as a danger to social harmony and Pancasila. In addition to rejecting democracy and human rights, the New Order dictatorship indoctrinates Pancasila at all societal levels, emphasising the need to put the interests of the country before those of the individual.

1) *A Belief in the One and Only God*

The Indonesian society, being multiethnic and multiracial, is conscious of its unity in diversity and the need to accommodate and tolerate the different beliefs of people living in the country.²³ Article 29 recognises the secrecy of believing in one and only god and goes further to establish that each person has the freedom of worship, each according to their religion or belief. Although Article 29 was part of the Constitution before the amendments to affirm the religious values provided in the preamble, a significant number of provisions on religion were included during these amendments to strengthen this new phase of constitutionalism in the country.²⁴ This includes *iman* (faith) and *takwa* (piety). Religious values, religious judiciary, and legislation of religion. The secularity of the preamble introduces ambiguity in a constitution that has a strong reverence for religions. The existential trend of a fragile political agreement creates a lacuna in the Indonesian legal system from the era of the drafting of the constitution in 1945 to the amendment period (1999–2002) on constitutional guarantee on religious liberty and discriminatory laws and court rulings as regards religious freedom.²⁵ This constitutional status of these beliefs is contentious, and their supporters have frequently complained about discrimination by the government, notably in the areas of education, employment and civil registration services. This supports the idea that beliefs, which are held by

²² David Bourchier, “Organicism in Indonesian Political Thought,” in *The Oxford Handbook of Comparative Political Theory*, ed. Leigh K. Jenco, Murad Idris, and Megan C. Thomas (Oxford University Press, 2020), 597–617, <https://doi.org/10.1093/oxfordhb/9780190253752.013.39>.

²³ Muwaffiq Jufri et al., “State Power Limitations on Religion for The Fulfillment of The Constitutional Rights of Indigenous Religion Believers in Indonesia,” *Journal of Indonesian Constitutional Law* 1, no. 3 (December 16, 2024): 194–220, <https://doi.org/10.71239/jicl.v1i3.23>.

²⁴ Muwaffiq Jufri, “Regulation Model of Religious Rights and Freedoms for Local Religious Believers in the Majapahit Constitution,” *Jurnal HAM* 13, no. 3 (December 22, 2022): 539, <https://doi.org/10.30641/ham.2022.13.539-556>.

²⁵ Mahaarum Kusuma Pertiwi, “Historical Development Over Religious Liberty in the Indonesian Constitution,” *Sociological Jurisprudence Journal* 3, no. 1 (May 27, 2020): 65–74, <https://doi.org/10.22225/scj.3.1.1525.65-74>.

certain supporters of those religions, are less important than official religions.²⁶ As a result, those who share this opinion continue to be marginalised in society and culture. The socioeconomic and cultural marginalisation of the belief-holders is thereby sustained.

The so-called “Jakarta Charter” (Piagam Jakarta) was successfully incorporated into the final draft of Indonesia's first independent constitution by Muslim activists before the country declared independence. Muslims were obligated to abide by Islamic law under this charter.²⁷ The 1945 Constitution's final draft did, however, subtly exclude the charter. It was taken away to appease non-Muslim groups, such as Christians in Eastern Indonesia, who threatened to secede even before the state was formally formed if the charter was kept. It was also taken away to allay worries about the broad application of Islamic law held by Indonesia's more moderate Muslims, who are believed to make up the majority.²⁸ But for certain Muslim groups, the Charter's rejection was and still is considered “the” greatest betrayal of Islam since its independence.

To understand “A belief in the One and Only God”, Article 28E, a part of the second amendment, clearly expresses “the right to the freedom to believe in his/her faith (kepercayaan)”.²⁹ So, what has this amendment offered to the Constitution? Is it a secular constitution or a theocratic constitution? A secular constitution separates religions from the affairs of the state. A secular constitution is also inclusive of religions, but does not pick and recognise some religions and disregard others.³⁰ A theocratic constitution identifies a religion or some religions as the only state-recognised religions. It is premised on religious laws and norms.³¹ The 1945 Constitution of Indonesia, after its amendments, adopts the status of a moderate religious constitution. A moderate religious constitution is an intermediate between a secular and a theocratic constitution. Such a constitution contains elements of both secular and theocratic constitutions. The moderate nature of the 1945 Constitution is evident in the adjudication and interpretation of constitutional cases before the Constitutional Court.

²⁶ Simon Butt, “Constitutional Recognition of ‘Beliefs’ in Indonesia,” *Journal of Law and Religion* 35, no. 3 (December 4, 2020): 450–73, <https://doi.org/10.1017/jlr.2020.39>.

²⁷ Mei Susanto et al., “Should the Muslim President Become a Constitutional Convention in Indonesia? Based on Constitutional Debates About Islam and State, and the Constitutional Practice,” *Cogent Social Sciences* 9, no. 1 (December 31, 2023), <https://doi.org/10.1080/23311886.2023.2196815>.

²⁸ Deasy Simandjuntak, “Disciplining the Accepted and Amputating the Deviants: Religious Nationalism and Segregated Citizenship in Indonesia,” *Asian Journal of Law and Society* 8, no. 1 (February 20, 2021): 88–107, <https://doi.org/10.1017/als.2020.49>.

²⁹ Muwaffiq Jufri et al., “Religion and State in Islamic Constitutional Law: The Role of Pesantren in Strengthening Symbiotic Islam and the State in Madura,” *Justicia Islamica* 21, no. 2 (November 6, 2024): 221–46, <https://doi.org/10.21154/justicia.v21i2.9283>.

³⁰ Ahdar Rex and Leigh Ian, *Religious Freedom in the Liberal State*, vol. 1 (Oxford: Oxford University Press, 2013), <https://doi.org/10.1093/acprof:oso/9780199606474.001.0001>.

³¹ Al Khanif, *Religious Minorities, Islam and the Law: International Human Rights and Islamic Law in Indonesia* (New York: Routledge, 2020), <https://doi.org/10.4324/9781003048695>.

The juridical nature of the Constitutional Court puts it in a critical place as an arbiter between the state and religions. These include:

- a) Article 28E (1), which provides citizens the right and freedom to “choose and practice the religion of his/her choice.”
- b) Article 29(2), which validates Article 28E(1), provides that “the State guarantees all persons the freedom of worship, each according to his/her own religion or belief.”
- c) Article 28I (1), which provides that freedom of religion, among other human rights, “cannot be limited under any circumstances.”

2) *Pancasila Democracy*

Indonesia is the third-largest democratic country in the world.³² It embraces a unique model of governance called “Pancasila democracy”.³³ Its democracy is one of the most crucial in the world to comprehend and protect. Pancasila appeared first in Indonesia in the speech of Soekarno. This came as a result of the faction among members of the Investigating Committee for the Preparation of Indonesian Independence.³⁴ While certain groups in the committee wanted secular, constitutional democracy, others wanted an Islamic state, and another vied for *negara integralistik* (“integralistic state”).³⁵ The main task of the committee was to establish a national philosophy for the making of the national constitution. In order to bridge the gap between constitutional democracy and the Islamic perspective of governance premised on the sharia, President Sukarno introduced Pancasila on 1 June 1945 as a national philosophy.³⁶ With fascinating implications for democratic emergence and durability elsewhere, the largest Muslim nation in the world has demonstrated that democracy can arise and persist in unexpected ways and in unexpected places. However, Indonesia's democracy is in danger of regressing, which is consistent with alarming worldwide trends. This puts the 275 million people who live in the nation at risk of losing their hard-won liberties.³⁷ In an era of democratic retreat, it poses a hazard to deprive international democratic leaders and campaigners of a successful illustration of the most likely route to democracy: authoritarian-led democratisation.

³² Fifiana Wisnaeni and Ratna Herawati, “The Politics of Law of Pancasila-Based Democracy in Indonesia as the World’s Third Largest Democracy,” *Academic Journal of Interdisciplinary Studies* 9, no. 4 (July 10, 2020): 39, <https://doi.org/10.36941/ajis-2020-0059>.

³³ Ousu Mendy, “A Comparative Analysis of Constitutional Rights in the Gambia and Indonesia,” *Constitutionale* 4, no. 1 (March 30, 2023): 85–98, <https://doi.org/10.25041/constitutionale.v4i1.2951>.

³⁴ I D.G. Palguna and Bisariyadi, “Indonesia’s Diversity: A Brief Constitutional Perspective,” in *Courts and Diversity* (Leiden, The Netherlands: Brill | Nijhoff, 2024), 17–54, https://doi.org/10.1163/9789004691698_003.

³⁵ Lita Tyesta Addy Listya Wardhani, Muhammad Dzikirullah H Noho, and Aga Natalis, “The Adoption of Various Legal Systems in Indonesia: An Effort to Initiate the Prismatic Mixed Legal Systems,” *Cogent Social Sciences* 8, no. 1 (December 31, 2022), <https://doi.org/10.1080/23311886.2022.2104710>.

³⁶ Moamen Gouda and Shima Hanafy, “Islamic Constitutions and Democracy,” *Political Research Quarterly* 75, no. 4 (December 14, 2022): 994–1005, <https://doi.org/10.1177/1065912921991241>.

³⁷ Dan Slater, “What Indonesian Democracy Can Teach the World,” *Journal of Democracy* 34, no. 1 (January 2023): 95–109, <https://doi.org/10.1353/jod.2023.0006>.

Instead of being healthy, Indonesia's democracy is brittle and may even be disintegrating. But what are the causes of Indonesia's current democratic fragility? The current influence of anti-reformist elites explains democratic stagnation and setbacks.³⁸ This is still a major factor contributing to Indonesia's fragile democracy. Even though some of these efforts have failed, Indonesia's democratic consolidation has now come to a standstill. However, the study contends that the idea of social discontent with poor post-authoritarianism has little to do with the cause of this democratic stasis. Despite public dissatisfaction with the efficiency of governance, opinion polls unmistakably demonstrate sustained support for democracy. Rather, I argue that the attempted rollback is mostly the product of anti-reformist elites.

But Indonesia's quick move towards democracy, which began in 1998, has only led to an electoral democracy instead of a new liberal democracy. The political reform agenda's (reformasi) preservation of the Pancasila is inextricably linked to this circumstance.³⁹ In this instance, as post-Suharto Indonesia moves to "electoralise" its societal life, the Indonesian interpretation of exceptionalism has unintentionally legitimised certain basic departures from globally accepted norms in constitutionalism.⁴⁰ The advent of some legislative initiatives to prosecute any sacrileges against it has furthered this Pancasila hallucination.⁴¹ In spite of the aforementioned, Indonesians are currently allowed to join and create political parties based on their own preferences. As long as they fit the criteria based on the support of the people themselves, the Indonesian people are now free to form political parties without feeling pressured to join a specific one.⁴² It is believed that this has occurred because our nascent democracy has a propensity to become rather liberal without being closely monitored by law enforcement. The rule of law has been evolving in opposition to the sovereignty of the people.

3) *The Justice System: Constitutional Court in the Aftermath of Reformation*

The key subject of discussing the justice system is founded on the third constitutional amendment, which ushered in, among other institutions, the Constitutional Court.⁴³ While the Constitutional Court (*Mahkamah Konstitusi*) and the

³⁸ Marcus Mietzner, "Indonesia's Democratic Stagnation: Anti-Reformist Elites and Resilient Civil Society," *Democratization* 19, no. 2 (April 2012): 209–29, <https://doi.org/10.1080/13510347.2011.572620>.

³⁹ Pranoto Iskandar, "The Pancasila Delusion," *Journal of Contemporary Asia* 46, no. 4 (October 13, 2016): 723–35, <https://doi.org/10.1080/00472336.2016.1195430>.

⁴⁰ David M. Bouchier, "Two Decades of Ideological Contestation in Indonesia: From Democratic Cosmopolitanism to Religious Nationalism," *Journal of Contemporary Asia* 49, no. 5 (April 8, 2019): 1–21, <https://doi.org/10.1080/00472336.2019.1590620>.

⁴¹ Min Seong Kim, "Agonizing Pancasila: Indonesia's State Ideology and Post-Foundational Political Thought," *Journal of Political Ideologies*, October 7, 2024, 1–23, <https://doi.org/10.1080/13569317.2024.2408230>.

⁴² Rizky Widian, Putu Agung Nara Indra Prima Satya, and Sylvia Yazid, "Religion in Indonesia's Elections: An Implementation of a Populist Strategy?," *Politics and Religion* 16, no. 2 (June 11, 2023): 351–73, <https://doi.org/10.1017/S1755048321000195>.

⁴³ Ousu Mendy and Ebrima Sarr, "The Judiciary in Governance: Understanding the Juridical Nature and Function of the Constitutional Court of Indonesia," *Journal of Indonesian Constitutional Law* 2, no. 1 (March 2, 2025): 1–22, <https://doi.org/10.71239/jicl.v2i1.45>.

Supreme Court (*Mahkamah Agung*) occupy the top tier of institutional order in Indonesia's legal system, the latter is not part of the reformation agenda. It existed before the constitutional amendments. The constitutional amendment was a commitment to institutional change, but this section focuses specifically and exclusively on the Constitutional Court, its strength and weakness in handling cases, and how it can rise to the demands and urgency of constitutionalism to safeguard constitutional democracy and other rights of the Indonesian people.⁴⁴ This court is created by Law Number 24 of 2003 on the Constitutional Court (*Undang-undang Mahkamah Konstitusi*).

Before delving into the main issue, it is not crucial to go into the legal background of the Constitutional Court, and it suffices to point out that constitutional courts are relatively new. They are products of the 21st century. There have been two main forms of constitutional judicial review since the 19th century. They are (a) the American model of 'decentralised' review by ordinary courts,⁴⁵ or what Saunders calls 'diffuse review', and (b) the Continental European model of 'centralised' review by a specialised constitutional court, or what she calls 'concentrated review'.⁴⁶ There also exist mixed or hybrid systems, which contain features of both the American and European models. Indonesia, being a civil law country, embraces a Continental European model.

The court comprises nine judges, with the president, the judiciary and the parliament each selecting three judges. The court has many functions, but the main ones are constitutional review, hearing and determination of election petitions.⁴⁷ Determination of disputes over the authorities of institutions and dissolution of political parties are also controversial constitutional processes in Indonesia's political dispensation. This is key to enforcing democracy, the rule of law and human rights.⁴⁸ In constitutional review, the 1945 Constitution is the benchmark, and the court is

⁴⁴ Simon Butt and Prayekti Murharjanti, "What Constitutes Compliance? Legislative Responses to Constitutional Court Decisions in Indonesia," *International Journal of Constitutional Law* 20, no. 1 (July 27, 2022): 428–53, <https://doi.org/10.1093/icon/moac014>.

⁴⁵ Juliane Kokott and Martin Kaspar, "Ensuring Constitutional Efficacy," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford: Oxford University Press, 2012), <https://doi.org/10.1093/oxfordhb/9780199578610.013.0039>.

⁴⁶ Cheryl Saunders, "Constitutional Review in Asia," in *Constitutional Courts in Asia* (Cambridge: Cambridge University Press, 2018), 32–59, <https://doi.org/10.1017/9781108163903.003>.

⁴⁷ Herlambang P. Wiratraman, "Constitutional Court and Democracy in Indonesia," by Simon Butt," *Bijdragen Tot de Taal-, Land- En Volkenkunde / Journal of the Humanities and Social Sciences of Southeast Asia* 174, no. 1 (January 1, 2018): 84–87, <https://doi.org/10.1163/22134379-17401005>.

⁴⁸ Tanto Lailam and M. Lutfi Chakim, "A Proposal to Adopt Concrete Judicial Review In Indonesian Constitutional Court: A Study on the German Federal Constitutional Court Experiences," *PADJADJARAN Jurnal Ilmu Hukum (Journal of Law)* 10, no. 2 (2023): 148–71, <https://doi.org/10.22304/pjih.v10n2.a1>.

tasked with ensuring that legislation and Acts of state institutions created by the Constitution are reviewed to be in line with provisions of the Constitution.⁴⁹

While the issue of revamping the whole governance system was the purpose of the reformation agenda, the subject of the establishment of the rule of law was already on paper as early as 1945.⁵⁰ To make this effective both in theory and practice, it was necessary to establish a constitutional court that helps in promoting constitutional governance. The 1945 Constitution amendment, which took place in Indonesia between 1999 and 2002 and gave rise to the Constitutional Court, provided the impetus for the development of Indonesian state administration and civilisation in the direction of a constitutional state of law. The Constitution must serve as the foundation and guideline for all governmental components to function as the highest law of the state. The Constitutional Court plays a crucial role in ensuring that the principles outlined in the Constitution are upheld in compliance with its rules and regulations.⁵¹ The changing circumstances of the growth of the Indonesian nation have led to demands and challenges for addressing a number of outstanding issues.

The last decade has seen a significant shift in Indonesian politics. Many academics contended that this situation devolves into a “new model of authoritarianism” or deteriorating democracy. This is an avenue for strengthening authoritarian politics. In the meantime, the role of the constitutional court is crucial to maintaining power balance in authoritarian regimes. In practice, though, attempts to promote constitutional conflict through the court will quickly cause it to lose its independence. In authoritarian politics, the constitutional court may have a big influence.⁵² The alleged cases of judicial corruption in this court raise doubts about the instrumentality of the institution in fighting for the rule of law and democracy after the fall of Suharto’s authoritarian rule. The most profound case was in 2013 when the third Chief Justice of the Court, Akil Mochtar, was arrested for alleged corruption. Before this, the court had two Chief Justices as predecessors.⁵³ The vibrancy of the court at the early stage of its establishment is found in some of the landmark cases it has decided.

⁴⁹ Zim Nwokora, “Constitutional Design for Dynamic Democracies: A Framework for Analysis,” *International Journal of Constitutional Law* 20, no. 2 (November 9, 2022): 580–610, <https://doi.org/10.1093/icon/moac030>.

⁵⁰ Article 1 (3) of Indonesia’s Constitution of 1945.

⁵¹ Tri Sulistyowati, Ali Ridho, and M Imam Nasef, “Constitutional Compliance Solution to Law Testing Rulings in the Constitutional Court,” *Jambura Law Review* 3 (May 1, 2021): 117–34, <https://doi.org/10.33756/jlr.v3i0.10735>.

⁵² Herlambang P Wiratraman, “Constitutional Struggles and the Court in Indonesia’s Turn to Authoritarian Politics,” *Federal Law Review* 50, no. 3 (September 1, 2022): 314–30, <https://doi.org/10.1177/0067205X221107404>.

⁵³ Jacqui Baker, “Reformasi Reversal: Structural Drivers of Democratic Decline In Jokowi’s Middle-Income Indonesia,” *Bulletin of Indonesian Economic Studies* 59, no. 3 (September 2, 2023): 341–64, <https://doi.org/10.1080/00074918.2023.2286020>.

Decision Number 011-017/PUU-I/2003 was on the right to be a candidate in the election. It requires a review of Law No. 12 of 2003 on Elections. Article 60(g) forbids a certain group of Indonesians from being nominated and having the right to be elected due to a particular belief they once held.⁵⁴ The court, in exercise of its jurisdiction, referred to Article 27 (1), Article 28D (1), and Article 28I (2) of the Constitution and further elucidated it by Law No. 39 of 1999. The right to vote and to be voted for is a constitutional right and is also found in international conventions, and therefore, Article 60(g) is unconstitutional.

4) *Human Rights*

The subject of human rights in Indonesian politics cannot be on the periphery of both academic and legal discourse. In fact, it is one of the key issues brought up during the Reformation period. The question is: Are human rights respected and protected by the state in the manner contemplated by the reformists? The enactment and promulgation of Law No. 39 of 1999 on human rights and the establishment of the National Commission on Human Rights (Komnas HAM). The commission was initially established by Presidential Decree No. 50 of 1993 and had to be re-established through Law No. 39 of 1999. Subsequent to this, the Human Rights Court was created in 2000 through Law No. 26 of 2000 during the first constitutional amendment. To me, this marked the beginning of the transplantation of a new constitutional order in Indonesia.

This 'legal transplantation' and transformation is spurred on by the need and urgency to revamp the authoritarian governance system of Suharto and create a constitutional system in which sovereignty is in the hands of the people and implemented according to the constitution, bringing an end to parliamentary supremacy. While there was institutional transformation on human rights from the start of the reformation project, the court had made significant strides in handling human rights cases.⁵⁵ However, there are significant setbacks encountered. Due to ongoing cases that remain unresolved, the Human Rights Court has come under fire, exposing weaknesses in its legal framework. According to the Court's performance, Indonesia has not been able to effectively resolve cases involving grave violations of human rights.⁵⁶ While there are comparative improvements compared to Suharto's New Era (*Era Baru*), the ideals of Pancasila in upholding human dignity are yet to be fully realised.

A phase of judicial reform followed political shifts away from authoritarian governance. In fact, since the 1960s, a key component of the law and development

⁵⁴ Luthfi Widagdo Eddyono, "The Constitutional Court and Consolidation of Democracy in Indonesia," *Jurnal Konstitusi* 15, no. 1 (March 29, 2018): 1, <https://doi.org/10.31078/jk1511>.

⁵⁵ M. Misbahul Mujib and Mustari Kurniawati Muchlas, "Achievements and Challenges of Human Rights Protection Policy in Realizing Good Governance in Indonesia and China," *Journal of Human Rights, Culture and Legal System* 3, no. 2 (June 27, 2023): 328–60, <https://doi.org/10.53955/jhcls.v3i2.98>.

⁵⁶ Ria Wierma Putri, Yunita Maya Putri, and Eddy Rifai, "Exploring the Effectiveness of the Human Rights Court in Indonesia: A Call for Humanitarian Action," *Journal of Liberty and International Affairs, Institute for Research and European Studies - Bitola* 10, no. 2 (2024): 97–118, <https://doi.org/10.47305/JLIA24102097w>.

movement has been court reform. Addressing long-standing corruption in judicial practice and enhancing the courts' independence from other branches of government are common goals of a post-authoritarian court reform agenda.⁵⁷ Despite this institutional transformation, efforts to resolve human rights violations in Indonesia have failed. It raises the question of the cause of the failure and the solution that must be taken to overcome it. Rommy Patra⁵⁸ argues that the factors causing the failure of the settlement of human rights violations in Indonesia include:

- a) weak substance of legislation, especially Law number 26 of 2000 on the Human Rights Court;
- b) issues of authority and institutional relationships that are not synergistic, especially between Komnas HAM and the Attorney General;
- c) weak political will from the government.

To deal with this failure, Law Number 26 of 2000 on the Human Rights Court needs to be improved in order to address its significant shortcomings. This will be accomplished by either amending it or replacing it with a new law that will build an efficient human rights enforcement system. Second, to establish institutional ties between the Attorney General and Komnas HAM to work together in the investigation of human rights breaches and to make clear the steps or procedures involved in setting up an ad hoc Human Rights Court. Third, to restore the KKR to bring the truth about the human rights abuses to light and focus on the rights of victims and their families. Finally, with the backing and pressure of civil society organisations to seek the resolution of numerous human rights breach cases, the ruling government must possess a strong political will to do so.

5) *Strengthening Unity in Indonesia: The Paradox of Regional Autonomy*

The second constitutional amendment in 2000 ushered in a unitary state with decentralised governments. Regional autonomy is the right, power, and responsibility of the region to control and oversee its own households. According to the circumstances and capabilities involved, the right is acquired by transferring government affairs from the national government to the local government.⁵⁹ By fostering active political participation, the transfer of power to local communities protects against the possibility of tyranny and authoritarianism that could result from the geographic separation between the national government and local communities.⁶⁰ Devolution strengthens the legitimacy of government and its

⁵⁷ Melissa Crouch, "The Challenges for Court Reform after Authoritarian Rule: The Role of Specialized Courts in Indonesia," *Constitutional Review* 7, no. 1 (May 31, 2021): 1, <https://doi.org/10.31078/consrev711>.

⁵⁸ Rommy Patra, "The Failure of Settlement of Human Rights Violations in Indonesia and Its Solutions," *Yustisia* 7, no. 1 (2018): 197–215, <https://doi.org/https://dx.doi.org/10.20961/yustisia.v7i1.19052>.

⁵⁹ Abdul Rahman Sabara, "Regional Autonomy in the Political System and Authority in Indonesia," *Diponegoro Law Review* 7, no. 2 (October 27, 2022): 296–311, <https://doi.org/10.14710/dilrev.7.2.2022.296-311>.

⁶⁰ Jouni K. Juntunen and Mari Martiskainen, "Improving Understanding of Energy Autonomy: A Systematic Review," *Renewable and Sustainable Energy Reviews* 141 (May 2021): 110797, <https://doi.org/10.1016/j.rser.2021.110797>.

programmes by strengthening local communities at the regional level.⁶¹ Economically speaking, this allows governments to adjust how public goods and services are distributed to suit local requirements, encouraging fair competition among various local administrations.

In its implementation, the regional autonomy in Indonesia has not functioned in accordance with the formulation of the basic idea of decentralisation, which is based on the Welfare State Theory, and in accordance with the state principles of Indonesia.⁶² There is a disparity in regional development in various Indonesian regions. Even though Indonesia has had tremendous economic growth recently, a large portion of its population still lives in extreme poverty.⁶³ The paradox of regional autonomy in Indonesia is the success and failure of the system within the same unitary state. In Aceh, autonomy helped to overcome conflict and can be regarded as successful, while in Papua, autonomy has failed, evident in continued unrest. Within the same country, the same institutional response to violent separatism has generated divergent self-government outcomes.⁶⁴ The administration of the government should guarantee the fulfilment of people's welfare through agendas of regional autonomy, as mandated by the 1945 Constitution, as the basis of the state to provide welfare to its people.⁶⁵ If Indonesia does this at a regional level, the country will experience the creation of unity in diversity, and there can be effective implementation of norms that were created during the four amendments more than two decades ago.

In Indonesia's attempt to maintain national unity, the Indonesian state has adopted an inequitable framework for multiculturalism. While its design is intended to safeguard diversity, this framework has fostered an environment which normalises privileges for Indonesia's Muslim majority and disadvantages for minorities. The state's values contained in the Pancasila precepts are not solely conceptual, but are based on the cultural values of the Indonesian people.⁶⁶ Considering Democratic Consolidation Theory and Unity Theory, there is a need to balance political freedom with national unity in Indonesia's democracy, especially in

⁶¹ Muhammad Mutawalli Mukhlis et al., "Regional Government Autonomy in Indonesia: The Ambiguity of the Federalism or Republic Model," *Malaysian Journal of Syariah and Law* 13, no. 1 (March 20, 2025): 35–57, <https://doi.org/10.33102/mjssl.vol13no1.760>.

⁶² Purwoko Aji Prabowo et al., "Special Autonomy Policy Evaluation to Improve Community Welfare in Papua Province Indonesia," *International Journal of Excellence in Government* 2, no. 1 (January 29, 2021): 24–40, <https://doi.org/10.1108/IJEG-06-2019-0011>.

⁶³ Arief Anshory Yusuf and Andy Sumner, "Growth, Poverty, and Inequality under Jokowi," *Bulletin of Indonesian Economic Studies* 51, no. 3 (September 2, 2015): 323–48, <https://doi.org/10.1080/00074918.2015.1110685>.

⁶⁴ Shane Joshua Barter and Hipolitus Ringgi Wangge, "Indonesian Autonomies: Explaining Divergent Self-Government Outcomes in Aceh and Papua," *Publius: The Journal of Federalism* 52, no. 1 (December 17, 2021): 55–81, <https://doi.org/10.1093/publius/pjab009>.

⁶⁵ Sabara, "Regional Autonomy in the Political System and Authority in Indonesia."

⁶⁶ Aim Abdulkarim et al., "Development of a Unity in Diversity-Based Pancasila Education Text Book for Indonesian Universities," *International Journal of Instruction* 13, no. 1 (January 3, 2020): 371–86, <https://doi.org/10.29333/iji.2020.13125a>.

the post-reform era. The level of democratic consolidation and institutionalisation still needs improvement to strengthen democratic institutions and ensure sustainable political stability, thereby protecting the political rights of citizens within a transparent and accountable system.

Consolidation can significantly strengthen national unity by meeting several prerequisites, including optimising government performance in the areas of law, bureaucracy, and the economy, all aligned with Pancasila values, particularly the third principle, “Indonesian Unity.” In terms of mechanisms for democratic consolidation to enhance unity, this research finds that the main obstacles stem from low levels of healthy political participation and high levels of social polarisation. Therefore, the role of political elements in maintaining national cohesion becomes essential, achieved through increased transparency and accountability within political institutions and strengthened understanding of a fair and equitable legal framework.

Amendability of the 1945 Constitution

While there is a chance for a fifth constitutional amendment to bring back the original version of the Indonesian Constitution, which helped the New Era regime, the Indonesian Constitutional Court can avert this foreseen menace. The Constitutional Court can do this by applying the doctrine of unconstitutional constitutional amendment. This was applied when the Constitutional Chamber of the Honduran Supreme Court invalidated Article 374 of the 1982 Honduran Constitution⁶⁷ that made the four-year presidential term unamendable.⁶⁸ Under this theory of unconstitutional constitutional amendment, it is within the South African, Indian and German judicial power to declare a constitutional amendment unconstitutional – even if that amendment fulfils the procedures mandated by the constitutional text as a condition for entrenchment.⁶⁹ In the Indonesian context, Article 37 of the 1945 Constitution recognises that “Provisions relating to the form of the unitary state of the Republic of Indonesia may not be amended.” It must be understood that authoritarianism was not perpetuated based on Indonesia being a unitary state, nor is the suggestion for the fifth amendment going to change Indonesia from a unitary state.

Yet, the key constitutional provisions that can prevent future amendments that can revert the state to authoritarianism are not entrenched.⁷⁰ However, in the event of an amendment, the philosophical and sociological underpinnings of the Indonesian society must be taken into consideration. So, the issue of unamendability can be understood as a legal strategy to restrain unnecessary constitutional

⁶⁷ David E Landau, Rosalind Dixon, and Yaniv Roznai, “From an Unconstitutional Constitutional Amendment to an Unconstitutional Constitution? Lessons from Honduras,” *Global Constitutionalism* 8, no. 1 (March 7, 2019): 40–70, <https://doi.org/10.1017/S2045381718000151>.

⁶⁸ See Art. 374 of the Honduran 1982 Constitution which prohibits amendments to Articles 237 and 239

⁶⁹ Richard Albert, “Nonconstitutional Amendments,” *Canadian Journal of Law & Jurisprudence* 22, no. 1 (January 20, 2009): 5–47, <https://doi.org/10.1017/S0841820900004550>.

⁷⁰ Wojciech Sadurski, “Constitutional Democracy in the Time of Elected Authoritarians,” *International Journal of Constitutional Law* 18, no. 2 (August 4, 2020): 324–33, <https://doi.org/10.1093/icon/moaa038>.

amendments, whether it is explicitly or implicitly stated. According to Richard Albert⁷¹ and Yaniv Roznai,⁷² there are four categories of unamendability provisions: substantive unamendability, procedural unamendability, emergency unamendability and temporal unamendability. Each of these must be chosen based on prevailing circumstances at a time.

Conclusion

Is a fifth constitutional amendment necessary as contemplated by some legal scholars? In my assessment in this research, it is not only about the creation or introduction of new laws that can change the constitutional order. While new laws are a sine qua non of a new constitutional order, political will is a non-negotiable factor. As a civil law country, Indonesia has enacted an unprecedented amount of legislation, and yet, it has yet to fulfil the dreams of the reformers. From the assessments in this research, Indonesia lacks the political will to enforce norms that are created in the aftermath of the reformation agenda, and therefore, it creates a speculation as to what the essence of the amendment is and at the same time prompts many to suggest a fifth constitutional amendment.

To avoid reverting to authoritarianism, the unitary state of Indonesia needs to go back to the basics and understand where it was before the reformation era and where it is now. This is a quest for guaranteeing constitutionalism. For this to be so, state institutions like the Constitutional Court and the National Commission on Human Rights (Komnas HAM), among others, must be revamped. This can be done by strengthening the laws that created these institutions. Law No. 24 of 2003 (Constitutional Court Act) and Law No. 39 of 1999 on Human Rights need to be revisited by the parliament to assess their successes and failures.

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⁷¹ Richard Albert, "Why Amendment Rules?," in *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford: Oxford University Press, New York, 2019), 39–60, <https://doi.org/10.1093/oso/9780190640484.003.0002>.

⁷² Yaniv Roznai, "Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea," *American Journal of Comparative Law* 61, no. 3 (July 1, 2013): 657–719, <https://doi.org/10.5131/AJCL.2012.0027>.

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